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EMPOWERING STAKEHOLDERS: LIMITS ON COLLABORATION AS THE BASIS FOR FLEXIBLE REGULATION

MARK SEIDENFELD*

INTRODUCTION

By many accounts, the United States regulatory system is at a crossroads. Federal regulation is lambasted as pervasive, unduly burdensome, and inefficient, even as the American public clamors for increased protection against threats from sources such as toxic substances, bacterially tainted meat, and airplane crashes. Politicians,¹ academics,² and popularizers of criticism of the regulatory state³ tell us that if the federal administrative government is to serve the interests of the public effectively, we must reinvent that government.

According to proponents of "reinvention," the key to effective reform is empowering all stakeholders—regulated entities, administrators, and intended beneficiaries alike—in a collaborative

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1. See, e.g., AL GORE, NATIONAL PERFORMANCE REVIEW, CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS: STATUS REPORT (1994) (describing the Clinton Administration's efforts to improve governmental efficiency).

2. See, e.g., IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 4-6 (1992); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 3-4 (1997).

3. See generally, e.g., PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994) (alleging that the government has created laws devoid of common sense); DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (1993) (outlining an effective approach to tap the power of the entrepreneurial process and the free market to create a more efficient government).

regulatory endeavor.⁴ As part of that tripartite endeavor, the very entities subject to regulatory compulsion should engage in the design of rules that will dictate their conduct, self-monitoring for compliance with those rules, and self-enforcement when the entity discovers a violation of those rules. In addition, groups of individuals who share more diffuse interests in the regulatory endeavor than do regulated entities—public interest groups representing purported beneficiaries of the statutes authorizing regulation—must be given equal power in the regulatory mechanism. Allowing public interest groups to assert appropriate institutional checks can reinforce cooperative interaction, rather than adversarial behavior, between such groups, regulated entities, and the agency charged with implementing the regulatory statute.⁵

In essence, those calling for collaborative regulation see a need to restructure the fundamental regulatory institutions of the United States. Since the New Deal, government's role in regulation has been to exercise informed discretion in setting and applying standards in order to achieve some conception of the public interest.⁶ Reinventors would alter the role of government from dictator of rules to facilitator of accords by stakeholders in particular regulatory matters. Government would be one of many interested groups, and would be discouraged from exercising independent judgment about what the public interest entails and how best to achieve it. Thus, reinventors of government seek a fundamental change in the very nature of the regulatory state.

I have always been skeptical, however, of claims that collaboration can provide a workable structure for the regulatory state

4. See AL GORE, NATIONAL PERFORMANCE REVIEW, IMPROVING REGULATORY SYSTEMS 29-30 (1993) (advocating negotiated rulemaking); Freeman, *supra* note 2, at 22 (describing five requirements for collaborative governance).

5. See AYRES & BRAITHWAITE, *supra* note 2, at 71.

6. See MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION 60-62 (1988) (describing the New Deal conception of expert agencies pursuing the public interest). Compare *id.* at 63-75 (noting developments in administrative law aimed at promoting interest group representation and judicial review to allay concerns that agencies do not pursue disinterestedly the public interest), with JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 58-62 (1978) (noting the New Deal's emphasis on political independence to ensure agency pursuit of the public interest).

outside of particular regulatory contexts that may be conducive to such collaboration. This Article evaluates the potential for reinvention to empower stakeholders to cure the regulatory ills of the country by borrowing institutional sociological understandings of interest group structures and dynamics. It concludes that the proponents of regulatory reinvention have overstated that potential. This Article does not advocate the elimination of efforts to experiment with collaborative approaches, but rather suggests that such experimentation should occur on a facility-by-facility basis, in situations characterized by participants who form a community of individuals with some common interests, and in which those participants who represent the interests of stakeholders in the regulatory process are accountable to those stakeholders.

The Article begins by reviewing the impetus for the stakeholder empowerment movement, noting along the way some weaknesses in the mechanisms reformers propose to encourage collaborative decision making. Next, it describes the structure and dynamics of various interest group typologies and proceeds to discuss pathologies of those internal dynamics that threaten to disable collaborative regulatory processes. The Article next evaluates the extent to which three collaborative mechanisms that the federal government recently created—negotiated regulation, citizen suits for penalties for rule violations, and the Environmental Protection Agency's Project XL—have successfully overcome the disabilities threatened by interest group dynamics. Despite finding overwhelming praise for each of these empowering mechanisms, my analysis indicates that none of them implement what I term a "truly collaborative regulatory process"—one in which (1) the participants seek true consensus as a means of resolving issues, rather than using the process to create strategic advantages vis-à-vis other stakeholders in a larger or longer-lasting interactive process; and (2) representatives of every interest shared by a significantly affected group of similarly situated stakeholders are included. Moreover, I conclude that these programs are unlikely to be panaceas for the problems that plague the current administrative state because they can succeed in overcoming the adversarial propensities of at least some stakeholders only within narrow regulatory environments. Final-

ly, the Article relies on its abstract description of interest group dynamics, and the lessons from those collaborative mechanisms that have been tried, to identify the particular conditions under which stakeholder empowerment is likely to result in stable and constructive regulatory collaboration. At a minimum, these conditions require that the collaborative regulatory endeavor involve issues of a local nature, and that it occur within a community of interest groups willing to cooperate. In addition, the process must allow the mainstream of regulatory beneficiaries to exclude participation by fringe groups who may have an ideological as well as organizational interest in subverting the process. These conditions for success impose significant barriers to the use of collaborative regulation, and hence reinforce my conclusion that, although collaborative regulation is a useful arrow in the quiver of regulatory reform, its potential to cure current regulatory ills is more confined than proponents suggest.

I. THE ROOTS OF THE EMPOWERMENT MOVEMENT

With the collapse of belief in the disinterested expertise of administrative agencies,⁷ administrative law recognized a need to allow putative beneficiaries of regulation access to administrative proceedings to protect their interests.⁸ The administrative state became an arena within which representatives of various interests battle for regulation that serves individuals sharing those interests.⁹ The purpose of the regulatory process is not to implement a government-defined conception of the public good, but rather to supply benefits demanded by groups on behalf of their members' private interests.¹⁰ One weapon in this battle

7. See FREEDMAN, *supra* note 6, at 46-47; Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1682-83 (1975).

8. See SHAPIRO, *supra* note 6, at 45. See generally Stewart, *supra* note 7, at 1711-56 (examining the judicial effort to provide better representation for a broader range of interests).

9. See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 32 (describing pluralist theory and its application to the administrative state).

10. See Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 38-39 (1982) (comparing how regulation provides benefits to the pluralist theory's assumption that regulation will correct market imperfections or provide public goods); Croley, *supra* note 9, at 31-33. For discussions of various reasons why

entails, at the day-to-day level, the ability to tie-up agency resources needed to respond to comments and petitions, which demand such response because they are backed up by threats of judicial review.¹¹ When necessary, interest groups can threaten use of the ultimate weapon—their ability to mobilize political support in Congress for the group's position. The theory of interest group representation asserts that if the battlefield is level, the pressures each interest group bring to bear on a regulatory issue, and hence the ultimate outcome, will be proportional to the collective importance various stakeholders in the debate placed on the particular issue before the implementing agency.¹²

Traditionally, regulated entities, whose property or contract rights were affected directly by regulatory actions, had access to agency proceedings and the right to seek judicial review of agency decisions.¹³ In order to level the field of administrative confrontation, representatives of so-called public interest groups, acting on behalf of individuals for whom Congress purported to have enacted regulatory statutes, had to be given a similar ability to provide input to agencies in a manner that the agency was not free to ignore.¹⁴ During the development of the interest group understanding of the regulatory state,¹⁵ courts relaxed access requirements to agency proceedings and to judicial review of agency decisions.¹⁶ At the same time, Congress authorized

a pluralistic theory of democracy might favor delegation of policymaking discretion to administrative agencies, see Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 92-98 (1985); Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 74-77 (1994).

11. See SHAPIRO, *supra* note 6, at 46-69.

12. See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 36-38 (1957) (describing generally how the political system can be seen as a means of efficiently distributing the benefits of regulation to interest groups); SHAPIRO, *supra* note 6, at 5-8, 14. Political scientists have developed a more general notion of pluralistic democracy, which views competition among interest groups as the best means of approximating the "public interest" that theoretically is distinct from the mere aggregation of private interests. See ROBERT A. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT* 23-24 (1967); DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* 512-16 (1953).

13. See Stewart, *supra* note 7, at 1723-24.

14. See *id.* at 1725.

15. See SHAPIRO, *supra* note 6, at 45-48. See generally Stewart, *supra* note 7, at 1711-90 (discussing the expansion of the traditional model of administrative law).

16. For example, in the late 1960s and early 1970s, the courts mandated that

members of the public to obtain almost any information in agency files and opened agency meetings to public scrutiny.¹⁷

Satisfaction with the interest group model of the administrative state has never been universal. Public choice economists accept the model's descriptive accuracy but note that government regulators essentially control a monopoly on regulation, which they can use to generate and distribute rents to those who continue to support them.¹⁸ Many public choice theorists conclude therefore that the inevitability of self-interested political behavior counsels severely constraining state regulatory authority.¹⁹ Other scholars have questioned the normative theory of

agencies allow interested persons to intervene even in adjudicatory administrative proceedings to which they were not a party. *See, e.g.*, *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1005-06 (D.C. Cir. 1966). Also, the courts liberalized standing to allow those who suffered injury in fact from an agency decision, but who had no legal entitlement affected by an agency decision, to petition for review of the decision under the Administrative Procedure Act (APA). *See, e.g.*, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686-90 (1973); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154-55 (1970). Around the same time, the courts allowed review of agency rules before the agency attempted to enforce those rules against any entity. *See, e.g.*, *Abbott Lab. v. Gardner*, 387 U.S. 136, 140-43 (1967). This equalized the ability of beneficiaries and regulated entities to seek judicial review because, without pre-enforcement review, a regulated entity that believed a rule was unreasonably harsh could always force review of a rule by simply violating it and challenging the agency's application of the rule to the entity. Without pre-enforcement review, however, beneficiaries of regulation who felt that a rule was too lenient on regulated entities could never bring a challenge to the rule. *See* Mark Seidenfeld, *Playing Games with the Timing of Judicial Review: An Evaluation of Proposals to Restrict Pre-enforcement Review of Agency Rules*, 58 OHIO ST. L.J. 85, 117 (1997).

17. *See* Freedom of Information Reform Act of 1986, 5 U.S.C. § 552 (1994).

18. *See* Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807, 809-12 (1975) (modeling efforts to obtain regulatory approval, such as licenses, as competition to obtain a monopoly); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3-6 (1971) (arguing that industry seeks regulation to obtain benefits that only the government can supply, such as legal restrictions on entry into the industry); *see also* DENNIS C. MUELLER, *PUBLIC CHOICE II: A REVISED EDITION OF PUBLIC CHOICE* 229-46 (1989) (describing the theory of rent-seeking behavior and its application to the regulatory and more general political process); Croley, *supra* note 9, at 36-37 (describing public choice theory of regulation as premised on analogy of the government regulatory process to private markets, but also recognizing the distinction between such markets and the regulatory process).

19. *See, e.g.*, Richard A. Epstein, *The Mistakes of 1937*, GEO. MASON L. REV., Winter 1988, at 5, 6 ("We should . . . strive to create institutions that prevent the

democracy from which the model derived—pluralistic democracy—because an uneven distribution of resources in society would bias the outcome in the political arena toward those who already have wealth and power regardless of the rules governing access to proceedings and information.²⁰ Scholars in diverse fields are also skeptical of the model's assumptions that interest groups pursue members' private interests narrow-mindedly and exclusively.²¹ They cite examples of political behavior that cannot be explained if one assumes that individuals acting in their political capacity rationally maximize their utility.²² Finally, communitarian critics assail pluralism because of its assumption that political conduct should be self-interested.²³ These critics fear that the interest group model legitimates conduct aimed at securing private benefits and dismisses concerns about conceptions

public officials who wield the monopoly of physical power from turning that power on their defenseless citizenry."); James D. Gwartney & Richard E. Wagner, *Public Choice and the Conduct of Representative Government*, in PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 3, 26 (James D. Gwartney & Richard E. Wagner eds., 1988); see also DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 4 (1991) (noting that acceptance of public choice theorists has resulted in a push for deregulation).

20. See KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 399-403 (1986) (noting the inequality of influence that is tied in some ways to differences in resources available to different interest groups); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1535 (1992) (describing distortions in the political process that can result from the differences in wealth and power of various interest groups).

21. See, e.g., HOWARD MARGOLIS, SELFISHNESS, ALTRUISM, AND RATIONALITY: A THEORY OF SOCIAL CHOICE 95 (1982) (contending that ideology plays a role in political choices that distinguishes such choices from those of consumers in ordinary markets); Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, AM. ECON. REV., June 1984, at 279, 298 (reporting empirical evidence that ideology is an important influence on legislators' decisions); Gregory B. Markus, *The Impact of Personal and National Economic Conditions on the Presidential Vote: A Pooled Cross-Sectional Analysis*, 32 AM. J. POL. SCI. 137, 151-52 (1988) (reporting evidence suggesting that the state of the national economy has greater influence on voting for the president than do the voters' personal economic interests).

22. Perhaps the most fundamental conundrum facing public choice theory is its inability to explain why any people vote in general elections. See FARBER & FRICKEY, *supra* note 19, at 24-25; Richard L. Hasen, *Voting Without Law*, 144 U. PA. L. REV. 2138-46 (1996) (rejecting as implausible or tautological any rational choice explanation for why people vote).

23. See, e.g., Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1544-45 (1988).

of the public good and the moral fabric of the political community.²⁴ For these critics, the interest group model encourages adversarial proceedings, and thereby forfeits the opportunity for more cooperative and consensus based regulation.

One can view many of the recent proposals for altering the empowerment of regulatory beneficiaries as attempts to define a regulatory model based on interest group participation that avoids the traditional model's prescription of pursuit of self-interest and adversarial relationships between the groups.²⁵ Reformers call for "collaborative regulation," by which they mean involvement of all stakeholders in a deliberative common venture of solving problems that plague activities of regulated entities.²⁶ By reorienting stakeholders to view others as compatriots in the problem-solving endeavor, reformers of the interest group model hope that both regulated entities and public interest group representatives will eschew strategic conduct that has dominated their interaction on regulatory matters over the past thirty years.²⁷ One significant means for reorienting public interest groups away from their historically adversarial posture would grant such groups access to the regulatory process prior to the point when various interests become wedded to positions and internalize a conception of the regulatory system as "us against them."²⁸ By granting such access at a point when even a controversial issue can be characterized as a problem in need of

24. See *id.* at 1550-51 (advocating that civic virtue, rather than self-interest, should motivate political decisions).

25. See Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 655-56 (characterizing regulatory proceedings as "a zero-sum game in which lawyer-mercenaries battle in an interest group struggle from which only the lawyers profit").

26. See THE ASPEN INSTITUTE, *THE ALTERNATIVE PATH: A CLEANER, CHEAPER WAY TO PROTECT AND ENHANCE THE ENVIRONMENT* at v-vi (1996); Freeman, *supra* note 2, at 6; Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1631-32 (1985); see also *infra* note 44 (acknowledging the derivation of the term).

27. See Freeman, *supra* note 2, at 23-24; Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 29 (1982); see also Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 795-801 (1984) (advocating involvement of parties to a legal dispute in a problem-solving endeavor as a means of overcoming intransigence and refusal to relate to the needs of others).

28. See Freeman, *supra* note 2, at 22.

a solution, and thereby engaging affected individuals in deliberation about the issue, regulators can harness the administrative process to induce stakeholders to be more empathetic to the concerns of others affected by the regulations at issue, and ultimately more open to public-regarding solutions to regulatory problems.²⁹

For example, reformers' efforts prompted Congress to enact provisions authorizing and encouraging agencies to engage in "negotiated rulemaking," which brings together regulated entities and other stakeholders at the earliest stages of the consideration of regulations.³⁰ The hope of negotiated rulemaking is that all stakeholders can cooperate and reach a consensus that takes into account the values and concerns of each affected interest group.³¹ Further reforms to make the regulatory process less adversarial might involve empowering stakeholders to cooperate with regulated entities and regulators in establishing enforcement plans for particular regulated entities and even allowing public interest groups some role in monitoring compliance. Again, Congress has already started down this road to empowerment by providing for citizen suits in select statutes in order to enforce violations of regulatory standards.³²

One can also view the call for greater empowerment of regulatory beneficiaries as a means of avoiding some of the pitfalls of industry self-regulation.³³ Proponents of self-regulation would depend on people's propensity to comply with regulations that they perceive as a reasonable means of avoiding many of the inefficiencies of traditional regulation.³⁴ Perceptions of the rea-

29. See Reich, *supra* note 26, at 1636-37.

30. See Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561-70 (1994).

31. See Procedures for Negotiating Proposed Regulations (Recommendation No. 82-4), 1 C.F.R. § 305.82-4 (1983); Harter, *supra* note 27, at 28-31.

32. See, e.g., Toxic Substances Control Act, 15 U.S.C. § 2619 (1994); Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (1994); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270 (1994); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972(a)(1)(A) (1994).

33. Cf. Marshall J. Breger, *Regulatory Flexibility and the Administrative State*, 32 TULSA L.J. 325 (1996) (noting that regulatory flexibility may involve voluntary (i.e., self) regulation, but that such regulation will require an increase in regulators' discretion, and critically examining how such an increase fits within current understandings of administrative law).

34. See, e.g., EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE*

sonableness of regulations, and the concomitant propensity of individuals to comply with such regulations, however, depend in turn on a trust that regulated entities will enforce the rules fairly and sensibly.³⁵ The potential, however, for groups representing the interests of regulatory beneficiaries to override agreements between regulators and regulatees, either by directly suing for penalties under citizen suit provisions or by politically forcing the agency to take a tougher stand than it had negotiated with the regulated industry, creates uncertainty that can undermine development of the requisite trust. A regulated entity is unlikely to share information and admit to regulatory violations if it believes that political pressure might force administrators to renege on deals not to use such information to penalize the entity severely. Moreover, even if such trust developed, under current doctrines of administrative law, representatives of regulatory beneficiaries can interfere with the implementation of self-regulation by challenging self-designed rules and perhaps even enforcement policies worked out between the agency and the entities.³⁶ Finally, for many regulatory programs, the development of self-regulatory approaches will require congressional authorization.³⁷ To the extent that putative beneficiaries of regulation are excluded from the cooperative venture between regulated entities and the regulatory agency, they are apt to oppose such ventures. One should not expect Congress to authorize self-regulation in the face of strong opposition from public interest groups representing members' interests.

PROBLEM OF REGULATORY UNREASONABLENESS 58-66, 92 (1982) (attributing the unreasonableness of much regulation to its counterfactual assumption that entities will avoid complying with rules unless threatened with legal sanctions for violations); JAY A. SIGLER & JOSEPH E. MURPHY, INTERACTIVE CORPORATE COMPLIANCE: AN ALTERNATIVE TO REGULATORY COMPULSION 99 (1988); Douglas C. Michael, *Cooperative Implementation of Federal Regulations*, 13 YALE J. ON REG. 535, 542-43 (1996) (noting that if the government expects voluntary compliance, the rules must be perceived as reasonable).

35. See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 73-81 (1990); Robert A. Kagan & John T. Scholz, *The "Criminology of the Corporation" and Regulatory Enforcement Strategies*, in ENFORCING REGULATION 67, 75-76 (Keith Hawkins & John M. Thomas eds., 1984).

36. See *infra* notes 202-34 and accompanying text.

37. See Michael, *supra* note 34, at 565-66 (noting the dependence of a self-regulatory meat inspection program on statutory authorization).

A second concern of some of the more sophisticated advocates of cooperative regulation is the potential for capture inherent in a cooperative regulatory system.³⁸ Viewed as a two-person system, a cozy environment between the regulating agency and regulated entities conduces co-option of the administrative apparatus to serve the ends of the entities rather than society as a whole.³⁹ Thus, Ian Ayres and John Braithwaite advocate empowerment of public interest groups to prevent capture that might result from cooperation between agency inspectors and regulated entity personnel.⁴⁰ Allowing public interest groups to participate in agency proceedings on an equal footing with regulated entities and regulators raises the stakes for a firm attempting to capture regulators.⁴¹ To succeed in making the regulatory system a tool for its private gain, the firm will also have to capture participating interest groups.⁴² As Ayres and Braithwaite note, one cannot credibly conceive of a firm offering to buy off an interest group leader like Ralph Nader.⁴³

Concerns about regulated entities abusing the trust inherent in a cooperative regulatory scheme lead to calls for what amounts to collaborative regulation⁴⁴—a variant of self-regula-

38. See AYRES & BRAITHWAITE, *supra* note 2, at 71. Classic capture scenarios, in which an industry co-opts an agency's entire regulatory program, rarely occurs in today's environment of competing interest groups. See JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 83-88 (1989); see also PAUL J. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES 164-74 (1981) (suggesting that various mechanisms thought to promote capture, such as hiring of agency staff by industry, do not do so). "Nonetheless, within niches of an agency's policy domain, firms in regulated industries and interest groups with strong central staffs still occupy a favored position in regulatory and political structures that allows them an advantage in influencing agency decisions." Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 464 (1999).

39. See AYRES & BRAITHWAITE, *supra* note 2, at 63-71.

40. See *id.* at 71-73.

41. See *id.* at 73.

42. See *id.*

43. See *id.* ("There exist individuals who for all practical purposes are incorruptible and immune to all available forms of capture.").

44. I borrow this term from Jody Freeman. See Freeman, *supra* note 2, at 4 (labeling this approach to regulation as "collaborative governance"). Others have used other descriptive terms to describe the same idea. See, e.g., AYRES & BRAITHWAITE, *supra* note 2, at 71 (labeling empowerment of regulatory beneficiaries "[t]ripartism"); THE ASPEN INSTITUTE, *supra* note 26, at 9 (describing its proposal as "The Alterna-

tion in which beneficiaries of regulatory statutes are empowered to participate in regulatory design and enforcement. If such empowerment is to deter undue influence by regulated entities, which in the context of cooperative regulatory interaction might lead to sweetheart deals, the regulatory system will have to grant these interest groups authority commensurate with that accorded regulated entities under self-regulation programs. Otherwise, regulated firms and regulators could work around objections of public interest groups. For example, if public interest groups were involved in the collaborative design of standards, but not enforcement, an agency could promulgate a rule that seemingly gave effect to interest group goals, but simply fail to enforce violations of the rule.

The mechanisms for granting representatives of beneficiaries commensurate power in the regulatory process depend on the opportunities those subject to regulation have to influence the process. If regulated entities have the ability to design the standards to which they are subject,⁴⁵ they control the ultimate structure of regulations; as long as the entities are willing to accept the existing regulatory structure as the alternative, they can prevent the introduction of any new regulation that they find too burdensome or invasive simply by refusing to propose such regulation. Commensurate power on the part of public interest groups would be the authority to veto self-designed standards that the groups did not believe sufficiently protective of their interests.⁴⁶ With veto power, public interest groups too can force the maintenance of the regulatory status quo over the adoption of new collaborative rules.

If a regulatory scheme entails entities engaging in regulated entity-enforcement of standards, these entities have significant leeway in determining the bounds of regulatory standards when the standards are applied.⁴⁷ Generally, enforcement of a stan-

tive Path").

45. On the distinction between self-design and self-enforcement of regulation, see Eric Bregman & Arthur Jacobson, *Environmental Performance Review: Self-Regulation in Environmental Law*, 16 CARDOZO L. REV. 465, 467-68 (1994), describing as two axes of self-regulation the power to set standards governing one's activity and the power to enforce such standards.

46. See AYRES & BRAITHWAITE, *supra* note 2, at 71; Freeman, *supra* note 2, at 30.

47. See BARDACH & KAGAN, *supra* note 34, at 219. The whole point of self-regu-

dard involves a high degree of discretion about what conduct constitutes a violation and whether to take official action in response to questionable conduct.⁴⁸ Even if the self-regulator's enforcement decision is potentially subject to oversight by a public official, the company has little incentive to construe regulations strictly when it applies them to itself.⁴⁹ Unless the agency overseer deems an entity's position regarding enforcement of a standard to be "cheating" on the self-enforcement compact, the agency is unlikely to seek penalties in response to the entity taking that position.⁵⁰ Thus, an entity usually will not face the threat of an agency imposing significant penalties in response to the entity construing a standard to benefit its own interests, so long as its construction is not patently unreasonable. Moreover, even if the agency alleges that such a construction represents an attempt to cheat on the collaborative program, if penalties for cheating are heightened significantly above those for inadvertent noncompliance, a court reviewing the imposition of a sanction often will hesitate to hold that honest disagreements about the scope of a standard rise to the level of bad faith.⁵¹ The bottom

lation, after all, is to allow those with the knowledge of the company's operation to use discretion to avoid unnecessarily burdensome regulations. *See id.*

48. *See* Keith Hawkins & John M. Thomas, *The Enforcement Process in Regulatory Bureaucracies*, in ENFORCING REGULATION, *supra* note 35, at 3, 13.

49. One exception is for performance-based standards whose violation might result in negative ramifications to the company in the marketplace. *See* Michael, *supra* note 34, at 569 (noting that the meat processing industry supports a recently proposed hazard analysis critical control point system of self-regulation, despite the costs it will impose on the industry, because "the industry wants all its products perceived as safe"). In that situation, however, the incentives for the company to comply are extralegal, and exist even in the absence of any regulation. Hence, self-regulation in that context would not provide the incentive for compliance.

50. *Cf.* Albert J. Reiss, Jr., *Selecting Strategies of Social Control over Organizational Life*, in ENFORCING REGULATION, *supra* note 35, at 23, 34 (noting that regulatory violations usually entail violations of trust and hence are addressed more appropriately by compliance-based means of enforcement, i.e., bargaining to ensure compliance). By cheating, I mean a failure to engage in self-enforcement in good faith. An isolated, unreported violation of a standard would constitute noncompliance with the standard that must be corrected, but would not in itself constitute evidence of cheating. *See* Robert A. Kagan, *On Regulatory Inspectorates and Police*, in ENFORCING REGULATION, *supra* note 35, at 37, 46 (noting that most often regulators will not perceive of a business entity that violates a regulatory prohibition as bad); *cf.* Reiss, *supra*, at 22 (stating that under compliance-based enforcement systems "[a] penalty is resorted to when and only when it signals the termination of [an enforcement] negotiation").

51. *See, e.g.,* Thunder Basin Coal Co. v. Martin, 969 F.2d 970, 975 (10th Cir.

line is that entities have little to deter them from ignoring conduct that only arguably comprises a violation of a regulation.

To counterbalance the discretion of the regulated entities to construe standards in their self-interest, Congress or the agency administering the program must empower public interest groups independently to enforce regulatory standards.⁵² Such empowerment allows a public interest group to bring to judicial attention conduct that, although not a clear rule violation, the group believes violates standards. By so empowering public interest groups, a tripartite regulatory scheme substitutes the public interest groups for the agency as the backstop to self-enforcement gone awry.⁵³ This saves money for the public fisc and allows disputes about the precise scope of regulatory standards to be resolved in adjudicatory contests regarding particular violations, thereby obviating the need for the agency to allege that entities have cheated in order to raise the issue of the scope of the standard. Thus, such empowerment might preserve a climate for agency-entity cooperation by preventing disputes about the scope of standards from escalating into disputes about the good faith of the entity's enforcement efforts.

Even in the context of traditional government enforcement of government designed regulations, regulated entities enjoy a privileged position to negotiate the reach of regulations to which

1992) (asserting that good faith violations of Department of Labor regulations that do not endanger the safety of miners would not be grounds for penalties under the Federal Mine Safety and Health Act), *aff'd sub nom.* Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994).

52. Statutory provisions in many environmental statutes that authorize citizens to enjoin regulatory violations, although premised on the need to check agency capture, see Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 193 (1992), or lax agency enforcement, see Marcia R. Gelpe & Janis L. Barnes, *Penalties in Settlements of Citizen Suit Enforcement Actions Under the Clean Water Act*, 16 WM. MITCHELL L. REV. 1025, 1025-26 & n.3 (1990), also provide a check against self-interested self-enforcement by regulated entities.

53. Cf. Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 836-37 (1985) (explaining that citizen suits hold the potential to go beyond merely inducing adequate government enforcement; they are "the means of seeking a major—perhaps permanent—realignment of roles and powers in important areas of regulation: the creation of 'private attorneys general' with responsibilities comparable to those of the public attorney general").

they are subject. Entities are free to seek waivers from or beneficial constructions of standards after they are adopted.⁵⁴ An entity can force the agency to resolve a dispute about the reach of a regulation by engaging in questionable conduct and waiting to see if the agency will enforce the regulation against such conduct.⁵⁵ Even if the agency decides to enforce the regulation, the entity still has an opportunity to negotiate a settlement.⁵⁶ To counterbalance the ability of entities to get a second bite at the apple of negotiating the reach of regulatory standards, collaborative programs must empower public interest groups to challenge agency decisions not to enforce a standard against particular conduct by a regulated entity. Such a challenge allows the public interest group a second chance to negotiate with the agency about the scope of the standard, without allowing the interest group directly to impose costs on the regulated entity.⁵⁷

Regardless of the underlying structure of the collaborative regulatory endeavor, empowerment of public interest groups would require that they have access to all relevant information that the industry has in its possession. Without such information, public interest groups cannot easily determine what is at stake in any regulatory debate. Perhaps more importantly, public interest groups will be unable to determine whether regulatory cooperation between regulators and a regulated entity is in

54. See Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277, 278 (stating that flexibility in the exercise of "requests for exceptions to regulatory legislation or to agency rules" is often-times "necessary").

55. See Seidenfeld, *supra* note 16, at 93 (noting that beneficiaries of rules, unlike regulated entities "cannot simply refuse to comply with the rule and be assured of an opportunity to raise their challenge in a post-enforcement proceeding").

56. See Laura Langbein & Cornelius M. Kerwin, *Implementation, Negotiation and Compliance in Environmental and Safety Regulation*, 47 J. POL. 854, 862 (1985); see also Cary Coglianese, *Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 L. & SOC'Y REV. 735, 757-58 (1996) (noting that litigation against an agency allows an interest group to negotiate with the agency in secret about the scope of a rule).

57. As one proponent of empowerment characterizes regulatory enforcement, it is a process by which "organizations bargain and negotiate rules rather than treat them as constraints." JOEL F. HANDLER, *THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY* 197 (1986). Given that characterization, Handler suggests that there "be bargaining with social movement groups as well as [regulators'] clients." *Id.*

fact undertaken in good faith rather than reflecting a sweetheart deal with captured regulators. Public interest group leaders are unlikely to develop trust in the other participants in a collaborative regulatory program if they always need to be wary of regulated entities and regulators taking advantage of information to which the leaders are not privy.

For empowerment to work, information must flow not only to group leaders who define how an interest group participates in the regulatory process, but to group members as well. As my analysis of the dynamics of interest groups will make evident, the deviation of group leaders' interests from those of their groups' members create agency costs. A group leader may be more concerned with maintaining monetary support for the group than delivering desired benefits to members. Yet experiences of group members may not allow them to evaluate whether group leaders are maximizing the benefits that members receive from belonging to the group because without detailed information about various parties' actions in particular regulatory proceedings, members cannot accurately assess alternative strategies that leaders may have adopted.⁵⁸ For example, if group members incorrectly perceive regulated entities as intransigent on basic issues, they may support efforts to obstruct the regulatory process that they would not support if they knew that reasonable compromise was possible.

58. In other words, benefits provided by interest groups often fall into the category of goods economists call "credence goods." See ANTHONY OGUS, REGULATION: LEGAL FORM AND ECONOMIC THEORY 133 (1994). For products that supply such goods, even the experience of having used the product does not reveal the quality of the product. See *id.*; Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 68-69 (1973). In comments on an earlier draft of this Article, Ian Ayres suggested that problems caused by the inability of members to assess accurately the efforts of group leaders can be cured by having competitors, i.e., other groups, make the relevant information known. Due to the nature of group dynamics, however, competition between groups tends to fracture interest groups and may actually contribute to the formation and stability of extreme fringe groups that are likely to undermine collaborative regulatory endeavors. See *infra* notes 70-80, 134-37 and accompanying text.

II. PATHOLOGIES IN PUBLIC INTEREST GROUP DYNAMICS

Achieving nonadversarial regulatory interactions by empowering interest groups depends on the willingness of such groups to cooperate with regulators and regulated entities. Cooperation can create surplus that can be shared between group members, regulated entities, and the government. Surplus can result when everyone affected by the conduct to be regulated prefers some change in the status quo, albeit that different groups of affected individuals entertain different ideal regulatory outcomes. Whether by compromise or collaborative development of creative solutions, cooperative groups can reach an accord that creates benefits for all affected.⁵⁹

Cooperative solutions to regulatory problems, however, do not necessarily result just because such solutions benefit everyone vis-à-vis the status quo. As the simple two-person prisoners' dilemma reveals, individuals acting in rational pursuit of their self-interest may be unable to reach or enforce cooperative agreements and therefore the outcome of their conduct may be suboptimal for each person.⁶⁰ By a similar dynamic, if interest group representatives pursue members' preferred outcomes too zealously, they forego cooperative outcomes and thereby forfeit such surplus and hurt their members' interests. Society as a whole can also forfeit surplus if a single group of affected individuals may dictate the outcome of the regulatory "game."⁶¹ Thus, the benefits of cooperation can also be lost by the flip side of overzealous pursuit of members' interests—the possibility that group leaders will sell out to regulated entities, or alternatively that leaders will be co-opted by the regulators. If leaders do not pursue members' preferred positions with enough zeal, and regulated entities can capture regulators, the resulting regulatory

59. See John T. Scholz, *Cooperation, Deterrence, and the Ecology of Regulatory Enforcement*, 18 L. & SOC'Y REV. 179, 182-85 (1984).

60. See DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 33 (1994); MARK SEIDENFELD, *MICROECONOMIC PREDICATES TO LAW AND ECONOMICS* 85-86 (1996); see also Scholz, *supra* note 59, at 185-87 (modeling regulatory enforcement as a prisoners' dilemma).

61. This potential for lost surplus again can be illustrated by the prisoners' dilemma. Note that in such a game, social surplus is not maximized by maximizing the benefit derived by any one player. See SEIDENFELD, *supra* note 60, at 86.

scheme can benefit such entities at the expense of society as a whole.

Unfortunately, for those who view empowerment of public interest groups as a means of fostering nonadversarial relationships among stakeholders or alternatively as a means of achieving regulatory reasonableness (and thereby flexibility), the internal structure and dynamics of interest groups can impede the achievement of these goals.⁶² Group leaders have incentives for forming a group, and group members for joining it, that may undermine the willingness of a public interest group to cooperate in a collaborative regulatory scheme, even when cooperation is best for the members' interests.⁶³ In other situations, incentives facing group leaders, especially leaders of groups with nontraditional group structures and sources of funds, raise the likelihood that the groups will be co-opted by regulators with whom they deal, or in rare instances even captured by the regulated entities whose activities directly affect the interest of group members.

A. *The Definition of Public Interest Group*

Before describing the internal structures and dynamics of "public interest groups," that phrase must be defined. For the purposes of this discussion, "public interest group" means a group that states as its aim the use of group resources to provide benefits to members who share a diffuse interest in particular regulatory matters. Essentially, this definition includes all political groups that represent the interests of individuals who otherwise would not have means or a sufficient stake in regulatory matters to get involved personally in their resolution.⁶⁴ This

62. I focus on the structure and dynamics of interest groups because the social sciences' answers to questions about interest group dynamics provide a framework of knowledge that by necessity informs the legal debate. See Carol A. Heimer & Arthur L. Stinchcombe, *Elements of the Cooperative Solution: Law, Economics and the Other Social Sciences*, 1997 WIS. L. REV. 421, 422 (stating that before one can ask questions from the disciplines of economics and law, one must "know something about the constitution and identity of the groups and individuals that can decide on and pursue ends effectively").

63. See Michael T. Hayes, *The New Group Universe*, in INTEREST GROUP POLITICS 133, 142 (Allan J. Cigler & Burdett A. Loomis eds., 2d ed. 1986).

64. These are groups whose interests, under the traditional model of adminis-

definition excludes groups of entities subject directly to regulatory edicts backed by the coercive power of the state—those whose conduct is restricted by the statute enabling agency implementation or by agency rules and orders. Usually such entities have the opportunity and incentive to defend against adjudicatory actions the agency takes against them, even if they do not always have sufficient resources to participate up-front in the rulemaking that sets the standards to which they are subject. My definition includes what many would characterize as private interest groups, such as the Chamber of Commerce or groups representing small farmers seeking government subsidies.⁶⁵ Their inclusion, however, reflects the understanding that such groups often are the putative beneficiaries of regulatory schemes, and that their members' interests may be affected by and need protection from the conduct of other entities that are subject directly to regulation.

B. Problems Caused by Nontraditional Structures of Public Interest Groups

Literature on public interest groups has characterized the traditional interest group—the pure membership group—as the archetype of public interest groups.⁶⁶ In the pure membership

trative government, were to be represented by the agency pursuant to a statute purporting to provide some regulatory benefits for those sharing these interests. As noted earlier, the rise of the interest group model of the administrative state led courts to allow these groups access to agency proceedings and judicial review to assert interests on their own behalf. See *supra* notes 8-16 and accompanying text.

65. To a large degree, my definition of a public interest group comports with what the literature calls "citizen groups." See Jack L. Walker, Jr., *The Mobilization of Political Interests in America, in MOBILIZING INTEREST GROUPS IN AMERICA: PATRONS, PROFESSIONS, AND SOCIAL MOVEMENTS* 33-34 (Joel D. Aberbach et al. eds., 1991) [hereinafter *MOBILIZING INTEREST GROUPS*] (defining citizen group). My administrative law perspective, however, leads me to focus on the nature of the interest represented, and therefore not necessarily to exclude groups that represent other organizations that would not have the means or incentives to participate directly in the regulatory process.

66. See, e.g., *INTEREST GROUP POLITICS*, *supra* note 63. My typology of interest groups describes idealized group structures. Actual interest groups do not fit these structures perfectly; rather, they exhibit characteristics of the several group types to different degrees. Nonetheless, the discussion of ideal types clarifies the problems created by the various characteristics of real groups.

group, leaders use their organizational talents and charisma to form a group of members who share a common interest about a regulatory matter. Funding for such groups comes from the members.⁶⁷ The group is organized with chapters that allow face-to-face interaction between members.⁶⁸ Chapter representatives regularly meet with central leaders and communicate rank and file members' concerns to that leadership. The archetype assumes that group leaders will diligently serve the interests of the members as reflected in communications from chapter representatives and feedback provided by individual members' decisions whether to exit the group.⁶⁹

Today, the complexity and breadth of many regulatory issues fuels the formation of groups that deviate significantly from the pure membership archetype. Group members are not homogeneous in their opinion about the matters that prompt them to join the interest group.⁷⁰ Groups differ in their sources of funding, the opportunities they provide for face-to-face interaction between members, and ultimately in their propensity to pursue members' interests rather than broader social interests or interests of the group leaders.⁷¹

The mass membership group is one alternative to the assumed archetype.⁷² Mass membership groups derive their fund-

67. See Hayes, *supra* note 63, at 137 (denoting pure membership groups as "[m]ass-membership [g]roups," a designation I use for an alternative group type).

68. See *id.* at 135, 137.

69. Exit takes on particular significance for pure membership groups because such groups obtain funds from membership dues. Consequently, leaders of such groups have an economic, as well as social, incentive to ensure that their activities comport with group members' preferences. See Cary Coglianese, *Unequal Representation: Membership Input and Interest Group Decision-Making* (May 25, 1997) (unpublished manuscript presented at the 1996 meeting of the American Political Science Association, on file with author). Coglianese reports, however, only a weak correlation between a group's percentage of funding derived from membership dues and the extent to which group leaders consult members. See *id.* at 8.

70. This is especially true of interest groups that involve themselves in numerous and wide ranging issues. See William P. Browne, *Policy and Interests: Instability and Change in a Classic Issue Subsystem*, in *INTEREST GROUP POLITICS*, *supra* note 63, at 183, 193 (noting that such multipurpose groups are characterized in part "by their heterogeneous memberships, supporters, and political contacts").

71. See Hayes, *supra* note 63, at 138-40; Coglianese, *supra* note 69, at 3-6 (discussing the likely effects of group structures on group leaders' propensity to consult with members before formulating public positions).

72. See Hayes, *supra* note 63, at 137.

ing primarily from members, but members have no opportunity for face-to-face interaction.⁷³ Thus, group leaders make most decisions about regulatory positions the group will take without much influence by members.⁷⁴ The positions taken by mass membership groups therefore may deviate significantly from those that best serve their members' interests; depending on the personal motivations of the group leaders, the group may take a more or less than optimally zealous position in regulatory interactions. Members can exercise some influence by their opportunity to exit the group, especially if there is competition between various groups for members' dollars.⁷⁵ Frequently, however, members respond to psychic benefits that they derive from their identification with the group when deciding whether to enter and stay in a group.⁷⁶ Also, members often make such decisions

73. See, e.g., MICHAEL W. MCCANN, *TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM* 177-78 (1986) (noting that although members fund 95% of the \$5-6 million annual budget of Common Cause, other than monetarily, only a small minority of its membership participates in the group).

74. See Hayes, *supra* note 63, at 139 (denoting such groups simply as "[m]ass [o]rganizations"). Common Cause, which receives almost all its funds from small contributions, and whose members interact only by electing a National Governing Board, is an example of what I would consider predominately a mass membership group. See *About Common Cause* (visited Nov. 22, 1999) <<http://www.commoncause.org/about/faq.htm>>. For a general discussion of the problem of remoteness of group leaders from their membership, see MCCANN, *supra* note 73, at 181; Theda Skocpol, *Unravelling from Above*, in *TICKING TIME BOMBS: THE NEW CONSERVATIVE ASSAULTS ON DEMOCRACY* 292, 300 (Robert Kuttner ed., 1996).

75. See Hayes, *supra* note 63, at 143 ("[M]arket pressures ultimately may prove more effective in forcing responsiveness to rank-and-file preferences than formally democratic mechanisms."); see also JEFFREY M. BERRY, *THE INTEREST GROUP SOCIETY* 56-57 (2d ed. 1989) (noting that competition for members leads group leaders to focus on a narrow goal in order to distinguish the group from others with a similar ideology).

76. See Constance Ewing Cook, *Participation in Public Interest Groups: Membership Motivations*, 12 AM. POL. Q. 409, 417-18 (1984) (reporting that three types of purposive benefits—policy commitment, feeling of civic duty, and sense of political efficacy—motivate individuals to join public interest groups); Burdett A. Loomis & Allan J. Cigler, *Introduction: The Changing Nature of Interest Group Politics*, in *INTEREST GROUP POLITICS*, *supra* note 63, at 1, 8 ("It is the nonmaterial incentives, such as fellowship and self-satisfaction, that may encourage the proliferation of highly politicized groups . . ."); *MOBILIZING INTEREST GROUPS*, *supra* note 65, at 48 (stating that in large memberships "annual dues represent a painless way [for members to amplify] their ideological views and [gain] a sense of involvement in the national political process"); see also TERRY M. MOE, *THE ORGANIZATION OF INTERESTS: INCENTIVES AND THE INTERNAL DYNAMICS OF POLITICAL INTEREST GROUPS* 118

without full knowledge of the group's operations or the precise positions it takes on issues. These imperfections in members' decisions about whether to exit the group may induce leaders to take extreme positions in order to generate publicity.⁷⁷ Thus, although in theory competition among groups for members should constrain against group leaders advocating extreme positions that do not best serve the interests of members, in actuality imperfections in the "market" for interest representation may cause competition to exacerbate rather than mollify leaders' extremist tendencies.⁷⁸ Competition also may fragment the group into subgroups that take different positions.⁷⁹ Such fragmentation can interfere with the ability of regulators, regulated entities, and the interest groups to reach regulatory outcomes acceptable to all.⁸⁰ Most likely, some fringe subgroup will be un-

(1980) (noting that a group member may "derive a sense of satisfaction from the very act of contributing, when he sees this as an act of support for goals in which he believes").

77. See Browne, *supra* note 70, at 188 (noting that recruiting, retaining, and raising revenue from members induces organizations to pursue creation of the organization's image as unique and necessary, and to publicize the organization's goals); see also Jeffrey W. Koch, *Assessments of Group Influences, Subjective Political Competence, and Interest Group Membership*, 15 POL. BEHAV. 309, 322 (1993) (noting that individuals are more likely to join a group representing interests of their self-identified "reference group" if they perceive the interest group as influential); Terry M. Moe, *Toward a Broader View of Interest Groups*, 43 J. POL. 531, 538 (1981) (noting that group leaders can manipulate information to create an impression that membership is an effective means of furthering the organization's political goals).

78. See *infra* notes 125-27 and accompanying text.

79. See Browne, *supra* note 70, at 187-88 (noting that "the range of different and often competing groups throughout American government" can destabilize and fragment traditional issue "subsystem[s]"); Allan J. Cigler, *From Protest Group to Interest Group: The Making of American Agricultural Movement, Inc.*, in INTEREST GROUP POLITICS, *supra* note 63, at 46, 51-52 (noting the interrelated nature of the American Agricultural Movement, Inc.'s (AAM) need to compete with other groups providing material benefits and its need "to retain the support of [its] intense, programmatic activists"); see also *id.* at 57-62 (describing how competition for support by members with different interests led to a split in the AAM).

80. See Allan J. Cigler & Burdett A. Loomis, *Moving on: Interests, Power, and Politics in the 1980s*, in INTEREST GROUP POLITICS, *supra* note 63, at 303, 308-09 (noting that increased competition for influence within traditional "issue networks" has resulted in "[r]egulatory and redistributive politics [that] are not characterized by compromise, accommodation and secrecy"); cf. Browne, *supra* note 70, at 187-88 (asserting that competition between agricultural interest groups that induced the fragmentation of these groups makes it "harder for government to decide on policy choices").

satisfied with a negotiated outcome, and the subgroup's ability to challenge the action may scuttle the whole cooperative regulatory venture.

Another nontraditional group structure is the subsidized member group, which allows for face-to-face interaction by members in chapters, but receives much of its funding from sources other than member contributions.⁸¹ Members of such a group have a mechanism for voicing their concerns, but the need to attract outside funding creates incentives for leaders to compromise members' interests. This structure is especially prevalent among groups in their formative stages, when leaders must depend on outside patronage for start-up funding.⁸² Such patronage can come from private philanthropies and government organizations, but is most likely to come from private institutions and individuals who see the group as a means of furthering their own institutional interests.⁸³ If the interest group's position deviates from the patron's interest, funding can vanish suddenly, often with dire consequences for the continued existence of the group.⁸⁴ Thus, leaders of subsidized groups are especially susceptible to co-option by their patrons.

A third exception to the membership group archetype is the central staff group.⁸⁵ Essentially, these groups have no members. A relatively small central staff engages in activities on behalf of individuals with interest in regulatory matters who may have no formal connection with the group.⁸⁶ Such groups rely solely on patronage or their own revenue-generating activities for their funding, and have no governance or deliberative process for input by those whom the group purports to represent.⁸⁷ A central

81. See Hayes, *supra* note 63, at 139.

82. See *id.* at 140; David C. King & Jack L. Walker, Jr., *The Origins and Maintenance of Groups*, in *MOBILIZING INTEREST GROUPS*, *supra* note 65, at 75, 78.

83. See King & Walker, *supra* note 82, at 82.

84. See *id.* at 99-100.

85. See Hayes, *supra* note 63, at 138.

86. See *id.*

87. See *id.* Public interest law firms, which derive operating revenues from business donations and grants from other foundations, epitomize groups in this category. See generally Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415 (1984) (describing in detail the history and structure of numerous business-funded public interest law firms). Groups that do have members, but generate a significant percentage

staff makes decisions about group activities subject to influence by the group's patrons. Often, central staff groups do not have the political capital to influence political decision making. Thus, such groups are apt to eschew collaborative deliberative processes for adversarial activity such as litigation.⁸⁸ From the perspective of regulated firms, central staff groups are thus unattractive as partners for cooperative regulatory ventures.

Analysis of the typology of interest groups thus reveals problems with reliance on such groups as moderating influences on self-regulation. Leaders of nontraditional interest groups are likely to deviate from the rational pursuit of members' interests: when such groups are independent of outside sources of funds leaders are apt to pursue members' preferred outcomes overzealously; when such groups are dependent on patronage, leaders are apt to compromise such preferred outcomes.⁸⁹

C. Problems with Representation by Pure Membership Public Interest Groups

Even the internal dynamics of traditional pure membership groups create impediments to cooperative behavior by such groups in a collaborative regulatory scheme. Public interest groups offer members three types of benefits: material benefits, expressive or purposive benefits, and solidary benefits.⁹⁰ Material benefits are particular goods or services provided to members.⁹¹ The literature on interest groups often treats material benefits as "selective," which means that they are limited to members.⁹² Because public interest groups seek to further dif-

of their revenues by litigating and settling citizen suits, such as the Atlantic States Legal Foundation, see *infra* note 217 and accompanying text, manifest some of the attributes of central staff groups.

88. See Hayes, *supra* note 63, at 138.

89. Cf. *id.* at 142 (asserting that "divergence between the views of leaders and followers is particularly serious in view of the lack of real accountability within most of the new citizens' groups").

90. See Robert H. Salisbury, *An Exchange Theory of Interest Groups*, 13 *MIDWEST J. POL. SCI.* 1, 15-16 (1969); see also JAMES Q. WILSON, *POLITICAL ORGANIZATIONS* 33-35 (1973) (identifying a broader category of purposive benefits for achieving social policy rather than the subset—expressive benefits—identified by Salisbury).

91. See WILSON, *supra* note 90, at 36; Salisbury, *supra* note 90, at 15.

92. See, e.g., PHILIP A. MUNDO, *INTEREST GROUPS: CASES AND CHARACTERISTICS*

fuse interests, however, their participation in the regulatory process frequently bestows material benefits on a general class of individuals that includes nonmembers.⁹³ Expressive benefits are ideological positions taken by the interest group that satisfy members' desire to speak out on the regulatory controversy in which the group participates.⁹⁴ Interest group expression obviates the need for each individual to participate directly, thereby providing a benefit to any individual who agrees with the group's stated position. Expressive benefits are collective rather than exclusive goods; provision of the benefit to one individual does not depreciate the value of the expression to others.⁹⁵ Like most collective goods, it is not selective, but rather can flow to both group members and those outside the group. Finally, public interest groups can provide solidary benefits. Members who are active in the group gain a sense of belonging and companionship by participating with other group members in a common endeavor or may derive social status from belonging to the group.⁹⁶ For groups that are not limited in membership, solidary benefits usually flow only to group members who actively participate in group events and decisions.

If an interest group provides predominantly selective material benefits, then it may be logical to trust the group to cooperate with administrators and firms in the regulatory endeavor. Gridlock caused by overzealous adversarialism denies the group members a share of the surplus that can be realized by collaborative regulation. Thus, although group empowerment can counterbalance the influence of regulated entities, the group has a

21 (1992).

93. A prime example of a group delivering nonselective material benefits is a "property-owners' association [obtaining] lower taxes." WILSON, *supra* note 90, at 38.

94. See Salisbury, *supra* note 90, at 16. Salisbury distinguishes expressive benefits from what Wilson calls purposive benefits. Compare *id.* (noting that expressive benefits express viewpoints related to political goals, notwithstanding whether the goals are achieved), with WILSON, *supra* note 90, at 45-47 (noting that purposive viewpoints involve the actual achievement of the organization's political goals). In most cases, members that derive expressive benefits from a group taking a position also would derive purposive benefits if the group succeeded in having its position adopted.

95. In microeconomic terms, collective goods are those whose consumption is nonrivalrous. See EDWIN MANSFIELD, MICROECONOMICS 563 (9th ed. 1997).

96. See WILSON, *supra* note 90, at 39-40; Salisbury, *supra* note 90, at 16.

similar incentive as such entities to implement improved regulatory structures and standards. Co-option is still a possibility, however, because group leaders may gain personally by making sacrifices to regulators that allow them to deliver some benefits without working as hard for the group members' interests.⁹⁷ Co-option is especially likely when the group leaders interact with government regulators on an ongoing, long-term basis, and the membership does not have the means to monitor day-to-day actions by group leaders.⁹⁸

Unlike groups that provide primarily material benefits, groups that provide mostly expressive and solidary benefits may not have incentives to accommodate welfare-increasing regulatory programs reasonably. Such groups generate and maintain support by adhering to ideological positions.⁹⁹ "Members that join groups of this kind do so in order to demonstrate their support for certain collective values, and they expect the group to advance these concerns as vigorously as possible."¹⁰⁰ Acquiescence undermines the extent to which members may feel that the group has expressed their views. Moreover, the solidarity of active members may depend on these members viewing the group as the righteous underdog rather than a mainstream player in the regulatory process.¹⁰¹

97. See HANDLER, *supra* note 57, at 243-44.

98. See *id.* at 243-44, 246 (describing the potential for co-option and asserting that it can be avoided only by "introduction of new blood" into interest groups that will ensure that group leaders remain responsive to the group's original mission).

99. See Stephen J. Driscoll, Note, *Environmental Private Actions: Are Special Interest Groups Hobbling Comprehensive Programs Without "Standing" Themselves?*, 24 RUTGERS L.J. 469, 471-72 & n.10 (1993) (noting that special interest groups often block all solutions to a problem and cannot overcome counterproductive refusals to cooperate because "these groups operate under the auspices of a righteous cause"); see also Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625, 1641 (1986) (positing that group leaders can secure financial support by refusing to settle regulatory challenges); Stewart, *supra* note 25, at 674 ("[M]any advocacy groups often have a strong ideological commitment to a cause; as a result, such groups may be more likely to fight for their preferred outcome as a matter of principle and less likely to accept compromise.").

100. Thomas L. Gais & Jack L. Walker, Jr., *Pathways to Influence in American Politics*, in MOBILIZING INTEREST GROUPS, *supra* note 65, at 103, 107. One scholar of interest group member motivation found that many group members enjoy being part of what they view as an ideological crusade. See Cook, *supra* note 76, at 409.

101. The tendency of active group members to support the group's obstructionist

Formation of a public interest group often depends on the group leader's ability to attract members to an uncertain cause.¹⁰² Outside of close communities of individuals who share a common regulatory interest, groups tend to rely on patrons for monetary support until the group can build a membership that can support its activities.¹⁰³ Hence most fledging public interest groups are not pure membership groups.¹⁰⁴ Even for those that may be pure membership groups, leaders cannot credibly promise material benefits before a group is well-established, as an interest group in its infancy often lacks the power to deliver such benefits. Thus, when forming groups, leaders attract new members by offering collective, purposive benefits rather than selective, material benefits.¹⁰⁵ In fact, many citizen groups begin as protest groups.¹⁰⁶ To get the group off the ground, leaders rely on the emotional appeal of expressive benefits and the solidary benefits available to members who actively contribute to the cause. The formation process for public interest groups thus undermines development of structures that might induce a group to cooperate in a regulatory scheme.

According to the rational choice based incentive theory of interest groups, however, maintenance of a public interest group requires that the group replace the expressive benefits it initial-

positions can be exacerbated further by individuals' propensity to conform to the views of their fellow members. See ELLIOT ARONSON, *THE SOCIAL ANIMAL* 19-34 (7th ed. 1995).

102. See RUSSELL HARDIN, *COLLECTIVE ACTION* 35-37 (1982) (discussing the role of "political entrepreneurship" in overcoming barriers to collective action that in theory would impede group formation); MOE, *supra* note 76, at 36-38 (attributing creation and maintenance of political interest groups to political and administrative leaders who act as entrepreneurs in setting up a benefits package to sell to members); Salisbury, *supra* note 90, at 11-13 (proposing an exchange theory of groups in which "[e]ntrepreneurs/organizers invest capital to create a set of benefits which they offer to a market of potential customers [i.e. group members]").

103. See King & Walker, *supra* note 82, at 75, 78.

104. See Hayes, *supra* note 63, at 141 ("Citizens' groups . . . often find it virtually impossible to establish a network of local chapters at the outset.").

105. See Cigler, *supra* note 79, at 47 (stating that mobilization of a political interest group requires identification of a problem and agreement about the need for collective action); King & Walker, *supra* note 82, at 88 ("For attracting members, citizen sector groups emphasize purposive benefits—which is to say collective goods—more than any other class of benefits.").

106. See King & Walker, *supra* note 82, at 93.

ly offered with material benefits to its members.¹⁰⁷ Once individuals join the group, incentive theory posits that members are attracted to other groups or simply exit the group and free ride on its efforts if the group does not provide benefits to members that others do not receive.¹⁰⁸ One might therefore conclude that, in the long run, groups will tend toward those that provide material benefits—precisely the groups likely to avoid overzealous adversarialism.¹⁰⁹ This conclusion is problematic on two counts.

First, empirical evidence contradicts the prediction of incentive theory that mature groups maintain membership by offering material benefits.¹¹⁰ Leaders of mature groups continue to accord greater significance to purposive rather than material benefits.¹¹¹ This empirical result may reflect the failure of incentive theory to factor into its model of public interest group dynamics information costs that members must incur to monitor group leaders. Group members may be unaware of the details of actions taken by leaders in regulatory proceedings. By definition, those who share a diffuse interest lack a strong incentive to learn about the issues in which group leaders take positions. Members are likely to evaluate the efficacy of leaders based on the information they hear, which may depend on what leaders include in newsletters to the group or what members hear through mass media outlets.¹¹² To the extent that members more readily contribute financially to groups that they perceive as actively pursuing their interests, the salience of group leaders'

107. See Cigler, *supra* note 79, at 48.

108. See *id.*; cf. MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 33-36 (theorizing that free rider problems create barriers to formation of large interest groups that provide diffuse, nonselective benefits).

109. Contrary to this prediction by incentive theorists, evolutionary theories of oligarchy suggest that "older [groups] become less responsive to their members' concerns." Coglianese, *supra* note 69. Coglianese's analysis, however, showed no significant correlation between a group's age and the propensity of its leaders to seek input from members. See *id.* at 8.

110. See King & Walker, *supra* note 82, at 75, 92.

111. See *id.* at 92 (noting that citizen group leaders "believe that the maintenance of their organizations depends on their success as . . . advocates for a cause").

112. See Gais & Walker, *supra* note 100, at 103, 106 (noting the problem caused by members getting information from the mass media).

actions may matter more to the financial stability of the group than to the actual congruence between positions taken by the leaders with members' interests.¹¹³ Reports of strong stances taken against adversaries may attract more attention, and therefore more money, than reports of negotiated accommodations that actually provide group members a modicum of tangible benefits.¹¹⁴ Hence, information costs explain why the structure needed to attract capital in the formation stage may continue to predominate even in mature groups.

Second, even if the prediction that mature groups must switch to provide selective benefits was accurate, new interest groups are continually forming and dying.¹¹⁵ At any given time, there is likely to be some public interest group in the formative stage promising to take an extreme position on regulatory issues in order to attract members. Such groups fill a niche for those who desire the expressive and solidary benefits that mature groups may not provide. Thus, some existing groups will always threaten to challenge regulatory agreements reached by other stakeholders. Faced with the potential of such unreasonable challenges, firms will rationally hesitate to make available all information about their plants and their self-regulatory efforts.

D. Empowerment as a Cure for Public Interest Group Pathologies

The arguments that public interest group pathologies will seriously impede the success of empowerment as a means of implementing regulatory flexibility is open to the criticism that such pathologies reflect groups that historically have not been empowered. Some proponents of empowerment contend that the very act of empowering public interest groups will cure the ills

113. See *id.* at 103, 105 ("Groups with a farflung membership . . . are naturally drawn toward controversial issues and tactics that will capture the attention of their diffuse membership . . .").

114. See Perritt, *supra* note 99, at 1641 (noting that public interest groups may have more incentive to litigate than to negotiate regulations because "publicity associated with a dramatic victory and extreme statements made in litigation tend to facilitate fund raising and other facets of membership support").

115. See King & Walker, *supra* note 82, at 99-100.

that threaten cooperation by the empowered groups.¹¹⁶ For them, public interest groups currently "are likely to be supporters of regulatory inflexibility and opponents of the regulatory discretion needed to constitute win-win solutions precisely because they are disempowered."¹¹⁷ These proponents rely on three aspects of empowerment as countering the historical propensity of interest groups to act adversarially.¹¹⁸

First, it is possible that public interest groups act overzealously because groups that cannot deliver material benefits must resort to provision of expressive and solidary benefits.¹¹⁹ Proponents of empowerment, however, see as "more durable, and ultimately more persuasive, [the] appeal of tangible long term progress towards goals that are important to their members."¹²⁰ Second, proponents note that group leaders may have an incentive to convince the membership that the symbolic victories they deliver are important. Proponents conjecture that the open information required by tripartism undermines the foundation of public interest group zealotry because communication of tangible outcomes that result from the collaborative regulatory process will undermine the appeal of symbolic politics.¹²¹ Finally, with the ability to deliver material benefits and the open communication that proponents see resulting from empowerment, competition among interest groups will induce the demise of groups that shun cooperative solutions and thereby forfeit material benefits for members.

Although these contentions suggest that empowerment may increase the propensity of public interest groups to cooperate, any prediction of wholesale changes in the nature of interest group participation is panglossian. Optimism in empowerment ignores that many public interest groups are not pure member-

116. See AYRES & BRAITHWAITE, *supra* note 2, at 75.

117. *Id.*

118. See *id.* at 75-78.

119. Of the proponents of collaboration, only Ayres and Braithwaite clearly recognize and attempt to minimize the problem of the "zealous PIG," i.e., the zealous public interest group. See *id.* at 75-78. Thus, the arguments in this subpart of the Article essentially summarize and respond to this attempt.

120. *Id.* at 76.

121. See, e.g., *id.*

ship groups. It also incorrectly assumes that the open provision of information to interest groups by administrative agencies and regulated firms will cure information cost problems within groups. Unfortunately, it is the members' difficulty in obtaining information about actions of group leaders in regulatory proceedings and in educating themselves to understand the significance of those actions, not lack of information regarding outcomes of regulatory negotiations, that encourage leaders to take extreme positions.¹²² Even with full provision of information by the agency and firm involved in a regulatory proceeding, few group members will have sufficient knowledge of the issues, let alone of the regulatory environment, to determine whether the outcome of the proceeding was the best that the group leaders could deliver.

More fundamentally, empowerment optimists unrealistically assume homogenous preferences among group members, and more particularly, that all members will prefer material benefits over expressive or solidary benefits.¹²³ This assumption leads optimists to predict that competition among groups will force fringe groups to conform to cooperative strategies.¹²⁴ Within groups, these advocates of collaboration would rely on the contestability of group leadership to ensure that group strategies do not deviate greatly from the desires of group members, who are affected directly by the conduct of regulated entities.¹²⁵ But

122. See Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 245 (1997) (asserting that if representatives are to deliberate on behalf of group members, "members [must] gain access to the contents of the deliberative agency decisionmaking process").

123. On the significance of the expressive element of individual decision making, see Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2150-54 (1990); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 66-72 (1995).

124. See AYRES & BRAITHWAITE, *supra* note 2, at 76.

125. See *id.* at 83-84. Ayres and Braithwaite state that for their theory to work, "all that is . . . required is for *enough* people to absorb the information made available [by empowerment] and [to] take up the opportunities for participation to supply countervailing regulatory power and to render that power contestable." *Id.* at 83. Accordingly, by contestability, Ayres and Braithwaite seem to mean that any leader who can garner sufficient ideological and monetary support to create an interest group would be entitled to participate fully in the regulatory process. This notion of contestability, however, is essentially the same as what I have characterized as

members' preferences are not homogenous, however: Some members undoubtedly prefer the satisfaction of staking out extreme positions over material goods.¹²⁶ Thus competition, both between and within groups, is likely to splinter public interest groups, with some representing more mainstream positions and others taking radical stances. In this way, competition for group members may create an environment hostile to cooperation.¹²⁷ Moreover, a radical group that adopts an obstructionist strategy can discourage cooperation by regulated entities with all public interest groups, especially because information that the firm would provide would go to the obstructionist as well as cooperative groups. Hence, unreasonable action by an extreme group can work to its advantage by undermining the collaborative process on which more mainstream groups rely to deliver material benefits. In such an environment, competition is more likely to scuttle cooperative regulation rather than undermine the viability of obstructionist fringe groups.

Finally, wholehearted defenders of empowerment ignore the influence of social norms that public interest groups have instilled in group members. To date, many public interest groups that participate in regulatory matters germinated out of protest groups that depended for success on the creation of a "knight on a white charger" identity.¹²⁸ Group leaders, staffs, and even members are socialized to oppose positions taken by firms rather than to cooperate with firms.¹²⁹ Even if proponents of empowerment are correct that cooperation represents an optimal strategy for interest groups that engage in rational decision making, protest groups' norms counteract this incentive to cooperate.¹³⁰ Thus, the

competition between groups for members and resources, and hence is likely to lead to the same fragmentation that engenders the emergence of extremist fringe groups.

126. See Salisbury, *supra* note 90, at 16.

127. See David C. King & Jack L. Walker, Jr., *An Ecology of Interest Groups in America*, in *MOBILIZING INTEREST GROUPS*, *supra* note 65, at 57, 68 ("For some groups, especially in the citizen sector, policy conflict and continuous competition for members make for a hostile environment in which opportunities to cooperate with other groups are severely limited.").

128. AYRES & BRAITHWAITE, *supra* note 2, at 75.

129. See Gais & Walker, *supra* note 100, at 103, 107 ("[O]nce members are attracted, a staff is recruited, and administrative routines are established, it is not easy [for the maturing group] to change course.").

130. "A group that begins its life dedicated to campaigns of grass roots agitation

influences on group members' decisions about whether to support a group are very different from those of an employee of a regulated entity, most of whom would tend to comply with regulatory commands. In the case of self-enforcement by regulated entities, incentives to cooperate reinforce social norms to comply with the law in the case of protest group participation in regulatory matters, group norms usually counteract incentives to cooperate.¹³¹

The government might try directly to counteract fringe group norms against cooperation, for example, by educating group members about the value of cooperation or perhaps, more specifically, about the opportunities group members lose by obstructing the regulatory process.¹³² Such direct efforts at changing group norms, however, are difficult and risky,¹³³ in large part because already distrustful protest group members likely will perceive government efforts to change their attitudes as propaganda, to which they might react by increasing their resistance to cooperation.¹³⁴ Alternatively, the government might use indirect attempts to induce cooperation, for example, by penalizing

and political mobilization, for example, will find it very difficult to shift its strategy toward intensive negotiations . . . even if circumstances call for such a change in tactics." *Id.* at 107-08.

131. Recent studies of the impact of social norms suggest that those who would try to countermand such norms by law face a difficult task. For example, Bob Ellickson has found that interactions between ranchers in Shasta County, California reflect social norms rather than bargaining in the shadow of less efficient legal rules. See Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 628 (1986). Ellickson's findings represent an exception to dispute resolution theories positing that legal rules establish background entitlements that influence the ultimate outcomes of dispute resolution. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979) (exploring this theory of the influence of legal rules on private resolution of divorce disputes).

132. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 974 (1995) (identifying education as a process for inculcating orthodox values in members of society); see also Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2031-32 (1996) (discussing the manipulation of norms through legal mandates).

133. See Eric A. Posner, *Law, Economics, & Inefficient Norms*, 144 U. PA. L. REV. 1697, 1732 (1996).

134. See Lessig, *supra* note 132, at 974-75 (stating that if the process of inculcating values is "revealed or understood as 'mere' coercion, then its pedagogic effect ceases").

groups that engage in obstruction of the regulatory process,¹³⁵ perhaps by barring such groups from that process.¹³⁶

Unfortunately, penalizing groups for engaging in anticompetitive behavior is also problematic because of the difficulty of distinguishing such behavior from legitimate conduct of a group participating in regulatory collaboration. In a collaborative endeavor, an empowered group must be free to refuse to accede to demands that the group truly deems unacceptable.¹³⁷ Hence, penalties for refusals to cooperate would hinge on a determination that the group engaged in "bad faith" in representing which regulatory outcomes it would find acceptable, a determination about the state of mind of the group that may make no sense, and in any case would be extremely difficult to prove. In sum, regulators' efforts to overcome protest groups' norms against cooperation are unlikely to succeed.

A more promising approach would rely on interest groups to monitor and sanction their uncooperative members. Interest groups usually have more information and ability about members' motives than do outsiders like government regulators, and thus are better able than the government to identify fringe

135. Generally, indirect methods operate by penalizing membership in a group that refuses to cooperate, or by providing the same good to nonmembers as members receive from the group, thereby making group membership less valuable. See Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 149 (1996). The government, however, cannot provide a substitute for the expressive benefit delivered by protest groups that derives from standing up to the established orthodoxy, which the government itself represents. Hence, penalizing the group remains the only means for the government to discourage an anticompetitive group norm that would threaten a collaborative regulatory process.

136. Denying an obstructionist group access to the regulatory process may be more effective than imposing monetary penalties for obstruction because lack of access, unlike a fine, undermines the appeal of the group as an intermediary by which members can register a protest. Cf. Lessig, *supra* note 132, at 971-72, 1012 (arguing that outlawing dueling in the Old South might have been less effective than banning duelers from holding public office, because the latter would undermine the same gentleman's sense of duty that prompted dueling in the first place).

137. As one set of proponents of collaborative regulation states: "The parties in public disputes can, and should, satisfy their own interests. No apologies are necessary for pursuing selfish rather than altruistic goals." LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 238 (1987).

factions. If an extremist faction is viewed as a defector from a larger, more orthodox group, then regulators might seek to harness the institutional advantages enjoyed by the group by empowering the larger group to discipline the defectors.¹³⁸ Such empowerment might be implemented by creating a mechanism for an interest group to exclude representatives of individuals who are similarly situated to the groups' members from participating in the regulatory process.¹³⁹

III. EVALUATION OF CURRENT MEANS FOR EMPOWERING REGULATORY BENEFICIARIES

Although the analysis above portrays a pessimistic view of empowerment as a means of achieving cooperative regulatory systems, in limited contexts, empowerment may succeed in reducing the costs of adversarialism and improving the flexibility of regulation. Many of the problems with empowerment result from the freedom of every group to use and abuse information and participatory opportunities that come from empowerment; the analysis assumed no mechanism to restrict empowerment to groups likely to cooperate. This suggests that selective empowerment might avoid some of the problems radical fringe groups cause. Granting regulators the authority to select the groups to be empowered, however, can undermine the role that beneficiary

138. See Posner, *supra* note 135, at 155-61 (discussing when groups should be allowed to resolve intragroup disputes and when courts should intervene in such resolutions).

139. So implemented, collaborative governance might appear, at first blush, to fit within the aegis of corporatism, broadly defined

as a system of interest representation in which the constituent units are organized into a limited number of singular, compulsory, non-competitive, hierarchically ordered and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports.

Philippe C. Schmitter, *Still the Century of Corporatism?*, in *TRENDS TOWARD CORPORATIST INTERMEDIATION* 7, 13 & n.22 (Philippe C. Schmitter & Gerhard Lehmbruch eds., 1979). Collaborative governance differs, however, from corporatism in that it envisions a shifting set of organizations, or at least a shifting set of leaders of organizations, that are responsive to the preferences of individuals who are actually affected by regulatory decisions. See HANDLER, *supra* note 57, at 244-45.

groups play in avoiding sweetheart deals between firms and regulators. It may also defeat attempts to achieve cooperative outcomes by emboldening excluded groups to sabotage the process. To better understand the need for restrictions on empowerment, as well as problems that may be created by selective inclusion, an examination of experiences with three established efforts at empowerment—negotiated rulemaking, citizen suits, and the EPA's Project XL—might prove illuminating.

A. Negotiated Rulemaking as a Mechanism for Empowering Interest Groups

Negotiated rulemaking is one mechanism for empowerment of interest groups for which there may be a sufficient history to permit a meaningful evaluation of its successes and failures.¹⁴⁰ This mechanism allows stakeholders in a regulatory matter to formulate a rule at its earliest stages.¹⁴¹ As soon as the rulemaking agency determines that there is a need for a rule and that negotiated rulemaking is appropriate, the agency convenes a rulemaking negotiating committee.¹⁴² Ideally this committee includes representatives of all interests likely to be affected by the ultimate rule,¹⁴³ although in reality the need for a workable number of discussants limits the group size and forces exclusion of some groups from the committee.¹⁴⁴ The committee

140. See Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1255 (1997) ("Negotiated rulemaking appears by most accounts to have come of age.").

141. See *id.* at 1266-67.

142. See 5 U.S.C. § 563(a) (1994) (detailing factors that an agency shall use in deciding whether "use of the negotiated rulemaking procedure is in the public interest").

143. See DAVID M. PRITZKER, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, BUILDING CONSENSUS IN AGENCY RULEMAKING: IMPLEMENTING THE NEGOTIATED RULEMAKING ACT (1995); Harter, *supra* note 27, at 52-53. The Negotiated Rulemaking Act requires that an agency using negotiated rulemaking should assure that "there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who can adequately represent the interests [of all persons who will be significantly affected by the rule]." 5 U.S.C. § 563(a)(3).

144. See Laura I. Langbein & Cornelius M. Kerwin, *Regulatory Negotiation Versus Conventional Rulemaking: Claims, Counter-Claims, and Empirical Evidence* 13, 34 (Nov. 20, 1997) (unpublished manuscript presented at the 1997 Northwest Political Science Association Annual Meeting, on file with author) (reporting that 34% of

then attempts to develop a rule that all of the representatives can support.¹⁴⁵ If the committee reaches consensus on a rule, it reports that to the agency, which then initiates an Administrative Procedure Act (APA) rulemaking proceeding by using the consensus of the committee as the basis for a proposed rule.¹⁴⁶ The agency remains free to modify the rule as part of the notice and comment rulemaking proceeding.¹⁴⁷

Experimentation with negotiated rulemaking at federal agencies dates back to 1983,¹⁴⁸ and in 1990 Congress endorsed negotiated rulemaking as a means of addressing the propensity of the APA rulemaking process to "cause parties with different interests to assume conflicting and antagonistic positions and to engage in expensive and time-consuming litigation over agency rules."¹⁴⁹ Since 1983, agencies have convened negotiated rulemaking committees for at least sixty-seven rules and have promulgated at least thirty-five negotiated rules.¹⁵⁰

participants in negotiated rulemaking who responded to a survey believed that some affected interests were not included on the negotiating committee); see also Coglianese, *supra* note 140, at 1324 (citing CORNELIUS KERWIN & LAURA LANGBEIN, AN EVOLUTION OF NEGOTIATED RULEMAKING AT THE ENVIRONMENTAL PROTECTION AGENCY: PHASE I, at 11 (1995)).

145. See Coglianese, *supra* note 140, at 1267.

146. The agency is obligated to propose a rule based on the negotiated consensus only to the maximum extent consistent with the legal obligations of the agency. Even aside from discretion to deviate to ensure meeting legal obligations, an agency need not propose the precise consensus rule to which negotiating committee members agree; an agency need only base the proposed rule on the consensus, see 5 U.S.C. § 563(a)(7), which would seem to allow the agency to add or amend provisions in a manner that does not directly conflict with the negotiated provisions and even to amend provisions in a manner inconsistent with the negotiation committee consensus if the agency feels such inconsistency is necessary, see Patricia M. Wald, *ADR and the Courts: An Update*, 46 DUKE L.J. 1445, 1469-71 (1997) (discussing agency discretion to propose a rule that deviates from that negotiated by the regulatory negotiation (reg-neg) committee, and noting that an agency commitment to propose a rule in accordance with the negotiated proposal is probably not judicially enforceable).

147. See Freeman, *supra* note 2, at 87 (noting an agency's authority to deviate from a consensus rule); William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1358 (1997) (noting that the agency's promulgation of a final rule different from the negotiated proposed rule might prompt a judicial challenge from a group represented on the negotiating committee); Wald, *supra* note 146, at 1458.

148. See Coglianese, *supra* note 140, at 1274-75.

149. Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, § 2(2), 104 Stat. 4970.

150. See Coglianese, *supra* note 140, at 1274-75.

The success of negotiated rulemaking, once seemingly taken for granted, is now contested. In part, controversy over its success depends on what one views to be the goals of the program. Most would include in such goals reducing the time it takes agencies to promulgate rules and increasing the acceptability of rules to those who might challenge them.¹⁵¹ At a deeper level, however, one might ask whether negotiated rulemaking has demonstrated a capability for alleviating the adversarialism that plagues the pluralist regulatory interactions of interest groups.¹⁵² One might also ask whether negotiated rulemaking has improved the overall quality of regulations, for example, by developing more flexible rules to achieve the tasks society asks of them without leading to the types of absurd decisions that prompt conjecture about the death of common sense.¹⁵³ Finally, even if the answers to these questions are affirmative, one can ask whether negotiated regulation holds the promise for improving the regulatory system generally rather than in a limited set of circumstances.

Agency experience with negotiated rulemaking supports proponents' arguments that face-to-face deliberation allows traditional adversaries to overcome differences, but only to a limited extent. Of the first sixty-seven negotiating committees convened, thirty-five reached sufficient consensus to prompt the agency to promulgate a rule.¹⁵⁴ Another nineteen were still under consider-

151. See Harter, *supra* note 27, at 28-29; Jeffrey S. Lubbers, *Better Regulations: The National Performance Review's Regulatory Reform Recommendations*, 43 DUKE L.J. 1165, 1171 (1994); Henry H. Perritt, Jr., *Administrative Alternative Dispute Resolution: The Development of Negotiated Rulemaking and Other Processes*, 14 PEPP. L. REV. 863, 906 (1987); Lawrence Susskind & Laura Van Dam, *Squaring Off at the Table, Not in the Courts*, TECH. REV., July 1986, at 36, 38.

152. See Patricia M. Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 COLUM. J. ENVTL. L. 1, 18 (1985) (noting reg-neg proponents' assertions that it will "soften the adversarial posture that animates the current comment process"); Langbein & Kerwin, *supra* note 144, at 1 (describing whether negotiated rulemaking decreases "conflict" as a major point of contention between proponents and opponents of reg-neg).

153. See Freeman, *supra* note 2, at 26 (claiming that a "problem solving [methodology] will produce better quality . . . [in that] it is more likely to be conducive to creative, implementable regulatory solutions capable of adaptation and revision than informal notice and comment [methodology]").

154. See Coglianese, *supra* note 140, at 1274-75.

ation by committees at the end of 1996, at which time it was too early to tell whether the committee might ever reach consensus.¹⁵⁵ Agencies disbanded committees that failed to reach sufficient agreement in only thirteen of the first sixty-seven instances.¹⁵⁶ That stakeholders with opposing interests, many of whom have staked out identities by taking hard-line positions on regulatory matters, were able to reach accords in such a significant percentage of negotiations indicates that negotiation prior to parties having taken a position on a rule can induce resolution of significant differences.¹⁵⁷

Unfortunately, data on judicial challenges to negotiated rules demonstrate that transcendence of adversarialism is extremely fragile. Challenges to rules promulgated after committee negotiation occur slightly more frequently than challenges to rules promulgated without negotiation.¹⁵⁸ Many challenges come from groups whose interests were represented on the negotiating committee.¹⁵⁹ Sometimes such groups object because the final

155. See *id.*

156. See *id.* at 1274.

157. In at least some instances, the agency proposed a rule even though the committee did not reach a full consensus. See Philip J. Harter, *Fear of Commitment: An Affliction of Adolescents*, 46 DUKE L.J. 1389, 1425-28 (1997) (describing in an appendix all rules in which an agency had used negotiated rulemaking and promulgated a final rule, including several in which the negotiating committee disbanded or could not reach agreement). Thus, the data I cite in the text overstate the extent to which the negotiating process may have led to consensus.

158. See Coglianese, *supra* note 140, at 1298-1301, 1335; see also Langbein & Kerwin, *supra* note 144, at 26 (finding "no difference between the two types of rulemaking with respect to non-enforcement litigation"). Philip Harter, an early and still major proponent of negotiated rulemaking, asserts that no rule promulgated precisely as negotiated has ever been subject to judicial challenge. See Harter, *supra* note 157, at 1404. Just what constitutes a deviation from a negotiated consensus proposal, however, is not clear. For example, if the agency adopts additional provisions related to, but not specifically addressed by, the negotiated proposal, does that constitute a deviation from the proposal? In any case, it is clear that agencies have frequently seen the need to add to or change negotiated proposals, and that the negotiation process does not immunize the resulting rule from the usual degree of challenge. See Coglianese, *supra* note 140, at 1324-25 (giving examples in which groups represented in negotiations challenged rules that they claimed deviated from the negotiated consensus).

159. See, e.g., *Chemical Mfrs. Ass'n v. EPA*, No. 94-1463 (D.C. Cir. 1996) (settling a challenge to a negotiated rule regarding control of chemical equipment emissions leaks); *Natural Resources Defense Council, Inc. v. EPA*, 907 F.2d 1146 (D.C. Cir. 1990); *Safe Bldgs. Alliance v. EPA*, 846 F.2d 79 (D.C. Cir. 1988).

rule addresses matters that fill gaps in the proposed rule reported out of the committee in a manner contrary to these groups' understanding of the negotiated consensus.¹⁶⁰ Other times these groups object to changes in the rules prompted by concerns of the agency, or those expressed during the comment period by groups not represented on the committee, or by political pressure brought to bear during the APA rulemaking process.¹⁶¹ One might also envision a group disagreeing with its representative on the negotiating committee about whether the negotiated consensus is in the group's interest, or simply changing its mind about support for this consensus.¹⁶² Thus, negotiated rules seem to be carefully crafted deals between interest groups who remain adversaries on regulatory matters and who, subsequent to the negotiations, continue to use all means available to them to alter the negotiated rule to their benefit and to the detriment of other participants.¹⁶³

160. For example, the American Water Works Association challenged an EPA rule on Disinfectant Byproducts, *see* American Water Works Ass'n v. EPA, No. 96-1208 (D.C. Cir. 1996), despite having participated in the negotiation of the rule, and expressing surprise and disappointment at some significant provisions of a regulation in which it had participated in negotiating. *See Future Uncertain for Negotiation Process on Microbials, Disinfection Byproducts, EPA Says*, 27 Env't Rep. (BNA) No. 21, at 1194, 1195 (Sept. 27, 1996); *see also* Coglianese, *supra* note 140, at 1290-94 (describing the American Petroleum Institute's administrative challenge to the second phase of nitrogen oxide restrictions in reformulated gasoline as inconsistent with the negotiated rulemaking agreement and the Clean Air Act).

161. *See, e.g.,* USA Group Loan Servs., Inc. v. Riley, 82 F.3d 708, 714 (7th Cir. 1996) (holding that to reverse an agency for changing a negotiated rule in response to comments would "extinguish notice and comment rulemaking in all cases in which it was preceded by negotiated rulemaking" contrary to the provisions of the Negotiated Rulemaking Act and the APA).

162. *See* Harter, *supra* note 27, at 102 (predicting that someday a participant in negotiated rulemaking would change his mind and challenge a negotiated rule); Wald, *supra* note 146, at 1458; *cf.* Harter, *supra* note 157, at 1412 (conceding essentially the fragility of consensus by asserting that if an "agency second-guesses the [negotiating] committee or takes a long time to review the [committee consensus proposal], the initial support [for that consensus] can wane").

163. This conclusion is consistent with the views of the participants in the negotiating process, who "tend to view reg-negs in terms of potential issues to be traded or compromised." Freeman, *supra* note 2, at 69. *But cf.* Langbein & Kerwin, *supra* note 144, at 9-10 (reporting that participants on the negotiated rulemaking committees were more satisfied with the outcome and process of negotiated rulemaking than were commenters in notice and comment rulemakings). The conclusion also comports with a detailed EPA study of negotiated rulemaking that concluded it could

In addition, groups not directly represented on negotiating committees bring numerous challenges to negotiated rules.¹⁶⁴ Such groups may see themselves as shut out of the process during the development of the rules and therefore become antagonistic towards the proposed rule reported out of the committee.¹⁶⁵ For almost every rule, however, some potentially affected interest will be shut out of the negotiations.¹⁶⁶ Even groups that to an outsider might appear to share goals will perceive their interests a little differently from each other. Hence, the sheer number of groups and their propensity to factionalize helps explain the greater likelihood of challenge to a negotiated rule than to a traditionally promulgated rule.

With respect to the quality of the rule finally promulgated, data on challenges to negotiated rules hint that the mechanism may provide a check against agency bias towards regulated entities.¹⁶⁷ Public interest groups appear not to challenge negotiated rules as often as regulated entities.¹⁶⁸ For example, environmentalists brought only one of the six challenges to negotiated rules promulgated by the EPA.¹⁶⁹ The dearth of challenges by environmental groups may indicate that participation in negoti-

not find evidence to support EPA literature claiming that the reg-neg process helps build future relationships between stakeholders. See Brian Polkinghorn, *The Influence of Regulatory Negotiations on the US Environmental Protection Agency as an Institution* 27 (1995) (unpublished manuscript presented at the 1995 American Political Science Association meeting in Chicago, on file with author).

164. See, e.g., *Central Ariz. Water Conservation Dist. v. EPA*, 990 F.2d 1531 (9th Cir. 1993) (water districts not represented on negotiated rulemaking committee challenged visibility regulations for the Grand Canyon); see also Coglianese, *supra* note 140, at 1305 (describing challenges by three chemical trade industry associations to EPA regulations governing wood furniture coatings that resulted from a negotiation committee that did not include these associations).

165. "[W]e might expect representatives of organizations excluded from a negotiation committee to react more acutely to an adverse portion of a rule if they knew the rule was developed in explicit consultation with other organizations having potentially divergent interests." Coglianese, *supra* note 140, at 1325-26.

166. See Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206, 1210 (1994) (claiming that environmental groups involved in rulemaking negotiating committees cannot always and do not necessarily speak for the ordinary citizen).

167. See Coglianese, *supra* note 140, at 1290-94, 1302-07.

168. See *id.*

169. For a detailed discussion to the challenges to these six EPA rules, see *id.*

ated rulemaking prevents the agency from shortchanging the concerns of intended beneficiaries of the rule.¹⁷⁰ Survey data from members of EPA rulemaking negotiating committees, however, show that representatives of environmental groups express lower levels of satisfaction with the negotiation process than other representatives, which cautions against drawing such a conclusion from the data on challenges.¹⁷¹

In an article detailing two fairly recent negotiated rulemakings, Jody Freeman suggests that the negotiated format also holds great potential for improving the quality of rules by fostering the development of creative and flexible solutions to regulatory problems.¹⁷² Intense negotiation with others who do not share one's perspective conduces questioning of the fundamental structure of the regulatory problem as posited by the agency that convened the negotiating committee.¹⁷³ This can foster path-breaking solutions. For example, Freeman reports that the equipment leaks negotiated rulemaking led to a focus on quality control principles and overall leak prevention rather than on emissions factors governing predictions of the frequency and magnitude of leaks, which the EPA had historically relied on to calculate risks posed by fugitive emissions of toxic air pollutants at particular plants.¹⁷⁴ The resulting negotiated rule phases in

170. This conclusion is consistent with anecdotal evidence from agency staff members that negotiated rulemaking shifts the rulemaking process away from a focus on ensuring scientific proof that the rule is justified toward incorporation of the values of affected interest groups. See Polkinghorn, *supra* note 163, at 29-30, 32. *But cf.* Langbein & Kerwin, *supra* note 144, at 16 (reporting that the EPA perceived negotiated rulemaking as shifting influence of the proposed rule, but not the final rule, from the agency to other participants). One cannot draw a solid inference from this data, however, without knowing the percentage of challenges to traditional rules brought by environmental groups and without a larger sample size. *Cf.* Coglianese, *supra* note 56, at 742-43 (reporting that environmental groups are less likely to challenge any EPA rule than are regulated entities).

171. See Cornelius Kerwin & Laura Langbein, *An Evaluation of Negotiated Rulemaking at the Environmental Protection Agency: Phase I*, at 26 (Sept. 1995) (unpublished manuscript prepared for the Administrative Conference of the United States, on file with author); see also Cindy Skrzycki, *Emission Impossible: The EPA Takes on Lawn Tool Makers*, WASH. POST, June 21, 1996, at D1 (reporting that an environmental group expresses dissatisfaction with negotiated rulemaking).

172. See Freeman, *supra* note 2, at 41-55.

173. See *id.*

174. See *id.*

more stringent standards than the industry was ready to meet initially, with the understanding that over the permitted time frame industry would improve pumps and valves and institute overall quality improvement programs to limit fugitive emissions of air toxics.¹⁷⁵ Yet even Freeman concludes that the benefits of negotiated rulemaking are limited because the cooperative approach of the representatives does not continue past the rulemaking stage, and the parties return to an adversarial posture during the implementation phase.¹⁷⁶

This adversarial posture at implementation may stem from a propensity of negotiating committees to leave differences among participants unresolved. The rule may be agreeable to all precisely because it postpones difficult choices until the enforcement stage of the process. The equipment leaks negotiated rule, cited as a success by Freeman, specified a process by which regulated entities were to adopt quality control plans without committing those entities to precise mandated conduct; the details of the regulation will be in the yet to be developed plans. The propensity of negotiated rules to leave details unresolved may reflect the focus of facilitators on obtaining agreement, without concern that the resulting proposed rule be good.¹⁷⁷ Whatever the cause of this propensity, EPA staff members outside the negotiating process have noted that the lack of resolution leads negotiated rules to be more ambiguous than those promulgated by traditional means, which in turn makes enforcement of the rules more difficult.¹⁷⁸

Recognizing that cooperation appears to end when the negotiating committee disbands, Freeman suggests that the traditional regulatory paradigm, which centers on agency responsibility for

175. *See id.*

176. *See id.* at 72.

177. *See* Polkinghorn, *supra* note 163, at 25.

178. As one EPA regulator stated about a negotiated rule:

Some of the issues were not resolved as clearly as they should have been because you negotiated it where the agency doesn't have the final pen necessarily which makes parts of it more difficult to enforce. Ok because [the rulemaking committee] couldn't get agreement on certain things so it was left more ambiguous so it was difficult for us to enforce it.

Id. at 31 (quoting a response given in an interview with an EPA "administrator").

formulation and enforcement of rules, should be abandoned in favor of one that relies on permanent committees of stakeholders to implement rules.¹⁷⁹ She suggests that negotiated rulemaking committees not disband upon promulgation of the rule, but rather that they continue to enforce and modify rules as experience with the rules warrants.¹⁸⁰ Virtually all others involved in negotiated rulemaking, however, do not see a continued role for the committee in the implementation stage, and my prior analysis of interest groups helps explain why. National public interest groups have sometimes played the role of representing the interests of rule beneficiaries in negotiated rulemakings. These groups may get some benefit and prestige from negotiating a favorable rule, especially if that rule garners national attention. The day-to-day implementation of rules, which tends not to involve salient issues that can bolster interest group membership or support, promises few institutional benefits to such groups.¹⁸¹ Moreover, interest group theory predicts that local neighborhood groups, whose members may have the most to gain from continued involvement in implementation, will have difficulty affording the significant costs of participating in rulemaking committee negotiations and overcoming the economic disincentives to organize because leadership of such groups promises little benefit for the entrepreneurs needed to build and sustain such organizations.¹⁸²

179. See Freeman, *supra* note 2, at 72.

180. See *id.* at 72-73.

181. See Frederick R. Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 DUKE L.J. 261, 337-38 (explaining why public interest groups would prefer high-visibility litigation to quiet negotiations); cf. Freeman, *supra* note 2, at 76 (noting that national interest groups sometimes fight turf battles with local groups by pressuring EPA headquarters in Washington, rather than participating in particular negotiated regulations).

182. See OLSON, *supra* note 108, at 33-36 (concluding that interest groups with many slightly affected members have greater barriers to organizations than those with a smaller number of more greatly affected members); Kerwin & Langbein, *supra* note 171, at 47 (concluding that "participation in negotiated rulemaking emerges as quite costly, with the impact appearing to fall disproportionately on smaller organizations"); cf. IRVING L. JANIS & LEON MANN, *DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE, AND COMMITMENT* 115 (1977) (noting that black community activists who had pushed for a school desegregation plan in San Francisco "were much too busy elsewhere playing a leading role in the struggle for racial equality" to participate in the actual development of the plan).

Bill Funk reached a more pessimistic conclusion about the potential quality of negotiated rules following a comprehensive analysis of an earlier negotiated rule setting woodstove emissions standards for particulate matter.¹⁸³ Funk's evaluation of this facially successful negotiated rulemaking raised serious questions about the extent to which even negotiations that result in consensus lead to rules that serve the public interest.¹⁸⁴ According to Funk's analysis, the rule reflected the interests of national environmental groups, the woodstove industry, the EPA, and state environmental regulators.¹⁸⁵ Environmental groups, such as the Sierra Club, desired that the EPA regulate polycyclic organic matter (POM), a potential carcinogen emitted by woodstoves, as a hazardous air pollutant.¹⁸⁶ The EPA had found that POM did not pose a sufficient threat to the environment to justify such regulation, but was defending a challenge to that decision from environmental groups and New York State.¹⁸⁷ Some states desired a limitation on woodstove emissions of particulates so they could allow greater industrial development without threat of exceeding ambient air quality standards for particulates.¹⁸⁸ Having the EPA adopt such a limit would save them the resources and perhaps more importantly the political cost from imposing their own standards. The woodstove manufacturers did not want regulation, but preferred a uniform federal regulation to the potentially conflicting regulations states might otherwise impose.¹⁸⁹ The negotiated rule accommodated all these interests by imposing new source performance standards on woodstoves that prohibited the sale of stoves emitting more than a determined amount of particulate matter.¹⁹⁰ Such a rule probably would not have been proposed by any other mechanism because woodstoves fell well outside the meaning of

183. See William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards*, 18 ENVTL. L. 55, 97 (1987).

184. See *id.*

185. See *id.* at 61.

186. See *id.* at 59.

187. See *id.*

188. See *id.* at 58.

189. See *id.* at 61-62.

190. See *id.* at 62-65.

"major source" to which the new source performance standards could apply. The compromise, however, allowed the EPA to escape suit on this issue, and thus to regulate despite its questionable legal authority for the rule finally promulgated.¹⁹¹

At first blush, the woodstove rule might appear to be an optimal compromise. The EPA avoided the onerous requirements of regulating smoke from woodstoves as a hazardous air pollutant and gave the major affected interests something that each wanted. One must wonder, however, whether allowing the EPA to adopt this rule truly served society's overall interests. Particulate emissions from woodstoves was not a national problem; it affected the ability of certain states to allow industrial development.¹⁹² The EPA standard applies nationally, however, requiring woodstove users in areas not plagued by problems with particulates to pay for catalytic converters and cleaner burning stoves unnecessarily.¹⁹³ The regulations may have reduced exposures to POM, but only coincidentally and without any guarantee that the reduction in exposure actually reduced health risks. Moreover, the rule seems to undermine the fundamental tenet of legislative supremacy. The statutory provisions governing new source performance standards envisioned regulation of industrial and commercial point sources of pollution, not diffusion into the atmosphere of pollutants from home appliances. None of the participants in the rulemaking took into account the precedential impact of allowing the EPA to expand its regulatory jurisdiction to such appliances.¹⁹⁴

Whatever conclusions one draws about the promise of negotiated rulemaking to improve rulemaking quality, negotiated rulemaking most likely is unsuitable as a replacement for the paradigm of notice and comment procedures.¹⁹⁵ Negotiated rule-

191. Some might herald that the committee circumvented statutory limits as an example of how reforms can ease inflexibility imposed by the "rule of law." See Seidenfeld, *supra* note 38, at 36. Others, however, might question whether undermining clear statutory mandates undermines the ability to check regulators to ensure they do not act out of expedience or self-interest. See Keith Werhan, *Delegalizing Administrative Law*, 1996 U. ILL. L. REV. 423, 460-61.

192. See Funk, *supra* note 183, at 58.

193. See *id.* at 62-65.

194. See *id.* at 74 (criticizing the rule for allowing the EPA to ignore limits on its statutory authority).

195. An EPA Negotiated Rulemaking Director has expressed the opinion that 5%

making does not appear to reduce dramatically the time for promulgating rules or the likelihood of judicial challenge.¹⁹⁶ More significantly, all commentators agree that negotiated rule-making is an intensive process requiring a concentrated devotion of resources by the agency and private negotiation participants.¹⁹⁷ Moreover, the very process of negotiating rules depends on a background of existing regulatory entitlements, which flow from standards the agency establishes by traditional regulatory processes, and the willingness of the parties to negotiate seriously, which depends in turn on threats by the agency of more drastic traditionally set standards.¹⁹⁸ From a theoretical perspective, the very legitimacy of negotiated rulemaking depends on its incorporation in the more traditional rulemaking process. Were a negotiating committee able to bind the agency to promulgate and implement the rule that the committee developed, negotiated rulemaking would raise the specter of privately enacted law.¹⁹⁹ Thus, negotiated rulemaking seems an unlikely candidate

to 10% of its rules are amenable to development by negotiation. See William H. Miller, *Bypassing the Lawyers: "Regulatory Negotiation" Gets Test in Agencies*, *INDUSTRY WK.*, June 23, 1986, at 20, 21; see also Polkinghorn, *supra* note 163, at 11-12 (reporting that several commentators estimated that 10% of rules are amenable to negotiation, but noting that historically the EPA has actually negotiated less than 1% of its rules since it first began using the process).

196. See Coglianese, *supra* note 140, at 1309 (noting that legal challenges have actually increased at the EPA since implementing neg-reg procedures). But cf. Harter, *supra* note 157, at 1421-22 (questioning the use of the total number of days to promulgate a rule as a measure of the impact of negotiated rulemaking on the time it takes to adopt a rule).

197. See CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 190 (1994); Harter, *supra* note 157, at 1420; Ellen Siegler, *Regulatory Negotiations: A Practical Perspective*, 22 *ENVTL. L. REP.* (Envtl. L. Inst.) 10,647, 10,651 (Oct. 1992). But cf. Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 *YALE J. ON REG.* 133, 151 (1985) (reporting that although participants "were surprised at the amount of time and effort it took to negotiate a consensus rule, they agreed that the time invested up-front reduced the overall amount of time involved in litigation and subsequent administrative wrangling").

198. Audio Tape of the Response of Thomas E. Kelly, Director, Office of Management and Information, United States Environmental Protection Agency, During the Administrative Law Section Program at the 1998 Meeting of the American Association of Law Schools, to a Question About the Extent to Which the Negotiated Regulation Process Depended on Existing Regulations and the Existence of the Agency's Traditional Rulemaking Authority (Jan. 1998) (on file with author) [hereinafter Kelly Audio tape].

199. The one aspect of the nondelegation doctrine that the Supreme Court has

to replace notice and comment rulemaking as the predominant regulatory paradigm, and hence cannot be the panacea for inflexible rules and an ossified rulemaking process that some would wish to make it.²⁰⁰

This is not to disavow the influence of negotiated regulation entirely, but that influence most likely will occur within the paradigm of traditional notice and comment rulemaking. Past negotiated rulemaking has demonstrated that the agency can benefit from brainstorming problem-solving sessions with a wide array of affected interest groups prior to issuing a notice of proposed rulemaking. Agencies appear receptive to incorporating such informal processes into the stage during which the agencies consider the need for rules and develop their basic architecture.²⁰¹ The collaborative process is most promising, however, if used as a tool to guide agency discretion, rather than as an alternative mechanism to promulgate regulations backed by the coercive power of the state.

never disavowed is that Congress cannot delegate lawmaking functions to purely private bodies. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-11 (1936); see also Funk, *supra* note 147, at 1373 (stating that "there was an early concern that negotiated rulemaking could run afoul of the non-delegation doctrine—not the unconstitutional delegation of legislative authority to an agency, but the potentially unlawful . . . delegation of legislative authority to private entities"). There is some academic disagreement about the extent of an agency's discretion to deviate or reject negotiated rules necessary to avoid the process being deemed unconstitutional private law making, see Freeman, *supra* note 2, at 83-89, but the agency or courts must retain some power to ensure that negotiated rules do not contravene statutory provisions and aim to implement something other than deals struck by some, but not all, affected interest groups, see Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. (forthcoming May 2000) (criticizing the nondelegation doctrine as a limitation on private authority to regulate) (manuscript at 32-33, on file with author).

200. See Freeman, *supra* note 2, at 72-73 (advocating the problem-solving approach of reg-neg as an alternative to traditional agency-centered regulation and arguing for an extension of the negotiating committees' authority into the regulatory implementation stage).

201. See Kelly Audio tape, *supra* note 198. Even Cary Coglianese, perhaps the most vociferous skeptic of negotiated rulemaking, admits the benefits of such discussions if divorced from a process aimed at reaching consensus of interest groups that in turn constrains agency discretion. See Coglianese, *supra* note 140, at 1332-33.

B. Citizen Suits as a Mechanism for Empowering Interest Groups

Citizen suits provide another mechanism for empowering regulatory beneficiaries for which there is sufficient history to evaluate the impact of such empowerment. Many statutes, especially those under which the EPA regulates pollution, directly authorize citizens to enforce statutory and regulatory requirements against violators.²⁰² At first blush, citizen suits would not seem to be promising candidates for collaborative regulation because they are premised on litigation, which is inherently adversarial. Nonetheless, citizen suit provisions, such as those under the Clean Water Act (CWA)²⁰³ on which I focus, do empower interest groups in a manner that closely tracks theoretically recommended mechanisms,²⁰⁴ and hold the potential for inducing collaborative negotiation of problems by industry and groups that bring such actions.²⁰⁵ The CWA authorizes members of the public to sue for fines as well as to mandate compliance,²⁰⁶ and the EPA maintains a list of violations of CWA permits and regulations that it has detected.²⁰⁷ Thus, public interest groups can use information that the agency has collected to provide redundant enforcement of regulatory requirements.²⁰⁸ The CWA

202. See, e.g., Consumer Product Safety Act, 15 U.S.C. § 2073 (1994); Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (1994); Clean Air Act, 42 U.S.C. § 7604 (1994).

203. Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1365(a) (1994).

204. These mechanisms—the ability of regulatory beneficiaries to be privy to the same information regarding violations as is the agency and to sue for the same penalties as can the agency—correspond to attributes of empowerment that Ayres and Braithwaite suggest are necessary for workable tripartism. See AYRES & BRAITHWAITE, *supra* note 2, at 57-58.

205. See generally Coglianese, *supra* note 56 (discussing litigation as a means of fostering negotiation between agencies and regulated entities).

206. See 33 U.S.C. § 1365(a).

207. See 40 C.F.R. § 122.41(l) (1998) (requiring permittees under the CWA to report violations of permit conditions or regulatory standards).

208. See Michael S. Greve, *Private Enforcement, Private Rewards: How Environmental Citizen Suits Became an Entitlement Program*, in ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 105, 109 (Michael S. Greve & Fred L. Smith, Jr. eds., 1992) (asserting that the EPA listing of violations has prompted a sharp increase in citizen suits under the CWA); see also JEFFREY G. MILLER, ENVIRONMENTAL LAW INSTITUTE, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION

deviates from the theoretical model of empowering enforcement only in precluding such enforcement if the EPA or an authorized state environmental agency is already diligently prosecuting the violation, and by requiring a private citizen to provide sixty days notice to the EPA and the state before bringing an enforcement action.²⁰⁹ Pragmatically these provisions do little to limit the power of interest groups because the EPA does not have the resources to prosecute every violation for which it believes its involvement is important and because sixty days may be an insufficient time for the EPA or a state to demonstrate diligent enforcement.²¹⁰

The CWA prohibits any point source from discharging any pollutant into navigable waters except in compliance with effluent standards or permits issued by the EPA or state approved permit programs.²¹¹ Such permits must ensure that sources comply with both technologically based and water quality based standards.²¹² For municipal wastewater treatment plants, which are publicly owned, permits aim primarily at meeting water quality standards established to ensure against threats to health and the environment,²¹³ for industrial point sources, which are

CONTROL LAWS 132 (1987) (noting the usefulness of permittees' "Discharge Monitoring Reports" for citizen group discovery of violations actionable under the CWA citizen suit provisions).

209. See 33 U.S.C. § 1365(b).

210. See Boyer & Meidinger, *supra* note 53, at 897-98. Under the CWA, an EPA enforcement action in federal court, brought after notice by a citizens group of intent to sue, bars the citizen suit. An EPA administrative enforcement action, however, does not bar the citizen suit. See 33 U.S.C. § 1319(g)(6)(B); see also MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS § 6.06 (1995) (discussing the issues raised for citizen suits by agency prosecution of a violation).

211. See 33 U.S.C. §§ 1311, 1342 (authorizing the EPA to set effluent limits and administer the National Pollution Discharge Elimination System permit program); David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1569 (1995).

212. See Hodas, *supra* note 211, at 1569.

213. Publicly owned treatment works (POTWs) have been excused from meeting technology forcing effluent limits and have enjoyed long delays for compliance with effluent limits based on currently available technologies. See 33 U.S.C. § 1311(i)(1) (allowing a POTW, until July 1, 1988, to delay meeting "best practicable" technology standards until it received aid from the federal government allowing it to pay for construction to meet that standard); see also 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR & WATER § 4.31, at 449 (1986) ("The phase two 'best practicable'

usually privately owned, permits predominantly reflect the Act's technologically based standards, which are not justified by the need to maintain safe and environmentally sound levels of water quality.²¹⁴

Congress has not given the EPA sufficient resources to fully enforce permit violations under the CWA.²¹⁵ State enforcement agencies are also not heavily funded, and private suits to enjoin and penalize such violations rival government actions as a means of enforcing the CWA.²¹⁶ If the goal of the citizen suit provision was to provide citizens a means of ensuring that they derive the benefits promised by the CWA, at first blush the number of such suits indicates that the provision is working. A closer analysis, however, raises at least some doubt about whether citizen suits primarily deliver money to the coffers of environmental interest groups, and only secondarily deliver improvements in water quality.

A substantial number of citizen suits under the CWA have been brought by a handful of national or large regional environmental groups like the Atlantic States Legal Foundation.²¹⁷ These groups usually seek a fine to be paid into the United

standard for POTWs still survives, not as an effluent standard but as a measure of how the plants are to be built under the funding provisions of the Act.") (citing 33 U.S.C.A. § 1281(g)(2)(A)). Hence, POTWs permits usually impose limits based on health and safety evaluations rather than on harsher limits based only on technological feasibility.

214. Industrial sources were subject to a 1977 deadline for meeting standards based on a "best practicable" technology criterion, and were subject to a 1989 deadline for meeting tougher standards, based, depending on the pollutant, on either a "best practicable control technology" criterion or a "best available technology economically achievable" criterion. 33 U.S.C. § 1311(b)(1)(A), (b)(2)(A)(i); *see id.* § 1311(b)(2)(E), (b)(2)(F). The "best achievable technology" standard requires the use of experimental technologies not in routine use or not in use at all. *See* 2 RODGERS, *supra* note 213, § 4.29(A)(2).

215. *See* Hodas, *supra* note 211, at 1558-60. *But cf.* Greve, *supra* note 208, at 114-17 (arguing that Congress never meant for penalties to attach to every violation of a permit or regulation and that citizen suits currently supplement EPA enforcement in a manner that Congress did not intend).

216. From 1983 to 1993, the number of 60-day notices for citizen suits seeking penalties for violations of the National Pollutant Discharge Elimination System (NPDES) water permits greatly exceeded the number of federal penalty enforcement actions and almost equaled the number of state judicial enforcement actions. *See* Hodas, *supra* note 211, at 1573.

217. *See* Greve, *supra* note 208, at 108.

States Treasury as well as an order that the defendant comply with its permit requirements.²¹⁸ In most cases, however, the parties settle these penalty-seeking suits, with plaintiffs obtaining guarantees of permit compliance along with significant attorney fees and sometimes monetary grants to the plaintiff or a sister organization.²¹⁹ By one account, a group chooses whom to sue based on the likelihood of achieving significant environmental benefits without an inordinate cost to the group.²²⁰ Plaintiffs rely on EPA lists of permit violations to identify large volume industrial polluters who repeatedly violate their permit requirements. Such lists provide a low cost means of identifying suits that promise significant direct environmental benefits and deterrent effects.

By an alternative account, however, the ability to obtain a large penalty at little cost to the plaintiff guarantees only that the suit is likely to benefit the plaintiff as an interest group without regard to the suit's effect on the environment.²²¹ Public interest plaintiffs rarely have sued publicly owned wastewater treatment facilities even though these facilities account for more pollution than industrial sources, and despite that provisions in treatment facility permits are more closely tied to water quality than those of industrial plant permits.²²² One reason for the focus on private industrial sources is that plaintiffs would likely have greater difficulty settling with public entities for monetary awards and grants than they do with private defendants.²²³ The proposition that plaintiffs who bring penalty actions focus on monetary awards rather than environmental benefits is reinforced by several suits involving record-keeping violations, the correction of which provided no direct benefit to environmental quality.²²⁴

218. *See id.* at 109.

219. *See id.* at 109-10.

220. *See Boyer & Meidinger, supra* note 53, at 928 (reporting that citizen suit plaintiffs sue for large penalties because they see such penalties as a means of deterring an entity's calculated decision to violate environmental regulations).

221. *See Greve, supra* note 208, at 112.

222. *See id.* at 111.

223. *See id.*

224. *See id.*; *see also, e.g., Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1241 (7th Cir. 1996) (holding that the defendant's failure to file reports under the

One might therefore interpret data about citizen suits under the CWA as evidence that a significant number of environmental interest group plaintiffs act to benefit leaders and patrons of the group, who depend on continued funding, rather than to deliver the material benefit of cleaner water to group members. This interpretation, however, may be too pessimistic. Although the data clearly demonstrate that interest groups focus on the ability of suits to fill their coffers, in the long run, this strategy might provide greater benefits to the environment than merely maximizing environmental benefits in each case. Monetary payments from citizen suits help groups like the National Resources Defense Council (NRDC) to maintain an enforcement program and hence to continue to bring citizen suits that may provide greater overall pollution reductions than would a single suit focused on such reductions. In short, the strategy of assuring funding for the group may be consistent with reasonable attempts to deliver material benefits to group members.

A normative evaluation of the impact of empowerment via citizen suits on the propensity of interest groups to cooperate in a collaborative regulatory venture depends heavily on the goals attributed to enforcement policy. If one views permit standards as reflecting determinations of optimal levels of pollution, one would view any mechanism that improves compliance with such standards as socially beneficial. Enforcement becomes a mechanism for coercing preset optimal behavior.²²⁵ From this perspec-

Citizens Right to Know Act subjected the defendant to a total fine that could exceed \$100 million, even though the defendant appeared not to have known that it had to file the reports and cured the violation promptly after receiving notice of suit and prior to the commencement of the suit), *rev'd*, 523 U.S. 83 (1998) (holding that the plaintiff did not have standing because a court cannot redress record-keeping violations that the defendant has already cured); *Public Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc.*, 40 ERC 1917, 1927-28 (D.N.J. 1995) (awarding a penalty in excess of \$2 million despite finding that the NPDES permit violation did not adversely affect water quality), *rev'd*, 123 F.3d 111, 120, 123 (3d Cir. 1997) (holding that the district court's finding of no harm or threat of harm implied that plaintiffs did not allege injury in fact, and, therefore, did not have standing).

225. For a description of the distinction between regulation that coerces a preset notion of optimal behavior and regulation that facilitates cooperation to arrive at optimal outcomes, see John T. Scholz & Wayne B. Gray, *Can Government Facilitate Cooperation? An Informational Model of OSHA Enforcement*, 41 AM. J. POL. SCI. 693, 695-98 (1997).

tive, citizen suits have been beneficial. The EPA and, to a greater extent, state enforcement efforts often have imposed only minimal penalties and have allowed long lead times for violators to comply with permit requirements.²²⁶ States in particular are likely to be sensitive to threats of relocation and plant shut-downs in considering enforcement actions.²²⁷ Suits by groups like the Atlantic States Legal Foundation have exacted more significant penalties from violators than have state and federal enforcement actions.²²⁸ As a result, they should have a greater deterrent effect on violations than government enforcement actions.²²⁹ Anecdotal evidence indicates that, in some cases, private suits have been able to force compliance even when drawn out EPA enforcement activity has not.²³⁰ Hence, from the coercing compliance perspective, citizen suits seem to serve as a valuable backstop against sweetheart deals between government enforcement authorities and polluting entities.

From another perspective, citizen suits fare poorly as a means of facilitating collaboration to achieve desired discharge levels by an individual plant. This less charitable assessment of citizen suits follows if one views a source's exceeding of permit levels as a signal of the need for more focused government attention on

226. See Boyer & Meidinger, *supra* note 53, at 928-29; Hodas, *supra* note 211, at 1621. A recent comparison of noncompliance with NPDES requirements in the states of Georgia and Washington indicated that facilities found to have violated a permit or regulatory requirement remained out of compliance for an average of 5.5 months in Georgia and 3.6 months in Washington. See Victor B. Flatt, *A Dirty River Runs Through It (The Failure of Enforcement in the Clean Water Act)*, 25 B.C. ENVTL. AFF. L. REV. 1, 26 (1997).

227. See Flatt, *supra* note 226, at 2-3 (noting that a state's need for economic development will affect its propensity to enforce environmental laws); Robert R. Kuehn, *The Limits of Devolving Enforcement of Federal Environmental Laws*, 70 TUL. L. REV. 2373, 2382-83 (1996) (describing states' abilities to take into account local social and economic needs as a reason for state enforcement of environmental law); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1215, 1238 (1992) (describing models illustrating the process by which states incorporate competition for jobs and capital into the setting of their environmental standards).

228. See Hodas, *supra* note 211, at 1652 & n.558.

229. *But cf.* Greve, *supra* note 208, at 119 (contending that citizen suits deter industry cooperation and voluntary compliance).

230. See Hodas, *supra* note 211, at 1620 & n.380.

appropriate pollution levels from that source. From this perspective, enforcement is merely part of a regulatory mechanism that relies on continued negotiation to reach consensus about appropriate pollution levels. This view is borne out, at least in part, by data indicating that the EPA has obtained agreements from regulatory violators to implement valuable supplemental environmental projects, which the EPA could not unilaterally order entities to undertake.²³¹ Citizen suits interfere with the EPA's ability to reach settlements that may require such projects by chilling the willingness of regulated entities to share information out of the fear of being sued by private environmental groups.²³² Citizen suits also force the EPA to file court suits of its own to preserve its initiative to reach settlements with violators, and such EPA suits displace more informal bases for settlement.²³³

Moreover, from a perspective that views enforcement as a means of encouraging case-by-case optimization of the CWA's mandate, enforcement should take into account circumstances surrounding particular violations, such as the effect of compli-

231. See Charles C. Caldart & Nicholas A. Ashford, *Negotiation as a Means of Developing and Implementing Environmental Policy* 28-29 (1998) (unpublished manuscript, on file with author).

232. For example, a 1995 study of industry sectors with more than 100 employees and with annual sales exceeding \$100 million revealed that, of the companies that did conduct environmental audits (nearly 75% of those polled), 45% were hesitant to expand their auditing program because they feared their self-policing would be used against them in citizen suits and enforcement actions. See PRICE WATERHOUSE LLP, *THE VOLUNTARY ENVIRONMENTAL AUDIT SURVEY OF U.S. BUSINESS* 28 (1995); see also Elizabeth Glass Geltman & Carey Ann Mathews, *Environmental Democracy*, 22 J. CORP. L. 395, 398 (1997) ("Government and business are also aware, however, that increased self-policing increases vulnerability to lawsuits."); *State Attorneys Quiz Browner on Audits, Federal Facilities, Criminal Investigations*, Chem. Reg. Rep. (BNA), at 2179 (Mar. 25, 1994), available in LEXIS, ENVIRN Library, CHEMRG File [hereinafter *State Attorneys Quiz Browner*] (quoting Lee Fisher, Ohio attorney general, who stated that "[b]usinesses are afraid of doing environmental audits for fear they will be hurt by audits by uncovering damaging information that . . . will [be] use[d] against them").

233. Almost all environmental citizen suits are precluded if the EPA or the state has commenced and is diligently prosecuting a civil action in either federal or state court. See, e.g., 33 U.S.C. § 1365(b)(1)(B) (1994) (providing for citizen suits under the Clean Air Act); 42 U.S.C. § 6972(b)(1)(B) (1994) (providing for citizen suits under the Solid Waste Disposal Act); 42 U.S.C. § 7604(b)(1)(B) (1994) (providing for citizen suits under the Clean Air Act). For a description of how citizen suits interfere with the EPA's enforcement agenda, see Rossi, *supra* note 122, at 223-24.

ance on the local economy, which stands to lose significantly if enforcement induces the closing of a plant. In fact, one can argue that much of the impact of water pollution is sufficiently local that citizens in the locale of the polluter have an incentive to balance the benefits of strict compliance against its burdens.²³⁴ By this account, citizen suits that are brought by nonlocal environmental organizations actually undermine the empowerment of local residents, who feel both the pinch of pollution and the impact of cutbacks in plant operation that CWA enforcement might prompt. The same argument counsels that state governments, being somewhat accountable to local political pressure, are in a better position than both the EPA and national interest groups to decide the appropriate level of enforcement activity. Thus, that states have reacted more aggressively in trying to preclude citizen suits indicates that such suits may seek enforcement that is counterproductive.

Finally, industry reaction to citizen suits bodes poorly for the argument that permitting such suits fosters cooperative regulation. Because of the threat of citizen suits, polluters have less incentive to accept permit limitations that may commit them to aggressive pollution reduction. In addition, citizen suits discourage industry self-monitoring of permit violations. Overall, although citizen suits appear to fit the criteria of empowerment specified by collaborative governance theorists, their availability has not seemed to have engendered meaningful collaborative processes for determining appropriate pollution discharge levels under the CWA.

C. Project XL as an Example of Collaborative Regulation

A third, much touted, example of collaborative regulation, which illustrates how self-design might operate successfully and yet highlights some of its limits, is the EPA's Project XL.²³⁵ The

234. See generally Revesz, *supra* note 227, at 94 (advocating that "race to the bottom" arguments for federal environmental laws are unjustified given the likelihood that, in setting environmental standards, states will balance the social benefits of development against environmental harms to reach an optimal outcome).

235. The Clinton administration announced Project XL in the Spring of 1995 as part of the President's National Performance Review. See BILL CLINTON & AL GORE, NATIONAL PERFORMANCE REVIEW, REINVENTING ENVIRONMENTAL REGULATION 36

EPA intends Project XL to allow regulated sources the flexibility to develop alternatives to existing regulatory requirements in order to produce greater environmental benefits at lower cost.²³⁶ The EPA envisions selecting fifty projects from proposals submitted by regulated sources,²³⁷ and listed the following eight criteria for project approval: achievement of "environmental performance that is superior to what would be achieved through compliance with current and reasonably anticipated future regulation"; "cost savings and paperwork reduction"; "support of parties that have a stake in the environmental impacts of the project"; testing of innovative strategies; testing of new approaches that could transfer generally to agency programs; measurable objectives and requirements that stakeholders can use to evaluate performance; and protection of worker safety and assurance of no environmental injustice.²³⁸ Thus far, the EPA has approved thirteen XL plans, eleven of which private companies sponsor.²³⁹

(1995). Although the EPA has not touted Project XL as a substitute for traditionally promulgated regulation, others have. See Dennis D. Hirsch, *Bill and Al's XL-ent Adventure: An Analysis of the EPA's Legal Authority to Implement the Clinton Administration's Project XL*, 1998 U. ILL. L. REV. 129, 140 (claiming that Project XL is the "Clinton administration's answer" to replacing inefficient command-and-control regulation); see also Freeman, *supra* note 2, at 56 (noting Project XL's potential for providing a "problem solving" approach to regulation).

236. See Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. 27,282 (1995). In exchange for regulatory flexibility, the Project XL program requires participants to reduce pollution below levels otherwise allowed by regulation. See *id.* at 27,283. The Project XL program encompasses initiatives for manufacturing company site-specific projects, industry-wide projects, federal agency projects, and community-based projects. See *id.* at 27,288. In this Article, I focus on the program for site-specific manufacturing company projects, which is the best developed part of the program and the part most analogous to proposals for collaborative regulation.

237. See *id.* at 27,289.

238. *Id.* at 27,287. More recently, the EPA has clarified that it would emphasize three of the eight criteria: "superior environmental performance, regulatory flexibility and stakeholder involvement." Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. 19,872 (1997).

239. The following entities sponsor these projects: HADCO Corp., covering four facilities in Oswego, New York, and Derry, Hudson, and Salem, New Hampshire; Jack M. Berry, Inc., covering its facility near LaBelle, Florida; Intel covering its facility in Chandler, Arizona; Merck & Co., covering its facility in Elkton, Virginia; Witco Corporation, covering its facility in Sistersville, West Virginia; Weyerhaeuser Co., covering its facility in Oglethorpe, Georgia; Molex, covering its facility in Lincoln, Nebraska; Lucent Technologies, potentially operating on a company-wide basis,

1. *The Project XL Process*

The regulated company that sponsors the project begins the Project XL process by submitting a proposal to the EPA staff.²⁴⁰ The EPA staff reviews the proposal to ensure it comes "within the scope of Project XL," and, if it does, the agency forms a team to review and further develop the proposal.²⁴¹ The EPA notifies state officials about the proposal, seeks additional information from the applicant, and informs the applicant of any problems that the staff identifies with the proposal.²⁴² The review team and the applicant then negotiate a final proposal.²⁴³ As part of the proposal, the applicant identifies stakeholders it believes should be involved in the negotiation of the final plan.²⁴⁴ Although the EPA can reject a proposal altogether if it finds the list of stakeholders inadequate, the project sponsor remains responsible for involving stakeholders throughout the process.²⁴⁵ The final project agreement (FPA) is supposed to reflect a consensus of the stakeholders and indicate specific rules, permits, and variances necessary to render the agreement legally enforceable.²⁴⁶

The mechanism for monitoring compliance with a Project XL plan is specified in the final agreement.²⁴⁷ The collection and publication of data relevant to performance under plans vary widely from plan to plan. Some plans, like those of Berry, Merck,

but initially covering facilities in Allentown and Reading, Pennsylvania, and Orlando, Florida; Jacoby Development Corporation, covering its facility in Atlanta, Georgia; Exxon's Fairmont Coke Works Superfund Site in Fairmont, West Virginia; Andersen Corp., covering its facility in Bayport, Minnesota; the Department of Defense, covering the Vandenberg Air Force Base in California; and the Massachusetts Department of Environmental Protection. See generally *The XL Projects* (visited Nov. 21, 1999) <http://yosemite.epa.gov/xl_home.nsf/all/xl_info> [hereinafter *XL Implementation Web-site*].

240. See Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. at 19,878.

241. *Id.*

242. See *id.*

243. See *id.*

244. See *id.*

245. See *id.*

246. See *id.* According to one plan proponent, however, "[The] [c]onsensus process [is] not fully agreed to or understood." *Intel Project XL Lessons Learned Summary* (visited Nov. 21, 1999) <<http://www.intel.com/intel/other/ehs/projectxl/lsnlrn1.htm>>.

247. See Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. at 19,875.

and OSI Specialties, rely heavily on self-reporting of compliance.²⁴⁸ These companies simply prepare compliance reports that they send to the EPA and stakeholders, and that they make available to the public for inspection.²⁴⁹ These plans neither provide for additional meetings of stakeholders to evaluate the company's performance nor address controversies involving the meeting of the plans' requirements. Other plans, like those of Intel, Weyerhaeuser, and HADCO, specify more than mere reporting of performance and provide for additional meetings of stakeholders to evaluate the companies' performance.²⁵⁰ Perhaps not coincidentally, the commitment to stakeholder involvement in the monitoring and enforcement of a plan appears to vary inversely with the inclusion of groups, such as hard-line national environmental groups, which may threaten the process of settlement and accommodation that characterizes the EPA's approach to enforcement.²⁵¹

248. See *Berry Corporation Final Project Agreement* (visited Nov. 23, 1999) <http://yosemite.epa.gov/xl/xl_home.nsf/all/berry-fpa.html> [hereinafter *Berry Corp. Website*]; *Merck & Co., Inc., Stonewall Plant, Project XL, Final Project Agreement* (visited Nov. 23, 1999) <http://yosemite.epa.gov/xl/xl_home.nsf/all/final_merckfpa.html> [hereinafter *Merck & Co. Website*]; *Project XL Final Project Agreement for the OSI; Specialties Plant in Sistersville, West Virginia* (visited Nov. 23, 1999) <http://yosemite.epa.gov/xl/xl_home.nsf/all/finalfpa1017.html>.

249. Berry and Witco Corp. have agreed to make required reports available for public inspection. See *Berry Corp. Website*, *supra* note 248; *Witco Reduces Unregulated Emissions in One of Its Production Processes Rather than Installing Less-Effective, Otherwise-Required Emission Controls for Its Wastewater Treatment Facility* (visited Nov. 23, 1999) <http://yosemite.epa.gov/xl/xl_home.nsf/all/osi.html>. Merck will send copies of reports to signatories of the FPA. See *Merck & Co. Website*, *supra* note 248. The Department of Defense will send reports to interested parties upon request. See *XL Implementation Website*, *supra* note 239.

250. Weyerhaeuser has agreed to provide the minutes of periodic performance review conferences. See *Weyerhaeuser FPA* (visited Nov. 23, 1999) <http://yosemite.epa.gov/xl/xl_home.nsf/all/vey_final_fpa.html> [hereinafter *Weyerhaeuser Website*]. Intel's FPA requires that it include reasons in its mandatory reports for any inability to meet one or more of its commitments under the FPA. See *Project XL: Final Project Agreement: 2* (visited Nov. 23, 1999) <http://yosemite.epa.gov/xl/xl_home.nsf/all/intel_fpa_final2.html> [hereinafter *Final Project Agreement Website*]. Also, Intel's air permit calls for semiannual public meetings to address progress toward achieving the FPA. See Timothy J. Mohin, *The Alternative Compliance Model: A Bridge to the Future of Environmental Management*, 27 ENVTL. L. REP. (Envtl. L. Inst.) 10,345, 10,349 (1997). HADCO has agreed to hold annual on-site meetings with its stakeholders requesting such a meeting after receiving a copy of the annual report. See *Final Project Agreement Work Plan* (visited Nov. 23, 1999) <http://yosemite.epa.gov/xl/_home.nsf/all/hadco_final_fpa.html>.

251. Berry's and Merck's projects involve regional and national groups as well as

The FPA sets goals for the project facility. These goals may reflect tradeoffs between demanding greater than required performance by a facility with respect to one medium of pollution,²⁵² while excusing a facility from meeting regulatory limits with respect to another medium of pollution.²⁵³ FPA goals are not enforceable standards, but may include both legally enforceable and voluntary commitments by the facility to meet specified standards.²⁵⁴ Project XL envisions that an FPA will provide a mechanism for holding the facility accountable if it fails to meet voluntary commitments.²⁵⁵ For example, an FPA may specify the convening of stakeholders to determine why the facility has failed to meet voluntary commitments and how this failure should be addressed. Although a facility that fails to meet voluntary commitments does not face any legal sanctions such as fines, such a facility does face the threat that the EPA might withdraw from the project, in which case the facility would have to meet all applicable regulatory standards.²⁵⁶

Consistent with the EPA's vision of Project XL, which views government as a facilitator of a collaborative regulatory venture, violations of EPA regulations that come to light because of the company's participation in the XL program warrant "a range of

local stakeholders. See *Berry Corp. Website*, *supra* note 248. Stakeholders listed in the Berry FPA include The Nature Conservancy and the Audubon Society. See *id.* Merck's FPA includes the Southern Environmental Law Center and the Natural Resources Defense Council as stakeholders. See *Merck & Co. Website*, *supra* note 248. By comparison, the Intel and Weyerhaeuser projects involve mostly small, local stakeholders. See *Stakeholder Team Contacts* (visited Nov. 30, 1999) <http://yosemite.epa.gov/xl/xl_home.nsf/all/intel_fpa_attach5.html>; *Weyerhaeuser Website*, *supra* note 250.

252. Pollution may occur in any of these mediums—air, water, and land.

253. See *Regulatory Reinvention (XL) Pilot Projects*, 62 Fed. Reg. 19,872, 19,874 (1997).

254. "Each project will have an enforceable component, described in the final project agreement (FPA), but also contained in a legally binding document, such as a permit, rulemaking, or administrative order." *Id.* at 19,875. An FPA also may contain voluntary commitments, "for which a facility may be held accountable through means other than . . . conventional legal [mechanisms]." *Id.* In addition, an FPA may specify aspirations for the project that are not enforceable by any means, but are relevant when the EPA decides whether to approve the XL proposal. See *id.*

255. See *id.* at 19,875 ("The type of accountability appropriate for a particular commitment should be discussed within a project's stakeholder process and incorporated into the FPA.")

256. See *id.*

mitigated enforcement responses—including the exercise of enforcement discretion not to pursue the violation”²⁵⁷ If a violation of EPA regulations is discovered independent of the company’s participation in Project XL, the EPA states that it will decide how to respond based upon its usual policies applied outside of the XL context, but that the company’s participation in Project XL “may be considered a relevant factor for mitigating penalties in the event a formal enforcement action is taken for such violation(s).”²⁵⁸

2. *The Benefits of the Project XL Program*

The projects already approved by the EPA demonstrate that for some pollution sources, Project XL promises caps on pollution below current allowances and lower costs for the project sponsor. For example, Intel has agreed nominally to meet more stringent air pollution standards than currently required by regulation,²⁵⁹ and has promised to reduce fresh water use and generation of hazardous waste at the site by aggressive recycling efforts.²⁶⁰ The standards to which the company holds itself appear to pose no greater problem for enforcement than traditional environmental standards. In return, Intel will not have to receive the approval normally required for significant modifications of the

257. Steve Herman, *Office of Enforcement and Compliance Assurance’s Operating Principles for Project XL Participants* (visited Nov. 23, 1999) <http://yosemite.epa.gov/xl/xl_home.nsf/all/xl_oeca.html>.

258. *Id.*

259. The Intel plan is somewhat controversial because it allows the facility to increase its current levels of air pollution without state approval. See Mohin, *supra* note 250, at 10,351. Because the plant is not a major source subject to federal emission limits, state approval was the only air pollution constraint on the plant. See *id.* at 10,350-51 & nn.52 & 56 (noting that Arizona Ambient Air Quality Guidelines are unenforceable regulatory limits). Perhaps to avoid the appearance of getting something for nothing, Intel agreed that the facility would not increase air pollution unless it also increased output, and that the facility will not increase emissions to such an extent that it will constitute a major source subject to federal emission limits. See Freeman, *supra* note 2, at 64 & n.190.

260. See *Project XL: Final Project Agreement: 3* (visited Nov. 23, 1999) <http://yosemite.epa.gov/xl/xl_home.nsf/all/intel_fpa_final3.html> (stating Intel’s overall water recycling commitment to the City of Chandler, Arizona); *Project XL: Final Project Agreement: 4* (visited Nov. 23, 1999) <http://yosemite.epa.gov/xl/xl_home.nsf/all/intel_fpa_final4.html> (outlining Intel’s commitment to increase its recycling of solid waste, hazardous waste, and nonhazardous chemical waste).

facility every time it changes its manufacturing operations.²⁶¹ In the fast-paced world of microprocessor development, freedom from potential delays stemming from the state regulatory approval process is extremely valuable.²⁶²

Like the Intel FPA, most approved XL projects allow facilities some freedom to alter the medium of pollution or the mix of pollutants emitted.²⁶³ This promises to reduce the project sponsors' regulatory compliance costs. Some critics of Project XL, however, fear that "cross-media" and "cross-pollutant" trades may allow the facility to alter the mix of emissions in a manner that could pose greater threats to the environment than pre-FPA operations.²⁶⁴ Even proponents of Project XL agree that the environmental benefit from such trades is difficult to establish objectively.²⁶⁵ Therefore, the extent to which current XL projects have improved environmental performance over what would have occurred without Project XL is uncertain.

One of the EPA's major hopes is that site-specific pilot projects will develop creative regulatory schemes that the agency then can adopt for entire industries.²⁶⁶ Thus far, the EPA's expectation that regulatory mechanisms created in XL plans could be transferred to other facilities has not materialized.²⁶⁷

261. See *Final Project Agreement Website*, *supra* note 250 (allowing changes in equipment and processes, provided air emissions are below Plant Site Emissions Limits).

262. See Mohin, *supra* note 250, at 10,350.

263. See Letter from David G. Hawkins, Senior Attorney and Chris van Loben Sels, Senior Project Analyst, NRDC, to Fred Hansen, Deputy Administrator, U.S. EPA, David Gardiner, Assistant Administrator, U.S. EPA, and Keith Laughlin, Associate Director, Council on Environmental Quality 1-2 (July 1, 1996) (visited Nov. 23, 1999) <http://yosemite.epa.gov/xl/xl_home.nsf/all/mer-7-3-96.html>.

264. Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 135-36 (1998).

265. See Mohin, *supra* note 250, at 10,352.

266. Thus, the EPA consistently has characterized the objective of Project XL as the achievement of a "[b]roader implementation of cleaner, cheaper and smarter ideas," Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. 19,872 (1997), and the EPA has premised the program on the intent "to transfer successful approaches into the current system of environmental protection." *Id.*; see also 60 Fed. Reg. 27,282, 27,287 (1995) (specifying transferability to other facilities or industries as a criterion for approval of XL proposals).

267. An electronic search of the Federal Register from 1995 through July 30, 1998 revealed no regulations for entire industries resulting from a final project agreement

3. *The Extent to Which Project XL Implements a Collaborative Approach to Regulation*

Project XL calls for stakeholder participation in the negotiation and implementation of XL projects. At the very least, the project must involve the owner of the facility covered by the FPA, the EPA, and state or tribal environmental agencies.²⁶⁸ Stakeholders in a project could also include local officials, representatives of individuals who potentially could be exposed to pollution from the facility, facility workers, neighboring business owners, and national or local environmental groups.²⁶⁹

The EPA has distinguished three levels of stakeholder participation: direct participants, commenters, and the general public.²⁷⁰ Direct participants engage in intensive negotiation of the plan itself.²⁷¹ The authority of direct stakeholders over the decisions of the project sponsor in negotiating the plan "should be determined at the outset by the stakeholders themselves."²⁷² Thus the extent to which a stakeholder has veto power over a plan depends on the authority worked out by direct stakeholders early in the process. Commenters do not work directly on the plan, but must be informed regularly about issues being negotiated and given the opportunity to communicate their views on these issues.²⁷³ The EPA states that the views of commenters will be used to evaluate the potential for wider application of the project's innovative approach to regulation.²⁷⁴ The general public must have easy access to the project development and any environmental results of the project.²⁷⁵

Although the EPA has stated that "all stakeholders who express a timely desire to be *direct participants* and understand the commitment involved should be given the opportunity to do

under Project XL. Search of WESTLAW, Federal Register Database (Nov. 23, 1999).

268. See Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. at 27,284.

269. See *id.* at 27,287.

270. See Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. at 19,877-78.

271. See *id.*

272. See *id.* at 19,879.

273. See *id.* at 19,877.

274. See *id.*

275. See *id.* at 19,878.

so,²⁷⁶ the project sponsor is responsible for selecting stakeholder representatives and determining at what level they will participate.²⁷⁷ To date, the EPA generally has deferred to the selection of the representatives of the community's interests made by project applicants.²⁷⁸

National environmental groups generally have not actively participated in many XL projects.²⁷⁹ This is understandable because participation on a committee of representatives to develop a plan for a particular facility does not promise notoriety that national group leaders can parlay into increased membership. Nor does such participation generate revenues for a participating group.²⁸⁰ In addition, project sponsors are unlikely to suggest

276. See *id.* at 19,879.

277. See *id.* (stating that the "EPA will not determine the membership of the group of *direct participants*, but may advise sponsors of whether it believes the group as assembled is consistent with the guidance contained in [the Federal Register notice regarding XL projects]"); see also *id.* at 19,878 (noting that the EPA leaves to sponsors the responsibility to "do as much of the groundwork as possible to engage appropriate stakeholders before formally proposing an XL project to EPA").

278. See Freeman, *supra* note 2, at 77; see also Bradford C. Mank, *The Environmental Protection Agency's Project XL and Other Regulatory Reform Initiatives: The Need for Legislative Authorization*, 25 *ECOLOGY L.Q.* 1, 73 (1998) (criticizing the discretion that the EPA has given to XL project sponsors over selection of direct stakeholders). For example, the staff at Jack M. Berry, Inc., selected initial stakeholders with whom they had previously worked, see Telephone Interview with Ernie Caldwell, Vice President, Jack M. Berry, Inc., (July 2, 1998), and the EPA ultimately accepted this list of stakeholders.

279. Of the first seven XL projects approved, only those of Berry and Merck claim to include national groups whose *sole focus* as stakeholders is the environment. But even these projects curtailed the participation by groups unlikely to compromise on environmental values. Merck included these groups as commenters but not as direct participants in the FPA negotiations. See *infra* notes 285-89 and accompanying text. Berry included environmental stakeholders on the committee that, in theory, was to negotiate the FPA, but "the committee's actual involvement in the Berry FPA was minimal." Freeman, *supra* note 2, at 78. Moreover, one of the national groups that participated in the Berry FPA negotiations, The Nature Conservancy, by its own account, engages in *nonconfrontational* methods for promoting long-term survival of all viable native species through the conservation of sites most representative of a region's biodiversity. See *THE NATURE CONSERVANCY, CONSERVATION BY DESIGN: A FRAMEWORK FOR MISSION SUCCESS 1-2* (David Williamson ed., 1996). The other group, the Audubon Society, is known as a group characterized by a professional and corporate structure that emphasizes cooperation with industry. See ROBERT GOTTLIEB, *FORCING THE SPRING: THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT* 151-54 (1993) (detailing the historical development of the Audubon Society's environmental ethos).

280. According to one industry representative in Project XL negotiation: "If

national groups as stakeholders. Such sponsors are usually not interested in environmental protection for its own sake, but rather in minimizing their cost of compliance with regulations and their exposure to lawsuits for regulatory violations.²⁸¹ Corporate leaders also face incentives to avoid risks to short-term profits that might result from seeking creative solutions to environmental problems that promise only long-term benefits.²⁸² Thus, they are especially apt to be wary of participating in collaborative endeavors with groups that previously had engaged in litigation and other antagonistic behavior towards industry. Project sponsors are likely to work directly with nonadversarial local groups or stakeholder representatives chosen by local governments, who may be more amenable to compromise and less likely to sue if they do not get their way in plan negotiations.²⁸³

Unlike members of local environmental groups, most members of national groups are unconnected to the community in which

stakeholders do not directly appropriate any of the benefits of a more efficient system, they are seemingly uninterested in spending their limited resources on improving efficiency." Mohin, *supra* note 250, at 10,353; see also Steinzor, *supra* note 264, at 155 (noting that lower cost regulation does not provide an incentive for environmental group participation in Project XL).

281. See JOEL MAKOWER, BUSINESS FOR SOCIAL RESPONSIBILITY, BEYOND THE BOTTOM LINE: PUTTING SOCIAL RESPONSIBILITY TO WORK FOR YOUR BUSINESS AND THE WORLD 115-16 (1994) (listing reasons that companies "go green" as including "lower operating costs and increased profit margins, reduced oversight by regulators, increased customer satisfaction and loyalty, and increased competitiveness in the global marketplace"); ALAN REDER, IN PURSUIT OF PRINCIPLE AND PROFIT: BUSINESS SUCCESS THROUGH SOCIAL RESPONSIBILITY 133-37 (1994) (suggesting that companies develop environmental compliance strategies to strengthen their image against potential litigation and to improve marketability of their products); Donald A. Carr & William L. Thomas, *Devising a Compliance Strategy Under the ISO 14000 International Environmental Management Standards*, 15 PACE ENVTL. L. REV. 85, 87 (1997).

282. See ROBERT JACKALL, MORAL MAZES: THE WORLD OF CORPORATE MANAGERS 81-92 (1988); Claudia H. Deutsch, *For Wall Street, Increasing Evidence that Green Begets Green*, N.Y. TIMES, July 19, 1998, § 3, at 7 (reporting corporations' skepticism about implementing environmentally sound practices despite evidence that companies that do so fare better than others).

283. This is borne out in the list of direct stakeholders in various projects, all of which have included local officials or representatives appointed by local government, but few of which have included environmental groups that have engaged in environmental litigation. See *XL Implementation Website*, *supra* note 239; see also Caldart & Ashford, *supra* note 231, at 26-27 (noting the exclusion of two vociferous opponents to Intel's XL project—the Silicon Valley Toxics Coalition and the NRDC—from the list of direct participants that negotiated the Intel FPA).

the XL facility is located and have little incentive to mollify any anti-industry feelings they may harbor.²⁸⁴ Moreover, agreeing to allow a facility to pollute beyond levels allowed by any current regulation might be viewed by members as "selling out" to industry. Thus, national environmental organizations would be more apt to take unreasonable positions because institutionally they are more likely to be harmed rather than benefitted by acceding to tradeoffs that allow reasonable, but currently prohibited, levels of pollution.

Merck's XL project seems to have included the most significant input from national and regional environmental groups.²⁸⁵ Although Merck included the Natural Resources Defense Council (NRDC) and the Southern Environmental Law Center (SELC) as stakeholders, the company included them only as commenters and did not allow them to participate directly in negotiating the FPA.²⁸⁶ Moreover, although Merck's proposed FPA called for review and potential modifications of the agreement every five years,²⁸⁷ it excluded representatives of environmental groups from direct participation in these reviews despite strong objec-

284. See John S. Applegate, *Beyond the Usual Suspects: The Use of Citizens Advisory Boards in Environmental Decisionmaking*, 73 IND. L.J. 903, 917 (1998) (suggesting that grassroots local citizen groups may be more accountable to the public interest than well-organized national interest groups); Mank, *supra* note 278, at 62 (noting that local environmental groups are sometimes closer to the interests of the average citizen than national environmental groups).

285. A representative of Intel on its XL project negotiating team asserted that Intel developed the most "extensive and inclusionary" XL process. Mohin, *supra* note 250, at 10,348. The national groups that Intel included as representative of environmental interests—the Campaign for Responsible Technology and the American Public Health Association, *see id.* at 10,349 & n.35,—do not focus solely on environmental issues and do not come to mind readily when one thinks of national environmental groups. Moreover, Intel used the breadth of stakeholder representation to its advantage by defining consensus as agreement by each of three categories of stakeholders: (1) Intel employees; (2) community members; and (3) regulators. *See id.* at 10,349 & n.37; *see also* Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. 19,879 (1997) (providing that direct stakeholder participants should determine whether group views will be reached by full consensus, majority vote, or subgroup consensus). These ground rules prevented environmental groups from exercising a veto over any aspects of the FPA with which they disagreed, no matter how strong that disagreement.

286. *See Merck & Co. Website*, *supra* note 248.

287. *See Merck XL Site-Specific Rulemaking Response to Comments Document* (visited Nov. 23, 1999) <http://yosemite.epa.gov/xl/xl_home.nsf/all/response.html>.

tions by both the NRDC and SELC.²⁸⁸ Nonetheless, the EPA approved the Merck FPA's provisions governing participation, essentially agreeing with Merck that inclusion of community representatives appointed by the local government and public interest representatives chosen by government signatories to the FPA was more appropriate than inclusion of representatives of groups that the project would not directly affect.²⁸⁹

If local environmental groups could be trusted to represent environmental interests adequately, then such groups might be preferable to national groups as participants in XL projects. Members of local groups are usually local residents, who have some incentive to consider the economic benefits of having an XL facility operate as well as the environmental harm from such a facility.²⁹⁰ Local advocates of environmental protection are more likely to get involved in a site-specific plan under Project XL because such plans tend to make local headlines and, at least in the short run, consume the attention of local residents. These advocates, however, often lack both the time to commit to the endeavor and the expertise needed to participate meaningfully in the process.²⁹¹ This lack of expertise often makes them wary of negotiation with the company, which can contribute to a failure of negotiations.²⁹² Despite those weaknesses, many local groups are strong environmental advocates.²⁹³ Like organizers of

288. See *id.*

289. See *id.*

290. See Mank, *supra* note 278, at 62 (claiming that "[s]ometimes . . . local environmental movements are closer to the interests of the average citizen than national environmental groups").

291. See *id.* at 61; Steinzor, *supra* note 264, at 142, 144-45.

292. See Gail Bingham, *ADR Procedures: Variations on the Negotiation Theme*, 56 A.L.I.-A.B.A. 265, 312 (1998) (explaining that natural resource issues are complex and require a variety of expertise, and that environmental organizations often have volunteer staff whose lack of training and resources prevent them from participating in negotiating such issues in an informed manner); Steinzor, *supra* note 264, at 180-82.

293. See Steinzor, *supra* note 264, at 180 (asserting that the conviction of grassroots environmental activists "lends an emotional edge to their advocacy, deepening their resolve"); see also GOTTLEB, *supra* note 279, at 170, 202-03 (describing the development of an alternative environmental movement of local organizations, which often find mainstream environmental groups too quick to compromise fundamental values); PHILIP SHABECOFF, *A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT* 233-34 (1993) (explaining the growing influence of local environmental groups).

national groups, leaders of local activist groups have a reputational stake in taking inflexible, antidevelopment positions even if their communities might be affected adversely by barriers to economic development.²⁹⁴ Thus, applicants also prefer to exclude representatives of local activist environmental groups, favoring instead representatives chosen by local officials.²⁹⁵ Often, these representatives are professionals, such as environmental engineers from the community, who are more apt to be receptive to the company's ultimate plan. This fosters negotiation of a workable agreement, but at the expense of representation of "die-hard" environmentalists' interests.

Representatives of environmental interests are even less capable of monitoring and enforcing FPAs than they are in helping to develop such plans. Usually, XL sites do not threaten environmental catastrophes, and without a salient threat of such catastrophes, leaders of environmental groups cannot utilize day-to-day monitoring activities in an entrepreneurial fashion to increase support for their causes. In addition, FPA enforcement is based on a compliance model, which proactively seeks to prevent violations, rather than a deterrence model, which penalizes

294. See SUSSKIND & CRUIKSHANK, *supra* note 137, at 207 (counseling group leaders that they must decide which they need most, a resolution of the dispute or the increase in membership that may result from intransigent opposition to the "enemy").

295. See DANIEL P. BEARDSLEY, GLOBAL ENVTL. MANAGEMENT INITIATIVE, INCENTIVES FOR ENVIRONMENTAL IMPROVEMENT: AN ASSESSMENT OF SELECTED INNOVATIVE PROGRAMS IN THE STATES AND EUROPE 13, 31 (1996) (reporting that industry participants in domestic and European environmental alternative compliance programs consider "a *sine qua non* for the likely success of the demonstration program [to be] the rather limited role throughout of public environmental organizations"). Recently, Lucent Technologies purported to involve local environmental organizations in its XL project, but its actual commitment to empowering such groups is suspect. See *Lucent Technologies Final Project Agreement*, (visited Nov. 23, 1999) <http://yosemite.epa.gov/xl/xl_home.nsf/all/Draft_FPA_6_24_98.html>. Thus far, Lucent has entered into an "umbrella" FPA to implement Environmental Management Systems at its various facilities. See *id.* As part of this metaplan, Lucent commits to creating a Local Environmental Advisory Group (LEAG) at each site. See *id.* The LEAG, however, will not be made up solely of environmental interest groups, but rather will include all "local stakeholders, including environmental organizations, community groups, employees, and other interested citizens." *Id.* Moreover, the LEAGs will play purely advisory roles and will not have signatory status for any local FPA that Lucent and state and federal authorities may work out ultimately. See *id.*

violations after the fact.²⁹⁶ Such enforcement requires ongoing monitoring of detailed data about facility performance, and an understanding of the facility's operations in order to determine whether poor performance is just a happenstance, rather than a signal of problems with the FPA, or even an indication of lack of good faith cooperation by the project sponsor.²⁹⁷ Hence, stakeholder monitoring of a facility's performance after an XL plan is implemented often will involve a greater and more consistent long run investment of resources than does initial plan development.²⁹⁸ Even if representatives of local groups happen to have the time to invest in regular monitoring and fine-tuning of FPAs, they almost invariably do not have the expertise to collect their own data on the facility's performance or even to review company data critically. Thus, the monitoring role generally devolves to the project sponsor, with checks by EPA and state or local government officials. Project XL envisions that the sponsor will make available to stakeholders and the public information that will allow national environmental groups to get more involved in enforcement of a sponsor's performance; the sponsor must issue reports about the XL site's performance,²⁹⁹ and if

296. See Reiss, *supra* note 50, at 23-26 (describing the differences between compliance and deterrence models of enforcement); see also Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. 19,875 (1997) (noting that FPAs will contain voluntary commitments that are not legally enforceable but rather are backed by the threat that the stakeholders and the EPA may withdraw from the cooperative XL agreement).

297. See BARDACH & KAGAN, *supra* note 34, at 160 (explaining that flexible, i.e., compliance-based, enforcement requires time, knowledge, and money that even the regulatory agency may lack); see also Reiss, *supra* note 50, at 25 (noting that for effective compliance-based enforcement, "the relationship between enforcer and potential violator must be a continuing one").

298. Although negotiation of a plan may take close to a year of labor intensive meetings, see, e.g., Steinzor, *supra* note 264, at 142 (reporting that negotiation of the Intel FPA took 10 months), the project itself might last indefinitely and call for reviews of performance on a periodic basis, see e.g., Merck & Co. Website, *supra* note 248 (providing that the stakeholder group will reconvene every five years to evaluate the project's implementation and determine if any changes are needed); Project XL: Final Project Agreement: 12 (visited Nov. 23, 1999) <http://yosemite.epa.gov/xl/xl_home.nsf/all/intel_fpa_final12.html> (promising to hold semiannual public meetings to discuss quarterly reports and to reassemble the Community Advisory Panel in three years to evaluate Intel's progress towards its five year plan); Weyerhaeuser Website, *supra* note 250 (providing for an annual meeting with stakeholders to discuss Project XL performance).

299. See Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. 19,875, 19,881

these reports indicate clear violations of regulations, other than those from which government officials have exempted the facility pursuant to the FPA, national environmental groups might threaten to sue the sponsor. Despite the Project XL rhetoric of stakeholder empowerment, however, this compliance mechanism does not differ from that under traditional regulation.

4. Constraints on the Universality of Project XL as a Means of Setting General Standards

In addition to failing to implement a truly collaborative regulatory process, Project XL is simply incapable of replacing traditional regulatory processes for setting national, industry-wide standards. The cost of developing Project XL FPAs is too great for the XL process to become the primary means for setting environmental standards across the nation.³⁰⁰ To date, experience with approved XL plans demonstrates that negotiating an FPA takes hundreds of hours of meetings between direct stakeholder representatives.³⁰¹ Presumably stakeholder groups spend similar amounts of time meeting with their own representatives to work out their negotiating positions and to evaluate the various issues being considered at any time by the negotiating committee. Expenditure of such resources may be justified for establishing general environmental standards, but an FPA governs only a single company, usually at a single site. Neither the gov-

(reaffirming the EPA's original guideline that the FPA should specify how the project sponsor will make performance data "available to stakeholders in a form that is easily understandable").

300. See GLOBAL ENVTL. MANAGEMENT INITIATIVE, INDUSTRY INCENTIVES FOR ENVIRONMENTAL IMPROVEMENT: COMBINED EXECUTIVE SUMMARY FOR THREE REPORTS SUBMITTED TO THE *IDEA 21* WORK GROUP OF THE GLOBAL ENVIRONMENTAL MANAGEMENT INITIATIVE 3 (1996) (stating that against a backdrop of weak incentives for participation and risks of litigation and other failures, "companies are increasingly discouraged by the unexpectedly high transaction costs of participation"). For example, by September 1997, Intel had spent close to \$1 million developing its Project XL initiative. See Dan Beardsley et al., *Improving Environmental Management: What Works, What Doesn't*, ENVIRONMENT, Sept. 1997, at 6, 28.

301. For example, negotiating the Intel FPA entailed 100 meetings of direct stakeholders each lasting four to six hours. See *Participants in Project XL to Meet, Discuss Problems with Stakeholder Process*, Nat'l Env't Daily (BNA), Jan. 13, 1997, available in WESTLAW, Topic Materials by Area of Practice Library, BNA-NED File (quoting a citizen participant in the Intel negotiating process who claimed to have attended 70 of the 100 meetings).

ernment, regulated entities, nor stakeholders could afford this commitment of resources to the regulatory process if they had to negotiate a separate FPA in order to regulate pollution at each individual facility.³⁰² Moreover, the extremely burdensome and often irksome negotiations that project design and implementation entail can undermine rather than reinforce a close relationship between the regulator and the firm that permits Project XL to escape from the adversarial structure of traditional regulation.³⁰³ Thus, if every facility had to negotiate an FPA, more often than not, the result would not be an agreement supported by all direct stakeholders.

Another reason why Project XL cannot replace traditional regulatory processes is because the XL process relies on existing standards, which are set using traditional regulation. Existing standards provide a yardstick against which the EPA can evaluate a project's potential for superior environmental performance—one of the key factors in the EPA's decision to commit to an XL project.³⁰⁴ The EPA will not approve an FPA that will result in a violation of any "ecological health or risk-based environmental standards"³⁰⁵—that is, any standard that if exceeded would unduly threaten human health or other environmental interests.³⁰⁶ In addition, the EPA considers the extent to which

302. See Caldart & Ashford, *supra* note 231, at 27-28 (reporting that the EPA and other Project XL participants now consider the XL negotiations so burdensome that the program probably will not survive).

303. According to one analysis of the Project XL, stakeholder negotiations "require exchanges so intimate, particular, and extended between the state, the private actor, and other concerned parties, as almost inevitably to suggest to some of the participants that others are colluding against them, even when they are not." Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 384 (1998).

304. See THE ASPEN INSTITUTE, *supra* note 26, at 10 (suggesting that alternative compliance schemes can only supplement, rather than replace, current regulatory systems because "[t]he current system is needed to serve as a benchmark for performance as new methods are tested").

305. See Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. 19,874 (1997).

306. A risk-based standard chooses the level of harm to health or the environment that society finds acceptable and attempts to reduce pollution to decrease the harm below that level at the cheapest possible cost. See OGUS, *supra* note 58, at 161 (discussing how standards set to achieve a particular goal can relieve a regulator from having to compare costs and benefits of regulation); ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 151 (1992) (describing health or environment-based regulation and noting its relation to costs and benefits

an XL proposal involving a new or expanded facility promises to reduce particular emissions of a pollutant into a medium below levels required by existing regulations in evaluating tradeoffs that free the facility from meeting technology-based standards with respect to other media or pollutants.³⁰⁷ Thus, without existing health and technology-based standards, the EPA would not have an adequately objective means to evaluate a project's environmental performance.

Additionally, if one restricts the XL pilot program to projects that deliver greater environmental protections than those currently required by law,³⁰⁸ they are attractive only to the rare entities for whom the value of flexibility and freedom from regular agency review exceeds the significant cost of developing plans and meeting greater environmental controls.³⁰⁹ It is not surprising that in the four years since the announcement of Project XL, far fewer companies than expected have proposed XL projects, many companies that initially proposed projects withdrew their proposals, and the EPA has approved only a handful of proposed Project XL agreements.³¹⁰

of regulation).

307. See Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. at 19,874 ("Where the project includes new facilities . . . or expansion of existing facilities . . . the benchmark will be set at the level of performance generally representative of industry practice, or the future allowable environmental loadings [under existing regulations] . . . whichever is more protective."). A technology-based standard chooses a level of pollution prevention technology that society believes appropriate or affordable and attempts to minimize environmental harms to that which efficient use of such technology would achieve. See PERCIVAL ET AL., *supra* note 306, at 151-52 (discussing technology-based regulation and noting its relation to costs and benefits of regulation); cf. OGUS, *supra* note 58, at 161 (discussing how regulators might implement a standard according to budgetary limits rather than harms caused by the regulated activity).

308. Current EPA guidelines require that an XL facility deliver superior environmental performance. See Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. at 19,873. Much commentary, however, has suggested that equivalent environmental performance at lower cost should also be a legitimate goal of alternative compliance programs. See, e.g., Mohin, *supra* note 250, at 10,353; Steinzor, *supra* note 264, at 188.

309. See Dorf & Sabel, *supra* note 303, at 384. According to some observers, "[t]he legal, enforcement, and methodological constraints built into Project XL do not appear to permit facilities to adopt the kinds of daring new approaches that could result in significant economic benefits to them." Beardsley et al., *supra* note 300, at 28.

310. As of July 1999, more than 4 years after the Project XL program was announced, only 13 XL projects were being implemented (11 sponsored by private industry). By that date, the EPA had approved proposals for seven additional facilities

5. Conclusions with Respect to Project XL as a Means of Empowering Stakeholders

Project XL has demonstrated that site-specific negotiations between regulated entities, regulators, and stakeholders can develop more reasonable means of achieving regulatory goals in some situations. In particular, where flexibility to change production processes is especially valuable, Project XL can achieve modest environmental improvement over traditional regulation at lower cost. But, the successes of individual XL projects derive as much from Project XL's relationship to traditional regulatory processes as from its departure from such processes. Project XL is more a variation on traditional regulatory processes than it is a radical empowerment of stakeholders. Project XL merely specifies a mechanism for stakeholders to provide information about site-specific regulation and to work out compromises of fundamental disagreements in the early stages of regulatory development.³¹¹ The EPA retains authority to reject an FPA that the agency determines fails to meet Project XL criteria and to approve a project even if the stakeholders do not reach a consensus about the FPA.³¹² The EPA and state regulators remain the primary institutions for monitoring compliance with an FPA.

The Project XL process does not reflect truly collaborative regulation. To ensure that the XL process remains tractable, project sponsors and the EPA essentially have had to limit the inclusion of the most aggressive environmental groups. Were the EPA to require greater empowerment of environmental interest groups, it is doubtful that industry would have participated even to the very limited extent it has,³¹³ and it is doubtful that ne-

(two sponsored by private industry), and the owners of these facilities have convened "stakeholder teams" to develop XL plans. In addition, 5 other entities (3 public and 2 private), which had submitted Project XL proposals to the EPA, entered into agreements facilitated by the XL program but not "full-fledged" XL projects, and 31 proposals have been withdrawn or rejected by the agency (24 sponsored by private industry). See *XL Implementation Website*, *supra* note 239.

311. See Mohin, *supra* note 250, at 10,354 (noting that the stakeholder process is not meant to transfer the government authority to regulate to private groups, but only "to provide concerned citizen volunteers better access to the system to make their concerns and views known and understood").

312. See *Regulatory Reinvention (XL) Pilot Projects*, 62 Fed. Reg. at 19,879.

313. See BEARDSLEY, *supra* note 295, at 13, 31 (noting industry's perception that

gotiating groups could have agreed on cross-media and cross-pollutant trades that have driven FPAs thus far.³¹⁴ In addition, the site-by-site negotiation process inherent in Project XL is too expensive and too dependent on a background of existing regulation to replace traditional regulation as a broad-based means of curtailing pollution.³¹⁵ Thus, the result of Project XL has been, and most likely will continue to be, a few agreements that accommodate select facilities' needs to lower regulatory costs but do not promise significant environmental improvement at the national level or creative breakthroughs about how to address pollution problems generally.

IV. CONTEXTS CONDUCTIVE TO SUCCESSFUL EMPOWERMENT

The theory of interest group formation and dynamics identifies two major threats to collaborative regulation: co-option and extremist obstruction. Proponents of collaboration look to contestability of group leadership to steer groups between the Scylla and Charybdis of these threats. Contestability itself, however, is in tension with the norm of cooperation that a group must share if it is to participate constructively in collaborative regulation. Contestability would require that any faction of an interest group can claim a place at the regulatory table, and there will always be some uncooperative faction ready to feast. Experiences with negotiated rulemaking, citizen suits, and Project XL illustrate how these threats can undermine collaborative regulation, but also suggest situations in which these threats can be avoided. The key to avoiding these threats lies in the ability of the government to establish internal group mecha-

active participation by public interest groups is a significant threat to the openness between industry and regulators that is necessary for the success of environmental alternative compliance programs).

314. Part of the problem with trying to obtain consensus on cross-media pollution shifts reflects the difficulty of evaluating the overall impact of such shifts, and the structure of current environmental statutes, which set standards in terms of particular pollution mediums. See Robert W. Hahn & Eric H. Males, *Can Regulatory Institutions Cope with Cross Media Pollution?*, 40 J. AIR & WASTE MGMT. ASS'N 24, 29 (1990).

315. See Beardsley et al., *supra* note 300, at 28 (noting that the transaction costs of Project XL have exceeded expectations).

nisms that ensure group leaders' accountability to putative beneficiaries of regulation without empowering extremist obstructionist factions among such beneficiaries. After extracting lessons from negotiated rulemaking, citizen suits, and Project XL about how empowerment can fail to implement collaborative regulatory processes, this Part describes contextual and structural predicates for the establishment of mechanisms that may lead to successful collaborative regulatory schemes.

A. Lessons from Experiments with Empowering Regulatory Beneficiaries

Evaluating negotiated rulemaking, Project XL, and citizen suits within the framework of interest group dynamics provides lessons about the contexts in which empowerment is likely to increase regulatory flexibility without subverting the public interest. Groups that are excluded entirely from the regulatory process are apt to act antagonistically towards the outcome of that process.³¹⁶ The negotiated rulemaking experience reinforces that cooperative processes involving interest groups are fragile and hence susceptible to being undermined by those left out.³¹⁷ Pragmatically, however, inclusion of every narrowly defined specific interest in a collaborative regulatory process is impossible.³¹⁸ Thus, successful collaborative regulation depends on the establishment of a process for excluding groups not likely to collaborate in good faith that neither destroys beneficiaries' ability to check agency capture nor forfeits the goodwill created by the involvement of beneficiary groups.

To the extent that participants view a regulatory proceeding as a single-shot game, they will act strategically to maximize their short-run payoff, often eschewing cooperative behavior in

316. See Coglianese, *supra* note 140, at 1323 (noting the propensity of groups left out of negotiated rulemaking to challenge the ultimate rule).

317. See *id.*

318. See Daniel Fiorino, *Regulatory Negotiation as a Form of Public Participation*, in FAIRNESS AND COMPETENCE IN CITIZEN PARTICIPATION: EVALUATING MODELS FOR ENVIRONMENTAL DISCOURSE 223, 236 (Ortwin Renn et al. eds., 1995); Harter, *supra* note 157, at 1405; Rose-Ackerman, *supra* note 166, at 1210 (noting the tension between the need for participation in negotiated rulemaking to be inclusive, meaningful, and still not involve too many distinct groups).

the process.³¹⁹ This might explain why participants in negotiated regulation can reach accords about standards that require some compromise and then resume an adversarial stance once the negotiations conclude. Experience with negotiated rulemaking thus counsels that empowerment is unlikely to alleviate adversarial interactions unless the collaborative process is ongoing.³²⁰ Project XL, however, teaches that, at least for local, site-specific regulation, ongoing participation may be too costly and require too much expertise for directly affected stakeholders to participate meaningfully in the process.³²¹ Moreover, the Project XL program indicates that industry often will demand the ability to prescreen interest group participants as a condition to engaging in an ongoing collaborative venture. Consequently, the Project XL experience reinforces the theoretical prediction that when groups engage in long-term, cooperative endeavors with regulators, the process is especially susceptible to co-option of group leaders. Thus, the requirement for successful collaborative regulation—that the various stakeholder groups interact on a long-term, ongoing basis—increases the potential for co-option. In turn, this potential creates the need for a mechanism that makes group leadership accountable, yet also allows the exclusion of extremist factions from the regulatory process.

The foregoing analysis of how citizen suits have operated also adds to the concerns identified in the earlier discussion of interest group dynamics. Citizen suits clearly provide a means to circumvent agency refusals to impose penalties for regulatory

319. Many aspects of regulatory processes present what game theorists call a prisoner's dilemma—a situation in which each participant maximizes its benefit from the regulatory process by refusing to cooperate with other participants. See BAIRD ET AL., *supra* note 60, at 33-34 (discussing the prisoner's dilemma); Scholz, *supra* note 59, at 185-88 (describing how regulatory enforcement can be modeled as a prisoner's dilemma).

320. See Freeman, *supra* note 2, at 72 (concluding that regulatory negotiation fails to achieve the full benefits of collaboration because it does not continue past the development of the regulation into the implementation phase). Ongoing processes may be modeled as supergames—infinite reiterations of single-shot subgames. If the subgame at each decision-making point is a prisoner's dilemma, the supergame may still allow a cooperative strategy that maximizes each participant's benefit from the process. See BAIRD ET AL., *supra* note 60, at 166-72 (describing the criteria for cooperative strategies to be equilibria of the infinitely repeated prisoner's dilemma).

321. See *supra* notes 298-303 and accompanying text.

violations, but they also threaten the broader agency framework established to obtain regulatory compliance at a reasonable cost because such suits strongly dissuade regulated entities from cooperating with regulators.³²² In addition, allowing national interest groups, whose leaders might not pursue the material interests of purported statutory beneficiaries, to sue regulatory violators for penalties also discourages cooperative interactions between representatives of putative beneficiaries and regulated firms.³²³ Ultimately, experiences with negotiated rulemaking, Project XL, and citizen suits lead to the conclusion that the full potential of collaborative regulation requires limiting empowerment to groups whose leaders can be made to share the interests of group members.

B. Structuring Accountable Empowerment

Several mechanisms might be used to ensure that empowered groups are accountable to the interests of the members they represent. One mechanism for weeding out groups that are unlikely to represent their members' interests appropriately, and who thus pose a threat to undermine a cooperative regulatory venture, would rely on the responsible agency to select which groups to empower. To reduce effectively the potential for extremist groups to obstruct the collaborative endeavor, groups excluded from participation would also have to be precluded from challenging the ultimate regulatory compact in order to

322. In other words, citizen suits threaten the agency's enforcement agenda, which is a substantial part of the policy underlying a regulatory scheme. See Rossi, *supra* note 122, at 223.

323. For example, the threat of citizen suits is a major impediment to companies participating in self-audit programs despite EPA promises generally not to impose penalties for violations uncovered by such audits. See Geltman & Mathews, *supra* note 232, at 406; *State Attorneys Quiz Browner*, *supra* note 232. A 1995 study of industry sectors with more than 100 employees and whose annual sales exceeded \$100 million revealed that, of the companies that did conduct environmental audits (nearly 75% of those polled), 45% were hesitant to expand their auditing program because they feared their self-policing would be used against them in citizen suits and enforcement actions. See PRICE WATERHOUSE LLP, *supra* note 232, at 28; see also *supra* notes 231-33 and accompanying text (discussing the drawbacks of citizen suits on enforcement as a cooperative venture between the agency and the regulated entity).

prevent them from retaliating for exclusion from the process. The agency's role would thus go further than the one it currently plays in choosing negotiated rulemaking committees, and perhaps further than the American polity would tolerate, because the agency would have the power to exclude an interest group from participation in all phases of the regulatory process, including judicial review.³²⁴

Allowing agencies to exclude groups from the regulatory process entirely, however, would be problematic because it might allow agencies to exclude those groups most likely to oppose a sweetheart regulatory deal between the agency and other groups that participate in the process. No bright line demarcates good faith aggressive advocacy of beneficiaries' interests from obstructionist or strategic behavior. Thus, for an agency intent upon shielding its regulatory outcomes from the meaningful judicial challenges by some affected interest groups, illegitimate exclusion of a zealous interest group could masquerade as a defense against obstructionist abuse of the group's right to participate. Vesting authority in regulators to choose which representatives of interest groups can participate in the regulatory process also provides a means for regulators to co-opt leaders of groups likely to oppose the regulatory scheme that officials would prefer.³²⁵ Moreover, the very appearance of a conflict of interest that arises because the agency has a stake in avoiding scrutiny by dedicated opponents of industry would erode confidence in the collaborative regulatory system and thereby undermine the political foundation of such a system.³²⁶ These are the precise concerns

324. This mechanism corresponds more closely with European corporatism than with the empowerment of groups in open network systems. Corporatism involves formal designation of private organizations as "partners with the state for the development and implementation of public policy." HANDLER, *supra* note 57, at 244. The partners do not vary with the precise issues and the external environment surrounding the regulatory endeavor. The collaboration that reformers in the United States advocate involves joint effort by a shifting set of organizations that are themselves responsive to changes in the politics and preferences of individuals who will feel the effects of regulatory decisions. *See id.* at 244-45.

325. *See id.* at 242; MARY GRISEZ KWEIT & ROBERT W. KWEIT, IMPLEMENTING CITIZEN PARTICIPATION IN A BUREAUCRATIC SOCIETY: A CONTINGENCY APPROACH 99 (1981).

326. The state might influence the nature of the groups that can participate effectively in the collaborative process less directly by providing information and resource-

that have led many environmental groups to oppose Project XL.

I do not mean to suggest that relying on the agency to choose the stakeholders it believes will engage in good faith in a collaborative endeavor will never prove worthwhile. Convening representatives of those directly affected by regulation for face-to-face brainstorming can help the agency distinguish credible information from that provided purely for strategic purposes.³²⁷ Such face-to-face sessions can also facilitate development of creative solutions that otherwise might elude regulators.³²⁸ But, the threat of co-optation when the agency controls participation suggests that any use of such an agency-chosen collaborative committee must include checks to ensure that the negotiating committee neither lulls group representatives into agreeing to provisions that their groups later decide not to accept, nor subverts the process for gain of included interests at the expense of those excluded. Thus, in the negotiated rulemaking setting, it is important that the agency does not simply defer to the end product of the negotiating committee, but rather sends the negotiated proposal to a rulemaking team comprised of staff members from various agency offices to evaluate whether it should be proposed as a rule.³²⁹ In addition, the threat of co-optation of both group representatives and the agency counsels against courts paying any more deference to rules that result from negotiation than they do any other agency rule.³³⁰ The larger point, though, is

es that allow leaders of groups that the regulators consider legitimate "to strengthen their position vis-à-vis the rank-and-file and any potential challengers [for group leadership]." HANDLER, *supra* note 57, at 230. But even such indirect sanctioning of particular leaders "raises the specter of domination and hierarchy within the group." *Id.*

327. See Caldart & Ashford, *supra* note 231, at 10 (reporting that in an EPA negotiated rulemaking involving coke oven emissions, unions were able to convince environmentalists that industry concerns—that applying the statutory standard would force the closing of most existing ovens—were valid).

328. See Freeman, *supra* note 2, at 46-47 (reporting how participants in the EPA's equipment leaks negotiated rulemaking altered the whole conception of how the rule should operate away from an emission standard and towards a total quality management approach); Caldart & Ashford, *supra* note 231, at 19-22 (describing how the EPA's wood furniture coatings negotiated rule committee arrived at an innovative solution instead of merely setting a standard).

329. Thus, my position is at odds with that of the father of negotiated rulemaking, Phil Harter, who would require the agency to attempt to adopt promptly the negotiated rule as drafted. See Harter, *supra* note 157, at 1410-12, 1418-20.

330. See Wald, *supra* note 146, at 1459-68 (explaining why courts should not use

that guarding against co-option in the negotiation process necessarily will render that process consultative rather than truly collaborative.

Another mechanism would empower all affected groups *ex ante*, subject to post hoc challenge to alleged abuse of regulatory authority by any group. A determination of abuse after the fact, however, will not cure the detrimental impact of such abuse. Thus, to be effective, an *ex post* challenge to obstructionist conduct must provide some sanction to deter that conduct *ex ante*. Sanctioning a private group's unacceptable use of regulatory authority would be similar to Rule 11 sanctions for frivolous lawsuits;³³¹ and, the problems that have plagued such sanctions³³² indicate that post hoc sanctions for abuse of regulatory process are unlikely to be effective.

Prior to 1983, Rule 11 allowed judges to impose sanctions only if a party acted in bad faith in litigating an issue.³³³ Under this subjective standard, judges hesitated to impose sanctions because the state of mind constituting bad faith is essentially impossible to prove.³³⁴ In 1983, in reaction to this hesitancy and a perception of increased abuse of litigation, Rule 11 was amended to include more objective proxies for bad faith as criteria for imposing sanctions.³³⁵ Under the current rule,³³⁶ a lawyer must demonstrate that she made a reasonable inquiry into the facts and the law asserted in a filed paper,³³⁷ and must certify

different standards or limit challengers to negotiated rules, but should take into consideration information that the negotiations make available, such as considerations of alternatives to the rule).

331. See FED. R. CIV. P. 11.

332. See generally GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 2 (2d ed. 1994) (describing the evolution of Rule 11).

333. See *id.* § 2(A)(1), at 6 (stating that "[g]ood faith or bad faith became irrelevant").

334. See William W. Schwarzer, *Rule 11: Entering a New Era*, 28 LOY. L.A. L. REV. 7, 7-10 (1994).

335. See FED. R. CIV. P. 11 note (Proposed Amendments 1983), reprinted in 97 F.R.D. 165, 198 (1983); Schwarzer, *supra* note 334, at 10.

336. The rule was amended again in 1993 to fine tune it to focus on attorney's conduct rather than on the content of claims in assessing whether litigation was frivolous. See FED. R. CIV. P. 11 note (Proposed Amendments 1993), reprinted in 146 F.R.D. 401, 584 (1993); Schwarzer, *supra* note 334, at 12-13.

337. See FED. R. CIV. P. 11.

that, to the best of her knowledge, the "paper is well-grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."³³⁸ Even under this more objective standard, Rule 11 remains controversial because it threatens to chill zealous advocacy, especially of claims that seek a change in the law.³³⁹

Experience with Rule 11 suggests that post hoc sanctions for noncooperative participation would not cure the problem of obstructionist interest groups. Fewer objective criteria can be used to verify the good faith of a position taken by a group in a regulatory setting than in a judicial proceeding. Participants in regulation are not limited to asserting interests that are consistent with existing or likely changes in law. The regulatory forum is political, and in politics any position that advocates an outcome within the power of the regulator to implement is "legitimate" as long as it attracts sufficient support to remain viable in the political arena.³⁴⁰ In other words, the criteria for distinguishing

338. Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1318 (1986).

339. The controversy reflects the necessary tension between the desire to bar obstructionist or vexatious litigation and the need to allow zealous pursuit of suits intended in good faith to change the law. See Byron C. Keeling, *Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1132-34 (1994) (asserting that Rule 11 creates a problem of "drawing the line between frivolous claims . . . and otherwise legitimate novel or uncertain claims"); Nelken, *supra* note 338, at 1339 (expressing concern that Rule 11 stifles the adversarial spirit of lawyers); Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-Verdict Dismissal Devices*, 60 FORDHAM L. REV. 257, 259-60 & n.19 (1991) (noting the tension Rule 11 creates between deterring and punishing frivolous litigation while avoiding chilling zealous advocacy and restricting access to courts, and citing a plethora of scholarly attempts to resolve this tension); Georgene M. Vairo, *The New Rule 11: Past as Prologue?*, 28 LOY. L.A. L. REV. 39, 42 (1994) (contending that Rule 11 shifts the attorney-client relationship in a manner that undermines zealous advocacy on behalf of the client).

340. I use the term "legitimate" descriptively, not normatively. Descriptively, politics differs from law because legitimate outcomes need not comport with stare decisis or even be derived from any form of status quo ante reasoning. See RONALD DWORKIN, *LAW'S EMPIRE* 226-27 (1986) (describing "law as integrity"); H.L.A. HART, *THE CONCEPT OF LAW* 131 (10th ed. 1979) (describing the role of precedent in law). But cf. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 79-86 (1993) (contending that the authority of law derives from the political accreditation of its source, rather than from some reasoning process).

good faith from purely obstructionist behavior depend on the subjective judgments of what behavior is acceptable, and such judgments are better screened by the political process than by judicial reasoning. Thus, just as courts rarely sanctioned parties for frivolous litigation under Rule 11's subjective bad faith standards prior to 1983, regulators and courts reviewing a group representative's conduct in a proceeding are unlikely to impose sufficiently severe penalties to deter such groups from engaging in unacceptable behavior for two reasons. First, even after the fact, distinguishing good-faith advocacy from bad-faith strategic behavior is difficult. Second, the American legal culture frowns upon impediments to access to the political and legal systems.³⁴¹ Together, these factors counsel against imposing threats for abuse of the system that might deter legitimate complaints.

Perhaps a more promising mechanism for limiting empowerment would be a democratic process for interested individuals to elect a representative to participate on their behalf in the regulatory process. Election by those directly affected could limit participation to representatives of interests that enjoy substantial support among beneficiaries—mainstream, rather than marginal interests. Election could also provide a direct check against group leaders pursuing personal goals at the expense of regulatory beneficiaries. From the perspective of the regulator, elections allow for the ascendancy of leadership with whom the government can build a relationship of trust, who know the

341. At some point, impediments to access to the regulatory process and courts would violate the First Amendment's guarantee of the right to petition the government for redress of grievances. See *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 748 (1983) (holding that an employer cannot be prevented from bringing suit against an employee even if the employer's motive is antiunion animus prohibited by the NLRA, as long as the employer has a "reasonable basis" for the suit); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (stating that the right to petition protects sham litigation for anticompetitive purposes from violating the antitrust laws unless the litigation is baseless and repetitive); Lars Noah, *Sham Petitioning as a Threat to the Integrity of the Regulatory Process*, 74 N.C. L. REV. 1, 59-60 (1995) (prefacing suggestions for restricting access to administrative proceedings by noting the potential limits imposed by the rights to petition and due process); Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 62 (1993) (arguing that aspects of Rule 11 violate the right to petition).

rules of the cooperative game, and who are committed to promoting the consensus worked out by the collaborative process.³⁴² Unfortunately, however, democratic mechanisms for choosing group representatives are appropriate and achievable only in limited circumstances.³⁴³

Beneficiary democracy poses challenges of its own. At the outset, establishing a system for putative beneficiaries of regulation to elect a representative will entail significant administrative expense. Even once such a system is in place, election by interested individuals may exclude representatives of subgroups whose interests differ from those of the majority, but who are willing to cooperate in a collaborative regulatory venture. Such exclusion is especially likely to occur if the group voting for a single representative includes individuals who are affected differently by the conduct of the regulated firm. For example, workers on an assembly line at a plant would have a different interest in workplace health and safety than would a secretary who works in an office at the same plant. Thus, beneficiary democracy depends on establishing a system in which those with dissimilar regulatory interests vote for separate representatives.³⁴⁴ Such a system would require a regulator to determine which individuals are similarly situated and therefore fall within a single group entitled to choose a representative to the process, as well as establishing procedures for members of each such group to choose a leader who can participate in the process

342. A similar understanding of the need for the development of stable "peak organizations" underlies any government interest in a corporatist system. See P.P. CRAIG, *PUBLIC LAW AND DEMOCRACY IN THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA* 149 (1990) (noting how peak organizations allow for the development of trust with the government, provide participants in governance who know "the rules of the game," and promote a policy agreed upon by the organization and the government).

343. Cf. JOHN GASTIL, *DEMOCRACY IN SMALL GROUPS: PARTICIPATION, DECISION MAKING AND COMMUNICATION* 6-10 (1993) (describing criteria for determining when a small group productively might rely on democratic processes).

344. The difficulty of establishing a system for interest group democracy to limit participation in collaborative regulatory endeavors is greatly increased by the fluidity of group members' interests. See Rossi, *supra* note 122, at 245 (asserting that, to the extent a representative "stand[s] for" others in the process, representation is "premised on a fundamental myth—that a group is defined by a static and uniform set of interests that can be preidentified").

and represent mainstream rather than fringe views.³⁴⁵ Establishing such a system is a daunting regulatory task by itself.

Even if an appropriate group framework could be established, elections would not guarantee that representatives would pursue their constituents' interests faithfully. Representatives might instead seek to increase their incumbency or power as representatives—an agency cost of having a representative system.³⁴⁶ On the one hand, agency costs of representation generally increase as the familiarity of the representatives to their constituencies

345. Federal labor laws provide the best known example of the government attempting to establish internal group democracy as a means of empowering group members to exclude nonrepresentative factions from the process of negotiating regulations. The regulated negotiations under the labor laws are collective bargaining agreements, and the defined interest groups entitled to choose a representative to participate in that process are collective bargaining units. See National Labor Relations Act, 29 U.S.C. § 159(b) (1994) (requiring the NLRB to identify the unit appropriate for collective bargaining). Difficulties in establishing a system for the democratic governance of unions free from corruption illustrate the magnitude of the task facing the government that attempts to establish such a system for self-policing of representation in a collaborative rulemaking process. See Eric Ames Tilles, Note, *Union Receiverships Under RICO: A Union Democracy Perspective*, 137 U. PA. L. REV. 929, 934-39 (1989) (using the sociology of group democracy to explain why unions are oligarchic and concluding that merely providing the tools of democracy to unions is insufficient to ensure that union leaders are truly representative of their members). See generally George Kannar, *Making the Teamsters Safe for Democracy*, 102 YALE L.J. 1645 (1993) (describing the corruption and lack of democracy that have plagued unions in the United States for over 100 years). In addition, the propensity for union-management negotiations to break down into adversarial processes illustrates that even such a system will not guarantee effective collaborative regulation. See Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. CORP. L. 657, 713-14 (1996) (asserting that the adversarial nature of American labor relations makes the employment relationship seem like a "chicken game" characterized by the issuance of ultimatums); Stanley Cherim, *Bargaining from Both Sides*, GOV'T UNION REV., Winter 1984, at 47, 48 (calling collective negotiation "an adversarial system of conflict resolution" that "divide[s] people] into two camps"); Paul F. Gerhart, *Maintenance of the Union-Management Relationship*, in HANDBOOK OF PUBLIC SECTOR LABOR RELATIONS 97, 101 (Jack Rabin et al. eds., 1994) (finding that in the past 30 years, labor-management relations in the public sector have evolved toward the adversarial model that has characterized private sector relations); Ruth Tallakson & Hoyt N. Wheeler, *Winning and Losing in Interest Arbitration*, in STRATEGIES FOR IMPASSE RESOLUTION 180, 180 (Harry Kershen & Claire Meirowitz eds., 1992) (stating that "[a]lthough it is true that collective bargaining often has a strong flavor of cooperativeness, there has also been an enduring emphasis upon winning and losing").

346. See Clyde W. Summers, *Democracy in a One-Party State: Perspectives from Landrum-Griffin*, 43 MD. L. REV. 93, 97 (1984).

and the concomitant ability of the constituencies to influence the representatives diminishes.³⁴⁷ Thus, the problem of agency costs of representation reinforces the need for beneficiaries to elect representatives on a facility-by-facility basis. In that case, it is most likely that a representative will be a member of the beneficiary voting unit, and that the voters can more easily monitor and constrain the actions of the representative. On the other hand, small localized groups are more likely to harbor parochial views and to refuse to accommodate competing perspectives.³⁴⁸ Thus, although leaders of a stakeholder group organized around an individual facility are likely to act in accordance with group members' desires, those desires often will be to resist achieving collaborative consensus. Moreover, local chapters of interest groups often lack the resources or expertise necessary to understand the assertions of their industry counterparts, let alone to verify the accuracy of those assertions regarding technically complex matters. This suggests that empowerment may depend on affiliation with a national group that can make available to the representatives needed resources and information.

Finally, representation may become tainted if the regulated firm can offer inducements to some voting members independent of their regulatory interests. For example, in the context of workplace health and safety, one should balk at a system that allowed an employer to buy off worker representatives with job perquisites or increased pay. One should also look askance at any inducement offered to a select subgroup of the voting unit. In both of these examples, the regulated firm essentially can split the interests of the voting unit, and collude with one subgroup against the overall beneficiary interest. Sweetheart regu-

347. See LEONARD R. SAYLES & GEORGE STRAUSS, *THE LOCAL UNION* 148-49 (rev. ed. 1967) (noting that the work of local unions is subject to close monitoring by rank and file members); Tilles, *supra* note 345, at 937 (stating that "the larger and more diverse the union, the greater the influence of the factors that lead to oligarchy").

348. The belief that local factions tend to be more extreme than national ones is often cited as an insightful perception that the Federalists used to persuade citizens of the original thirteen states to support the Constitution's national republican structure. See *THE FEDERALIST* NO. 10 (James Madison). Accounts of grassroots environmental organizations lend empirical support to Madison's perception. See GOTTlieb, *supra* note 279, at 170, 202-03; SHABECOFF, *supra* note 293, at 233-34.

latory provisions are the likely result. The regulated firm's ability to offer such inducements increases when the relationship of the firm to the beneficiaries involves multiple distinct issues. In the example above, the problem occurs because the employee is interested in more than just workplace safety, an interest she shares with other members of the voting unit. The employee may be interested in such independent matters as pay, other working conditions, and opportunity for training and advancement. Avoiding side inducements requires a system that defines what the regulated firm may promise representatives or subgroups of voting units, and a means of policing against regulated entity transgressions.

C. Conjectures About Particular Contexts in Which Collaborative Regulation Might Work

The preceding analysis of mechanisms to ensure accountable empowerment suggests that although beneficiary democracy may work to limit empowerment to constructive contexts, setting up such a democratic system will not be cheap. Moreover, even after the system is established, it is only likely to work when beneficiaries can be divided into groups with distinct regulatory interests, on a facility-by-facility basis, and when those groups maintain an ongoing relationship with the owner of the regulated facility and have access to expertise and resources, perhaps through a relationship with a national interest group. Despite these extensive prerequisites, there are contexts in which beneficiary democracy might be feasible.

For example, Ayres and Braithwaite suggest that empowerment be tried for residents of nursing homes in Australia.³⁴⁹ They suggest that nursing home residents are among the most powerless, so that if empowerment works in that context, it would prove the pragmatic viability of the theory.³⁵⁰ The reason residents of nursing homes may be powerless, however, lies in

349. See AYRES & BRAITHWAITE, *supra* note 2, at 99.

350. Ayres and Braithwaite suggest that "[t]here is no group that . . . is more difficult to empower than nursing home residents," and therefore the ability to implement collaborative regulation of nursing homes would be a crucial case indicating the strength of the theory of such regulation. See *id.*

their physical or mental incapacity to pursue or protect their own interests actively, rather than in any interest group pathologies. In fact, my analysis suggests that in those rare instances when a significant proportion of nursing home residents are capable of making and acting upon informed decisions about their care, the nursing home setting in many ways provides an arena well suited for effectuation of collaborative governance by empowerment of residents. Regulations that vary from home to home can easily be negotiated. Clearly, residents have an ongoing interest in the quality of care they receive from a facility. In most instances there would be no need to divide residents into various voting units because each resident shares a common interest in quality of care. Those who may be more independent today, and thus might favor regulation that gives them more benefits at the expense of the more infirm, must worry that they may find themselves in the less fortunate group in the near future. Finally, nursing home operators generally share an internal norm of seeing that their residents are well cared for, even if they also are pinched by the realities of the cost of providing such care. In such a context, the chief challenges that empowerment must overcome are the actual communication of issues and ideas to residents and the need to ensure that residents are aware of the process, can understand where their interests lie, and have some means of expressing those interests to representatives with some power in the regulatory process. For those nursing homes that can overcome these challenges, contrary to Ayres and Braithwaite's opinion, I see nursing homes as the quintessential type of regulatory arena in which empowerment can provide significant responsiveness to beneficiaries' needs.

Regulation of workplace safety is another broad area in which collaborative regulation might be implemented successfully. Line workers in a particular manufacturing plant all share a continuing interest in safety at their plant. Moreover, union representation provides a mechanism for selecting worker participants in a plant safety committee and for ensuring continued involvement in such a committee. Thus, it is not surprising that the California Occupational Safety and Health Administration's experiment with a cooperative workplace safety program at construction sites was successful. The program established safety committees at each of several construction sites. The committees included

two employer and two labor representatives.³⁵¹ The labor representatives were employees at the site chosen either by the secretary of the local building trades council or by the workers at the site.³⁵² The committees were not merely brought together to set standards; they continued in existence to hear and act on complaints about safety problems at the sites. Reports from the sites indicated that workers were more willing to communicate safety problems they perceived,³⁵³ and that accident rates at the experimental sites were below those at similar sites that had not established safety committees.³⁵⁴

Whether successes with safety committees at particular construction sites are illustrative of the potential for such committees to improve workplace safety regulation generally, however, remains an open question. In many manufacturing settings, the influence of national or regional unions alters the interaction between labor and management that would otherwise exist. A significant number of plants are unionized,³⁵⁵ and those that are not unionized usually operate in the shadow of potential union representation.³⁵⁶ National or regional union leaders recognize the ability of such committees to reinforce organized workers' commitment to the union, or to give nonunionized workers a taste of interacting with employers as part of a collective unit.³⁵⁷

351. See JOSEPH V. REES, *REFORMING THE WORKPLACE: A STUDY OF SELF-REGULATION IN OCCUPATIONAL SAFETY* 134 (1988).

352. See *id.* at 141.

353. See *id.* at 142-44.

354. See *id.* at 2-3.

355. Currently, about 11% of manufacturing plants in the United States are unionized. See Clyde W. Summers, *Questioning the Unquestioned in Collective Labor Law*, 47 CATH. U. L. REV. 791, 810 (1998).

356. See RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 151-54 (1984) (suggesting that competition with unionized firms results in nonunion firms offering employees wages and benefits similar to those offered by nonunion shops); Charles B. Craver, *Mandatory Worker Participation Is Required in a Declining Union Environment to Provide Employees with Meaningful Industrial Democracy*, 66 GEO. WASH. L. REV. 135, 138 (1997) (noting that unorganized labor benefits indirectly from the labor movement).

357. Hence, national labor unions have supported mandatory labor-management safety committees in which labor representatives are selected by secret ballot of employees in appropriately designated work units. See Adrienne E. Eaton & Paula B. Voos, *Unions and Contemporary Innovations in Work Organization, Compensation, and Employee Participation*, in *UNIONS AND ECONOMIC COMPETITIVENESS* 173, 180-93

Union leaders have much to lose, however, if labor's representatives on safety committees at unionized plants are selected by means independent of the union representation of workers. Loyalties to local committees chosen outside of the union structure may replace loyalties to the national union. This problem is magnified when an employer retains discretion about whether to form a committee or over the make-up of the committee because such discretion provides a means for employers to instill or exacerbate antiunion sentiments in workers.³⁵⁸ Because the aura of union-management adversarialism pervades the debate about safety committees in the usual manufacturing plant,³⁵⁹ it would

(Lawrence Mishel & Paula B. Voos eds., 1992) (describing union efforts in developing and implementing employer-employee cooperative programs); Louise Sadowsky Brock, Note, *Overcoming Collective Action Problems: Enforcement of Worker Rights*, 30 U. MICH. J.L. REFORM 781, 810 (1997); see also AFL-CIO COMM. ON THE EVOLUTION OF WORK, *THE CHANGING SITUATION OF WORKERS AND THEIR UNIONS* 18-19 (1985) (noting worker concerns with health and safety issues and reporting that several unions have received positive membership response to "union-management programs affording greater worker participation in the decision-making process at the workplace").

358. It may be sufficient that the employer can falsely create the impression that, even without a union, workers are effectively represented in disputes with management. See Samuel Estreicher, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125, 126 (1994) (labelling this basis for opposing worker committees as a "false consciousness" rationale). This rationale underlies the NLRA's current prohibition of any employer influence over "any organization . . . in which employees participate and which exists for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." National Labor Relations Act § 2(5), 29 U.S.C. § 152(5) (1994); see also 29 U.S.C. § 158(a)(2) (prohibiting employer domination of labor organizations). But cf. Robert J. Rabin, *The Role of Government in Regulating the Workplace*, 13 LAB. LAW. 1, 9-10 (1997) (questioning whether employer supported worker groups provide inadequate representation of workers' interests or discourage support for unions).

359. This debate is being played out in the legislative arena. Industry has supported the Teamwork for Employees and Managers (TEAM) Act of 1995, which was passed by both houses of Congress but vetoed by President Clinton. See H.R. 743, 104th Cong. (1996); S. 295, 104th Cong. (1996); *Clinton Vetoes TEAM Act Despite Pleas from Business for Passage*, Daily Lab. Rep. (BNA) No. 147, at AA-1 (July 31, 1996). TEAM, however, "focused heavily on employer concerns and failed to ensure that employers would not use worker committees to thwart union organizing efforts." Craver, *supra* note 356, at 143. Those associated with the concerns of labor have supported an alternative recommendation proposed by President Clinton's Commission on the Future of Worker Management Relations, better known as the Dunlop Commission. See Rafael Gely, *Whose Team Are You on? My Team or My TEAM?: The NLRA's Section 8(a)(2) and the TEAM Act*, 49 RUTGERS L. REV. 323, 366-69

be difficult to implement a system for establishing committees that were seen neither as antimanagement nor antiunion. Thus, union opposition to employer backed labor-management safety committees and industry opposition to committees whose labor representatives are chosen by secret ballot, and whose information regarding safety concerns at individual plants came from sources other than the employer—sources that might include national unions—threaten the emergence of a truly collaborative process for regulating workplace safety.

CONCLUSION

The analysis in this Article indicates many potential problems with empowerment of stakeholders as a means of creating collaborative government that are likely to limit its usefulness to select regulatory contexts or experimental programs. Perhaps the greatest such problem is the need to limit participation to groups that will not undermine the collaborative nature of the process without granting regulators or regulated entities the ability to co-opt stakeholder involvement by controlling access to the process. My analysis of interest group dynamics suggests that even in the few contexts where collaborative regulation might work, the government will have to create a mechanism for interest group internal democracy, which will itself require a substantial regulatory mechanism.

I do not mean to suggest that experimental programs premised on some notion of a collaborative endeavor by stakeholders cannot be beneficial. Experimental programs can educate regulators about flexible regulatory mechanisms that agencies can then incorporate into more traditional regulatory structures. The success of such programs, however, hinges on the ultimate rejection of true collaboration by all affected stakeholders as the basis of regulation. This rejection occurs by reliance on government control over two aspects of such experimental programs.

(1997) (outlining the present state of worker-management relations throughout the nation and suggesting which obstacles need to be overcome). *See generally* COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, FACT FINDING REPORT (1994) (reporting on the state of worker-management relations in the United States).

First, such programs rely on regulators to exclude groups that have no interest or incentive to reach a consensus about the public interest to prevent fringe extremist groups from sabotaging such programs. Second, such programs place the ultimate responsibility for adopting and implementing regulations in the hands of government officials to ensure that proposals reached by consensus of stakeholders further a broadly held conception of the public interest. Thus, the analyses in this Article tend to confirm my initial suspicions that reinventing government by empowering stakeholders to engage in a collaborative regulatory endeavor is unlikely to replace the traditional regulatory paradigm in which government is the institution that identifies and tries to achieve its vision of the public interest.