UNRAVELING THE ADMINISTRATIVE STATE: MECHANISM CHOICE, KEY ACTORS, AND REGULATORY TOOLS

Robert L. Glicksman and David L. Markell***

* Robert L. Glicksman is the J.B. & Maurice C. Shapiro Professor of Environmental Law, The George Washington University Law School.

** David L. Markell is the Steven M. Goldstein professor at Florida State University College of Law. The authors thank Dave Owen, J.B. Ruhl, and Mary Ziegler for helpful comments on earlier drafts. They also thank Germaine Leahy, Head of Reference & Environmental Law Librarian, The George Washington University Law School; Barbara Kaplan and Katie Miller of the Florida State University College of Law Research Center; and research assistants Brooke Wickham, Sam Walenz, and Blair Schneider.

I. INTRODUCTION

The debate over the administrative state's role in our system of government is perhaps as vibrant and contentious as it has ever been in the academic literature, in judicial decisions, and in the halls of Congress and in the offices of the executive branch. Some scholars contest the constitutionality of the administrative state.[1] Supreme Court Justices and other federal judges raise concerns about "the aggrandizement of the power of administrative agencies,"[2] and question whether particular agency structures,[3] practices,[4] or administrative law doctrines pass constitutional muster.[5] Others vigorously defend the legality of administrative agencies and the manner in which they implement regulatory statutes.[6]

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[1] *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231–32 (1994).

[2] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring in part and concurring in the judgment). *See also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010) ("The growth of the Executive Branch . . . heightens the concern that it may slip from the Executive's control, and thus from that of the people.").

[3] *See, e.g.*, PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) ("The independent agencies collectively constitute, in effect, a headless fourth branch of the U.S. Government . . . .Because of their massive power and the absence of Presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.").

[4] *See, e.g.*, Dep't of Transp. v. Ass'n of Am. Railroads, 135 S. Ct. 1225, 1252 (2015) (Thomas, J., concurring in the judgment) (questioning the validity of the nondelegation doctrine and requiring the government to "create generally applicable rules of private conduct only through the proper exercise of legislative power").

[5] *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("*Chevron* deference raises serious separation-of-powers questions.").

[6] *See, e.g., Free Enter. Fund*, 561 U.S. at 499 (referring to Justice Breyer's "paean to the administrative state" in his dissent); Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 8 (2017) [hereinafter Metzger, *Foreword*] (arguing "that the contemporary reality of delegation makes core features of the administrative state constitutionally obligatory"); Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1566 (2015) (reviewing

Scrutiny of the administrative state is not confined to these overarching constitutional questions, however. Administrative law scholars in recent years have increasingly sought to open up the "black box" of agency functioning and to understand the inner workings of agencies by exploring administrative governance "from the inside-out."[7] Relying on the work of public administration scholars,[8] law professors Sidney Shapiro and Ronald Wright several years ago inquired into the manner in which internal managerial controls provide a mechanism for promoting "'inside-out' accountability," which is capable of supplementing the control of bureaucratic discretion from outside the agency that has traditionally been achieved through congressional and executive oversight and judicial review.[9] Others have followed their lead, evaluating the extent to which internal agency mechanisms and procedures can help legitimize agency action in circumstances in which external oversight is limited.[10] Elizabeth McGill and Adrian Vermeule have addressed how horizontal and vertical allocations of authority within an agency affect not only the likelihood of judicial deference to statutory interpretations, but also the extent to which agencies may rely on post hoc rationalizations and the circumstances in which agencies are

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PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014) and arguing that it is "irresponsible" to characterize the administrative state as "unlawful").

[7] For an early example of a scholarly reference to "inside-out" exploration of agency functioning, see Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 60 (2009). *See generally* ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW (Nicholas R. Parrillo ed., 2017).

[8] Political scientists and public administration scholars have evaluated how the structuring and allocation of authority within agencies affect regulatory effectiveness. *See, e.g.*, JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 196–202 (1989).

[9] Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 578 (2011) (discussing the need "to identify the conditions that make inside-out control most likely to succeed and identify the agencies that best fulfill those conditions"); *see also* Elizabeth Fisher et al., *Rethinking Judicial Review of Expert Agencies*, 93 TEX. L. REV. 1681, 1692–97 (2015) (tracking interactions of inside-out and outside-in accountability processes in connection with EPA's issuance of air quality standards under the Clean Air Act ("CAA")).

[10] *See* Emily Hammond [Meazell] & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313 (2013) (arguing that administrative process design can advance legitimacy); David L. Markell & Robert L. Glicksman, *A Holistic Look at Agency Enforcement*, 93 N.C. L. REV. 1, 4 (2014) [hereinafter *Holistic*] (arguing that "inside-out" analysis can help decide how best to structure agency enforcement and compliance efforts); David L. Markell & Robert L. Glicksman, *Dynamic Governance in Theory and Application, Part I*, 58 ARIZ. L. REV. 563, 618–20 (2016) [hereinafter *Dynamic Governance*] (considering how encouraging the participation of civil society can improve agency enforcement).

bound by their own precedents.[11] Gillian Metzger and Kevin Stack have explored "internal administrative law" as a counter to those who view "administration as a persistent threat, not a system capable of law self-governance."[12] A growing number of scholars, in short, have realized that understanding the administrative state requires close attention to the operation of the agencies.[13] This focus differs from much of the traditional administrative law scholarship, which emphasizes the operation of the courts and, in particular, judicial review of agency action.[14]

This Article contributes to the recently emergent and expanding literature on how the internal operations of agencies affect the development and implementation of law and policy in the administrative state. In an effort to "unravel" the manner in which agencies operate,[15] we

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[11] Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1035 (2011); *see also* David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446, 1515 (2014) (arguing that "the details of agency design *should* matter" for judicial deference).

[12] Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1249 (2017). For other recent work on internal agency functioning, see Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421 (2015) [hereinafter Nou, *Coordination*]; Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006).

[13] As discussed below, it is possible, and indeed essential, to consider other actors besides agency officials even while using such a lens. *See infra* Part III.B.–C.

[14] This aspect of the operation of the administrative state remains important in its own right, as judicial review has obvious implications for regulatory initiatives. An iconic article is Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975). The voluminous literature on judicial review of agency statutory interpretations attests to continuing scholarly fascination with the interplay between agency decision-making and judicial review. For a recent sampling, see Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1 (2017); Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. CHI. L. REV. 757 (2017). Other strands of the literature on governance and administrative law include research on democratic experimentalism, *see, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); new governance, *see, e.g.*, Orly Lobel, *Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 498 (2004); and the role of civil society in administrative law. *See, e.g.*, Robert L. Glicksman et al., *Technological Innovation, Data Analytics, and Environmental Enforcement*, 44 ECOLOGY L.Q. 41 (2017); Roberto Caranta, *Civil Society Organizations and Administrative Law*, 36 HAMLINE L. REV. 39, 40 (2013). All three areas implicate allocation of responsibility among those, inside and outside the government, with a stake in regulatory programs' operation. Another area of recent interest is adaptive governance, which explores the capacity of agencies to respond to dynamic change. *See, e.g.*, Robin Kundis et al., *Designing Administrative Law for Adaptive Management*, 67 VAND. L. REV. 1, 2 (2014); *see also* David L. Markell, *Emerging Legal and Institutional Responses to Sea-Level Rise in Florida and Beyond*, 42 COLUM. J. ENVTL. L. 1, 4, 49–56 (2016) (identifying literatures addressing dynamism in the context of sea-level rise).

[15] We use the word "unraveling" to capture our intent to unpack the key elements of the administrative state to learn more about its operation. An alternative meaning as a synonym for dismantling or coming apart is evocative of claims that the regulatory state is at risk of becoming dysfunctional. *See, e.g.*, Metzger, *Foreword*, *supra* note 6, at 9–10 (noting the Trump administration's "aggressively antiregulatory" actions, the appointment of officials who have opposed the missions of the agencies they lead, and slashing of agency budgets); Sidney A. Shapiro,

offer a conceptual framework for policy design that focuses on five key features of administrative governance: (1) the key or foundational legal mechanisms available to agencies (rulemaking, permitting, and enforcement),[16] (2) the major actors, (3) the objectives the agency is trying to achieve, (4) important tools available to achieve policy objectives,[17] and (5) the nature of the statutory authority delegated to the agency.[18] We have not uncovered other studies that propose such a conceptual framework.[19]

Talking About Regulation: Political Discourse and Regulatory Gridlock, 7 WAKE FOREST J.L. & POL'Y 1, 21 (2017) (describing conservatives' efforts to slash government revenue to create deficits and justify "downsizing government"); Gerald Benjamin, *Reform in New York: The Budget, the Legislature, and the Governance Process*, 67 ALB. L. REV. 1021, 1025 (2004) (describing unraveling of "[t]he fabric of trust, accountability, and cooperation"). From the other side of the political spectrum, Senator Ted Cruz charged President Obama with threatening to unravel our governmental system through expansive use of executive powers in violation of separation of powers principles. Senator Ted Cruz, *The Obama Administration's Unprecedented Lawlessness*, 38 HARV. J.L. & PUB. POL'Y 63, 64–65 (2015). Others point to the loss of trust in public institutions, *see Public Trust in Government: 1958–2017*, PEW RESEARCH CTR. (Dec. 14, 2017), http://www.people-press.org/2017/12/14/public-trust-in-government-1958-2017/; and the media, *see* Matthew Ingram, *Here's Why Trust in the Media Is at an All-Time Low*, FORTUNE (Sept. 15, 2016), http://fortune.com/2016/09/15/trust-in-media/.

[16] These are not the only legal mechanisms exercised by agencies such as EPA. Others, to which we devote less attention, include strategic planning and financing. EPA can rely on grants and technical assistance, for example, to foster compliance by regulated entities. Agencies also use guidance documents to advance policy objectives. Even though those documents are not legally binding, they clearly influence agency and regulated party behavior. A rich literature explores the use (and abuse) of guidance documents and the availability and scope of judicial review of those documents. *See, e.g.*, Richard A. Epstein, *The Role of Guidances in Modern Administrative Procedure: The Case for* De Novo *Review*, 8 J. LEGAL ANALYSIS 47 (2016); Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331 (2011). Although we address the choice between legislative and nonlegislative rules in Part II.C, *infra*, we focus here primarily on rulemaking, permitting, and adjudicatory enforcement because these are the binding mechanisms through which EPA has sought to implement the enforcement initiative we have selected to illustrate the value of our conceptual framework. Analysis of agency mechanism choice in other contexts in which the use of guidance documents plays a larger role would supplement the insights drawn from our case study.

[17] *Next Generation Compliance*, EPA, https://www.epa.gov/compliance/next-generation-compliance (last updated June 5, 2018) (identifying five tools EPA planned to use to bolster enforcement and compliance).

[18] In a previous article, *Dynamic Governance*, *supra* note 10, we suggested that policy design aimed at optimizing regulatory governance should consider three key dimensions: (1) the actors; (2) available legal and other mechanisms; and (3) tools to enhance governance. These dimensions are interrelated: actors can and often do work together; an agency may use more than one mechanism to advance a policy objective; and a mechanism may use more than one tool. To illustrate the value of this framework, that article focused on the roles of different actors (especially interested citizens) in enforcing and fostering compliance with environmental laws. *Id.* at 618–629. We integrate the insights from that discussion into our analysis here. For further discussion of the role that nongovernmental actors play in governance, see *id.* at 566 n.6, 621 n.284; *supra* note 14.

[19] Our effort is provisional; others have offered different conceptions of key features of administrative governance. *See Dynamic Governance*, *supra* note 10, at 618 n.272 (identifying alternative frameworks).

Along with our companion piece, *Agency Mechanism Choice*,[20] this Article grounds this "inside-out" assessment of governance through an illustrative case study of the efforts of one agency (the United States Environmental Protection Agency ("EPA")) to transform how it enforces and seeks to improve compliance with environmental laws. EPA's Next Generation Compliance initiative ("Next Gen"),[21] launched in 2013,[22] reflected EPA's determination that "pollution challenges require a modern approach to compliance, taking advantage of new tools and approaches while strengthening vigorous enforcement of environmental laws."[23] Next Gen addresses conceded weaknesses in a fundamental aspect of EPA's mission by building into its enforcement program multiple mechanisms with multiple tools deployed by multiple actors.[24] Next Gen also exemplifies an agency that has broad discretion under its

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[20] David L. Markell, Robert L. Glicksman & Justin Sevier, *Agency Mechanism Choice* (forthcoming) [hereinafter *Agency Mechanism Choice*].

[21] Cynthia Giles, *Next Generation Compliance*, 30 ENVTL. F. 22, 22 (Sept.–Oct. 2013) [hereinafter Giles, *NGC*] (noting that EPA launched Next Gen because of the need for dramatic change). According to Giles, who was then the head of EPA's Office of Enforcement and Compliance Assurance (OECA), Next Gen is a "new paradigm" which would "mov[e] our compliance programs into the 21st century." Next Gen was also motivated by resource shortages. *See* EPA, NEXT GENERATION COMPLIANCE: STRATEGIC PLAN 2014–2017, 3–7 (2014) [hereinafter EPA, NGC 2014–2017] ("Budget uncertainties and constrained resources only reinforce the imperative to move forward with Next Generation Compliance."); *EPA Official: 'Next Generation' Improving Compliance*, 47 ENV'T REP. (BNA) 1742 (2016) (quoting EPA official acknowledging limited inspection resources). For discussion of EPA's recent budgetary constraints and the impact they have had on agency operations, see Joel A. Mintz, *"Running on Fumes": The Development of New EPA Regulations in an Era of Scarcity*, 46 ENVTL. L. REP. 10501 (2016); *Holistic*, *supra* note 10, at 49–55; *Dynamic Governance*, *supra* note 10, section II.B.1. For more on the genesis and components of the Next Gen initiative, see *Dynamic Governance*, *supra* note 10, section III.A.; EPA, OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, OECA NATIONAL PROGRAM MANAGER GUIDANCE FY 2014 10–12 (2013). Commentary on Next Gen is fairly limited. Some comments have been critical and have suggested that EPA is diverting the focus from traditional enforcement strategies, notably inspections and the imposition of penalties, and that the initiative may be a cover for resource limitations. *See, e.g.*, Rena Steinzor, *The Victims of EPA's Retreat from Enforcement*, CPR BLOG (Apr. 14, 2014), http://progressivereform.org/CPRBlog.cfm?idBlog=603ADAFB-B7C7-ABBD-06B46C85603D419D.

[22] As of mid-2018, EPA's website still touted Next Gen, notwithstanding a change in administration. *See Next Generation Compliance*, EPA, https://www.epa.gov/compliance/next-generation-compliance (last visited Aug. 28, 2018). The Trump administration appears to be less committed to Next Gen than EPA's enforcement officials were under the Obama administration, however. *See EPA Backs Away from Obama NextGen Initiative but Impact Uncertain*, INSIDEEPA.COM (Apr. 12, 2018), https://insideepa.com/daily-news/epa-backs-away-obama-nextgen-initiative-impact-uncertain.

[23] *Next Generation Compliance*, *supra*.

[24] For discussion of the various enforcement challenges that Next Gen was designed to address, see *Dynamic Governance*, *supra* note 10, at 586–608. These include data gaps, significant incidences of noncompliance, inadequate state enforcement, the absence of useful enforcement metrics, declining resources, EPA's increased regulatory responsibilities, increased differential treatment of regulated entities, and the need to afford greater attention to numerous small sources.

organic statutes to choose among the three key legal mechanisms on which we focus to pursue its regulatory mission. Thus, EPA's implementation of Next Gen is a revealing lens through which to assess agency mechanism choice and its relationships with the other four elements of our governance framework.

Our case study of Next Gen evaluates the role that rulemaking, permitting, and enforcement have played in EPA's efforts to transform its enforcement and compliance actions. We explore the intersection of the use of these three legal mechanisms with the other key features of administrative governance we identify above—actors, objectives, tools, and statutory authority. This effort, to our knowledge, is a first-ever empirical review of an agency's actual reliance on each of these foundational mechanisms of governance (separately and in conjunction with one another) in the context of a novel regulatory initiative, which we are able to study from its inception.[25]

We believe that our typology for examining the use of these mechanisms offers a model for further study of administrative process design that includes close examination of the use of different legal mechanisms. We hope that our empirical findings in the companion article will ground future work that explores the impact of agency action on furthering statutory goals such as enhancing environmental protection through improved regulatory compliance. Such work can increase understanding of the strengths and weaknesses of available legal mechanisms, and the tools they may incorporate, and it can provide guidance to agency officials choosing which tools to use (and how to use them) in pursuing the agency's statutory mission.

This analysis also contributes to the legal literature that specifically addresses regulatory compliance and enforcement. The dynamics of regulatory enforcement are complex and multidimensional.[26] Different strands of the regulatory enforcement literature explore topics such as the

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[25] This Article supplies the theoretical foundation for our conceptual framework for improving regulatory governance, using Next Gen to illustrate the value of considering each feature of our model individually and in combination. The companion article includes empirical analysis of how EPA has actually implemented Next Gen, providing a basis for evaluating whether it has taken full advantage of its statutory authority and discretion to structure its choice of legal mechanisms and tools, and its assignment of roles to affected stakeholders, to enhance compliance. *See Agency Mechanism Choice*, *supra* note 20.

[26] *See* Virginia E. Harper Ho, *From Contracts to Compliance: An Early Look at Implementation Under China's New Labor Legislation*, 23 COLUM. J. ASIAN L. 35, 71 (2009); Ralph Smith, *Detect Them Before They Get Away: Fenceline Monitoring's Potential to Improve Fugitive Emissions Management*, 28 TUL. ENVTL. L.J. 433, 452 (2015). *See generally*, ELGAR ENCYCLOPEDIA OF ENVIRONMENTAL LAW: COMPLIANCE AND ENFORCEMENT OF ENVIRONMENTAL LAW (Lee Paddock et al. eds., 2017) [hereinafter Paddock et al., COMPLIANCE]; Neil Gunningham, *Compliance, Deterrence, and Beyond*, *in id*.

relative merits of using deterrence-based versus cooperation-based approaches;[27] the capacity of social norms to promote compliance;[28] the roles of different actors, such as states,[29] civil society[30] and the courts[31] in enforcement and compliance; the use of different procedural enforcement mechanisms;[32] the impact of agency discretion on enforcement;[33] and the effectiveness of regulatory enforcement.[34] Scholars nevertheless recognize that we are far from settling on the best approach for using available resources and strategies to optimize compliance.[35] Indeed, it is probably not possible to postulate an overarching and universally applicable approach for integrating all aspects of regulatory enforcement.[36] Still, our case study of EPA's compliance promotion efforts comprises a novel effort to illustrate how five key aspects of enforcement governance regimes interrelate and are likely to influence

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[27] *See, e.g.*, CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, REINVENTING ENVIRONMENTAL ENFORCEMENT & THE STATE/FEDERAL RELATIONSHIP (2003); Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181 (1998); Christine Parker, *The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement*, 40 LAW & SOC'Y REV. 591 (2006).

[28] *See, e.g.*, Michael P. Vandenbergh, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 STAN. ENVTL. L.J. 55 (2003); Neil Gunningham et al., *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307 (2004).

[29] *See, e.g.*, David L. Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1 (2000) [hereinafter Markell, *Reinvented*]; Robert R. Kuehn, *The Limits of Devolving Enforcement of Federal Environmental Laws*, 70 TUL. L. REV. 2373 (1996).

[30] *See* David L. Markell & Tom R. Tyler, *Using Empirical Research to Design Government Citizen Participation Processes: A Case Study of Citizens' Roles in Environmental Compliance and Enforcement*, 57 U. KAN. L. REV. 1 (2008); David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616 (2013) [hereinafter Engstrom, *Gatekeepers*]; Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339 (1990).

[31] *See, e.g.*, Kenneth J. Markowitz & Jo J.A. Gerardu, *The Importance of the Judiciary in Environmental Compliance and Enforcement*, 29 PACE ENVTL. L. REV. 538 (2012).

[32] *See, e.g.*, Robert L. Glicksman & Dietrich H. Earnhart, *The Comparative Effectiveness of Government Interventions on Environmental Performance in the Chemical Industry*, 26 STAN. ENVTL. L.J. 317 (2007).

[33] *See, e.g.*, Ashutosh Bhagwat, *Modes of Regulatory Enforcement and the Problem of Administrative Discretion*, 50 HASTINGS L.J. 1275 (1999).

[34] *See, e.g.*, Wayne P. Gray & John T. Scholz, *Does Regulatory Enforcement Work? A Panel Analysis of OSHA Enforcement*, 27 L. & SOC'Y REV. 177 (1993).

[35] *See* Edward Rubin, *The Citizen Lawyer and the Administrative State*, 50 WM. & MARY L. REV. 1335, 1358 (2009) (discussing the need for "an enforcement strategy that optimizes the level of compliance it achieves at a given level of resources"); J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757, 847–48 (2003) (discussing "resource allocation" model of regulatory compliance); John T. Scholz, *Cooperation, Deterrence and the Ecology of Regulatory Enforcement*, 18 L. & SOC'Y REV. 179, 183, 210 (1984) (discussing ways to optimize compliance through cooperation and coercion).

[36] *See* Matthew C. Turk, *Regulation by Settlement*, 66 U. KAN. L. REV. 259, 323 (2017) (asserting that "the current regulatory enforcement environment is complex and not amenable to grand over-arching reforms").

the prospects for achieving regulatory goals. It provides insights on compliance theory and practice that are rooted in real-world experience and attempts to assess how best to improve regulatory compliance through the use of available legal mechanisms in light of governing statutory authority and the agency's goals in exercising that authority.

The Article is structured as follows. Parts II to IV provide the contextual backdrop for our analysis of legal mechanism choice in the implementation of EPA's Next Gen initiative. Part II identifies three foundational legal mechanisms that are integral to administrative governance in both general and environmental regulation. It surveys the theoretical literature on mechanism choice by agencies, and it highlights the advantages and disadvantages of using one mechanism over another. Part II also explains how mechanism choice affects an agency's procedural duties, the substantive policies the agency seeks to promote, and the opportunities for judicial review of decisions reached using that mechanism. These features of mechanism choice have important implications for the efficiency and effectiveness of agency operations, as well as for the legitimacy of those actions.[37]

Part III discusses the roles of three critical sets of actors in policy development and implementation—federal officials, state officials, and nongovernmental actors, including regulatory beneficiaries and regulated entities. Our summary of the role of federal officials includes attention to the Department of Justice ("DOJ") (whose work with EPA to advance Next Gen and compliance more generally gives rise to horizontal coordination issues), as well as to the interactions of different offices within EPA headquarters and to the role of regional officials, particularly in permitting and enforcement. The role that states play in cooperative federalism systems of governance, such as the regulatory models Congress has used in the major environmental protection statutes, implicates significant issues concerning vertical coordination. Finally, nongovernmental stakeholders, including regulated parties and interested citizens and community organizations, play key roles in contemporary governance; thus, policy design should be based on an assessment of their appropriate roles, too.

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[37] *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004). *Cf.* Philip J. Weiser, *Entrepreneurial Administration*, 97 B.U. L. REV. 2011, 2037 (2017) [hereinafter Weiser, *Entrepreneurial*] (measuring regulatory experiments on basis of effectiveness, legitimacy, and accountability); Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1990 (2015) (arguing that agency adherence to rule of law principles depends on conformity with authorization, notice, justification, coherence, and procedural fairness).

Part IV addresses tools of contemporary governance that are in common use across the administrative state. These include the use of transparency and accountability measures, use of communications technologies (such as electronic reporting), compliance monitoring techniques (including advanced monitoring and third-party monitors), and adoption of norms that make it easier for regulated entities to understand and comply with their responsibilities.[38] Regulatory tools play two roles in our conceptual framework. First, they are strategies an agency may use to carry out its mission (e.g., the use of electronic reporting to achieve improved compliance). Second, they provide metrics that assist in the evaluation of agency performance (e.g., the extent to which rules, permits, and enforcement settlements that have required electronic reporting are likely to facilitate evaluations of regulated entity compliance status).[39] Thus, tools are both a means to an end (better compliance) and a measure of whether the agency is successfully moving toward that end (more effective agency action).

In Part V, we consider the impact of an agency's statutory authority on mechanism choice.[40] In some respects, the relationship between statutory authority and mechanism choice is obvious. If an agency's organic statute does not delegate to it any authority to adopt regulations, then the rulemaking mechanism is not an available choice. Even if an agency has the discretion to use multiple legal mechanisms, certain statutory features may induce the agency to favor some mechanisms over others. Statutory deadlines can similarly force an agency to use a mechanism, such as issuing a regulation. Mechanism choice may be further driven by the applicable procedures (rulemaking may be subject to informal procedures while certain forms of adjudication may be subject to more rigorous trial-type procedures) or by the availability and scope of judicial review for specific actions.[41] The extent to which an agency wishes to apply a

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[38] One of the five elements of Next Gen is regulation and permit design. EPA sometimes refers to this element as "Rules with Compliance Built in." *See* Giles, *NGC*, *supra* note 21, at 22.

[39] EPA, along with other agencies, has long struggled with metrics for itself and the states. It is often difficult to connect regulatory efforts to changes in environmental protection and human health. EPA has therefore used various measures of performance, including the outcomes of its efforts. We are not aware of other efforts to use EPA's five objectives for Next Gen to measure EPA's performance and welcome suggestions about the appropriateness of doing so.

[40] Mechanism choice has been defined as "a kind of social engineering," "the task of designing optimal instruments to achieve social objectives" and, in the area of public law, as "synonymous with 'instrument choice' or policy design." Jonathan B. Wiener & Barak D. Richman, *Mechanism Choice*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 363, 363 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (discussing the legal, policy, and economic implications of mechanism choice).

[41] Although we focus on three foundational mechanisms—regulations, permitting, and adjudicatory enforcement—the dividing lines between mechanisms are not always clear. *See* Engstrom, *Gatekeepers*, *supra* note 30, at 624 (discussing the "blurred boundary between

mandate retroactively may also affect mechanism choice given that retroactive adjudication can face fewer legal obstacles than retroactive rulemaking. In short, since each foundational legal mechanism comes in different shapes and sizes, variations in how a statute structures a particular mechanism may influence how an agency uses it. For example, the lower penalties that the Clean Water Act ("CWA") authorizes for administrative enforcement compared to the higher sanctions available to the government for civil judicial enforcement is one intra-mechanism statutory difference that has the potential to influence agency mechanism choice.[42]

The creation of our five-part conceptual framework to assess the factors that influence mechanism choice by administrative agencies is significant in its own right in providing a template for scholars to assess why agencies administering different regulatory programs have resorted to some legal mechanisms more than others.[43] It should also facilitate critical thinking by those inside and those outside the government about which mechanisms are best suited to use by agencies embarking on new regulatory initiatives, and how best to achieve administrative efficiency, effectiveness, and legitimacy. The largely theoretical framework we elaborate in this Article, coupled with the empirical analysis we provide in our companion piece, offers a foundation for comparable work on mechanism and tool choice in other regulatory contexts with the aim of enhancing the effectiveness of the regulatory state.

II. A CLOSER LOOK AT THE CHOICE OF LEGAL MECHANISMS

This Article explores agency policymaking processes through the lens of the five-part framework described in the introduction above illustrate the value of viewing agency policymaking through this lens, we consider how it can illuminate the likely prospects of Next Gen, which EPA regards as an innovative approach to facilitating compliance and pursuing enforcement.[44] We begin by exploring the legal mechanisms available to

administration and litigation"). EPA's acknowledgement in formulating Next Gen that improving compliance requires close attention to the content of rules ("rules with compliance built in") tangibly reflects the intersection of different mechanisms available to advance agency agendas, Giles, *NGC*, *supra* note 21, at 22.

42 *See* 33 U.S.C. § 1319(a), (g) (2012).

43 The framework's utility is not limited to regulatory programs. It can also enlighten evaluation of public benefit program administration, although our focus here is on compliance with and enforcement of regulatory obligations constraining private conduct.

44 Our analysis also lays the groundwork for additional work to connect use of these tools to the advancement of EPA's larger mission of improving environmental protection. We hope to engage in future empirical work to test whether use of Next Gen tools by EPA and the states in their legal mechanisms is benefitting compliance levels and environmental quality.

agencies to advance their statutory missions and the scope of their discretion to choose among them mechanism.

A. Foundational Mechanisms of the Administrative State

"Black letter" administrative law suggests that agencies have two primary legal mechanisms to accomplish their missions:[45] rulemaking and adjudication.[46] Agency use of these legal authorities to establish binding legal expectations generally takes the form of regulations, which are the product of rulemaking; licensing (or permitting),[47] which may take the form of rulemaking or adjudication; and enforcement actions pursued through judicial or administrative adjudication.[48] Regulations, or legislative rules, "are akin to statutes in that they prospectively set forth a general substantive standard of conduct for a class of private actors."[49] An agency engaged in rulemaking "will function much like a legislature. It will promulgate abstract rules in detail and then expect adjudicative bodies to apply those rules in individual cases."[50]

Adjudication, on the other hand, reflects a different model of lawmaking. "An agency relying on adjudication will function much like a common law court. It will develop a body of case law that allows affected parties to infer general principles from the outcomes of the cases."[51] Enforcement is a form of adjudication.[52] It involves case-by-case application of legal rules through an adjudicatory proceeding involving

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[45] Absent statutory compulsion, agencies always have the option of doing nothing, thereby "leaving a problem to individuals to resolve through market, contract, and tort institutions . . . [Regulation of] private behavior . . . adds to this mix of market, contract, and tort institutions that would otherwise govern the behavior of the affected entities through decentralized decision making by individuals." Andrew P. Morriss et al., *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179, 185–86 (2005). Our study assumes an agency has decided to intervene in the market, requiring it to choose the mechanism for doing so.

[46] WILLIAM F. FUNK & RICHARD H. SEAMON, ADMINISTRATIVE LAW 13 (3d ed. 2009).

[47] The Administrative Procedure Act ("APA") treats permitting as a subset of licensing. 5 U.S.C. § 551(8) (2012).

[48] *See* Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133, 141 (2014) ("Permitting unquestionably is an enormous enterprise of the administrative state.").

[49] Magill, *supra* note 37, at 1386. The Supreme Court has characterized rules as framing "generalized standards," while adjudicatory orders are individualized, case-by-case determinations. NLRB v. Bell Aerospace Co., 416 U.S. 267, 293–94 (1974). Rules "generally have only 'future effect' while adjudications bind parties by retroactively applying law to past actions." Safari Club Int'l v. Zinke, 878 F.3d 316, 333 (D.C. Cir. 2017).

[50] Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. ST. U.L. REV. 529, 530 (2005).

[51] *Id.* at 529–30.

[52] Elizabeth Magill lists enforcement actions, licensing proceedings, and benefit determinations as forms of adjudication. Magill, *supra* note 37, at 1386.

regulated entities alleged to have violated those rules.[53] Permitting is harder to define,[54] partly because agencies sometimes issue permits through both rulemaking and adjudication.[55] Essentially, however, an agency-issued permit allows its recipient to conduct an activity that would otherwise be prohibited by statute or regulation.[56] Permitting has the potential to bolster fundamental legitimizing governance values such as transparency and accountability. It also facilitates enforcement because it "can allow a regulatory agency to know who might be violating the law, what standards regulated parties need to be complying with, and where regulated activities are supposed to be occurring."[57]

An agency may have the option of promoting its policy agenda not only by choosing among these mechanisms, but also by making choices within a mechanism. An agency pursuing adjudicatory enforcement, for example, may have the option to proceed administratively or in court.[58] While the maximum penalties may be higher in court,[59] agencies choosing judicial enforcement lose some control over the matter because DOJ is the lead agency in civil litigation brought by the federal government. Similarly, an agency, in conjunction with DOJ, may have a choice between judicial civil or criminal enforcement.[60] While the penalties for criminal violations are often more severe,[61] and may have a stronger deterrent effect than civil sanctions, the government's burden of proving a criminal violation is more onerous.[62]

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53 "Traditional enforcement requires investigation and prosecution in order to impose sanctions on violators." ROBERT L. GLICKSMAN & RICHARD E. LEVY, ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT 760 (2d ed. 2015). Other mechanisms, such as ratemaking and licensing, and tools such as reporting requirements, can enhance enforcement. *Id.* Regulatory statutes often authorize imposition of criminal and civil sanctions. Agencies may not administer criminal sanctions, so the emphasis here is on civil enforcement which, in EPA's case, may be pursued in court (with the assistance of DOJ) or administratively.

54 *See* Biber & Ruhl, *supra* note 48, at 143 ("Exactly what constitutes a regulatory permit in the administrative state is not self-evident.").

55 For discussion of general permitting by rule, see *id.*, *passim*. According to Biber and Ruhl, the "core feature" of general permits is "issuance of a permit in advance to authorize an activity generally, while retaining the power to withdraw the general approval in specific cases." *Id.* at 140. They regard permits as "hybrid tools," with general permits having the characteristics of rulemaking while specific permits are adjudicatory. However, "it may be quite tricky to identify whether any one permit program is more like rulemaking or more like adjudication." *Id.* at 177.

56 *See id.* at 146.

57 *Id.* at 204.

58 33 U.S.C. § 1319(a)(3) (2012) (CWA provision authorizing EPA to pursue administrative or judicial enforcement).

59 *See, e.g.*, *id.* § 1319(d), (g)(2).

60 *See, e.g.*, *id.* § 1319(b)–(c).

61 *E.g.*, *id.* § 1319(b)(2), (d).

62 For discussion of factors relevant to an agency's choices along both dimensions (administrative vs. judicial and civil vs. criminal) in the environmental context, see generally Jeremy Firestone, *Enforcement of Pollution Laws and Regulations: An Analysis of Forum Choice*,

Agencies have the authority to use mechanisms other than legislative rulemaking, permitting, or enforcement,[63] to advance regulatory goals. These additional options include planning, budgeting,[64] and the use of guidance documents.[65] We focus here, however, on what we regard as three foundational mechanisms of the administrative state—rulemaking, permitting, and enforcement—because EPA has made them the centerpiece of its effort to implement Next Gen,[66] and it has likely done so because, unlike guidance documents, all three create legally binding obligations for the regulated entities whose compliance efforts are the ultimate target of Next Gen.

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27 HARV. ENVTL. L. REV. 105 (2003). The empirical analysis in our companion article reflects EPA's nuanced decisions about how best to use its adjudicatory authorities in implementing Next Gen. *See Agency Mechanism Choice*, *supra* note 20.

63 One option is the issuance of "advance rulings" to supplement case-by-case adjudication, such as Internal Revenue Service Private Letter Rulings, Securities and Exchange Commission No-Action Letters, and Federal Trade Commission Advisory Opinions. Yehonatan Givati, *An Incomplete Contracting Approach to Administrative Law*, 18 AM. L. & ECON. REV. 176, 177 (2016) [hereinafter Givati, *Contracting*]. Many if not all of these would appear to qualify as nonlegislative rules. *See also* David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 923 (1965) [hereinafter Shapiro, *Choice*] (highlighting "less formal alternatives" to rulemaking and adjudication including "veiled threats" of prosecution, advisory opinions, speeches, and press releases).

64 Although planning and budgeting are indispensable elements of governance, we only touch on them briefly here. Planning, budgeting, nonbinding nonlegislative rules, and informal advice may influence use of binding mechanisms. *See* Magill, *supra* note 37, at 1391. For example, policy statements, which are nonlegislative rules, may announce an agency's plans for future enforcement strategies. For discussion of the value of strategic planning and agenda setting, see Phil Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State*, 61 ADMIN. L. REV. 675, 692–97 (2009) [hereinafter Weiser, *FCC Reform*].

65 As noted above, we have chosen to concentrate on the adoption of legislative rules (as well as on permitting and enforcement mechanisms) and to afford little attention to guidance documents such as nonlegislative rules. *See supra* note 16. A significant amount of literature addresses agencies' use of guidance documents rather than legislative rules. *See e.g.*, David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276 (2010); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 ADMIN. L. REV. 547 (2000); Magill, *supra* note 37, at 1386; Roberta Romano, *Does Agency Structure Affect Agency Decisionmaking? Implications of the CFPB's Design for Administrative Governance* (Yale L. & Econ. Res. Paper No. 589, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3096356 (comparing use of legislative and nonlegislative rules by four agencies and concluding that at least one independent agency, the Consumer Financial Protection Bureau, uses notice-and-comment rulemaking less frequently than other agencies). The Trump administration has sought to limit the use of allegedly burdensome guidance documents. *See* Robert Pear, *Administration Imposes Sweeping Limits on Federal Actions Against Companies*, N.Y. TIMES (Feb. 10, 2018), https://www.nytimes.com/2018/02/10/us/politics/legal-violations-federal-rules.html (describing the imposition of new limits on agency use of guidance documents); Charlie Savage, *Justice Dept. Revokes 25 Legal Guidance Documents Dating to 1975*, N.Y. TIMES (Dec. 21, 2017), https://www.nytimes.com/2017/12/21/us/politics/justice-dept-guidance-documents.html?_r=0.

66 *See Agency Mechanism Choice*, *supra* note 20 (discussing EPA's Compendia listing Next Gen achievements).

B. Legal Constraints on Agency Mechanism Choice

Many factors bear on an agency's choice of the mechanisms with which to pursue its goals. For instance, constitutional separation of powers principles can constrain agencies' use of particular mechanisms.[67] The Constitution's federalism provisions also may limit agency authority to regulate in a particular area,[68] and its individual rights provisions may dictate the procedures an agency must use if it chooses a particular mechanism.[69] Separation of powers concerns may also influence judicial review,[70] with obvious implications for agency mechanism choices.

Beyond constitutional constraints, an agency may use a mechanism to advance policy objectives only if Congress has empowered it to do so. Agencies have no inherent authority. The extent to which an agency may use rulemaking or adjudication, for example, depends on whether Congress has authorized it to use both procedures and afforded it the discretion to choose between the two in a particular context.[71] An agency can only pursue administrative enforcement of the components of its regulatory program if its organic statute allows it to do so. Further, Congress has established parameters or conditions for agency use of policymaking mechanisms, such as with the degree of formality in agency procedures.[72]

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[67] The nondelegation doctrine is unlikely to impose significant constraints on congressional delegation of rulemaking authority to agencies, *see, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001), but courts have interpreted statutes narrowly to avoid nondelegation concerns. *See* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980). Such narrowing interpretations may make rulemaking unavailable in a particular context. Article III and the Seventh Amendment may constrain congressional delegations of adjudicatory authority to agencies. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986) (Article III); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) (Seventh Amendment); Tenn. Valley Auth. v. Whitman, 336 F.3d 1236 (11th Cir. 2003) (concerning EPA's power to issue administrative compliance orders).

[68] *E.g.*, Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 160–61 (2001) (construing the CWA narrowly to avoid addressing whether regulation exceeded Commerce Clause authority).

[69] *E.g.*, Matthews v. Eldridge, 424 U.S. 319, 332 (1976) (discussing procedural due process constraints).

[70] Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he law of Art. III standing is built on a single idea—the idea of separation of powers."); Christopher Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1555 (2014) (arguing that "the agency-court relationship plays out against the backdrop of separation of powers principles"). *See also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992) (discussing constraints on private access to the courts to enforce the law that are derived from Article II's Take Care Clause).

[71] Erica Seiguer & John J. Smith, *Perception and Process at the Food and Drug Administration: Obligations and Trade-Offs in Rules and Guidances,* 60 FOOD & DRUG L.J. 17, 22 (2005) (noting that if a statute directs an agency to issue a rule, "only rulemaking can be considered").

[72] The APA prescribes procedures for both formal and informal rulemaking and for formal adjudication. 5 U.S.C. §§ 553–554, 556–557 (2012). *See* Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534 (9th Cir. 1993) (applying the APA's prohibition on ex parte

C. Judicial Treatment of Discretionary Mechanism Choice

Courts have grappled with issues concerning both the extent to which Congress empowered an agency to use a particular mechanism in a particular setting[73] and the nature of the procedures Congress directed an agency to use in employing a particular mechanism. Traditionally, courts have been reluctant to second guess agency mechanism choices. For example, the Supreme Court in *Chenery II*,[74] recognized broad agency discretion to choose between rulemaking and adjudication to implement policy.[75] Similarly, the Court declared in *Bell Aerospace* that, in pursuing chosen policies, "the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion."[76] Subsequent decisions track that logic.[77]

Moreover, courts are not free to impose procedures beyond those required by statute or agency regulations that may bear on an agency's choice of mechanism. *Vermont Yankee* held that the APA establishes the "maximum procedural requirements" that courts may impose upon

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communications in formal adjudication); Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098, 1104 (4th Cir. 1985) (construing notice requirements under § 553(b) of the APA). *See generally* Emily S. Bremer & Sharon B. Jacobs, *Agency Innovation in Vermont Yankee's White Space*, 32 J. LAND USE & ENVTL. L. 523 (2017) (discussing sources of procedural constraints on agency discretion).

[73] *See, e.g.*, Heckler v. Campbell, 461 U.S. 458, 467 (1983) (holding that an agency could use rulemaking to narrow issues to be resolved during subsequent adjudications).

[74] SEC v. Chenery Corp., 332 U.S. 194 (1947).

[75] *Id.* at 202–03; *see also* Rachlinski, *supra* note 50, at 530, 532; Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 508 (1970) ("[I]t has been accepted that the choice of procedures is . . . one primarily for the agency itself to make.").

[76] NLRB v. Bell Aerospace Co., Div. of Textron, Inc., 416 U.S. 267, 294 (1974).

[77] *See, e.g.*, Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 96 (1995) ("The APA does not require that all the specific applications of a rule evolve by further, more precise rules rather than by adjudication."); Safari Club Int'l v. Zinke, 878 F.3d 316, 331–32 (D.C. Cir. 2017) (recognizing agencies' broad discretion to choose between rulemaking and adjudication); Chisholm v. FCC, 538 F.3d 349, 364–65 (D.C. Cir. 1976) (upholding use of adjudication instead of rulemaking to reverse prior policy). *But cf*. Nestle Dreyer's Ice Cream Co. v. NLRB, 821 F.3d 489, 501 (4th Cir. 2016) ("[C]ourts have sometimes found the choice of adjudication inappropriate where an agency purports to establish a new rule of widespread application."); Chamber of Commerce of U.S. v. NLRB, 721 F.3d 152 (4th Cir. 2013) (narrowly construing the NLRB's rulemaking authority). A challenge to an agency's choice of procedural mechanism is subject to review to determine whether the action was "without observance of procedures required by law." 5 U.S.C. § 706(2)(D) (2012). That standard tends to be deferential. *See, e.g.*,

Meister v. U.S. Dept. of Agric., 623 F.3d 363, 371 (6th Cir. 2010) (stating that "even in cases arising under § 706(2)(D), the arbitrary and capricious test frequently governs"). Judicial hackles are most likely to be raised when an agency reverses a previous policy retroactively in an adjudicatory enforcement action. *See, e.g.*, PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 113 (D.C. Cir. 2018) (Tatel, J., concurring); Retail, Wholesale & Dep't Store Union, AFL-CIO v. NLRB, 466 F.2d 380 (D.C. Cir. 1972).

agencies engaged in rulemaking."[78] More recently, in *Perez v. Mortgage Bankers Association*,[79] the Court held that courts cannot require an agency to use notice and comment rulemaking when it revises an interpretive rule.[80] Similarly, courts may not alter the prescribed standard of judicial review in ways that might lessen deference, increase the chances for reversal, or induce agencies to avoid affected mechanisms. In *Fox Television*,[81] for example, the Court opined that the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness."[82]

Some scholars have argued that judicial influence on mechanism choice is, however, more important than it initially appears. For instance, Dean Elizabeth Magill finds that even though courts have little power to direct agencies to use one mechanism instead of another, they have considerable ability to affect the consequences of mechanism choice through application of threshold justiciability doctrines, identification and application of standards of review,[83] and definition of mechanism-specific procedures (such as whether to interpret an agency's organic statute to trigger formal APA adjudication or not).[84] In addition, courts may have the power to determine whether an agency action has binding effect (for example, by deciding whether a rule is legislative or nonlegislative),[85] or by determining whether an order issued in an adjudication has purely prospective or retroactive effect.[86] Thus, Magill posits, "courts in fact review [mechanism] choices, but they do so in a roundabout way."[87]

Notwithstanding this kind of judicial influence, the case law continues to suggest that agencies have considerable room to choose among available mechanisms in pursuing policy objectives. The relatively weak check on foundational administrative values such as transparency, accountability, and participation that judicial review of mechanism

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78 Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 524 (1978).

79 135 S. Ct. 1199 (2015).

80 *Id.* at 1206.

81 FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).

82 *Id.* at 513.

83 Magill characterizes statutory standards of review as "open-ended enough to permit judicial creativity in their interpretation." Magill, *supra* note 37, at 1427.

84 Even in this context, however, courts sometimes defer to an agency's interpretation of organic statute language that governs whether formal procedures apply. *See, e.g.*, Chemical Waste Mgmt. v. EPA, 873 F.3d 1477 (D.C. Cir. 1989).

85 Magill, *supra* note 37, at 1434–35.

86 *Id.* at 1435.

87 *Id.* at 1385; *see also id.* (referring to "judicial freedom to design the elements of an agency's procedural form").

choice provides makes it all the more important to understand why agencies choose among available legal mechanisms and to structure regulatory regimes ex ante in ways that increase the chance that agencies will make appropriate choices.

D. The Factors that Influence Discretionary Mechanism Choice

Assuming that Congress has afforded an agency discretion to use multiple mechanisms in a particular regulatory context, it behooves the agency to consider carefully which mechanism, or combination of mechanisms, is most likely to advance its goals effectively.[88] An agency often has considerable flexibility in choosing which of the available mechanisms will achieve its goals in a particular context and in deciding how to employ the chosen mechanism.[89] Determining how agencies make those choices is no easy matter. According to Jonathan Wiener and Barak Richman, "standard positive theories [including public choice, political economy, or positive politics] are insufficient to explain the observed policy choices; more complex models and empirical research are needed across diverse institutional settings."[90] This article and its companion are an effort to provide just such a model and to offer empirical insights based on one case study into the comparative value of key procedural mechanisms in promoting regulatory policies.

1. Three Key Considerations in Agency Mechanism Choice

Several factors are relevant to agency mechanism choice and its effects on policy formulation. As Magill has noted, these include "the procedure the agency must follow, the legal effects of the agency's action [e.g., whether it binds private parties], and the availability and intensity of judicial examination of the agency's action if it is challenged in court."[91] Procedural requirements are important because they affect fundamental

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[88] *See, e.g.*, Magill, *supra* note 37, at 1384 (discussing the Securities and Exchange Commission's ("SEC") choice among legislative rules, administrative adjudication, judicial enforcement, or guidance to address alleged violations of the securities laws).

[89] *See. e.g.*, Biber & Ruhl, *supra* note 48, *passim* (analyzing the flexibility agencies may have in permitting, including discretion to issue permits by rule or on a case-by-case basis); Bremer & Jacobs, *supra* note 72, at 526 (discussing relationships between procedural choices and values such as transparency, public participation, and efficiency).

[90] Jonathan B. Wiener & Barak D. Richman, *Mechanism Choice*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 363, 363 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

[91] Magill, *supra* note 37, at 1390; *see also id*. at 1396.

legitimacy values such as transparency, accountability, participation, efficiency, and effectiveness.[92]

Further, even when an agency has discretion to choose among two or more mechanisms, its authority to dictate the procedures that govern the use of those mechanisms may be limited.[93] If an agency's organic statute requires it to follow the APA's formal rulemaking procedures, it may not avoid doing so when it chooses to promulgate legislative regulations.[94] Formal rulemaking is, however, relatively rare because few statutes require it and agencies usually prefer to avoid its strictures.[95] When formal procedures do not apply, the APA's requirements for notice and comment rulemaking typically do. Although these procedures are less time-consuming than trial-type formal rulemaking,[96] they have become more rigorous (some call it ossified) over time as a result of both judicial review[97] and executive and congressionally-created regulatory impact analysis requirements, such as preparation of a cost-benefit analysis, for significant regulations.[98] Before joining the Supreme Court, Antonin Scalia, surveying these changes, opined that "the procedural advantages

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92 The Court's due process precedents reflect that legitimacy concerns may have a constitutional dimension. *See, e.g.*, Matthews v. Eldridge, 424 U.S. 319 (1976).

93 Magill, *supra* note 37, at 1443.

94 It may choose to adopt nonbinding nonlegislative rules, such as interpretative rules, instead of legislative rules, however. Nonlegislative rules are exempt from even APA informal notice and comment rulemaking procedures. 5 U.S.C. § 553(b)(A) (2012).

95 Stuart Shapiro, *Agency Oversight As "Whac-A-Mole": The Challenge of Restricting Agency Use of Nonlegislative Rules*, 37 HARV. J.L. & PUB. POL'Y 523, 523 (2014) [hereinafter Shapiro, *Whac-A-Mole*] (noting that agencies have "largely abandoned" formal rulemaking because "[i]t is extremely burdensome").

96 *But cf.* Magill, *supra* note 37, at 1390–91 (characterizing informal rulemaking as "a labor-intensive enterprise").

97 *See, e.g.*, Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493 (2012); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 Tex. L. Rev. 525 (1997); Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 165 (2000). *Compare* William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393 (2000) (questioning the link between arbitrary and capricious review and rulemaking ossification based on study of forty years of Department of Interior regulations), *with* Rachlinski, *supra* note 50, at 531 (stating that "frustration with the slow pace of the rulemaking process ultimately led the SEC to rely increasingly on an adjudicative approach").

98 *See* Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1430 (2012) (contending that the contribution of presidential oversight of rulemaking by the Office of Management and Budget's Office of Information and Regulatory Affairs ("OIRA") "is straightforward"); *see also* Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1468 (1992) (referring to regulatory impact analysis as an "encrustation" on informal rulemaking).

of rulemaking for the agency itself are headed for extinction."[99] Not surprisingly, the changes have informed agency mechanism choice, such as by inducing agencies to substitute guidance documents for legislative rules.[100]

The decision to use adjudication has similar practical implications. When an agency's organic statute triggers Administrative Procedure Act ("APA") formal adjudication, a proceeding that resembles a judicial trial occurs. Formal adjudication entitles parties to "extensive participation rights, including many of the trappings of adversarial judicial process."[101] If an agency's organic statute does not trigger formal adjudication,[102] the procedures that apply to its adjudications are governed by the organic statute, agency regulations, and, in limited instances, the Due Process Clause. These non-APA adjudications range from almost no process to procedures analogous to APA formal adjudication. Agencies required to conduct formal adjudication may prefer mechanisms that impose less onerous procedural burdens on them.

Magill's second factor is the impact of the agency action. This factor is relevant when an agency committed to rulemaking decides whether to adopt legislative rules, which are binding, or nonlegislative rules, which are not.[103] In some contexts, the rapid pace of scientific, technical, or other forms of knowledge may make nonlegislative rules, such as guidance documents, the best option for providing information to assist industry in understanding and complying with regulatory requirements.[104] This factor is not as salient when the agency chooses among legislative rules, permits, and administrative compliance orders, all of which are binding on regulated parties.[105] Even here, however, the binding nature of the mechanism may matter. Legislative rules, for example, typically apply to

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99 Antonin Scalia, *Back to Basics: Making Law Without Making Rules*, REGULATION 25 (July/Aug. 1981), *available at* http://www.aei.org/publication/back-to-basics-making-law-without-making-rules.

100 *See* Nina A. Mendelson & Jonathan B. Wiener, *Responding to Agency Avoidance of OIRA*, 37 HARV. J.L. & PUB. POL'Y 447, 486 (2014); Rakoff, *supra* note 97, at 166.

101 Magill, *supra* note 37, at 1391.

102 5 U.S.C. § 554(a) (2012) (establishing the trigger for formal adjudication).

103 Shapiro, *"Whac-A-Mole*," *supra* note 95, at 531 ("The supposed largest advantage of informal rulemaking over nonlegislative rules is that, once promulgated, legislative rules have the force of law.").

104 Seiguer & Smith, *supra* note 71, at 23.

105 The dynamic character of the regulatory context may affect mechanism choice. An agency might want to use a permit or enforcement proceeding, rather than a rule, in a fast-changing world because it may be easier to modify either of the former. The likelihood that policy preferences will change rapidly also may incline an agency to proceed on an ad hoc rather than on a comprehensive basis.

a broad range of regulated entities, while adjudications only bind the parties to the adjudication.[106]

The third factor Magill deems relevant to mechanism choice is judicial review. Both the availability of review and the standard of review applicable to the end products of different mechanisms may influence agencies' incentives to choose one mechanism over another to advance their objectives. For example, litigants may be able to challenge legislative rules at the "pre-enforcement" stage, before the agency has initiated an enforcement action,[107] but policies adopted in an adjudication are subject to challenge only upon issuance of a final order.[108] The identity of the litigants may vary depending on the mechanism as well. In addition, mechanism choice may affect the standard of review.[109] For example, the standard that applies to agency factual determinations in a formal adjudication is the substantial evidence test, whereas the arbitrary and capricious test, which traditionally was regarded as more deferential, applies to fact finding in informal rulemaking.[110] Relatedly, others have reasoned that it is more difficult and less likely for courts to review the policy merits of a collective set series of adjudications than in the context of a single rulemaking.[111]

The availability and scope of judicial review may also influence choices within a mechanism. Legislative rules are reviewable upon issuance, but at least one court has taken the position that policy statements, a form of nonlegislative rule, are not reviewable final agency

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[106] *See, e.g.*, Ralph F. Fuchs, *Agency Development of Policy Through Rule-Making*, 59 NW. U.L. REV. 781, 789 (1965) ("Economy of time and effort is obtained by covering an entire category of situations in a single rule-making proceeding."); Robinson, *supra* note 75, at 516 ("Rulemaking may be very efficient in eliminating the burden of individual case-by-case adjudications."). Agencies may adopt new policies in an adjudication, however, which they may then apply in subsequent adjudications without rehashing the policy's appropriateness. *See* POM Wonderful, LLC v. FTC, 777 F.3d 478, 497 (D.C. Cir. 2015) (quoting Conf. Grp., LLC v. FCC, 720 F.3d 957, 966 (D.C. Cir 2013) ("The 'fact that an order rendered in an adjudication may affect agency policy and have general prospective application does not make it a rulemaking subject to APA section 553 notice and comment.'"); *Conf. Grp.*, 720 F.3d at 958, 965 (concluding that an informal adjudicatory order providing that "all 'similarly situated' [telecommunications] providers" would be treated in the same way as the defendant in that adjudication did not convert the adjudication into a rulemaking because "[w]ithout the phrase, the precedential effect of the order would be the same[]").

[107] *See, e.g.*, Abbott Labs. v. Gardner, 387 U.S. 136 (1967). Some statutes require challenges to be brought within a specified time after a rule's enactment. Absent such a challenge, a regulated party may not challenge the validity of the rule as a defense. *See* 42 U.S.C. § 7607(b)(1)–(2) (2012).

[108] Magill, *supra* note 37, at 1395.

[109] *Id.*; *see also* Rachlinski, *supra* note 50, at 531 ("The agency will be primarily concerned with choosing a policymaking method that will allow it to be efficient and yet survive judicial review.").

[110] 5 U.S.C. § 706(2)(A), (E) (2012).

[111] *See* Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J.L. ECON. & ORG. 349, 360–61 (1999).

action.[112] If the agency wants to delay judicial challenges, therefore, it may prefer to adopt a nonlegislative rule. Conversely, courts afford more deference to agency statutory interpretations rendered in the course of adopting a legislative rule than in a nonlegislative rule,[113] which may cut in favor of adopting a legislative rule if the agency is concerned that its interpretation may be vulnerable.[114]

2. The Choice Between Rulemaking and Adjudication

The manner in which agencies must balance these and other factors in making mechanism choices has probably been most extensively explored in judicial and scholarly evaluation of the choice between rulemaking and adjudication. The D.C. Circuit addressed this choice in a 1973 decision in which it held that the Federal Trade Commission ("FTC") has authority to define unfair practices by adopting substantive legislative rules rather than being required to do so in the context of case-by-case adjudicatory enforcement.[115] The court identified several advantages of rules over case-by-case adjudication: rulemaking can be a cost-effective way to resolve recurring policy issues in a comprehensive way; it allows for broad public input from affected interests;[116] and it affords uniform treatment to regulated entities by subjecting them to new obligations at the same time, rather than putting the defendants in early adjudications at a disadvantage.[117] Agencies can reduce unintended or undesirable consequences of applying an across-the-board rule by allowing individual entities to seek an exception to or waiver of the requirement based on hardship, fairness, or other grounds.[118]

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112 Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 253 (D.C. Cir. 2014); *cf.* Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta, 785 F.3d 710, 716–17 (D.C. Cir. 2015) (holding that whether agency notice was a policy statement or an interpretive rule, it was not reviewable final agency action because it was not binding).

113 *See* Hagans v. Comm'r of Social Sec., 694 F.3d 287 (3d Cir. 2012); GLICKSMAN & LEVY, *supra* note 53, at 663–64 (comparing degree of deference afforded agency interpretations of ambiguous statutes rendered in adopting legislative and nonlegislative rules).

114 *See* Shapiro, *Whac-A-Mole*, *supra* note 95, at 527 (contending that agencies may adopt legislative rules to establish policies likely to receive judicial deference).

115 Nat'l Petroleum Refiners Ass'n v. Fed. Trade Comm'n, 482 F.2d 672 (D.C. Cir. 1973).

116 *See also* Shapiro, *Choice*, *supra* note 63, at 930 (noting that agencies must allow "general participation in the deliberative process by all those who may be affected by the rule, while no such opportunity is afforded in adjudication[]").

117 *See Nat'l Petroleum Refiners Ass'n*, 482 F.2d at 681–90; *see also* Shapiro, *Choice*, *supra* note 63, at 935 ("[A] rulemaking proceeding operates evenhandedly to bar that practice on the part of all, while an order directed to only one permits his competitors to gain an unfair advantage.").

118 *See* Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729, 758 (1961) ("A principal advantage of the *ad hoc* approach [reflected in adjudication] is that it permits consideration of, and adjustment for, the individual differences and factors found in particular cases."). For discussion of the grounds upon which agencies may be

Professor Richard Pierce has also catalogued the benefits of rulemaking over adjudication, some of which may enhance the policymaking process even if they are not important motivators for the agency itself.[119] Pierce lists the following benefits:

> (1) rules provide a valuable source of decisional standards and constraints on agency discretion;[120] (2) rules enhance efficiency by simplifying and expediting agency enforcement efforts;[121] (3) rules enhance fairness by providing affected members of the public easily accessible, clear notice of the demarcation between permissible and impermissible conduct and by insuring like treatment of similarly situated individuals and firms; (4) rulemaking enhances the quality of agency policy decisions because it focuses on the broad effects of alternative rules and invites participation by all potentially affected groups and individuals; (5) rulemaking enhances efficiency by allowing an agency to resolve recurring issues of legislative fact once instead of relitigating such issues in numerous cases; (6) rulemaking enhances fairness by allowing all potentially affected members of the public to participate in the decision-making process that determines the rules that apply to their conduct; and (7) rulemaking enhances the political accountability and legitimacy of agency policy making by providing the general public, the President, and members of Congress advance notice of an agency's intent to make major policy decisions and an opportunity to influence the policies ultimately chosen by the agency.[122]

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willing to grant exceptions or deadline extensions, see Robert L. Glicksman & Sidney A. Shapiro, *Improving Regulation Through Incremental Adjustment*, 52 U. KAN. L. REV. 1179, 1188–200 (2004).

[119] Morriss et al., *supra* note 45, at 210–11 ("According to . . . public choice theory, the regulatory choice is made based on the costs and benefits to the regulator rather than based on some aggregated social welfare calculation.").

[120] *Cf.* Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 590 (1970) ("The principal advantage of rulemaking is that it provides a clear articulation of broad agency policy.").

[121] Todd Rakoff concludes that agencies shifted from formal adjudication to rulemaking as a policymaking vehicle in the 1960s because reliance on adjudication was costly, yielded uncertainty and inconsistency, and was not well suited to the establishment in areas such as environmental protection of "generally applicable standards" with precise contours. Rakoff, *supra* note 97, at 163.

[122] Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 189 (1996); *see also* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.8, at 496–501 (5th ed. 2010); Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 38 ADMIN. & REG. L. NEWS 15, 15–16 (2013) (arguing that EPA's pursuit of policy through adjudicatory permitting decisions is more insulated from presidential review than rulemaking); Shapiro, *Whac-A-Mole*, *supra* note 95, at 527 (suggesting that the difficulty of overseeing case-by-case enforcement "led to the demand for rulemaking in the first place"). Professor Jeffrey Rachlinski argues that "environmental law might well present the paradigmatic case to illustrate the advantages

Some of these advantages echo the benefits identified in the FTC case, such as the higher quality that results from information provided by rulemaking participants[123] and the greater efficiency rulemaking yields through general rules that can be applied without a series of adjudications.[124] Rulemaking may also be preferable because of the greater clarity that rules tend to provide,[125] and the greater control of the policymaking agenda that rulemaking tends to afford an agency compared with iterative adjudications.[126]

Notwithstanding these benefits, adjudication is sometimes better suited to a particular regulatory task. In the *Chenery* case, decided shortly after the APA's enactment, the Supreme Court noted that "[n]ot every principle essential to the effective administration can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations."[127] The Court identified several situations in which policymaking through adjudication may be preferable:

> [P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is

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of a rulemaking approach." Rachlinski, *supra* note 50, at 550. Rulemaking allows systematic analysis of complex scientific information and is likely to better highlight policy tradeoffs than when an agency addresses a specific question in an adjudication and is better suited to reaching efficient and effective results rather than allocating blame. *Id.* at 550–51.

123 *See, e.g.*, Peck, *supra* note 118, at 756–57 (arguing that input received in rulemaking may help identify defects in proposed rules and avoid unforeseen and undesirable consequences).

124 *See* Tiller & Spiller, *supra* note 111, at 359 (arguing that rulemaking is "an efficient policy-making mechanism" because it has "wide impact, while economizing on agency time and resources"); Morriss et al., *supra* note 45, at 230 (rulemaking offers a lower cost per regulated entity than case-specific enforcement).

125 *See* Shapiro, *Choice*, *supra* note 63, at 940–41 (arguing that rulemaking tends to be more accessible in light of the number of parties allowed to participate in adjudication); Robinson, *supra* note 75, at 526 (claiming that rulemaking may enhance clarity and transparency).

126 *See* Bernstein, *supra* note 120, at 588; Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 406 (1981) ("A system of policymaking by adjudication, especially one that relies heavily on private initiation, delegates to a wide constituency the task of identifying policy questions."). Rulemaking may also benefit those outside the agency, such as interests lacking the resources to participate in multiple adjudicatory policymaking processes. *Id.* at 432.

127 SEC v. Chenery Corp., 332 U.S. 194, 202 (1947). *See also* GLICKSMAN & LEVY, *supra* note 53, at 408 (referring to the flexibility benefits of adjudication).

> to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.[128]

If, for example, as *Chenery* suggests, an agency were unsure of the value of e-reporting (one of the central tools of EPA's Next Gen initiative) or what the scope of its application should be, it might prefer to impose these reporting requirements in individual permits or through an enforcement settlement, and then track the results before deciding whether to use this tool more broadly. As some observers have observed, the use of adjudication "grounds the agency's decision-making in empirical reality."[129] As *Chenery* recognizes, however, the choice between rulemaking and adjudication is not a one-time decision. As case-by-case adjudication reduces uncertainty about the effects of regulation, rulemaking may become a more attractive policymaking mechanism.[130]

Nevertheless, even if agencies have the knowledge and experience to adopt rules, they may choose not to do so because rules may inadvertently facilitate "evasion of the basic statutory objectives,"[131] as when rulemaking will take too long and defer the benefits of the new policy.[132] Adjudication can also provide greater flexibility to alter an agency's position, as courts may be more willing to create exceptions to administrative *stare decisis* than to depart from the requirements of a

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[128] *Chenery*, 332 U.S. at 202–03; *see also* Fuchs, *supra* note 106, at 790. One author has suggested resort to multi-stage "experimental rules" rather than adjudication in the face of the kinds of uncertainties identified in *Chenery*. *See* Zachary J. Gubler, *Experimental Rules*, 55 B.C. L. REV. 129 (2014).

[129] Philip J. Weiser, *The Future of Internet Regulation*, 43 U.C. DAVIS L. REV. 529, 589 (2009); *see also* Weiser, *FCC Reform*, *supra* note 64, at 702 ("The weakness of [the rulemaking] process is that it does not provide the agency with an effective avenue for developing an empirical basis for and understanding of the issues involved in a regulatory policy domain."); Rachlinski, *supra* note 50, at 531 ("[A]n agency that believes that it cannot easily predict the problems it will encounter might choose to proceed by adjudication."). *Cf.* Yehonatan Givati, *Game Theory and the Structure of Administrative Law*, 81 U. CHI. L. REV. 481, 498 (2014) [hereinafter Givati, *Game Theory*] (suggesting that adjudication allows an agency to defer policy application until it has more information about individual firm circumstances and "to harness information that [it] currently lack[s] but that firms have in order to narrowly tailor the policy to each firm's circumstances").

[130] Weiser, *FCC Reform*, *supra* note 64, at 703–04 ("[R]ulemakings need not be viewed as a binary alternative to the use of adjudication, but can actually follow from and be informed by adjudication."); *see also* Peck, *supra* note 118, at 756 (arguing that the NLRB's need to formulate policy through adjudication "appears to vanish after . . . years of experiment and experience with a problem" as it "accumulate[s] a wealth of basic data upon which broad principles and general rules could be formulated with a certainty that formerly was lacking.").

[131] Shapiro, *Choice*, *supra* note 63, at 928.

[132] *See* GLICKSMAN & LEVY, *supra* note 53, at 408 (discussing the "immediacy" benefits of adjudication).

legislative rule.[133] The use of adjudication may further enhance an agency's leverage in dealing with regulated entities as a result of its ability to threaten large financial losses to uncooperative regulated entities and to extract resources as part of a settlement.[134] The nature of the evidence relevant to policy formulation may also favor adjudication; for example, "in some cases testimonial proof and cross-examination can serve a more valuable function in testing forecasts and generalized conclusions underlying future policy planning than in making findings concerning specific past events."[135] Finally, the difficulty of applying rules retroactively, and the potential unfairness in doing so, may favor the use of adjudication.[136] The Supreme Court allows retroactive rulemaking only if there is clear evidence of Congress's intent to vest that power in agencies. A general grant of rulemaking authority will not suffice.[137]

3. A Summary of Factors Typically Thought to Bear on Agency Mechanism Choice

Given the different considerations that make alternative legal mechanisms more or less attractive to an agency, how do agencies actually choose among available mechanisms in a particular setting? Agencies often must make tradeoffs in choosing among alternatives with different upsides and downsides.[138] Based on the foregoing discussion, tables 1 and 2 list some of the more significant advantages of rulemaking and adjudication (whether in the form of permitting or enforcement) from an agency perspective.[139]

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133 *See* Shapiro, *Choice*, *supra* note 63, at 947 ("[A]gencies appear to be freer to disregard their own prior decisions than they are to depart from their regulations.").

134 Morriss et al., *supra* note 45, at 230–31. An enforcement-centered approach can also offer agencies the opportunity to separate industry alliances, as some firms may look favorably on enforcement against their competitors, and it may allow regulators to limit input by non-parties who might wish to weigh in. *Id.* at 230–32.

135 Robinson, *supra* note 75, at 522; *see also* GLICKSMAN & LEVY, *supra* note 53, at 408 (arguing that reliance on oral testimony and cross-examination "may be necessary and appropriate for resolving some issues, particularly issues of judicial fact").

136 Fuchs, *supra* note 106, at 793 (While adjudication "usually operates retroactively," rulemaking "ordinarily takes effect only as of its date.").

137 Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

138 *See, e.g.*, Perez v. Mort. Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015) (noting that issuance of an interpretive rule is "comparatively easier for agencies than issuing legislative rules," "[b]ut that convenience comes at a price" in terms of lacking "the force and effect of law" and diminished judicial deference).

139 These lists are drawn from the discussion above and the sources cited in it. Others have tallied the relative advantages and disadvantages of rulemaking and adjudication differently. *See, e.g.*, Richard K. Berg, *Re-examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149, 163–64 (1986); Arthur Earl Bonfield, *State Administrative Policy Formulation and the Choice of Lawmaking Methodology*, 42 ADMIN. L. REV. 121, 123–36

Table 1. Rulemaking Advantages

Cost-effectiveness in adoption and enforcement
Access to broad public input, which increases quality of agency decision-making
Ability of all affected interests to participate, which enhances fairness
Systematic analysis
Uniformity
Public accessibility
Clarity
Enhanced accountability and legitimacy
Agenda control
Ability to consider interests of regulatory beneficiaries

Table 2. Adjudication Advantages

Enhancement of ability to develop policy despite unforeseeability, uncertainty, or lack of experience
Ability to experiment with limited adverse consequences
Responsiveness to specialized problems
Reliance on testimonial evidence and cross-examination
Prospective flexibility
Speed
Limits on interest group influence
Increased agency bargaining leverage
Greater ability to apply new policy retroactively

Scholars have sought to identify how agencies do or should balance these competing considerations in choosing which mechanisms to use, both generally and in specific contexts. Professor Jeffrey Rachlinski identifies potential disadvantages of both adjudication and rulemaking as policymaking vehicles. Adjudication's single-case perspective may blind an agency to broader policy implications and pose the risk that atypical details raised by a single case, or emotional reactions to individual litigants' circumstances, may inappropriately influence decisional outcomes.[140] A different set of problems accompanies the choice of

(1990); Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. 1469, 1473–77 (2015).

[140] Rachlinski, *supra* note 50, at 539–45; *see also* Bernstein, *supra* note 120, at 588 ("A distorted emphasis upon the dominant factors in particular cases which have been decided tends to stunt the growth of balanced and flexible doctrine."). *But cf.* Diver, *supra* note 126, at 430 (arguing that

rulemaking. Its one-time agency response to an issue may forego learning opportunities provided by sequential adjudications and impair the ability to identify sensible categories from the adjudicatory record. Agencies' lack of awareness of the limits of their knowledge may also result in overconfidence in policy judgments and the lack of "emotional content" in rulemaking may deprive agencies of "useful cues to good decision-making."[141]

Professors Eric Biber and J.B. Ruhl have addressed mechanism choice in a more particularized setting—the choice between general permitting, which often takes the form of rulemaking, and specific permitting, which is adjudicatory in nature. They argue that the choice is primarily affected by "the risk of harm the permitted activity poses, and the level of burden the transaction costs of a general-or specific-permitting program impose on the regulated parties and the agency."[142] As the risk of harm increases, specific permit requirements become more attractive, while high transaction costs favor general permitting.[143] In addition, agencies may prefer general permitting because individualized permitting tends to receive more rigorous judicial review.[144] Biber and Ruhl list three factors favoring general permits: (1) reduced information-gathering costs for regulated parties and the public as to the content of regulatory standards; (2) greater efficiency when future decision-making issues are more likely to have common features; and (3) greater predictability for regulated parties.[145] However, "general permits may be less likely to produce useful information about how a regulatory program is functioning and may provide fewer opportunities for public participation."[146] Thus, they suggest, study of an agency's choice between general and specific permitting highlights "the need to take a careful, context-dependent approach in thinking about rulemaking versus adjudication in agency practice."[147]

In an effort to understand the factors that influence agency mechanism choice, some scholars have recognized and explored the relationship

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adjudicatory incrementalism better "accommodate[s] uncertainty and diversity" and "creates a quasi-market for [the] serial reconciliation" of conflicting values).

141 Rachlinski, *supra* note 50, at 546.

142 Biber & Ruhl, *supra* note 48, at 178; *see also id.* at 190–91 ("By definition, more specific permits allow for more tailoring of the permit to the specific circumstances of the applicant, the particular activity being approved, or the particular location of the regulated activity.").

143 *Id.* at 217 (General permits are likely to be superior to specific permits in managing environmental harms from accumulation of many individual activities).

144 *Id.* at 206.

145 *Id.* at 211.

146 *Id.* at 211; *see also id.* at 213, tbl. 3 (summarizing factors relevant to the choice between the two forms of permitting).

147 *Id.* at 212.

between that choice and the identity and roles of actors implicated in the implementation of regulatory programs. One scholar, for example, has urged agencies to choose rulemaking if regulated firms are relatively homogenous but to choose licensing-type adjudication for heterogeneous industries, especially when the social cost of preapproval procedures such as licensing is high.[148]

According to Professors Magill and Vermeule, the allocation of decision-making authority within agencies, and the professional training of those authorized to make mechanism choices, may also influence the choice between rulemaking and adjudication. Agencies whose culture is more lawyer-dominated may be inclined to engage in ex post enforcement and case-specific policy elaboration. Agencies whose culture is more dominated by scientists, economists, or other nonlawyer professionals may tend to favor ex ante rulemaking.[149] This hypothesis supports our claim that to understand how agencies implement their statutory authority, it is necessary to consider all components of our decision-making model, including not only the mechanisms available to an agency to promote its policy agenda, but also the actors authorized to implement the available mechanisms.

E. A More Integrated Approach to Agency Mechanism Choice

These and other evaluations of how and why agencies choose among available alternative mechanisms suggest insights that may help to break open the black box of agency decision-making. We seek to build on these insights by expanding the analysis to encompass all five elements of our analytical framework and to evaluate how the relationships among these elements are likely to influence discretionary mechanism choices. Our case study is the first of which we are aware to evaluate empirically how an agency (EPA) actually used the legal mechanisms available to it to advance its policy agenda and to test the weight the agency may have attached, in making its mechanism choices, to the different factors that comprise our model. Some of these factors have either not yet received

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[148] Givati, *Contracting*, *supra* note 63, at 179–81; *see also* Givati, *Game Theory*, *supra* note 129, at 490–91; *cf.* U.S. GOV'T ACCOUNTABILITY OFFICE, NO. 18-22, KEY CONSIDERATIONS FOR AGENCY DESIGN AND ENFORCEMENT DECISIONS 21 (2017) [hereinafter GAO, KEY CONSIDERATIONS] ("The characteristics of regulated entities—such as the hetero- and homogeneity of the regulated community and frequency of interaction with agency officials—may inform agency compliance assistance and enforcement resource decisions.").

[149] Magill & Vermeule, *supra* note 11, at 1081. The authors describe their own hypothesis as "fragile," but "at least "minimally plausible." *Id.* They also point out that "where external institutions, such as courts, mandate that the agency use a certain regulatory form, a spillover effect of the mandate can be to change the relative dominance of professions within the agency." *Id.* at 1082.

attention in the literature or have not been integrated into systematic evaluation of the entire constellation of relevant factors.

Our project examines the question of mechanism choice more deeply than much of the literature. Our hypothesis, consistent with our five-part framework for process design, is that agencies do not (or at least should not) consider which mechanism to use in a vacuum, or simply by considering the advantages and disadvantages of each mechanism. Instead, the five components of our framework may influence mechanism choice. Mechanism choice may, for example, be informed by the identity of the actors involved in the use of each available mechanism. If a novel policy initiative (like Next Gen) is the brainchild of enforcement officials, agency officials may be most likely to use enforcement mechanisms, such as settlements, rather than rulemaking or permitting, which may be under the control of other, less committed arms of the agency (e.g., the program offices and the relevant policy office). Similarly, an agency like EPA might prefer to use administrative rather than judicial enforcement to retain control over litigation, rather than share decision-making control with DOJ.[150] Alternatively, an agency may prefer to use a regulation to establish a default position (such as the requirement that all new regulatory standards require electronic reporting) instead of relying on varying permitting authorities located throughout EPA's regions and the states to impose such a requirement on a case-by-case basis. Indeed, we found that EPA uses electronic reporting much more frequently in regulations than in enforcement settlements.[151] The nature of the regulated party community may also influence mechanism choice. Our findings suggest, for example, that EPA has used settlements to advance Next Gen tools significantly more often against industries than municipalities.[152] Those interested in policy design of mechanism use should thus consider how the roles of different actors may influence the agency's ultimate choice.

Mechanism choice also may be affected by the objectives an agency is trying to achieve and the tools it has at its disposal to pursue a given policy end. An agency might decide, for example, that rulemaking is especially appropriate for e-reporting because of the importance of standardization, consistent infrastructure development, and similar factors. On the other hand, permitting or enforcement may be a preferable mechanism for requiring some forms of monitoring or third-party

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150 Magill, *supra* note 37, at 1393 (noting that DOJ's "near-monopoly" over litigation on behalf of the federal government "means that most agencies wishing to bring judicial enforcement actions must persuade lawyers in [DOJ] or the U.S. Attorneys' offices that the action should be brought[]").

151 *Agency Mechanism Choice*, *supra* note 20 (Finding 3).

152 *Id*. (Finding 6).

verification if the need for and type of such oversight depends on the circumstances of particular regulated parties.[153]

Statutory authority may also influence mechanism choice, as may intra-mechanism differences that lead an agency to prioritize use of one variation of a mechanism over another in particular circumstances (e.g., administrative vs. judicial enforcement). Table 3 is a non-exhaustive list of these additional possible influences. Our empirical analysis, detailed in *Agency Mechanism Choice*, provides findings concerning how each of these factors may have affected EPA's choice of legal mechanisms to advance Next Gen. We found, for example, that although EPA settlements more frequently than either permits or rules under the CWA, the Clean Air Act ("CAA"), and the Resource Conservation and Recovery Act ("RCRA") to implement Next Gen, it has used rules more frequently than permits under the CAA and RCRA, but not under the CWA.[154] We also found that EPA has used settlements in judicial proceedings to enforce the CWA more often than it has in administrative settlements.[155]

Table 3. Additional Possible Influences on Mechanism Choice

Statutory authority
Inter-agency issues (e.g., capacity, coordination, alignment of priorities)
Intra-agency issues (e.g., capacity, coordination, alignment of priorities)
Federalism issues (e.g., capacity, coordination, alignment of priorities with state officials)
Regulated community features (e.g., capacity, political salience, homogeneity or heterogeneity)
Intra-mechanism issues (e.g., features of different variations of the same mechanism)
Agency policy objectives
Agency tools to achieve policy objectives

By testing these and other hypotheses by reference to EPA's implementation of Next Gen in our companion to this Article, we believe

153 *See* David L. Markell, *States as Innovators: It's Time for A New Look to Our "Laboratories of Democracy" in the Effort to Improve Our Approach to Environmental Regulation*, 58 ALB. L. REV. 347, 403–04 (1994) [hereinafter Markell, *Innovators*] (describing how New York confined third-party monitoring requirements to violators whose performance and status warranted them). Our findings confirm this intuition. *See Agency Mechanism Choice*, *supra* note 20 (Finding 3).

154 *See Agency Mechanism Choice*, *supra* note 20 (Finding 4).

155 *Id*. (Finding 7c).

we provide potentially fascinating insights about the intersection of mechanism choice and the other four elements of our conceptual framework. We also offer tentative explanations for our findings, which are based on our evaluation of the role that each element of our framework plays in mechanism choice. In Parts III through V of this Article, we elaborate on the roles that different actors, tools, goals, and statutory authorizations may play in agency mechanism choice.

III. A CLOSER LOOK AT THE ROLES OF KEY ACTORS

The second component of our model of regulatory design concerns the actors implicated in the administrative policymaking process. An extensive literature addresses the roles of Congress, the courts, and the President in regulatory governance.[156] Much administrative policymaking, however, occurs at a more granular level, which is relatively free of ongoing supervision by any of the three branches.[157] Therefore, it is important to consider the internal workings of agencies, including the capacity of different actors, the ways in which agency officials relate to one another, and the relationships of these officials with other federal actors, state officials, regulated entities, and regulatory beneficiaries. These considerations can drive the formulation and implementation of administrative policy, sometimes in ways unanticipated by or even contrary to the expectations of Congress and the President, and sometimes in venues that are relatively immune from judicial scrutiny (such as the exercise of enforcement discretion).

Part A addresses federal actors within the agency and in other arms of the federal government, focusing on both horizontal and vertical aspects of these relationships relevant to EPA's enforcement function. Part B

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156 Conventional accounts of the key actors in the administrative state begin, of course, with the three branches of government. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009) (various opinions considering roles of the three branches in controlling broadcast policies); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (discussing presidential control of executive agencies and judicial review of such control); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 583–92 (1984) (discussing agency relations with all three branches); Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463 (2017) (considering roles of the three branches in "legitimizing" the administrative state). Scholars have focused on the capacity of each branch to spur governance changes, including the role of legislative "entrepreneurs." *See, e.g.*, GREGORY WAWRO, LEGISLATIVE ENTREPRENEURSHIP IN THE U.S. HOUSE OF REPRESENTATIVES (2000); Richard B. Stewart, *Reconstitutive Law*, 46 MD. L. REV. 86, 96 (1986).

157 Jennifer Nou, for example, has argued that agencies' "organizational design choices deserve study in their own right" and that "decades of scholarship [have attempted] to explain or mitigate the principal-agent problems posed by the federal bureaucracy." Nou, *Coordination*, *supra* note 12, at 433–34.

tackles federal-state relationships, using Next Gen as an example of how the structure of those relationships can affect the administration of regulatory programs. Part C is devoted to scrutiny of an array of what some have referred to as "new governance actors," the regulated community and civil society (including individuals and organizations ranging from local citizen groups to national non-governmental organizations), which agencies may "deputize" to assist in regulatory implementation.[158] The nature and impact of these relationships is likely to differ, sometimes dramatically, depending on the legal mechanism the agency chooses and the regulatory tools it relies on. We use regulatory enforcement, and EPA's Next Gen initiative in particular, to illustrate the importance of evaluating this component of our regulatory design framework.

A. Key Federal Actors Inside and Outside the Agency

The effectiveness of regulation in general, and of regulatory enforcement in particular, depends in part on the dynamics of decision-making within the responsible agency. As Robert Katzmann put it, "[o]rganizational arrangements have much to do with determining how power is distributed among participants in the decision-making process . . . , the kinds of policy issues that are discussed, the choices that are made, and the ways in which decisions are implemented."[159] Agencies often possess substantial autonomy to make structural choices in exercising delegated policymaking authority.[160] This dynamic raises questions about how agencies choose the internal structures and procedural mechanisms with which to fulfill their statutory missions and what the implications of those choices are.[161]

Despite the importance of internal organizational arrangements, the scholarship on the interplay of actors within an agency is not as rich as the scholarship on how external actors influence regulatory enforcement.[162] Several observers have noted the tendency of legal

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158 *See, e.g.*, Alec C. Zacaroli, *Clean Air Act: New Developments that are Redefining the Enforcement Landscape*, 14 ENV'T REP. (BNA) No. 205, at B-2 (Oct. 23, 2014) (arguing that Next Gen's air monitoring strategy essentially "deputize[s] citizens" by "shifting part of its enforcement responsibility to a broader network of entities and giving them the tools to do its enforcement bidding").

159 ROBERT A. KATZMANN, REGULATORY BUREAUCRACY 7 (1980).

160 Nou, *Coordination*, *supra* note 12, at 427.

161 *See, e.g.*, Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 425 (2009) (urging "greater attention to internal administrative design" and analysis of "what types of administrative structures are likely to prove effective and appropriate in different contexts").

162 *E.g.*, Nou, *Coordination*, *supra* note 12, at 427–28 (lamenting administrative law scholarship's failure to incorporate perspectives from public administration, organizational theory,

scholarship, positive political theory,[163] and public administration to conceive of agencies as impenetrable and undifferentiated black boxes,[164] a metaphor commonly invoked to refer to the manner in which agencies implement their statutory mandates.[165] As noted above, some scholars have begun to look inside the black box.[166] Among other things, this emerging literature recognizes that while agency actors may adhere to basic principles of rational decision-making in some instances, they also respond to positive and negative incentives and to heuristics that can influence or bias decision-making.[167]

The starting point for understanding intra-agency dynamics (and how they affect regulatory enforcement) is the recognition that "agencies, like nearly all large organizations, are not unitary actors," but instead are composed of political appointees, civil servants, and a host of policy professionals that include attorneys, economists, public policy analysts, and scientists.[168] An agency's internal operations are affected by important horizontal and vertical components. The horizontal

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economics, and political science on internal agency norms and socialization and alternative bureaucratic arrangements).

163 Positive political theory "treats institutions like the various branches of government and administrative agencies as individual actors reacting rationally to outside influences." Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 488 (2002).

164 *See, e.g.*, Magill & Vermeule, *supra* note 11, at 1035.

165 *Cf.* J. Brad Bernthal, *Procedural Architecture Matters: Innovation Policy at the Federal Communications Commission*, 1 TEX. A&M L. REV. 615, 631 (2014) (suggesting that the "inner machinations" of rulemaking are not well understood); Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 57 (2014) (noting paucity of work on "the networks of authority and influence that constitute modern federal agencies"). The black box metaphor would seem to be even more applicable to agency permitting and enforcement, which appear to be less transparent than rulemaking. *See, e.g.*, Julie Andersen Hill, *Bank Capital Regulation by Enforcement: An Empirical Study*, 87 IND. L.J. 645, 708 (2012) (arguing that, generally, "rulemaking should be favored over discretionary enforcement because rulemaking is," among other things, "more transparent").

166 *See, e.g.*, Schlanger, *supra*, at 57 (addressing "complex interactions among agency personnel inside that black box, and how those interactions are affected by and themselves affect outsiders"); *supra* notes 7–14 and accompanying text.

167 Seidenfeld, *supra* note 163, at 494–95; *id.* at 530–43 (explaining how group psychology literature offers insights relevant to determining agency structures on matters such as enforcement).

168 Magill & Vermeule, *supra* note 11, at 1036–37; *see also* William Funk, *Regulation by Litigation: Not So Bad?*, 5 REG. & GOVERNANCE 275, 277 (2011) (noting that agencies are not monolithic and it is impossible to impute knowledge held by one part of an agency automatically to another); *cf.* Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 889 (1985) (noting that "the actors in regulatory enforcement settings, exist within complex social and political structures which serve to create and distort incentives in their own right"); Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227 (2016) (discussing rivalries among political appointees, career civil servants, and civil society authorized to participate in development and implementation of agency policies).

organizational structure "determines the relative influence within agencies of various professionals."[169] The vertical structure, in contrast, "determines the relative influence within agencies of appointed agency heads, lower-level bureaucrats, and line personnel."[170] As Magill and Vermeule have observed, a single agency enforcement action (such as seizure by the Food and Drug Administration of an adulterated drug) may implicate a range of agency personnel, including:

> A front-line enforcement agent who develops the facts and executes the seizure; her supervisors in the regional office and perhaps central agency (who may even have authored a manual instructing enforcement agents on how to conduct seizures); the agency attorney who advises on the enforcement action and defends the agency if the action is challenged in court; and the attorneys, civil servants, and political appointees who help decide whether to seek to appeal if there is an adverse ruling against the government.[171]

The relative influence in the decision-making process matters because, for instance, lawyers, economists, and engineers within the agency will not necessarily agree on policy priorities or, even if they do, on how best to achieve them.[172] Furthermore, various officials' access to, and comfort with, different legal mechanisms varies. For example, EPA enforcement officials have much more influence over use of enforcement mechanisms than over permitting or regulation in most situations.[173] Differences in access to, or in comfort with, possible mechanisms may influence agency officials' interest in using them to advance their objectives. Relationships at a horizontal level similarly may influence mechanism choice.

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169 Magill & Vermeule, *supra* note 11, at 1035.

170 *Id*. The citations issued by agency inspectors, for example, may be reviewed by their superiors to ensure consistency with agency guidance and legal authority. *See* Shapiro & Wright, *supra* note 9, at 586.

171 Magill & Vermeule, *supra* note 11, at 1037.

172 *See, e.g.*, *id*. at 1038 (discussing divergent views of FTC lawyers and economists); Wendy Nelson Espeland, *Authority by the Numbers: Porter on Quantification, Discretion, and the Legitimation of Expertise*, 22 LAW & SOC. INQUIRY 1107, 1126 (1997) (discussing conflicts within the NLRB between attorneys and economists).

173 EPA's enforcement office had the lead role with respect to one Next Gen rulemaking. *See Agency Mechanism Choice*, *supra* note 20. When an agency's organic statute requires it to conduct formal adjudication, as some statutes administered by EPA do, *see, e.g.*, 33 U.S.C. § 1319(g)(2)(B) (2012) (CWA), the adjudication is typically presided over by yet another actor, an administrative law judge ("ALJ"). 5 U.S.C. § 556(b) (2012); GLICKSMAN & LEVY, *supra* note 53, at 480. Although ALJs technically work for the agency over whose adjudications they preside, they are largely independent of the agency due to separation of functions requirements, limitations on ex parte communications, and statutory protections against removal from office and pay cuts. *Id*. at 481–83; *see also* Magill & Vermeule, *supra* note 11, at 1075 (describing ALJs' "decisional independence" under the APA). For analysis of efforts to coordinate interagency adjudication, see Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805 (2015).

One important question is the degree to which those within the agency who did not originate an initiative are willing to support it. Public administration scholars have recognized that "[c]omplex innovations require laying the social, technical, and intellectual groundwork acceptable to a wider spectrum of organizational units and members."[174] Policy entrepreneurs may emerge anywhere in an agency.[175] For instance, Next Gen's principal sponsor (its primary policy entrepreneur) is EPA's Office of Enforcement and Compliance Assurance ("OECA"), while EPA's program offices (air, water, solid waste) are largely responsible for developing rules, with the assistance of the Office of General Counsel ("OGC").[176] All of these offices are within EPA's national office, but the compliance and enforcement officials at EPA headquarters and their counterparts in other D.C. offices, such as the programmatic offices, have not always seen eye to eye. At least some past EPA enforcement-related initiatives encountered significant pushback from other agency headquarters offices.[177] A former EPA Assistant Administrator described "an unforgiving assault by the program offices on the enforcement program" during the 1990s.[178] He added that those offices regarded OECA "as an obstacle to be gotten around or to be ignored, and hopefully

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174 Fariborz Damanpour & Marguerite Schneider, *Characteristics of Innovation and Innovation Adoption in Public Organizations: Assessing the Role of Managers*, 19 J. PUB. ADMIN. RES. & THEORY 495, 503 (2008); *see also* Sergio Fernandez & Hal G. Rainey, *Managing Successful Organizational Change in the Public Sector*, 66 PUB. ADMIN. REV. 168, 170 (2006) ("Managerial leaders must build internal support for change and reduce resistance to it through widespread participation in the change process and other means."). EPA enforcement official David Hindin put it more simply: "Any time you ask people to change you're going to get some resistance . . . .That's normal. We expect it." *EPA Official: 'Next Generation' Improving Compliance*, 25 ENV'T DUE DILIGENCE REP. (BNA) No. 6 (June 16, 2016).

175 For other work focusing on agencies as policy entrepreneurs, see, e.g., Weiser, *Entrepreneurial*, *supra* note 37; Elizabeth Garrett, *Interest Groups and Public Interested Regulation*, 28 FLA. ST. U. L. REV. 137, 151 (2000) (discussing how "committed and aggressive policy entrepreneurs" may "pursue their own objectives"); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 13 (2007) (referring to policy entrepreneurs at federal agencies "who exercise power in the vacuum created by a gridlocked Congress"); Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. Rev. 1497, 1553–54 (2009). Gillian Metzger has explored the extent to which agency entrepreneurial initiatives represent a form of administrative common law development. *See* Gillian E. Metzger, *Foreword, Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293 (2012)

176 EPA, NGC 2014–2017, *supra* note 21, at 2 (noting that OECA has the lead for many Next Gen ideas and is "working across the agency to help assure coordinated implementation").

177 The problem is longstanding. *See, e.g.*, Frederick R. Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 DUKE L.J. 261, 309 n.179 (1985) ("Program and enforcement are in an uneasy equilibrium at headquarters.").

178 JOEL A. MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES 161–62 (rev. ed. 2012) (quoting J.P. Suarez).

avoided at all costs," noting that "[e]very single one of the media programs in EPA resents the existence of enforcement."[179]

Another aspect of intra-agency relationships is vertical in nature. Some agencies have a central office located in Washington, D.C., with regional offices scattered around the country.[180] The agency we studied, EPA, has ten regional offices,[181] while EPA's regulations are issued by its national headquarters. Much of the enforcement of those regulations occurs in the regional offices, as does the agency permitting work.[182] As one observer has noted, "[c]oordination of enforcement activity between different program enforcement sections with respect to individual facilities is difficult because of the organizational and often physical separation, as well as divergent budgets and priorities."[183]

The difficulty of implementing headquarters-driven policy initiatives such as Next Gen is exacerbated by the considerable autonomy that the ten regional offices have traditionally enjoyed.[184] As the Government Accountability Office ("GAO") has reported, EPA expects consistency among its regional offices in implementing enforcement and other functions.[185] Yet, the regions have traditionally embraced different priorities and used widely different strategies.[186] Differences in

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179 *Id*. OECA has faced criticism from a number of other EPA offices, creating tension. *See id.* at 170–71 (discussing clashes between OECA and the Office of Policy, Economics, and Innovations).

180 *See* Dave Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58, 61 (2016) ("About 85 percent of federal employees do not work in Washington, D.C."); *cf*. David Fontana, *The Geography of Campaign Finance Law*, 90 S. CAL. L. REV. 1247, 1251 (2017) (considering "the role of place in democratic self-government").

181 *EPA Organization Chart*, EPA, https://www.epa.gov/aboutepa/epa-organization-chart (last visited June 21, 2018); *Senior Contacts in EPA's Regional Offices*, EPA, https://www.epa.gov/aboutepa/senior-contacts-epas-regional-offices (last visited June 21, 2018). For discussion of the development of EPA's structure, see Alfred A. Marcus, *EPA's Organizational Structure*, 54 L. & CONTEMP. PROBS. 5 (1991). For discussion of the role of the regional offices of federal agencies, see Owen, *supra* note 180.

182 Peter J. Fontaine, *EPA's Multimedia Enforcement Strategy: The Struggle to Close the Environmental Compliance Circle*, 18 COLUM. J. ENVTL. L. 31, 48 (1993); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-115, ENVIRONMENTAL PROTECTION AGENCY: EPA SHOULD DEVELOP A STRATEGIC PLAN FOR ITS NEW COMPLIANCE INITIATIVE 4 (2012) [hereinafter GAO, NEW COMPLIANCE]. Under the current cooperative federalism system, states conduct much of the enforcement and permitting work. *See infra* Part III.B.

183 Fontaine, *supra*, at 48.

184 *See* Firestone, *supra* note 62, at 155 (discussing regional office enforcement autonomy).

185 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-165T, CLEAN WATER ACT: LONGSTANDING ISSUES IMPACT EPA'S AND STATES' ENFORCEMENT EFFORTS 1 (2009); *see also* Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA, 752 F.3d 999 (D.C. Cir. 2014) (holding that an EPA directive concerning CAA permit provisions violated 40 C.F.R. § 56.3, requiring "fair and uniform application by all Regional Offices" of implementation and enforcement criteria, procedures, and policies).

186 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-422T, ENVIRONMENTAL PROTECTION AGENCY: MAJOR MANAGEMENT CHALLENGES 1 (2011) [hereinafter GAO, CHALLENGES];

philosophy about how best to achieve compliance in state laws and enforcement authorities, in available resources, and in the completeness of enforcement data have thus contributed to inconsistencies among the regions on matters that include inspection coverage, number and types of enforcement actions taken, size of penalties assessed, and strategies for reviewing state performance of delegated responsibilities.[187] The lack of regional consistency in philosophy, results, and even institutional structure has periodically led to calls for less regional flexibility and more prescriptive direction from EPA headquarters.[188] Yet, the agency's headquarters have struggled to provide direction that the regional offices are able and willing to follow.[189] For EPA, at least, studies have documented significant coordination challenges because of the agency's regional structure.[190]

As our companion to this Article demonstrates, EPA has not ignored these institutional challenges. OECA, in fact, developed a Strategic Plan to institutionalize EPA's commitment to Next Gen.[191] It also has worked with other EPA offices to promote Next Gen features, such as greater reliance on advanced monitoring,[192]and has provided training to non-OECA staff on developing rules that incorporate Next Gen principles.[193] Yet, this institutional work is incomplete. For example, OECA does not include in its guidance specific expectations for incorporation of Next Gen into rules, permits, and enforcement proceedings.[194] The lack of such

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Clifford Rechtschaffen, *Promoting Pragmatic Risk Regulation: Is Enforcement Discretion the Answer*, 52 U. KAN. L. REV. 1327, 1331 (2004) (referring to "broad variations" in regional enforcement approaches under the CWA). Notwithstanding its quest for consistency, EPA has applauded some of these differences. GAO, CHALLENGES, *supra*, at 3 (endorsing variations in how regions target resources and in levels of enforcement activity and oversight of state enforcement programs).

187 GAO, CHALLENGES, *supra*, at 3–5.

188 *See, e.g.*, EPA, OFFICE OF INSPECTOR GEN., 16-N-0206, EPA'S FISCAL YEAR 2016 MANAGEMENT CHALLENGES 3–6 (2016) (discussing the need to improve oversight of regional operations); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-00-108, ENVIRONMENTAL PROTECTION AGENCY: MORE CONSISTENCY NEEDED AMONG EPA REGIONS IN APPROACH TO ENFORCEMENT 11–12 (2000) (urging more consistency for regional audit protocols).

189 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-840T, ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT: EPA'S EFFORT TO IMPROVE AND MAKE CONSISTENT ITS COMPLIANCE AND ENFORCEMENT ACTIVITIES 7 (2006) (noting that "EPA's decentralized, multilevel organizational structure allows regional offices considerable latitude in adapting headquarters' direction in a way they believe best suits their jurisdiction").

190 *See id.*, *passim*.

191 EPA, NGC 2014–2017, *supra* note 21, at 3–7.

192 E-mail from David Hindin, to Dave Markell (July 20, 2015) (on file with the authors).

193 *Id.*

194 EPA, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, 300S15001, FY 2016–2017 NATIONAL PROGRAM MANAGER GUIDANCE 13–15, app. 2 (2015) [hereinafter 2016–2017 GUIDANCE].

specifics may reflect the nascent nature of Next Gen's integration into EPA's operations, especially given the specific expectations for other deliverables. Other regionalized agencies may face similar issues and challenges.

EPA's structure and past experience, in short, illustrate that informed policy design requires close attention to the actual internal operation of agencies, including the existence of barriers to effective policy design and implementation resulting from internal substantive disagreements, capacity shortcomings, or coordination challenges.[195] Dismantling of "silos" that may undermine policy implementation[196] is only one of many bridge-building and capacity-building steps that often will be needed if an agency aspires to systematically revisit its policy challenges and develop and implement strategies likely to address these challenges effectively.[197] OECA's success in pursuing innovative approaches like those embedded in Next Gen is likely to depend on its ability to generate buy-in from those inside other EPA offices, such as those who write rules, issue permits, and enforce regulatory obligations, and to build the agency-wide capacity to implement such approaches. The fact that only a small percentage of the rules, permits, and enforcement matters that EPA has initiated or completed over the past few years appear to have included Next Gen ideas, at least based on the information EPA has publicly provided,[198] suggests that the internal vertical and horizontal challenges of transforming agency policy and practice may be substantial.

Federal officials other than those who work for the agency whose regulatory mandates have allegedly been violated may also influence the development and implementation of enforcement policy. For example, DOJ, which represents some agencies in litigation, may displace agency control over arguments and tactics in judicial enforcement.[199] At a

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195 *See, e.g.*, *Holistic*, *supra* note 10, at 34 (referring to "horizontal coordination challenges . . . within, between, and among agencies"). *See generally* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Spac*e, 125 HARV. L. REV. 1131 (2012).

196 The "silo effect" describes "the tendency of subdivisions within organizations to develop their own bureaucratic imperatives that create obstacles to information sharing and other forms of cooperation." Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 501 (2011).

197 *See id.* at 510–14 (discussing the silo effect's role in administrative law). *See also* Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. & POL'Y REV. 453, 512 (2011) (discussing models for intra-agency specialization).

198 *See Agency Mechanism Choice*, *supra* note 20.

199 Magill & Vermeule, *supra* note 11, at 1060–61. *See also* Peter L. Strauss, *The Internal Relations of Government: Cautionary Tales from Inside the Black Box*, 61 L. & CONTEMP. PROBS. 155, 166 (1998) ("[A]gency litigators are rarely the individuals given principal operating responsibility for agency policy formation and implementation"). Some statutes require DOJ representation in judicial enforcement actions to which EPA is a party. *See, e.g.*, 42 U.S.C. §

minimum, DOJ may have a significant say in matters for which it has ultimate litigation responsibility. Differences in priority and strategy between internal agency personnel and DOJ attorneys have the potential to slow, divert, or defeat agency enforcement initiatives, as well as to promote them.[200] As a result, it is essential to those interested in policy design to consider the possible roles of officials in other federal agencies implicated in regulatory enforcement, whose views may differ from those of the agency responsible for investigating and choosing to move forward with enforcement action.[201] In short, questions about internal horizontal and vertical authority and relationships, and federal inter-agency coordination, are important to consider in evaluating policy initiatives such as Next Gen.[202]

B. The State-EPA Partnership

Whether the state government or the federal government is empowered to make key policy choices and to undertake day-to-day implementation and enforcement is also critical to crafting a new policy initiative such as Next Gen and to assessing its likely success. Congress's adoption of a cooperative federalism structure for many of the key environmental regulatory programs makes meaningful state involvement critical to the successful integration of a purportedly transformative initiative such as Next Gen. Against this backdrop, the limited steps that EPA has taken to date to engage states in Next Gen are a red flag for the initiative's future effectiveness.

7605(a) (2012). For discussion of the impact of DOJ's control of litigation on programs of agencies such as EPA, *see generally* Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345 (2000); Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558 (2003).

200 *See* Marc Melnick & Elizabeth Willes, *Watching the Candy Store: EPA Overfiling of Local Air Pollution Variances*, 20 ECOLOGY L.Q. 207, 227 (1993). For other work on horizontal relationships among agencies, see Alejandro E. Camacho & Robert L. Glicksman, *Functional Government in 3-D: A Framework for Evaluating Allocations of Government Authority*, 51 HARV. J. ON LEGIS. 19 (2014).

201 *See infra* Part III.B.

202 *See Former EPA Officials See Uncertain Future for 'Next Generation' Compliance*, INSIDEEPA.COM (Oct. 26, 2016), https://insideepa.com/daily-news/former-epa-officials-see-uncertain-future-next-generation-compliance (questioning commitment of EPA's rank and file to Next Gen principles and noting uncertainty as to whether a future EPA enforcement head would support it).

1. Environmental Federalism Theory

Efforts to "locat[e] government power at the appropriate place on the federalism dimension"[203] are often laden with controversy. The extensive theoretical literature on federalism indicates that policymakers have a wide array of choices in devising approaches that serve both chosen federalism values and substantive policy goals.[204] That literature explores "classic" federalism analysis, which seeks to identify the single "optimal regulatory jurisdiction" for a particular problem.[205] It also explores alternative conceptions of federalism, such as polyphonic (or interactive) federalism, which promotes the values of plurality, dialogue, and redundancy,[206] and process-based models, which protect the values of federalism by integrating the participation of states (and the representation of state interests) into the national political process.[207]

Given the regularity with which federalism issues arise in environmental law and public health and safety regulation, some scholarly federalism models are designed to deal specifically with environmental problems. David Adelman and Kirsten Engel have proposed an "adaptive environmental federalism" model, which is designed to sustain "competitive legislative and administrative processes that promote the refinement of policies . . . and processes that produce a diverse range of policy options."[208] William Buzbee's "contextual environmental federalism" is based on identifying the benefits of overlapping and interactive structures, which include avoiding a regulatory commons problem.[209]

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[203] THOMAS O. MCGARITY, THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES 56–57 (2008). *See also* Robert R.M. Verchick & Nina Mendelson, *Preemption and Theories of Federalism*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 13 (William W. Buzbee ed., 2009) [hereinafter Buzbee, PREEMPTION] (arguing that the best federalism outcomes "are not obvious").

[204] For a survey of empirical literature on environmental federalism, see Daniel L. Millimet, *Environmental Federalism: A Survey of the Empirical Literature*, 64 CASE W. RES. L. REV. 1669 (2014).

[205] *See* David E. Adelman & Kirsten H. Engel, *Adaptive Environmental Federalism*, *in* Buzbee, PREEMPTION, *supra* note 203, at 277, 281 (characterizing as superficial "the classical school of environmental federalism [which] provides a simple framework that draws on standard economic metrics to determine the level of government at which regulation should take place").

[206] Robert A. Schapiro, *Toward A Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 288–94 (2005).

[207] *See, e.g.*, Bradford R. Clark, *Process-Based Preemption*, *in* Buzbee, PREEMPTION, *supra* note 203, at 192. *See also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985) (discussing "the built-in restraints that our system provides through state participation in federal governmental action").

[208] Adelman & Engel, *supra* note 205, at 290.

[209] William W. Buzbee, *Contextual Environmental Federalis*m, 14 N.Y.U. ENVTL. L.J. 108, 122–26 (2005).

In practice, the federal environmental laws explicitly adopt "cooperative federalism,"[210] which cedes enormous frontline responsibility for program implementation to the states.[211] While the environmental regulatory statutes vary in their approach, cooperative federalism typically involves the creation of federal goals (such as air quality sufficient to protect the public health[212]), the adoption of federal or state standards to achieve those goals,[213] and the opportunity for states to implement programs through the issuance of regulations, which provide the legal authority to issue permits and pursue enforcement actions to address non-compliance.[214] Most importantly for this Article, states are often responsible for the lion's share of enforcement case work and permitting,[215] though the federal government retains both oversight and frontline responsibilities in some cases.[216] Notwithstanding the designation of federalism in environmental law as "cooperative," conflicts between the two levels often arise, reflecting differing federalism priorities.[217]

Even assuming policymakers are committed to shared environmental enforcement authority, power-sharing arrangements may take many different forms. The form that best fits a particular environmental problem depends upon how alternative arrangements promote or thwart

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[210] *See* Kirsten Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address A Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015, 1020 (2006) (describing cooperative federalism as a system in which "state laws function as the core of environmental programs but only after being approved by EPA as meeting federal requirements"). For discussion of cooperative federalism in environmental law generally, see Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719 (2006) (identifying obstacles to successful cooperative federalism in environmental law); Markell, *Reinvented*, *supra* note 29 (cooperative federalism in environmental compliance and enforcement).

[211] *See, e.g.*, 33 U.S.C. § 1251(b) (2012) (referring to "the primary responsibilities . . . of States to prevent, reduce, and eliminate" water pollution); 42 U.S.C. § 7407(a) (2012) ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan . . . .").

[212] *E.g.*, 42 U.S.C. § 7401(b) (2012).

[213] *E.g.*, *id.* §§ 7401(b), 7409(b); 33 U.S.C. §§ 1311(b), 1314(b) (2012).

[214] *See, e.g.*, 33 U.S.C. §§ 1313(c), 1342(b) (2012) (CWA); 42 U.S.C. §§ 7410, 7661a(d) (2012) (CAA). The federal government often retains authority to control implementation if a state chooses not to do so or fails to abide by its statutory responsibilities. *See, e.g.*, 33 U.S.C. § 1313(c)(4) (2012); 42 U.S.C. § 7410(c) (2012). Many cooperative federalism environmental regulatory regimes empower states to be more, but not less, stringent than the federal government. *See, e.g.*, 33 U.S.C. § 1370 (2012); 42 U.S.C. § 7416 (2012).

[215] *Holistic*, *supra* note 10, at 34.

[216] *See, e.g.*, 33 U.S.C. § 1319 (2012); 42 U.S.C. § 7413 (2012).

[217] ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN xv (2011) (Environmental law "showcase[s] federalism's internal tug of war."); Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1496 (1999).

both the objectives of the particular statutory scheme involved and federalism values. These values include governmental accountability and transparency—both of which enhance democratic participation—local autonomy that enables innovation and competition, and a "regulatory synergy" to help address interjurisdictional problems that neither level of government could resolve alone.[218]

2. The Federalism Implications of Next Gen

At a minimum, two foundational observations should ground analyses of how to embed a program such as Next Gen within the prevailing cooperative federalism framework. First, states are indispensable to environmental regulation if only because of the degree of authority EPA has delegated to them[219] and the constraints that resource limitations place on EPA's own capacities.[220] And because the existing environmental regulatory infrastructure is federalized on the ground as well as in the statutes, program effectiveness depends in part on state performance. As a result, transformation of environmental enforcement of the sort that EPA aspires to achieve in Next Gen will not occur without significant state cooperation. Whether and to what extent that occurs, and whether Next Gen fulfills the potential of a cooperative federalism venture, will depend on states' performance in using available legal mechanisms to advance Next Gen objectives.

Second, a smooth relationship between EPA and the states as EPA strives to promote Next Gen is anything but assured. Studies of the implementation of environmental programs in the past have revealed shortcomings in state performance and its oversight by EPA.[221] In 2012, for example, the GAO found widespread inconsistencies and

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[218] RYAN, *supra*, at xiv. *See also* Erwin Chemerinsky, *The Values of Freedom*, 47 FLA. L. REV. 499, 503 (1995) (identifying as traditional federalism values preventing tyranny, enhancing democracy, and providing laboratories for experimentation); David L. Markell, *"Slack" in the Administrative State and its Implications for Governance: The Issue of Accountability*, 84 OR. L. REV. 1, 19–47 (2005) [hereinafter Markell, *Slack*] (discussing accountability and transparency challenges of environmental cooperative federalism).

[219] *ECOS President Touts New Approach to Environmental Regulation*, ENV'T REP (BNA), May 30, 2014, at 4 (citing EPA's estimate that "96.5 percent of all of EPA authority has been delegated to the states").

[220] *See* Linda K. Breggin, *Increasing Federal Outreach to States*, 32 ENVTL. F. 10 (Nov./Dec. 2015) (discussing increasing state independence resulting from reduced federal monetary support); *cf*. Hammond & Markell, *supra* note 10, at 332 (noting that EPA has reacted with "abject horror" to a state's proposal to return delegated authority back to it).

[221] Milo Mason, *Snapshot Interview: Steven A. Herman*, 12 NAT. RESOURCES & ENV'T 286 (1998) (quoting former EPA official's acknowledgement that "forging an effective, cooperative relationship with the states on enforcement" was his "most significant" challenge).

underperformance in state enforcement of environmental programs.[222] Concerns about state deficiencies have included shortcomings related to inadequate resources,[223] legal authority,[224] performance of foundational elements of regulatory enforcement such as monitoring (inspections) and pursuit of enforcement actions when significant noncompliance occurs,[225] and transmission of information to EPA.[226]

These state-federal relationship problems will be a challenge for EPA in integrating states into its Next Gen initiative.[227] For example, EPA is in the early stages of developing critically important metrics for state performance, which must be both mutually acceptable and reflective of Next Gen principles.[228] OECA has indicated, however, that EPA has not yet incorporated Next Gen ideas into the metrics used to evaluate state performance.[229] Nor are those current metrics mutually acceptable. Some state officials have expressed frustration with EPA's continued focus on state activity levels, such as the number of penalties and notices of violation, urging greater reliance on assessments of state performance on outcomes.[230] States have also complained that existing metrics undermine state participation in Next Gen, even if states wanted to participate. Not surprisingly, if states allocate resources to an innovative initiative such as Next Gen, they want assurances that they will "get credit" for doing so and not be penalized if experimental enforcement strategies fall short of EPA's traditional performance measures.[231]

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[222] *See* GAO, NEW COMPLIANCE, *supra* note 182, at 1.

[223] U.S. OFFICE OF INSPECTOR GENERAL, Rep. No. 12-P-0113, EPA MUST IMPROVE OVERSIGHT OF STATE ENFORCEMENT 6 (2011) [hereinafter OIG, OVERSIGHT].

[224] ENVTL. L. INST., BEYOND ENFORCEMENT?: ENFORCEMENT, COMPLIANCE ASSISTANCE, AND CORPORATE LEADERSHIP PROGRAMS IN FIVE MIDWEST STATES 61–62 (2003) (noting that "[s]ome states lack critical enforcement tools," such as sufficient penalty authority, and have overly complex procedural requirements for enforcement).

[225] OIG, OVERSIGHT, *supra* note 223, at 9.

[226] *See* SHELLEY H. METZENBAUM, IBM CTR. FOR THE BUS. OF GOV'T, STRATEGIES FOR USING STATE INFORMATION: MEASURING AND IMPROVING STATE PERFORMANCE 16–17 (2003) (arguing that incompatibility between state and EPA systems have taken away states' incentives to ensure the quality of data being supplied to EPA). Differences in enforcement philosophy between EPA and the states also contribute to shortcomings of the sort described in the text.

[227] EPA and others are well aware of the challenges. *See, e.g.*, OIG, OVERSIGHT, *supra* note 223, at 3–4.

[228] *See* 2016–2017 GUIDANCE, *supra* note 194, at 13 (stating that there are currently no Next Gen "implementation requirements" for the states).

[229] 2016–2017 GUIDANCE, *supra* note 194, at 13–15.

[230] As one observer has noted, "[h]ow many enforcement actions you take doesn't necessarily measure success. Sometimes it is a measurement of failure, that somewhere along the line somebody didn't communicate." Bob Martineau et al., *The Forum*: *State Leadership in Environmental Protection*, 32 ENVTL. F. 50, 53 (Jan./Feb. 2015).

[231] David LaRoss, *EPA Details 'Next Generation' Enforcement Plan but States Question Credit*, INSIDEEPA.COM (Mar. 27, 2015), https://insideepa.com/daily-news/epa-details-next-generation-enforcement-plan-states-question-credit.

In our companion article we detail the extremely limited state involvement in Next Gen that EPA has reported to date. If the depictions provided by EPA's own compilations of examples of Next Gen actions, which we discuss in that article, are representative of the mix of federal and state use of Next Gen tools, state engagement with Next Gen has been less than robust. It is possible that states are doing more but that EPA lacks the data to substantiate that activity or has decided not to share it. It is also possible that Next Gen has not yet filtered down to state enforcers, permit writers, or other state officials, or has done so but has been met with an indifferent or even hostile reception.

The dynamic character of governance holds some promise that state engagement in Next Gen will expand in the future despite the challenges and apparently limited progress to date. EPA is aware of the concern that current metrics have the unintended consequence of discouraging state-level innovations, and it has indicated that it hopes that Next Gen will help it deploy new enforcement performance measures that better reflect the effectiveness of state enforcement activity.[232] Better data, and timely access to more detail, may provide an impetus for progress on performance metrics that both EPA and states embrace. For example, electronic reporting that enables EPA and the states to measure compliance reliably in regulated sectors for which such monitoring has previously been impossible might help governments give credit for innovative work that contributes to compliance, such as work that avoids violations and tracks post-violation enforcement activity. Moreover, because advanced monitoring will improve EPA's understanding of actual pollution releases, it will be easier to identify the most significant violations by comparing actual releases with permitted amounts, which the federal and state governments can then jointly prioritize.[233] Such innovations may further enable the states and EPA to coordinate their responses to more significant problems and to shift resources as needed. EPA also stated that it hoped to begin a dialogue with states, tribes, and the public to help it reassess the usefulness of current measures, select new interim measures, and experiment with them to supplement existing metrics.[234] Thus far, however, progress has been limited.[235]

EPA's roll-out of Next Gen tools through the different legal mechanisms will also inform both EPA and the states about the promise

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232 EPA, EPA STRATEGIC PLAN: FY 2014–2018 56 (2014).

233 *Id.*

234 *Id.* at 57 (explaining further that in light of state resource constraints, EPA is aware of the need to avoid increasing state and tribal reporting burden as it revamps its metrics).

235 LaRoss, *supra* note 231 (describing a Next Gen leader hesitating to implement a rubric for measuring state efforts to improve compliance due to state officials' concerns).

of different strategies to improve compliance. Thus, even EPA's own use of its legal mechanisms to promote Next Gen has the potential to build state capacity and to improve state-federal relations. Limited progress in the short-term, in other words, does not necessarily lead to the conclusion that an initiative such as Next Gen lacks promise for transforming, or at least improving, state-federal relations over a longer horizon. In sum, when an agency implements a novel regulatory initiative such as Next Gen, it should consider the opportunities to engage a broad suite of governmental actors other than the entrepreneurial driver (in this case, OECA) at both the federal and state levels.

C. Non-Governmental Actors

This section surveys the role of key non-governmental actors—regulatory beneficiaries and regulated entities—in contemporary governance and policy design. It further addresses some of the salient questions that any effort to rely heavily on non-governmental actors (as Next Gen does) to advance new policy initiatives is likely to pose for the operation of the administrative state.

1. Public-Private Partnerships

Next Gen seeks to engage and empower non-governmental actors in the basic work of governance much more than has historically been the case at EPA. Cynthia Giles noted, for example, in touting the transparency component of Next Gen that "there is powerful evidence that publishing information about company performance drives better behavior, as pressure is applied by customers, neighbors, investors, and insurers."[236] She also expressed the hope that the greater accessibility of advanced monitoring technology "will encourage more direct industry and community engagement, and reduce the need for government action."[237] Next Gen was thus conceived of as an initiative that would "engage" community groups and non-governmental organizations ("NGOs") in fostering improved compliance.[238]

Lester Salamon, a government and policy studies scholar, has described a "new era" which mobilizes non-governmental actors in "complex partnerships with the state."[239] Salamon argues that the

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[236] Giles, *NGC*, *supra* note 21, at 24.

[237] *Id.*

[238] *See, e.g.*, Cynthia Giles, *The Next Generation of Enforcement and Compliance*, THE EPA BLOG (Aug. 22, 2013), https://blog.epa.gov/blog/2013/08/nextgen/. *See also* Zacaroli, *supra* note 158 (Next Gen "deputize[s] the public").

[239] Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 FORDHAM URB. L.J. 1611, 1674 (2001) [hereinafter Salamon, *Tools*]. *See also* Jody Freeman,

establishment of interdependencies between public agencies and third-party actors provides government with important allies, but results in the loss of complete control over the operation of government programs. He contends that these changes are likely to yield increased government openness and accountability as well as an enhanced capacity of regulatory beneficiaries to influence decisions.[240] EPA's Next Gen initiative has the potential to implicate many aspects of this model, as this section demonstrates.

2. The Role of Regulatory Beneficiaries

In previous work, we assessed EPA's efforts to pursue increased engagement of regulatory beneficiaries in the compliance and enforcement realm.[241] We concluded that determining the appropriate role for NGOs and individual citizens in a regulatory program should depend on (1) an assessment of the relative capacities of regulatory beneficiaries, regulated parties,[242] and government officials to perform the functions needed to advance regulatory goals, and (2) the extent to which citizen and government efforts can be effectively coordinated. We then evaluated capacity and coordination opportunities and challenges relating to four different citizen roles—when they participate in environmental actions undertaken by the government, interact with regulated parties, serve as fire alarms, and operate as direct actors through the legal process (such as by filing citizen suits). Finally, we suggested how EPA's use of Next Gen tools in rulemaking, enforcement, and permitting can foster improved compliance and enforcement.[243]

We concluded that expanded data availability resulting from two key elements of Next Gen—the development of advanced monitoring technology and enhanced transparency through website postings and other means—will expand the capacity of regulatory beneficiaries to participate in government decision-making processes, facilitate the creation of partnerships with regulated entities, bolster their role as fire

The Private Role in Public Governance, 75 N.Y.U. L. REV. 543, 552, 592 (2000) [hereinafter Freeman, *Governance*] (discussing shared governance responsibility among public and private actors).

240 Salamon, *Tools*, *supra*, at 1628–29. *See* Markell, *Slack*, *supra* note 218, at 7–8, 47–67 (discussing how interdependencies may lead to less rather than more openness and accountability in some cases); Reeve T. Bull, *Making the Administrative State "Safe for Democracy": A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, 65 ADMIN. L. REV. 611 (2013) (discussing the relationship between citizen participation and legitimacy).

241 *Dynamic Governance*, *supra* note 10, at 618–29.

242 See *infra* Part III.C.2. for a discussion of the role of regulated parties.

243 *See also* Glicksman et al., *supra* note 14, at 77–83 (discussing the impact of advanced monitoring, one of EPA's Next Gen tools, on citizen participation in enforcement).

alarms that alert the government of potential noncompliance, and provide the grounding for citizen suits.[244] We will not repeat that evaluation of the role of regulatory beneficiaries in Next Gen's implementation here. Instead, in the next section, we discuss some of the opportunities and challenges associated with integrating regulated parties into compliance promotion work.

3. The Role of Regulated Parties

Regulated parties play multiple roles in governance.[245] Not only must they comply with regulatory standards but they also are subject to sanctions for failure to comply with these and other regulatory requirements. Often, they must monitor their performance and provide information on compliance status. Some agencies have even developed incentive programs to recognize and reward regulated parties who improve their own performance or collaborate with the agency or with other regulated entities to improve sector-wide performance.[246] Regulators also may encourage regulated parties to engage with and respond to the needs of local communities.[247]

Factors such as the strain on government resources, increased engagement by civil society, and improving technology that enhances regulated party capacity may induce agencies like EPA to rely more heavily on regulated parties' efforts to track their own compliance status and respond appropriately.[248] EPA's advocates for Next Gen explicitly anticipated an expanded regulated party role in the form of engagement with civil society and increased responsibility.[249] Efforts to integrate regulated parties more thoroughly into governance regimes will present both capacity problems (i.e., are regulated parties capable of assuming some of the tasks traditionally performed by government) and trust (i.e.,

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244 *Dynamic Governance*, *supra* note 10, at 628.

245 Views about the value added from such engagement differ dramatically. *Compare* Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741, 1744 (2008) (discussing capture risks), *with* Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60 (2000) (touting the value of negotiated rulemaking).

246 Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 147 (2013) [hereinafter Vandenbergh, *Private*] (discussing how such collaborations may take many forms, including industry-wide trade groups and efforts to improve supply chain performance).

247 *Cf.* Giles, *NGC*, *supra* note 21, at 24 (noting that advanced pollution monitoring by civil society "will encourage more direct industry and community engagement, and reduce the need for government action").

248 *See, e.g.*, *Holistic*, *supra* note 10, at 52–53 (discussing reports from inside and outside the agency concerning resource constraints).

249 *See, e.g.*, Zacaroli, *supra* note 158 (explaining how regulated party attorneys have already anticipated some of the possible changes).

should government feel comfortable that regulated parties' will exercise that capacity in good faith) issues, as well as the challenge of devising appropriate incentives. Agencies considering increased reliance on regulated parties would be well advised to take these factors into account in devising appropriate roles for them.[250]

The extent to which regulated parties have the capacity (financial and technical) and incentives to undertake particular tasks is an important determinant of the roles that ought to be assigned to them.[251] RCRA, for example, requires prospective owners and operators of hazardous waste treatment, storage, and disposal facilities to prove they have adequate financial capacity to address environmental incidents in order to qualify for a permit.[252] Similarly, EPA and other regulators need to ensure that a prospective permittee or regulated entity has the capacity to fulfill the self-monitoring, reporting, and operating requirements that are common features of the major environmental laws (such as conditions for obtaining a discharge permit under the CWA[253] and operation of new or modified stationary sources under the CAA).[254] Even if such an entity satisfies minimum requirements for procuring a permit and operating pursuant to its conditions, full compliance is not a given. Close attention to regulated party capacity and performance is therefore an important aspect of contemporary governance efforts.

Trust is also a critically important variable, if only because of the obvious self-interest inherent in allowing a party to monitor and report on its own activities.[255] We suggest that two dimensions of trust may influence the roles regulated parties play in agency initiatives, using Next Gen to illustrate each one. The first is encapsulated in the well-known

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250 *See, e.g.*, Ronald J. Colombo, *Trust and the Reform of Securities Regulation*, 35 DEL. J. CORP. L. 829 (2010); Freeman, *Governance*, *supra* note 239, at 550 (2000) (explaining that though contextual differences may distinguish regulatory regimes, we expect that the issues addressed here will be common to regulatory regimes in a variety of policy spheres).

251 *See* Jodi L. Short & Michael W. Toffel, *Making Self-Regulation More Than Merely Symbolic: The Critical Role of the Legal Environment*, 55 ADMIN. SCI. Q. 361 (2010) (reviewing ways in which the legal environment may influence regulated parties' commitment to self-regulate).

252 40 C.F.R. §§ 264.140 to 264.151 (2017). *See also id.* §§ 264.110 to 264.120 (discussing how owners also must have the capacity to care for waste disposal sites after they close).

253 *E.g.*, 40 C.F.R. § 122.41(e) (2017) (requiring permit applicants to operate back-up or auxiliary facilities when necessary to achieve compliance with permit conditions).

254 *E.g.*, 40 C.F.R. § 60.13 (2017) (requiring use of continuous monitoring systems and monitoring devices).

255 *See, e.g.*, Wendy Wagner & David Michaels, *Equal Treatment for Regulatory Science: Extending the Controls Governing the Quality of Public Research to Private Research*, 30 AM. J. L. & MED. 119, 123 (2004) (addressing risk of data falsification under self-regulatory regimes and providing examples).

aphorism "trust but verify."[256] This notion stems from lack of confidence in regulated party monitoring, which has received considerable attention.[257] For instance, recent media attention focused on the discovery that Volkswagen used "defeat devices" in its diesel vehicles to suggest a degree of performance in reducing emissions that its vehicles were not achieving.[258] Performance-based regulatory regimes therefore can incentivize regulated parties to find cost-effective strategies to achieve regulatory results that government did not anticipate.[259] As Cary Coglianese has noted, "[t]he Volkswagen case makes clear that regulators opting to use performance-based regulation need to pay careful attention to how they will monitor compliance once firms start to take advantage of the flexibility that performance standards offer."[260] Thus, evaluations of the need for verification, and the best means to achieve it, are important features of regulatory design.[261]

A second and related aspect of trust concerns how a regulated party's behavior should affect an agency's approach to interacting with it, such as by decreasing reliance on its self-monitoring or reporting. The responsive regulation "enforcement pyramid" envisioned by Ayres and

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256 The phrase is sometimes attributed to President Reagan, who used it in the context of nuclear weapons control treaties. *See, e.g.*, United States v. W.R. Grace, 526 F.3d 499, 527 (9th Cir. 2008); *see generally* M. Bruce Harper, *Trust but Verify: Innovation in Compliance Monitoring as a Response to the Privatization of Utilities in Developed Nations*, 48 ADMIN. L. REV. 593 (1996).

257 *E.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/RCED 93-21, EPA CANNOT ENSURE THE ACCURACY OF SELF-REPORTED COMPLIANCE MONITORING DATA (1993).

258 For discussion of the scandal and ensuing consequences, *see* Arnold W. Reitze Jr., *The Volkswagen Air Pollution Emissions Litigation*, 46 ENVTL. L. REP. NEWS & ANALYSIS 10,564 (2016).

259 Cary Coglianese, *What Volkswagen Reveals about the Limits of Performance-Based Regulation*, REG. REV. (Oct. 5, 2015), https://www.theregreview.org/2015/10/05/coglianese-volkswagen-performance-based-regulation/.

260 *Id.*

261 One option receiving considerable attention is greater reliance on third-party verification. *See* Cynthia Giles, Assistant Administrator, EPA, Memorandum to Regional Counsels et al., Use of Next Generation Compliance Tools in Civil Enforcement Settlements 4 (Jan. 7, 2015) (explaining that EPA has incorporated third-party verification into Next Gen-influenced settlements). Expanding third-party verification is one of the tools EPA has included in Next Gen, viewing it as "a resource-efficient way" to obtain information about compliance status. *Id. See also* Lesley K. McAllister, *Regulation by Third-Party Verification*, 53 B.C. L. REV. 1 (2012); Administrative Conference of the United States ("ACUS") Recommendation 2012-7, Agency Use of Third-Party Programs to Assess Regulatory Compliance, 78 Fed. Reg. 2939, 2941 (Jan. 15, 2013); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-667, FEDERAL GREEN BUILDING: FEDERAL EFFORTS AND THIRD-PARTY CERTIFICATION HELP AGENCIES IMPLEMENT KEY REQUIREMENTS, BUT CHALLENGES REMAIN (July 2015). Observers have called for greater use of third-party verification in other contexts. *See, e.g.*, John J. Infranca, *The Earned Income Tax Credit as an Incentive to Report: Engaging the Informal Economy through Tax Policy*, 83 N.Y.U. L. REV. 203, 236 (2008); John H. Walsh, *Institution-Based Financial Regulation: A Third Paradigm*, 49 HARV. INT'L L.J. 381, 395 (2008).

Braithwaite[262] and refinements to it, such as the "smart enforcement" paradigm championed by Neil Gunningham and others,[263] offer a theoretical foundation for this dimension of trust. In its iterations over the years, EPA's Self-Audit Policy, which was itself designed to reward firms that self-report violations, has sought to advance such a strategy. It has provided penalty relief for generally highly-performing parties, but it has not allowed regulated parties whose compliance records are problematic to take advantage of the Policy's opportunity to reduce liability exposure through self-auditing.[264] A government might also impose additional monitoring requirements, including third-party oversight, on regulated parties whose performance creates doubt about their commitment to compliance.[265] Relatedly, the government may be more likely to pursue criminal enforcement against repeat violators.[266] In short, when trust is in issue, regulators can tailor treatment of regulated parties, and their roles in governance, accordingly.[267]

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[262] IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 35–40 (1992).

[263] *See, e.g.*, Peter Grabosky, *Beyond* Responsive Regulation*: The Expanding Role of Non-State Actors in the Regulatory Process*, 7 REG. & GOVERNANCE 114 (2013); Gunningham, *supra* note 26, at 63 (recognizing benefits of escalating responses up an enforcement pyramid).

[264] Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations; Final Policy Statement, 65 Fed. Reg. 19,618, 19,619 (2000) ("Repeat violations . . . are not eligible for relief under this Policy"). *See also* Lee R. Okster, *Smithfield Foods: A Case for Federal Action*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 381, 402 (1999) ("some posit that compliance assistance is ill-suited to repeat violators because it fails to influence their behavior").

[265] *See* Markell, *Innovators*, *supra* note 153, at 400, 403–06.

[266] *See* Samuel L. Silverman, *Federal Enforcement of Environmental Laws*, 75 MASS. L. REV. 95, 97 (1990). See also Greve, *supra* note 30, at 361, for a discussion of how NGOs may also be more likely to bring citizen suits against repeat violators.

[267] The flip side of reducing the governance role of regulated entities with poor compliance histories is rewarding those with good records, especially those which have voluntarily exceeded their regulatory obligations. EPA's experience in using such incentives to create a firm foundation for the role of regulated parties has been uneven. *See, e.g.*, Cary Coglianese & Jennifer Nash, *Performance Track's Postmortem: Lessons from the Rise and Fall of EPA's "Flagship" Voluntary Program*, 38 HARV. ENVTL. L. REV. 1, 11–12 (2014) (noting the inherent tension between offering inducements for voluntary participation while insisting on substantive and procedural conditions that dissuade participation).

Privatization is related to third-party verification. An example is government contracting with private vendors to perform compliance inspections traditionally performed by the agency. As Gillian Metzger has observed, private actors' participation in governance has increased recently, as governments afford them greater discretion over program implementation and create new types of public-private partnerships. Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1370 (2003). For discussion of different forms of privatization, see Carol M. Rose, *Privatization—The Road to Democracy?*, 50 ST. LOUIS L.J. 691, 694 (2006) (identifying four forms—recognition, deregulation, divestment, and enablement); Laura A. Dickinson, *Privatization and Accountability*, 7 ANN. REV. L. & SOC. SCI. 101, 101 (2011) (laying out "a taxonomy for analyzing privatization"). Privatization has both proponents and detractors. For a sampling of the literature, see PAUL VERKUIL, VALUING BUREAUCRACY: THE CASE FOR PROFESSIONAL GOVERNMENT (2017); GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN

One additional consideration in determining appropriate roles for regulated entities is their degree of receptivity to different approaches. Some regulated parties may embrace the opportunity to excel in meeting regulatory requirements and to be recognized for their performance. Others, however, may not necessarily accept agency ideas for improving compliance, the mechanisms an agency wants to use to advance those ideas, or the agency's authority to pursue various objectives. In fact, some regulated parties have pushed back on EPA's use of Next Gen mechanisms and tools.[268] The petroleum industry, for example, has charged that both third-party verification (in this case, of storage tank controls) and electronic reporting (of quantitative environmental results on corporate websites)—two important Next Gen tools—are not only unnecessary but also beyond EPA's statutory authority.[269] Other regulated parties have criticized EPA's use of one legal mechanism—enforcement settlements—to pursue Next Gen, claiming that changes in approaches like those that are central to Next Gen should be pursued through rulemaking, not case-by-case settlements.[270] Some regulated parties have also raised concerns about the reliability of advanced monitoring (another tool), claiming it is not sufficiently field-tested.[271] Beyond trust and compliance, therefore, regulated party perspectives may affect an agency's choice of mechanism and use of particular tools.

DEMOCRACY (Jody Freeman & Martha Minow eds., 2009); JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC (2017); Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717 (2010); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1285 (2003). The comparative merits and demerits of privatization are beyond the scope of this Article.

268 Environmental NGOs, and even some former agency officials, have also criticized Next Gen to the extent they perceive it to be a substitute for traditional enforcement. *See, e.g.*, Doug Parker, *Former EPA Criminal Investigations Chief Faults 'Next Generation' Efforts*, INSIDEEPA.COM (May 25, 2016), https://insideepa.com/daily-news/former-epa-criminal-investigations-chief-faults-next-generation-efforts (describing concern of former chief of EPA's criminal investigations over shifting agency resources and staff toward Next Gen "in lieu of in-person inspections" because Next Gen "alone will not achieve sufficiently strong enforcement which in turn poses potential risks to the environment"). This kind of pushback does not necessarily raise the same kinds of issues as resistance from regulated entities because NGO resistance is not likely to decrease the activities EPA wants them to perform. If anything, if NGOs believe that EPA's enforcement activity is inadequate, they may be willing to engage in more extensive efforts to supplement government efforts with their own monitoring and enforcement actions.

269 Bridget DiCosmo, *API Faults EPA 'Next Generation' Compliance Plan for Oil & Gas Air Policy*, INSIDE EPA ENVTL. POL'Y ALERT, Dec. 23, 2015, at 23. *See also EPA's Giles Touts Difficulty of Violating 'Next Generation' Rules*, INSIDEEPA.COM (May 13, 2016), https://insideepa.com/news-briefs/epas-giles-touts-difficulty-violating-next-generation-rules.

270 Dave Reynolds, *Industry Officials Say TSCA Reform May Boost EPA Next Gen Enforcement*, INSIDE EPA ENVTL. POL'Y ALERT, Mar. 30, 2016, at 25.

271 David LaRoss, *EPA Air Toxics Enforcement Focus Spurs Fears Over 'Next Generation' Data*, INSIDE EPA ENVTL. POL'Y ALERT, Oct. 14, 2015, at 17.

A significant challenge for agencies that rely heavily on regulated party participation, and are likely to do so even more in the future, is to determine how best to integrate their efforts into existing or desired regulatory structures.[272] Legitimacy issues such as transparency, accountability, participation, efficiency, and effectiveness are important factors for agencies like EPA to consider in structuring such relationships. In an era of shrinking resources, these considerations are particularly critical to ensure that regulated entities have the capacity to perform their assigned roles and are doing so legitimately.[273] In its Next Gen initiative, EPA has embraced increased use of a group of tools, which we discuss further in Part IV below, that hold promise in taking advantage of regulated parties' potential to supplement traditional regulatory and enforcement approaches while creating an infrastructure (including third-party verification) that promotes regulated party accountability.

D. Summary of the Roles of Key Actors

The foregoing discussion makes clear that many actors play key roles in the administration of regulatory endeavors such as EPA's enforcement and compliance programs. Those programs are most likely to advance statutory goals if policymakers carefully consider the roles each actor has the capacity to play, how the activities of each actor are likely to influence the activities of others, and how institutional arrangements should be structured to optimize each actor's performance and resulting outcomes.

The relative capacities of governmental and non-governmental actors, for example, might influence the role of citizen suits in environmental enforcement. In a policy arena where citizens' capacity (including interest, resources, and technical ability) is considerable, government capacity is limited or unreliable because of factors such as budgetary constraints or the fear of capture, and regulated parties' capacity or credibility is lacking, policymakers might opt for a significant civil society role. Congress could, for example, significantly strengthen citizen suit provisions to encourage citizens—rather than the government—to

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[272] Private environmental governance is "the development and enforcement by private parties of requirements designed to achieve traditionally governmental ends." Vandenbergh, *Private*, *supra* note 246, at 147. The governance approaches discussed in this section are broader than this conception of private governance because they include requirements established by government alone for private participation in regulatory implementation.

[273] For arguments that, to date, privatization of environmental permitting has been ill-advised, see Jessica Owley, *The Increasing Privatization of Environmental Permitting*, 46 AKRON L. REV. 1091 (2013). Delegation of enforcement authority to regulatory beneficiaries is another form of privatization. For opposition to such privatization through mechanisms such as *qui tam* actions, see Dayna Bowen Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. MICH. J.L. REFORM 281 (2007).

hold regulated parties accountable. By contrast, in a policy arena where citizens' capacity is limited, government capacity is substantial, and regulated parties' capacity and credibility are great, policymakers might choose to rely more heavily on government officials and regulated parties and constrain the role of citizens in enforcing regulations. Using the same example, Congress could weaken the citizen suit provisions by strengthening the government's gatekeeping capacity or limiting recovery of attorneys' fees by successful citizen suit plaintiffs.ß

In some cases, the roles of the various actors are already defined by statute (such as the authority of EPA or the states to block citizen suits through diligent pursuit of government enforcement). But even in implementing such regimes, EPA has ample discretion.[274] Agencies designing regulatory programs, such as Next Gen, to better advance statutory goals or accommodate change therefore should focus on the full range of actors and craft particular actors' roles in ways that leverage their strengths and mitigate other actors' weaknesses.[275]

IV. A CLOSER LOOK AT GOVERNANCE TOOLS AND OBJECTIVES

Even after an agency has chosen the mechanisms it will rely on in implementing a policy initiative and has determined the roles various actors should play, it must select regulatory tools that it believes will best promote the initiative's goals. This Part reviews the roles of tools and objectives as part of policy design through an overview of the five key tools that EPA is trying to advance through Next Gen. Specifically, EPA has selected five tools to improve compliance with the nation's environmental laws: increased use of advanced monitoring technologies to detect pollution, enhanced transparency, improved communications (with a focus on e-reporting), other innovative enforcement approaches (including expanded use of third-party verification), and "better" regulations that facilitate compliance because they are easier to understand.

Tools serve two roles in our conceptual framework for policy design in the specific context of an initiative such as Next Gen. First, they represent strategies that an agency uses in connection with one or more legal mechanism to carry out its mission. In this respect, the particular tools an agency chooses to advance its goals are important in their own

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[274] For example, the Agency can decide whether to initiate a civil or criminal action which, when diligently prosecuted, will block a citizen suit. 33 U.S.C. § 1365(b)(1)(B) (2012).

[275] The dynamic character of the challenges facing regulators suggests the need for periodic reassessment of these roles. *See Dynamic Governance*, *supra* note 10. The findings in our case study in *Agency Mechanism Choice*, *supra* note 20, support our claim that focusing on the roles of different actors is a critical aspect of regulatory policy design and implementation.

right for legitimacy purposes. Improved communication through settlement provisions requiring regulated entities to post performance results on publicly accessible websites, for example, is likely to serve transparency and accountability values and might affect efficiency and effectiveness. Those interested in policy design should therefore consider the particular tools an agency might use to advance its goals from a legitimacy perspective.

Second, for some programs, such as Next Gen, and we suspect for many others,[276] it is important to consider the tools an agency uses in a particular initiative because actual use of tools provides metrics for evaluating the agency's performance. For example, while an agency may attempt to improve public health by increasing the use of advanced monitoring technology that detects the presence of pollution, it may be difficult to evaluate the success of its efforts because of complicating factors, such as the challenges of measuring actual public health over time and the multiple causes of adverse health outcomes.[277] To mitigate these shortcomings, however, the agency can use the frequency of the use of particular tools such as advanced monitoring as surrogates for the public health benefits they are presumed to provide. For purposes of our study of Next Gen, we use EPA's own objectives—the five tools the agency is trying to advance—to evaluate its performance.

By evaluating the intersection of EPA's use of these mechanisms with the key actors involved in each mechanism, the tools the agency is seeking to advance, and the statutory authority involved, our companion article explores more fully how EPA has used its available legal mechanisms to advance use of these tools. We believe this conceptual framework offers a template for considering critical elements of process design.

A. Advanced Monitoring

Compliance monitoring is a central feature of effective environmental governance.[278] It enables regulated entities to track their

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[276] *See, e.g.*, Shapiro & Steinzor, *supra* note 245, at 1769 (endorsing definition of metrics that includes "measurements of current and future activities and their expected results"); *Lessons Learned from 9/11: DNA Identification in Mass Fatality Incidents*, 1 S. NEW ENG. ROUNDTABLE SYMP. L.J. 25, 35 (2006) (discussing use of activity metrics to assess performance of laboratories engaged in DNA analysis to identify the mass fatality victims).

[277] EPA's Charles River initiative is a prominent example of the use of actual environmental quality metrics to evaluate regulatory performance. *See, e.g.*, Shelley H. Metzenbaum, *Measurement that Matters: Cleaning Up the Charles River*, *in* ENVIRONMENTAL GOVERNANCE: A REPORT ON THE NEXT GENERATION OF ENVIRONMENTAL POLICY (Donald F. Kettl ed., 2001).

[278] Compliance monitoring is critical "to ensur[ing] that the regulated community obeys environmental laws and regulations through on-site visits by qualified inspectors, public reporting

compliance with regulatory requirements, identify (in at least some cases) why noncompliance or other potentially problematic activity is occurring, and correct problems.[279] Monitoring information also enables government officials to track compliance and improve their understanding of ambient conditions.[280] Further, government officials use compliance monitoring information to establish enforcement priorities both generally and with respect to particular facilities.[281] Finally, civil society uses compliance monitoring information in various ways, such as by providing support for allegations of noncompliance in citizen suits or related enforcement actions.[282]

Shortcomings in compliance monitoring, however, have hampered efforts to reduce the incidence of noncompliance, as government officials have acknowledged.[283] In some instances, limitations in data, including compliance-related data, have precipitated dramatic restructuring of statutory regimes. Congress's recognition that data limitations undermined ambient-based regulation and severely hampered

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of violations, and by reviewing information submitted to it by the regulated industry as part of self-monitoring and reporting programs." INT'L NETWORK FOR ENVTL. COMPLIANCE & ENFORCEMENT, PRINCIPLES OF ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT HANDBOOK 7 (2009), *available at* https://www.inece.org/assets/Publications/5944124a76861_PrinciplesOfEnvironmentalComplianceAndEnforcementHandbook_en_full.pdf. *See also Holistic*, *supra* note 10, at 18; *cf.* Mark A. Cohen & Jay P. Shimshack, *Monitoring, Enforcement and the Choice of Environmental Policy Instruments*, (forthcoming in ELGAR ENCYCLOPEDIA OF ENVIRONMENTAL LAW: POLICY INSTRUMENTS IN ENVIRONMENTAL LAW __ (Kenneth R. Richards & Josephine van Zeben eds.)) (manuscript at 4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2821265 (arguing that "monitoring and enforcement actions consistently yield" positive results by generating specific and general deterrence and encouraging "beyond compliance behavior").

279 *Cf.* Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706, 66710 (Dec. 22, 1995) (describing a function of self-auditing to be preventing future violations by making modifications to a regulated entity's operations).

280 *See, e.g.*, *How We Monitor Compliance*, EPA, http://www.epa.gov/compliance/how-we-monitor-compliance (last updated Dec. 11, 2016); Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards, 80 Fed. Reg. 75,178, 75,192 (Dec. 1, 2015) (describing the purpose of fenceline air quality monitoring as ensuring that sources are limiting emissions within the facility).

281 *Cf.* Sidney M. Wolf, *Fear and Loathing About the Public Right to Know: The Surprising Success of the Emergency Planning and Community Right-to-Know Ac*t, 11 J. LAND USE & ENVTL. L. 217, 324 (1996) (noting that data derived from the Toxic Release Inventory ("TRI") helps development of EPA's enforcement priorities).

282 *See* Roy S. Belden, *Preparing for the Onslaught of Clean Air Act Citizen Suits: A Review of Strategies and Defenses*, 1 ENVTL. L. 377, 379 (1995) (predicting that increased monitoring requirements under the 1990 CAA amendments "may encourage a wave of citizen suits"); Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 216–26 (2000) (discussing role of citizen monitoring in environmental enforcement).

283 *See Dynamic Governance*, *supra* note 10, at 586–89 (discussing challenges posed by data gaps concerning compliance status), *See also Holistic*, *supra* note 10, at 21 (providing examples of adverse impacts on compliance performance of inadequate verification of outside monitoring).

enforcement efforts, for example, spurred it in 1972 to introduce an effluent-based component to its regulatory scheme in addition to its original ambient-based approach to water pollution control.[284] Even today, limitations in monitoring data undermine governance efforts, as the experience with total maximum daily loads ("TMDLs") under the CWA makes clear.[285]

Advances in monitoring capacity create opportunities to transform our understanding of pollution outputs, ambient conditions, and compliance status. As scientists involved in the effort put it, monitoring capacity is changing dramatically from "expensive, complex, stationary equipment, which limits who collects data, why data are collected, and how data are accessed," to "lower-cost, easy-to-use, portable pollution monitors (sensors) that provide high-time resolution data in near real-time."[286] Two EPA officials involved in Next Gen have noted that this revolution in monitoring capacity "builds compliance drivers into the rules and permit, leading to better environmental protection for all."[287]

B. Electronic Reporting

Agencies need information on which to base their regulatory or management decisions. To maximize the accuracy, thoroughness, and timeliness of that information, Congress often requires them to make decisions based on the "best available"[288] or the "latest"[289] scientific or technical information. Congress has long recognized the importance of acquiring information on compliance status to effective implementation of regulatory programs and to effective enforcement in particular.[290] All

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[284] *See* Robert L. Glicksman & Mathew R. Batzel, *Science, Politics, Law, and the Arc of the Clean Water Act: The Role of Assumptions in the Adoption of a Pollution Control Landmark*, 32 WASH. U. J.L. & POL'Y 99, 118–21 (2010).

[285] *See, e.g.*, Dave Owen, *After the TMDLs*, 17 VT. J. ENVTL. L. 845, 851 (2016) (referring to pervasive information gaps that have hampered implementation of TMDLs).

[286] Emily Snyder et al., *The Changing Paradigm of Air Pollution Monitoring*, 47 ENVTL. SCI. & TECH. 11369, 11369 (2013).

[287] Jon Silberman & David Hindin, *Effective Environmental Monitoring and Reporting*, *in* Paddock et al., COMPLIANCE, *supra* note 26, at 128, 138. The companion to this Article details EPA's progress in expanding use of advanced monitoring technologies. In doing so, it evaluates how each component of our conceptual framework may be influencing the agency's mechanism choices for this purpose. *See Agency Mechanism Choice*, *supra* note 20.

[288] *E.g.*, 16 U.S.C. § 1533(b)1)(A) (2012).

[289] *E.g.*, 33 U.S.C. § 1314(a)(1) (2012); 42 U.S.C. § 7408(a)(2) (2012).

[290] *See, e.g.*, S. REP. NO. 92-414 at 62–63 (1971), *reprinted* in 2 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1415, 1480–81 (concerning CWA enforcement). Mandatory reporting is also a critical component of other regulatory programs. The income tax system would collapse, for example, without accurate self-reporting of taxable income.

of the major pollution control statutes authorize EPA to require reporting by regulated entities and to obtain information itself.[291]

Yet the information that EPA has acquired under those provisions has fallen short of statutory aspirations. Several problems have hindered the ability of EPA and regulated entities to make effective use of information reporting requirements. These include piecemeal crafting of information production and disclosure requirements with regard to interactive or cumulative effects; regulators' narrow interpretations of these requirements to avoid overwhelming industry and themselves with information production costs and analytical overload; lack of coordination, resulting in "fragmented, piecemeal, and minimally informative data under separate and largely incompatible" regulatory programs; aggregation and comparison difficulties stemming from lack of computer accessibility or standardized formats and poor quality control; and dispersal of data across incompatible databases.[292] The upshot has been a "data-rich but information-poor" environment which reduces the value of the data accumulated to the agency itself and to other stakeholders in the regulatory process.[293]

EPA has sought to redress some of these failings by resorting to electronic reporting. It has indicated that e-reporting has the capacity to "drive better compliance"[294] by allowing EPA and the states to rely on advanced information technology to target efficiently the most serious pollution problems and expand its efforts to provide meaningful data to the public.[295] As EPA conceives of it, e-reporting includes more than just electronic data entry by regulated entities. It relies on advances in information technology to improve and streamline information submission to improve data quality, the timeliness of data availability, and the accessibility of data for use by the government, regulated parties, and the public.

EPA envisions a significant role for e-reporting under Next Gen. It has already issued regulations requiring e-reporting under the CWA and RCRA[296] and even built e-reporting conditions into recent settlements.[297]

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291 *E.g.*, 33 U.S.C. § 1318(a) (2012); 42 U.S.C. § 7418(a), (d) (2012).

292 Bradley C. Karkkainen, *Information As Environmental Regulation: TRI and Performance Benchmarking, Precursor to A New Paradigm?*, 89 GEO. L.J. 257, 284–85 (2001).

293 *Id*. at 285.

294 Giles, *NGC*, *supra* note 21, at 25.

295 National Pollutant Discharge Elimination System (NPDES) Electronic Reporting Rule, 80 Fed. Reg. 64,064 (Oct. 22, 2015). *See also* 2016–2017 GUIDANCE, *supra* note 194, at 14 (describing goals for e-reporting as providing better information on pollution sources, pollution, and compliance and enhancing efficiency, effectiveness, and transparency).

296 *See Agency Mechanism Choice*, *supra* note 20.

297 *Id*.

A guidance document issued during the Obama Administration directed regional offices to "[r]equire electronic reporting, as appropriate, for all permits written by the regions and all data required by enforcement actions, where appropriate and in accordance with national guidance"[298] (although OECA did not include in the Guidance specific implementation requirements for this new technology element and an OECA memorandum issued under the Trump Administration eliminated the requirement that Next Gen enforcement tools be considered in all enforcement settlements).[299]

C. Increased Transparency

A third Next Gen tool is transparency, which is one of the "hallmarks" of modern administrative law.[300] Transparency "refers to the availability of information about government policies, structures, and actions. This information helps citizens (and others) assess and attempt to change their government's performance."[301] In the context of Next Gen, transparency also provides information about regulated party performance and responses thereto. Transparency promotes the legitimacy and accountability of the administrative state by "subject[ing] administrators to the informal pressures of shame and pride that may contribute further to the alignment of practice with legislative and popular will."[302] Transparency also can promote more effective regulation by empowering those to whom information is provided, assisting public participation in government, and facilitating the production of knowledge.[303] Finally, it

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298 2016–2017 GUIDANCE, *supra* note 194, at 12.

299 Susan Parker Bodine, Assistant Administrator, EPA, Memorandum to Regional Counsels et al., The Appropriate Use of Compliance Tools in Civil Enforcement Settlements (Apr. 3, 2018) (stating that "there is no default expectation that 'innovative enforcement' provisions will routinely be sought as injunctive relief, where such activities are not required by the applicable statute or regulation"). The companion article evaluates use of this tool and its intersection with different legal mechanisms, key actors, and statutory authority to explore the roles these features of our conceptual framework may play in advancing use of e-reporting.

300 William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171, 171 (2009); Transparency and Open Government, 74 Fed. Reg. 4685, 4685 (Jan. 21, 2009) (espousing the value of transparency).

301 Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655, 1717 (2006). *See also* Peter S. Orszag, Director, Office of Mgmt. & Budget, Memorandum for the Heads of Executive Departments and Agencies, Open Government Directive 1 (Dec. 8, 2009) ("Transparency promotes accountability by providing the public with information about what the Government is doing.").

302 William H. Simon, *The Organizational Premises of Administrative Law*, 78 L. & CONTEMP. PROBS. 61, 65 (2015); *id.* at 81 ("Transparency enhances accountability"). *See also* O'Connell, *supra* note 302, at 1718.

303 *See* Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1347–51 (2011) (discussing transparency as regulation, democracy, efficiency, and epistemology).

can make it more difficult for regulated entities or others to capture agency officials.[304]

EPA's track record on transparency has left something to be desired, both generally and in the enforcement context. In a 2008 report, for example, GAO took issue with EPA's methods for reporting enforcement penalties that inhibited its accuracy and transparency.[305] It also took EPA to task for the lack of transparency in its peer review process,[306] and others have criticized EPA for lack of transparency in the way it interacts with OIRA in the latter's review of EPA regulations.[307]

OECA has invoked the importance of transparency in explaining Next Gen. When Assistant Administrator Giles introduced Next Gen, she touted transparency as a way to improve performance and increase compliance.[308] She asserted that transparency can bring compliance problems to the attention of senior management and put pressure on lower performing companies to match the performance of others in the same industry. Transparency can also alert EPA regions and states to better results being achieved in other jurisdictions, thereby motivating lagging regions to learn why they are behind the curve and take steps to redress the situation.[309] Giles warned, however, that transparency can only be as effective as the accuracy of the information disclosed and that "[r]eleasing an avalanche of data is not the answer" if such data is not understandable or readily put to use by the intended audience.[310] Still, she concluded that, even with constrained resources, "thoughtful transparency strategies can improve results."[311]

Although OECA has since continued to stress the value of transparency as a Next Gen tool,[312] it has conceded that it has not established "implementation requirements" in the form of specific actions

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304 *See id.* at 1349; Roberta S. Karmel & Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation*, 34 BROOK. J. INTL. L. 883, 946 (2009).

305 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-1111R, ENVIRONMENTAL ENFORCEMENT: EPA NEEDS TO IMPROVE THE ACCURACY AND TRANSPARENCY OF MEASURES USED TO REPORT ON PROGRAM EFFECTIVENESS 6 (2008).

306 U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-00-270R, INFORMATION ON SCIENCE ISSUES IN EPA'S PERFORMANCE REPORT FOR FISCAL YEAR 1999 AND PERFORMANCE PLANS FOR FISCAL YEARS 2000 AND 2001 (2000).

307 *See* Sidney A. Shapiro, *Why Administrative Law Misunderstands How Government Works: The Missing Institutional Analysis*, 53 WASHBURN L.J. 1, 17 (2013). *See also* U.S. GEN. ACCOUNTING OFFICE, GAO-03-929, RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS (2003).

308 Giles, *NGC*, *supra* note 21, at 25. She cited the TRI program, 42 U.S.C. § 11023 (2012), as evidence to support this potential.

309 *Id.* at 25–26.

310 *Id.* at 26.

311 *Id.*

312 2016–2017 GUIDANCE, *supra* note 194, at 14.

or deliverables for regions and states with respect to this or any of the other four Next Gen components.[313] Thus, the agency's efforts to improve transparency remain a work-in-progress.[314]

D. Innovative Enforcement (including Third-Party Verification)

A fourth tool that EPA identifies to transform compliance and regulatory enforcement is the use of innovative enforcement.[315] EPA's use of the term has been amorphous, but it appears to cover a variety of efforts to pursue vigorous enforcement with fewer resources. Adding to the confusion, even though EPA has identified innovative enforcement as a fourth and separate Next Gen tool, it has also cited other Next Gen tools, including advanced monitoring and electronic reporting, as examples of innovative enforcement. The agency has, however, identified at least one form of "innovative enforcement" that stands apart from other Next Gen tools—the use of third-party auditors to monitor and certify compliance.[316] Because accountability is an important component of any regulatory program, an enforcement and compliance regime should seek to hold accountable both regulated entities[317] and regulatory officials.[318] Gaps in agency monitoring capacity,[319] in tandem with concerns about the credibility of regulated party efforts,[320] provide compelling reasons to consider different strategies to improve the quality and extent of performance monitoring.

Third-party auditing and other forms of verification may be tools that at least partially address shortcomings in traditional government oversight and "first-party" certification provided by the regulated party itself.[321] The concept is that an independent third party will monitor and assess a regulated party's performance of its legal responsibilities. If

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313 *Id.* at 13.

314 The companion to this Article details how EPA has used its available legal mechanisms to promote transparency and explores the intersection of this effort with the other features of our conceptual framework, notably the actors and statutory authorities involved.

315 Giles, *NGC*, *supra* note 21, at 26.

316 *Id.* Despite EPA's treatment of third-party monitoring as innovative, the strategy's roots extend back at least two decades. *See, e.g.*, Markell, *Innovators*, *supra* note 153, at 406–08.

317 The use of "gatekeeping mechanisms" such as agency control over citizen interventions, including citizen suits, also may hold regulatory beneficiaries accountable. *See generally* Engstrom, *Gatekeepers*, *supra* note 30.

318 The horizontal coordination issues discussed in Part III.A., *supra*, reflect efforts by one federal actor (such as the federal courts) to ensure accountability of other federal actors (such as EPA or DOJ). The vertical coordination issues discussed in Part III.B., *supra*, relate to the federal government's efforts, through devices such as enforcement metrics, to hold states with delegated implementation and enforcement authority accountable.

319 *See Dynamic Governance*, *supra* note 10, at 586–89.

320 *See supra* Part III.C.2.

321 ACUS, *supra* note 261, at 2941.

effective, third-party auditing has the potential to "leverage private resources and expertise in ways that make regulation more effective and less costly . . . [T]hird-party programs may also enable more frequent compliance assessment and more complete and reliable compliance data."[322] In addition, third-party auditing may allow for diversion of scarce government resources to other responsibilities.[323] The Administrative Conference of the United States ("ACUS") has endorsed such efforts, subject to appropriate safeguards that guarantee "a high degree of rigor and independence," especially in the face of public health risks.[324]

Thus, third-party auditing is an enforcement tool available to EPA and other regulators that, if designed well, can improve compliance by enhancing monitoring coverage, bolstering transparency, and enabling reassignment of agency resources to other priorities. It has the potential to be used through multiple legal mechanisms, most obviously permits and enforcement actions, to tailor regulatory responses to facility-specific circumstances.[325]

E. Better Rules

The difficulties for regulated entities, regulatory beneficiaries, and regulatory enforcers stemming from opaque, uncertain, or complex regulations are well known.[326] Legal and policy analysts have recommended ways to mitigate these problems, including adopting more

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[322] *Id.*

[323] Giles, *NGC*, *supra* note 21, at 26. *See also* ACUS, *supra* note 261, at 2941.

[324] ACUS, *supra* note 261, at 2942. The use of third-party auditors poses risks concerning auditor credibility, accuracy of results, and agency oversight costs. *Id.* at 2941–42. It also raises questions about the appropriate allocation of responsibility for oversight between public and private actors. *See, e.g.*, PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT (2007). Transparency, another tool highlighted in Next Gen, can serve as a palliative to some of these accountability problems. ACUS, *supra* note 261, at 2943 (discussing access to information).

[325] The companion Article details the extent to which and the reasons why EPA has done so through the different legal mechanisms it has relied on in implementing Next Gen.

[326] *See, e.g.*, Joel A. Mintz, *Has Industry Captured the EPA?: Appraising Marver Bernstein's Captive Agency Theory After Fifty Years*, 17 FORDHAM ENVTL. L. REV. 1, 31 (2005) (noting that opaque, complex, and difficult to administer, CAA regulations have hindered enforcement); Pierrick B. Le Goff, *The French Approach to Corporate Liability for Damage to the Environment*, 12 TUL. EUR. & CIV. L.F. 39, 63 (1997) (explaining complex French environmental regulations); Connel Fullenkamp & Celine Rochon, *Rethinking the Direction of Bank Capital Regulation*, 34 BANKING & FIN. SERVICES POL'Y REP. no. 2, Feb. 2015, at 5, 7 (explaining relevant bank regulations).

specific rules,[327] improving transparency,[328] avoiding rules that require inherently uncertain determinations,[329] or offering flexibility in the available means of compliance.[330]

The final Next Gen tool is an effort to address these concerns. Assistant Administrator Giles explained in rolling out Next Gen that designing "rules with compliance built in"—those that "will work in the real world"—can make agencies' efforts to improve compliance and enforce more efficient.[331] The aim is to make regulations "more self-implementing,"[332] by, say, focusing compliance burdens on limited entities with great capacity to understand and comply with their duties (such as requiring auto manufacturers to install pollution controls and certify that they have done so instead of requiring vehicle owners to purchase and install such equipment).[333] Giles also endorsed efforts to increase simplicity, clarity, and flexibility, even if the resulting rules are not as protective. The upshot of this approach is that agencies can improve health and environmental protection with reduced reliance on enforcement.[334]

VI. STATUTORY AUTHORITY

The final component of our regulatory design model is the statutory authority vested in an agency responsible for administering a regulatory program. The nature of the agency's authority may dictate or circumscribe the mechanisms and tools the agency uses, the extent to

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327 Bernard Black, *A Model Plain Language Law*, 33 STAN. L. REV. 255, 297 (1981); Ronen Avraham, *Private Regulation*, 34 HARV. J.L. & PUB. POL'Y 543, 617 n.261 (2011); Christian Bovet & Philippe Gugler, *Public Perspectives on Privatization: Connecting Regulations and Competition Law: A Swiss Perspective on Liberalization*, 63 L. & CONTEMP. PROBS. 133, 136 (2000) (arguing that "more specific and precise" regulations are "easier to comply with and to enforce").

328 Joan MacLeod Hemingway, *Personal Facts About Executive Officers: A Proposal for Tailored Disclosures to Encourage Reasonable Investor Behavior*, 42 WAKE FOREST L. REV. 749, 760–61 (2007).

329 Anthony P. Polito, *Fiddlers on the Tax: Depreciation of Antique Instruments Invites Reexamination of Broader Tax Policy*, 13 AM. J. TAX POL'Y 87, 97 (1996) (detailing tax rules concerning useful life and salvage value).

330 James J. Park, *Two Trends in the Regulation of the Public Corporation*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 429, 438–39 (2012).

331 Giles, *NGC*, *supra* note 21, at 23. EPA procedures require that enforcement officials participate in rule drafting. Further, OECA's training and guidance materials encourage regulation drafters to incorporate compliance principles such as clarity and transparency into the process and to consider how design choices in rule drafting can influence compliance and enforcement needs. GAO, KEY CONSIDERATIONS, *supra* note 148, at 15–16, 29.

332 Giles, *NGC*, *supra* note 21, at 23.

333 *Id.*

334 *Id.* at 24. Our companion article investigates EPA's use of its legal mechanisms to create "better rules," and explores the agency's promotion of such rules in the context of the entire suite of features of our conceptual framework.

which the agency relies on different actors in pursuing its objectives, and the objectives the agency seeks to achieve.[335] If the agency lacks the authority to engage in rulemaking, for example, it will have to resort to some other mechanism as a policymaking vehicle.[336] If an agency wishes to seek penalties that exceed the limits allowed for administrative adjudication under its organic statute, it may be forced to pursue enforcement in court if the cap on judicially imposed fines is higher.[337] Conversely, if a statute imposes deadlines for an agency's issuance of rules, the agency may need to divert resources from the pursuit of alternative mechanisms that are not subject to such action-forcing devices.[338]

In many situations, however, organic statutes vest agencies with discretion over mechanism choice. The Supreme Court has recognized that the National Labor Relations Board ("NLRB"), for example, has broad discretion to choose between rulemaking and adjudication to implement labor relations policy.[339] But even if an agency generally has the discretion to choose among available mechanisms, it may not be able to do so in a particular instance without undercutting agency goals or values. A plurality of the Supreme Court in the *Wyman-Gordon* case, for example, held that the NLRB could not limit the application of a new policy adopted in an adjudication to prospective application without complying with the procedures for adopting a rule.[340] Application of a new policy to an adjudicative party whose conduct occurred before adoption of the policy can create notice and fairness concerns, however.[341] Thus, if the agency finds these concerns overriding, it in effect will be forced to adopt the policy through rulemaking, even though its organic

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335 Magill, *supra* note 37, at 1387 (noting that although statutes often confer the power to use all three foundational mechanisms, "sometimes Congress declines to permit an agency to use one or more of the standard policymaking tools").

336 *See, e.g.*, Chamber of Commerce v. NLRB, 721 F.3d 152 (4th Cir. 2013) (narrowly construing the NLRB's rulemaking authority to hold that it could not adopt rules requiring employers to inform workers of their rights).

337 The choice of adjudication may be unavailable in some instances. *See* Magill, *supra* note 37, at 1389.

338 *See* Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 836 (1988) (discussing potential for deadlines to produce resource misallocation); *cf.* Daniel P. Selmi, *Jurisdiction to Review Agency Inaction Under Federal Environmental Law*, 72 IND. L.J. 65, 133 (1996) (explaining how unrealistic deadlines force hasty decisions or divert resources into litigation).

339 NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (noting the Board's discretion to choose rulemaking or adjudication, even when it announces new principles).

340 NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969).

341 *Id.* at 775 (Black, J., concurring in the result) (referring to "considerations of fairness" raised by retroactive adjudication).

statute generally allows it to choose between rulemaking and adjudication.

As *Wyman-Gordon* illustrates, mechanism choice also may be driven by the procedures that organic statutes attach to the use of different mechanisms.[342] Even if an agency is allowed to formulate policy through rulemaking or administrative adjudication, the agency may prefer to use the mechanism that avoids triggering elaborate formal procedures, all other things being equal. Likewise, the availability and scope of judicial review under organic statutes and the APA may influence mechanism choice. If a statute subjects rulemaking to arbitrary and capricious review and adjudication to the supposedly more rigorous substantial evidence review, the agency may prefer the mechanism that triggers more deferential review.[343]

Agency organic statutes also affect the actors who may be involved in implementing regulatory program components. If, for example, a statute authorizes adjudicatory enforcement only in court, a decision to pursue enforcement would necessarily require the agency to coordinate with, and perhaps to defer to the judgments and strategic choices, of DOJ. If an agency delegates permitting authority to a state, as EPA often does under the cooperative federalism statutes, its own ability to issue permits that include elements of an initiative such as Next Gen is limited.[344]

Finally, organic statutes may limit an agency's ability to pursue certain objectives regardless of the mechanism. EPA's information-gathering authority under the pollution statutes is broad, likely providing ample basis for requiring regulated parties to use (at least in some circumstances) some of the tools that EPA has identified, such as advanced monitoring and electronic reporting.[345] As noted above, however, industry has asserted that two Next Gen tools, third-party verification and electronic reporting, exceed EPA's statutory authority in the context of regulation of underground storage tanks.[346]

Thus, organic statute provisions may compel the use of certain mechanisms and preclude the use of others, influence the mix of

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342 *Id.*

343 The choice between legislative and nonlegislative rules may be influenced by the availability of review. Nonlegislative rules, which may not qualify as final agency actions, *see* Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243 (D.C. Cir. 2014) (policy statements), may be attractive if the agency seeks to avoid immediate judicial challenges.

344 *See, e.g.*, 33 U.S.C. § 1342(d)(2), (4) (2012) (authorizing EPA to issue NPDES permits only if a state with delegated permitting authority has not remedied its own deficient permit).

345 *See, e.g.*, 33 U.S.C. § 1318 (2012); 42 U.S.C. § 7414 (2012). Constitutional constraints may limit the use of certain tools. *See, e.g.*, United States v. Jones, 565 U.S. 400 (2012) (holding that use of global positioning tracking device was a search for purposes of the Fourth Amendment).

346 *See supra* note 269 and accompanying text.

stakeholders who may be involved in a regulatory venture, constrain the tools an agency may require a regulated party to use, and similarly constrain the agency's objectives. Logically, in developing and implementing a legal regime to advance a particular goal, policymakers, agency officials, and others should consider the impact that statutory authority will have on the use of legal mechanisms, the involvement of different actors, the tools an agency may use to advance its objectives, and the objectives themselves.

VI. CONCLUSION

Understanding how agencies operate to carry out their missions is fundamental to any effort to promote better regulatory governance. The roles that the three branches of government play in regulatory administration is of course critically important to the fate of regulatory programs. That kind of inquiry, however, should not obscure the importance of analyzing what agencies themselves do and why. Agencies do much of the work of governance, often with passing—if any—involvement or engagement by Congress, the Executive, or the courts. Challenges, such as limited data about agency activities and outcomes and limited transparency more generally, have complicated the search for insight about agency actions and motivations.

Our thesis is that much of agencies' work occurs through their use of one or more of three foundational mechanisms of the administrative state—rulemaking, licensing, and enforcement. We believe, further, that agency mechanism choice matters because, to borrow Magill's phrase, each mechanism is distinct in critical respects: "The differences are significant and they run along three dimensions: the process the agency must follow, the legal effect of the agency's use of a particular mechanism, and the availability and nature of judicial examination of the agency's action."[347] Because of their distinct features along these three dimensions, agency mechanism choice has significant implications for fundamental administrative law values such as transparency, accountability, participation, deliberation, fairness, effectiveness, and efficiency, and therefore for the legitimacy of the administrative state.[348]

Yet, as others have noted, agency mechanism choice has traditionally operated under the radar.[349] Congress typically has given agencies broad

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[347] Magill, *supra* note 37, at 1384; *see also id.* at 1397 (noting importance of the choice of policymaking form). The third variable may be further unpacked into two sub-parts—whether and when an agency may be challenged in court, and the standard of review a court will use. *Id.* at 1396.

[348] Hammond & Markell, *supra* note 10, at 316, 319–20.

[349] *See, e.g.*, Magill, *supra* note 37, at 1383 ("The nonconstitutional dimensions of agencies' ability to rely on a mix of policymaking tools generate little interest or investigation."). Mechanism

discretion to choose among different legal mechanisms, and it rarely second-guesses agencies' exercise of that discretion. The Executive rarely intervenes in agency mechanism choice, [350] though the occasional interventions of OIRA into agency rulemaking obviously has the potential indirectly to influence such choices.[351] And the courts, often characterized as the legitimizers of agency action by providing for judicial review of such action,[352] have traditionally shown little interest in assessing agency mechanism choice or directing agencies to use one mechanism rather than another.[353]

This article and its companion, *Agency Mechanism Choice*, shine a light into the shadows of this critical dimension of agency practice by proposing a conceptual framework composed of five key features of administrative governance and the relationships among them: legal mechanisms, the actors that implement them, the tools agencies use to integrate affected stakeholders into agency programs, the agencies' objectives, and the nature and scope of relevant statutory authority. This framework extends beyond much of the law review literature on mechanism choice, which has largely focused on the impacts of different features of the legal mechanisms themselves. It elaborates on an issue that Professor Shapiro raised more than half a century ago: "whether there are factors, perhaps not consistent with sound administration, that may impel an agency to choose one formal route rather than another."[354] We suggest that a range of understudied factors may influence agency mechanism choice and provide a model for conducting a more searching analysis of regulatory governance.

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choice is common grist for administrative law casebooks and treatises because varying procedures apply to different mechanisms. *See, e.g.*, GLICKSMAN & LEVY, *supra* note 53, chs. 3–7 (providing separate treatment for different "modes" of agency procedure—rulemaking, policymaking adjudication, mass adjudication, informal action, and investigation and enforcement).

350 *Cf.* David Freeman Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197, 1229 n.141 (2004) (noting that "legislative and executive control over agency conduct is, as with any principal-agent situation, something less than total"). On OIRA's role in the administrative process, see Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013).

351 *See* Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1173 (2014) "[T]he White House—typically through OIRA—is now at least as important as an overseer of agency action, at least if that action is significant rulemaking or guidance, particularly because it holds almost unreviewable power to block regulation entirely.").

352 *See* Hammond & Markell, *supra* note 10, at 321–22.

353 Magill, *supra* note 37, at 1385 (discussing the courts' "hands-off" approach). For further discussion of Magill's analysis of the interaction of courts and agencies concerning mechanism choice, see *supra* notes 91–114 and accompanying text.

354 Shapiro, *Choice*, *supra* note 63, at 944.

In our companion article, we test this framework empirically through a case study of EPA's Next Gen initiative to explore possible intersections between agency mechanism choice and the other features of the administrative state that we regard as critically important to agency behavior. We hope that the framework we develop in this Article, and the empirical case study in the companion piece, will illuminate how the administrative state actually functions, provoke more debate about agency mechanism choice, and, ultimately, lead to more informed policy design.