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REGULATORY FLEXIBILITY AND THE ADMINISTRATIVE STATE

Marshall J. Breger†

I. INTRODUCTION

We live in an age of reconceptualization of administrative law in which scholars are proposing new paradigms such as “reflexive” regulation,¹ “cooperative implementation,”² and “interactive compliance.”³ In the Clinton administration, this has meant an emphasis on “reinventing government”⁴ by making the administrative process more efficient. At the same time, many in the Republican-controlled Congress have sought to shift from an adversary or enforcement paradigm for regulation to a cooperative partnership with the regulated community.⁵ This “new” learning is motivated by the premise that cooperation be-

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1. Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227 (1995). Reflexive regulation in, for example, the environmental law context means “engender[ing] a practice of environmentally responsible management” where businesses impose upon themselves policies which “minimize environmental harms and maximize environmental benefits.” *Id.* at 1232.

2. Douglas C. Michael, *Cooperative Implementation of Federal Regulations*, 13 YALE J. ON REG. 535, 540-41 (1996). Douglas Michael’s expansive notion of “cooperative implementation” includes:

governmental reliance upon agents or employees of the regulated entities themselves to interpret and enforce applicable rules. . . . The government would rely on the regulated entities to develop specific and individual implementation plans, and would thus restrict its role to assisting in and providing incentives for self-implementation programs, and to maintaining a credible residual program of detection, surveillance and enforcement.

Id. at 540-41.

3. JAY A. SIGLER & JOSEPH E. MURPHY, *INTERACTIVE CORPORATE COMPLIANCE: AN ALTERNATIVE TO REGULATORY COMPULSION* (1988). “Interactive compliance rests upon the encouragement [and development] of reliable self-regulatory systems for corporate activity.” *Id.* at x; see generally, *CORPORATE LAWBREAKING AND INTERACTIVE COMPLIANCE: RESOLVING THE REGULATION-DEREGULATION DICHOTOMY* (Jay A. Sigler & Joseph E. Murphy eds., 1991).

4. VICE PRESIDENT AL GORE, *REPORT OF THE NATIONAL PERFORMANCE REVIEW: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS 1* (1993).

5. As example, some commentators have suggested that OSHA is based on a system of “compliance through punishment.” See Albert L. Nichols & Richard Zeckhauser, *Government Comes to the Workplace: An Assessment of OSHA*, PUB. INTEREST, Fall 1977, at 39, 42. In contrast, the proposed OSHA Consultation Services Authorization Act of 1995, H.R. 1433, 104th Cong. (1995), would have required OSHA to have instituted a program of cooperative agreements where employers subject to OSHA could consult with State

tween business and government is more likely to lead to greater compliance by the regulated community than the traditional adversarial relationship between the two.⁶ Thus, many in Congress and government have stressed the need to promote flexibility in regulatory enforcement and policy making. This desire for flexibility has resulted in federal programs such as OSHA's Voluntary Protection Program, the EPA's Project XL, and the EPA's Environmental Leadership Program. It has also meant the promotion of performance standards⁷ and market based regulations such as deposit/refund systems, tradeable pollution permits and pollution taxes,⁸ as well as the proposed elimination of numerous traditional command and control regulations.⁹

officials with respect to voluntary efforts by employers to establish and maintain safe and healthful employment environments and facilities. The possible extent of this focus on cooperation can be seen in the Safety and Health Improvement and Regulatory Reform Act of 1995, H.R. 1834, 104th Cong. (1995). Introduced by Representative Ballenger, this measure would have required OSHA to spend at least half of its budget on consulting and other employer assistance programs. *Id.* §§ 4, 5. The Occupational Safety and Health Reform Reinvention Act, S. 1423, 104th Cong. (1995), included a worksite-based initiatives provision that would have encouraged voluntary compliance by exempting a facility from all safety and health inspections and investigations where the facility had an exemplary safety and health record and had a program for identifying and correcting workplace hazards. *Id.* § 4. Such provisions would have codified OSHA's Voluntary Protection Program, discussed at *infra* part IIA.1.

Legislation which focuses on cooperative partnerships should be seen as distinct from OSHA overhaul bills. H.R. 107, 104th Cong. (1995), sought to repeal OSHA provisions for inspections, investigations and recordkeeping, citations, enforcement procedures, judicial review, and civil and criminal penalties. In contrast, for a proposal that OSHA needs to be strengthened by giving the agency more power, including additional enforcement power, see SIDNEY A. SHAPIRO & THOMAS O. MCGARITY, *WORKERS AT RISK: THE FAILED PROMISE OF OSHA* (1993); Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1 (1989). Professor Shapiro argues that the political weakness of workers has prevented the revamping of the Occupational Safety and Health Act to achieve greater workplace safety. See Sidney A. Shapiro, *Occupational Safety and Health: Policy Options and Political Reality*, 31 HOUS. L. REV. 13, 33-42 (1994). Similarly, Professors McGarity and Shapiro recently argued that most existing data understate actual workplace fatalities and injuries. See Thomas O. McGarity & Sidney A. Shapiro, *OSHA's Critics and Regulatory Reform*, 31 WAKE FOREST L. REV. 587, 591-92 (1996).

6. Thomas McGarity classifies this approach as reflecting that of "good government reinventionists." Thomas O. McGarity, *The Expanded Debate Over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1506-13 (1996).

7. See Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 267-68 (1996) (noting that under a performance standard regime, industry is given the freedom to choose the most flexible and cost-effective means to achieve the regulatory goal). One article has called this a "beyond incentives approach." Timothy A. Wilkins & Terrell E. Hunt, *Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community as a Model for the Congress-Agency Relationship*, 63 GEO. WASH. L. REV. 479, 492 (1995).

8. See UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *THE UNITED STATES EXPERIMENT WITH ECONOMIC INCENTIVES TO CONTROL ENVIRONMENTAL POLLUTION* (1992). See also Richard B. Stewart, *United States Environmental Regulation: A Failing Paradigm*, 15 J.L. & COM. 585, 590-91 (1996). Professor Stewart argues that such market based regulations will provide industry with "positive incentives to invest in environmental protection, in contrast to the current system, which leads firms to invest in lawyers in order to fight regulations." *Id.* at 592.

9. Command and control regulations specify the particular manner in which a regulatory goal must be met. Examples of command and control regulations include air and water pollution statutes that mandate specific pollution "fixes," including "best available technology requirements." In contrast, performance standards only identify the regulatory goal, leaving the method of achieving the goal to the regulated entity. See, e.g., Federal Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (codified as amended at 33 U.S.C. § 1311(b)(1)(a) (1994)); Clean Air Act of 1955, Pub. L. No. 84-159, 69 Stat. 323 (codified as amended at 42 U.S.C. §§ 7401, 7411(a)(1)-7412(d)(2) (1994)). As numerous commentators have underscored, "the use of 'command and control' ideology becomes a political strategy to perpetuate older technologies in place of using the best performers as models for improvement." See Samuel P. Hays, *The Future of Environmental Regulation*, 15 J.L. & COM. 549, 565 (1996).

For many, an emphasis on voluntary compliance¹⁰ and other “cooperative” approaches ineluctably means less enforcement. This need not and should not be the case. A cooperative approach should not be premised on the proposition that a regulated entity gets “two bites at the apple” before enforcement kicks in. As example, environmental audits¹¹ present a good opportunity for voluntary compliance, but it is unclear that companies should be given an absolute privilege for any material contained in such audits. The mere fact that a firm voluntarily undertook an audit which turned up violations should not preclude enforcement on the basis of that audit *in every case*.¹² The EPA, however, remains firmly opposed to establishing an absolute evidentiary privilege for such voluntary orders.¹³ This is a far more nuanced regulatory approach than some of the extreme formulations that promise “absolution” if the firm simply conducts an audit and takes an accounting of its sins.¹⁴

See also PHILIP K. HOWARD, THE DEATH OF COMMON SENSE 10-11 (1996). Howard argues that command-and-control regulation has resulted in the death of common sense: “Our regulatory system has become an instructional manual. It tells us and bureaucrats exactly what to do and how to do it. Detailed rule after detailed rule addresses every eventuality, or at least every situation lawmakers and bureaucrats can think of.” *Id.* *See also* Stewart, *supra* note 8, at 585 (noting that “[t]he current paradigm of environmental regulations in the United States assumes that economic factors (including producers and consumers) in a capitalist market-based economy will not take measures to reduce pollution, wastes, and other forms of environmental degradation unless coerced by government to do so”). Compare Daniel J. Fiorino, *Toward a New System of Environmental Regulation: The Case for an Industry Sector Approach*, 26 ENVTL. L. 457, 465 (1996) (arguing that “most companies that are regulated for health and safety reasons in this country want to comply with the law”).

10. It should be clear that the term “voluntary compliance,” while probably too well established to be expunged from lawyers’ vocabularies[,] is ambiguous and potentially misleading. The word *voluntary* implies that the motivations for compliance are internal. In fact, a private actor will often comply with legal norms in whole or in part because of the system of incentives created by the law. In this situation, compliance is “voluntary” only in the sense that no one has to invoke the formal machinery of law enforcement to achieve its purposes.

E. Donald Elliot, *Environmental TQM: Anatomy of a Pollution Control Program that Works!*, 92 MICH. L. REV. 1840, 1840 n.2 (1994).

11. The EPA defines an environmental audit as “a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements.” United States Environmental Protection Agency, *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*, 60 Fed. Reg. 66,706, 66,710 (1995) [hereinafter *Incentives for Self-Policing*].

12. *See id.* at 66,706-07. EPA currently provides three incentives for companies to police themselves. First, the EPA does not seek gravity-based penalties (that is, penalties which reflect the seriousness of the violation) for violations discovered as a result of a company’s own auditing process, and which are promptly disclosed and corrected. *See id.* at 66,707. Second, the EPA will reduce by 75% a gravity-based penalty which, though not discovered through an auditing process, was voluntarily discovered, promptly disclosed, and expeditiously corrected. *See id.* Third, the EPA does not make recommendations for criminal prosecution violations which are discovered through an auditing process and disclosed before a government investigation begins. *See id.* Thus, under present EPA policy, companies have “two rather stark alternatives: they can wait for the EPA to discover any violations and face imposition of the full range of civil and criminal penalties, or they can conduct audits and comply with the conditions outlined in the policy.” David Sorenson, Comment, *The U.S. Environmental Protection Agency’s Recent Environmental Auditing Policy and Potential Conflict with State-Created Environmental Audit Privilege Laws*, 9 TUL. ENVTL. L.J. 483, 489 (1996). The present incentives present a substantial enhancement of the first audit policy, which merely provided that the “EPA will not promise to forgo inspections, reduce enforcement responses, or offer other such incentives in exchange for implementation of environmental auditing or other sound environmental management practices.” United States Environmental Protection Agency, *Environmental Auditing Policy Statement*, 51 Fed. Reg. 25,004, 25,007 (1986). *See generally* Michael Ray Harris, *Promoting Corporate Self-Compliance: An Examination of the Debate Over Legal Protection for Environmental Audits*, 23 ECOLOGY L.Q. 663 (1996).

13. *See* *Incentives for Self-Policing*, *supra* note 10, at 66,710.

14. *See* the proposed Voluntary Environmental Audit Protection Act, S. 582, 104th Cong. (1995). As a

All of these cooperative efforts presume the expansion of agency discretion within specific goals and parameters. Little attention has been paid, however, to developing a theory of regulatory flexibility. There has also been a lack of significant analysis concerning how such flexibility fits into the present Administrative Procedure Act (APA).¹⁵ This essay attempts to examine some evolving notions of regulatory flexibility and show how, if at all, they fit in with the existing framework of the administrative state. It is a preliminary effort to suggest the kinds of flexibility that should be encouraged and discouraged. It will highlight as well, the effect of increased administrative flexibility on the structure of administrative law and the APA thereby raising the question whether the APA — a document written to structure both adjudication and rule-making — is, in fact, well suited to regulate cooperation between industry and government.¹⁶

response to increased environmental liability over the past decade at least 17 states (Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, Oregon, South Carolina, South Dakota, Texas, and Wyoming) have enacted legislation which provides that environmental audit reports may not be introduced as evidence in court. *See Environmental Audits: State Immunity, Privilege Laws Examined for Conflicts Affecting Delegated Programs*, STATE ENV'T DAILY (BNA), Sept. 20, 1996. One more, South Dakota, has enacted legislation providing that the state may not request environmental audit reports from companies. *See id.*

The oft-repeated argument of the regulated community is that without a comprehensive statutory privilege, companies will scale back their voluntary, self-policing efforts and thus the result will be less, not more, compliance. *See*, as example, Protection of Environmental Self-Evaluation Data, Hearing on H.R. 1047 Before the House Committee on the Judiciary, 104th Cong., FDCH Cong. Testimony, June 29, 1995, (testimony of Bruce Adler, Senior Environmental Health and Safety Counsel, General Electric Corp.), available in LEXIS, LEGIS Library, CNGTST File. For large corporations, at least, this argument is little more than an advocate's assertion and should be taken as such.

15. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

16. The one exception being negotiated rulemaking, a relatively new approach to agency rulemaking that facilitates the consensual development of rulemaking by allowing all interested parties to collaborate in the development of a proposed rule. This bargaining, of course, takes place in the shadow of the agency's ability to go it alone with informal (section 553) rulemaking, as appropriate. *See* Administrative Dispute Resolution Act of 1995, Pub. L. No. 104-320, 1996 U.S.C.C.A.N. (110 Stat.) 3870 (to be codified in 5 U.S.C.), which is largely based on the now repealed Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969. And even negotiated rulemaking has played to mixed reviews since it was first approved as an alternative to conventional agency rulemaking. *See* William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest — EPA's Woodstove Standards*, 18 ENVTL. L. 55, 89-94 (1987). *See also* USA Group Loan Services, Inc. v. Riley, 82 F.3d 708, 714-15 (7th Cir. 1996) (neither promises made by officials during negotiated rulemaking nor claims for bad faith negotiations are enforceable under Negotiated Rulemaking Act).

II. FLEXIBILITY EFFORTS¹⁷

A number of different types of flexible and cooperative regulatory schemes have been created in the last few years. These schemes have included inducements or "carrots" for super-compliance, waivers of regulatory requirements if specific goals are otherwise met, and the use of flexible individuated goals that depend on the economic and cultural "situation" of a regulated party.

A. Inducements for Super-Compliance

1. OSHA's Voluntary Protection Program

The classic example of inducements for super-compliance is the Voluntary Protection Program¹⁸ ("VPP") created by OSHA¹⁹ in 1982. The VPP offers a

17. Much of the material in this section draws on the excellent study of Professor Lucia Ann Silecchia. See Lucia Ann Silecchia, *Ounces of Prevention and Pounds of Cure: Developing Sound Policies for Environmental Compliance Programs*, 7 FORDHAM ENVTL. L.J. 583 (1996). Silecchia is concerned that the removal of permit and paperwork obligations inherent in a shift from command and control regulations to more cooperative modes will in some way allow industry to escape burdensome transaction costs and thus be insulated from the threat of penalties without actually providing better environmental compliance. *Id.* at 587-94. See also Fiorino, *supra* note 9, at 464. Put otherwise, Silecchia fears that it is merely legal compliance that is being encouraged, not better environmental results. See Silecchia, *supra*, at 596-97. To an extent I agree. The point of performance as opposed to command and control regulations is that they should result in at least equal compliance with fewer transaction costs. But Silecchia suggests something more. Her complaint is that "policies creating incentives for environmental compliance must center on the goal of preventing environmental harm from occurring rather than focussing solely on encouraging legal compliance." *Id.* at 596. Silecchia thinks it overly generous to reward entities for "mere compliance" with the law. *Id.* at 629. Her desire to raise the bar on environmental compliance or even to devalue process-oriented compliance may or may not be appropriate. However, it is somewhat unfair for Silecchia to suggest that the cooperative modes should require a regulated entity to have, what the Department of Justice has described as, "safeguards beyond those required by law." *Id.* at 605 (quoting DEP'T OF JUSTICE, FACTORS IN DECISIONS ON CRIMINAL PROSECUTION FOR ENVIRONMENTAL VIOLATORS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR (July 1, 1991)).

This viewpoint further ignores the fact that the government will not necessarily be rewarding mere compliance but rather the type of compliance that lowers the government's transaction costs. The mechanisms critiqued by Silecchia save the government significant costs of enforcement including litigation costs. These savings do not seem to have been factored into her equation.

18. Although the VPP has no explicit statutory mandate, OSHA is generally authorized to "encourag[e] employers and employees . . . to reduce the number of occupational safety and health hazards at their places of employment." 29 U.S.C. § 651(b)(1) (1994). There are no VPP regulations, although guidelines were published in the Federal Register in 1988. See Voluntary Protection Programs to Supplement Enforcement and to Provide Safe and Healthful Working Conditions; Notice of Changes, 53 Fed. Reg. 26,339 (1988) [hereinafter 1988 VPP Notice].

19. OSHA enforces the Occupational Safety Health Act of 1970, 29 U.S.C. §§ 651-678 (1994), by promulgating and enforcing standards pursuant to the Act. OSHA's enforcement model is based upon a deterrence through punishment scheme consisting of unannounced visits to places of employment by a compliance officer ("CO") trained in the field of occupational safety and health. If the CO discovers a violation of an OSHA standard, a citation is issued. If the employer agrees with the CO, they devise an abatement schedule and fines may be imposed. If the employer disagrees with the nature of the citation, the abatement schedule, the fine itself, or its amount, it can file a Notice of Contest. A typically "post-modern" course of due process follows, which includes administrative proceedings and both administrative and judicial appeal. OSHA has been controversial from its birth, because of its vast regulatory regime (OSHA currently regulates six million work sites and ninety-six million workers), the dramatic effect of its regulations on a great many businesses, the fourth amendment issues surrounding its enforcement, and its inevitable embroilment in union/management relations. However, the effectiveness of its command and control enforcement method is limited by the low ratio of COs to workplaces. At this time, OSHA has 1,000 COs to inspect six million

special regulatory relationship with the agency, including greater self-policing authority for companies that demonstrate exemplary employee protection over time.²⁰

There are three levels of VPP participation. The three levels are "star" status, "merit" status, and "VPP" status. Each descending participation level has less stringent requirements.²¹ To qualify for the highest participation level, star status,²² a company must meet strict criteria over time. Star status firms must encourage employee participation in addressing workplace health and safety issues, establish and review annually a written workplace health and safety program approved by OSHA, offer training in occupational health and safety issues to managers and employees, maintain a reliable feedback system to notify management of hazards, and utilize follow-up mechanisms to track management's response to those hazards.²³ In addition, these companies must maintain below-average injury rates for their industry for three years before achieving star status.²⁴ Upon being selected to participate in the star program, a company assumes primary responsibility for compliance monitoring at its facility. Although most major OSHA sites are subject to annual compliance inspections, star facilities are instead subject only to an in-depth star recertification inspection every three years, and thus receive a reprieve from possible surprise inspections.²⁵ Minor routine violations reported to OSHA or discovered during the recertification inspections are resolved by requiring that the hazard be promptly remedied or, in more serious cases, by revoking the company's star status.²⁶ Only cases involving knowing misconduct or serious injury at a star facility are referred to OSHA's enforcement staff.²⁷

workplaces with the number of inspections declining forty percent in the past six years. See *OSHA Program at "Critical Juncture" Dear Tells Business, Government Officials*, O.S.H. DAILY (BNA), July 21, 1994, at D2.

20. See Voluntary Protection Programs to Supplement Enforcement and to Provide Safe and Healthful Working Conditions; Notice of Changes, 50 Fed. Reg. 43,804 (1985) [hereinafter 1985 VPP Notice]; Voluntary Protection Programs to Supplement Enforcement and to Provide Safe and Healthful Working Conditions, 47 Fed. Reg. 29,025, 29,027-28 (1982).

21. See Voluntary Protection Programs to Supplement Enforcement and to Provide Safe and Healthful Working Conditions; Notice of Changes, 51 Fed. Reg. 33,669-70 (1986) [hereinafter 1986 VPP Notice].

22. At this time, about 215 of the six million worksites subject to OSHA are designated star worksites. *Kerr-McGee Facility Earns OSHA Star Status*, PR NEWSWIRE, Mar. 18, 1996, available in LEXIS, News Library, Wires File. Achieving star status by earning the initial three-year certification is considered an honor in the industrial community. Companies display that status with the flags and plaques they are awarded, and indicate their star status on company letterhead. *Two Midas Plants in Wisconsin Receive Star Designation by OSHA*, BUS. WIRE, Mar. 20, 1996, available in LEXIS, News Library, Wires File.

23. See 1986 VPP Notice, *supra* note 21, at 33,672-74.

24. For example, last year, Motorola's Schaumburg, Illinois facility was the 150th workplace to be awarded OSHA's prestigious Star award. See *Motorola's Schaumburg Facility Awarded OSHA's Highest Honor*, BUS. WIRE, Sept. 26, 1995, available in LEXIS, News Library, Wires File. In 1994, the facility had a forty percent decrease in accidents and, by the end of 1995, a six-five percent decrease is projected. See *id.*

25. See 1985 VPP Notice, *supra* note 20, at 43,816. However, all employee complaints, chemical leaks or spills, as well as all fatalities or catastrophes are handled in accordance with normal OSHA enforcement procedures. See 1988 VPP Notice, *supra* note 18, at 26,339.

26. See 1988 VPP Notice, *supra* note 18, at 26,348. See also Gerry Catanzaro & Judith Weinberg, *Answers to Some Frequently Asked Questions on VPP*, JOB SAFETY & HEALTH Q., Summer 1994, at 22.

27. See 1988 VPP Notice, *supra* note 18, at 26,339-41.

The VPP approach differs sharply from traditional regulatory approaches rooted in a deep and universal mistrust of the regulated community. With VPP, OSHA recognized that at least some members of the regulated community have demonstrated their trustworthiness. Given OSHA's regulatory objectives, companies that have implemented internal self-governing systems that exceed OSHA standards do not require the same level of scrutiny as companies which lack such systems or which frequently run afoul of workplace safety laws.

2. EPA's Environmental Leadership Program

The EPA has instituted an Environmental Leadership Program ("ELP"), similar to OSHA's VPP. Under the ELP pilot program,²⁸ participating companies agree to meet enhanced pollution prevention goals within the existing regulatory framework. They will have to develop an environmental management system that meets EPA standards as well as compliance management systems that include the use of devices such as third party audits and self certification. In exchange, the EPA and participating states will not conduct routine inspections at ELP facilities, will give participants 90 days to correct violations before filing an enforcement action, and will provide expedited permitting and permit modification processes. They will also receive public recognition as a model facility.²⁹ The ELP is designed to not only clean up pollution, but to develop strategies which will prevent pollution.³⁰ The pilot project ended in August, 1996,³¹ and the EPA is developing standards for implementing a nationwide program by late 1997.³²

B. Some Flexibility Alternatives

1. EPA's Excellence and Leadership Program

One approach to regulatory flexibility is the use of waiver or variance from otherwise applicable general rules. The waiver option can also be viewed as a recognition that formal rules are unlikely to capture the infinite varieties of empirical reality and that increased flexibility in the rulemaking process is necessary. Sometimes, these approaches are embedded in a statute,³³ in an agency

28. See Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement, 60 Fed. Reg. 16,875 (1995). The ELP was initiated in April 1995 when twelve model facility program projects were approved by the EPA. See *id.* at 16,876. See also Environmental Leadership Program, Notice of Intention to Develop an Environmental Leadership Program and Request for Comments, 58 Fed. Reg. 4802 (1993).

29. *Companies Might See Fewer Inspections, Faster Permitting Under EPA Initiative*, 26 Env't Rep. (BNA) No. 30, at 1289 (Dec. 1, 1995). The EPA saw this program "as a way to focus its increasingly scarce enforcement resources where they are needed most" because companies which meet environmental standards would be exempt from routine inspections. *Id.* See also Environmental Leadership Program: Request for Pilot Project Proposals, 59 Fed. Reg. 32,062 (1994); *Innovative Initiative to Provide Facilities Relief Readied for Launch in 1997, Program Chief Says*, 27 ENV'T REP. (BNA) No. 24, at 1347 (Oct. 18, 1996).

30. See *Inspections at Plants to Be Suspended in Environmental Leadership Pilot Program*, 25 Env't Rep. (BNA) No. 49, at 2448 (Apr. 14, 1995).

31. See UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL LEADERSHIP PROGRAM FACT SHEET, PUBLICATION NO. 100-F-96-038 (Sept. 1996).

32. See *id.*

33. As example, the OSHA Act's provisions dealing with variances are §§ 6(b) and 16 (codified at 29

regulation, or an agency policy. An example of one such highly touted agency policy is the EPA's Excellence and Leadership Program ("Project XL") which centers on the environmental permitting process, rather than on compliance plans. The philosophy behind Project XL is that since "companies know their business a whole lot better than the government does, they understand how better to reduce their own pollution."³⁴ This program allows certain regulated industries to design and implement their own strategies to replace EPA regulatory requirements when those strategies produce greater environmental benefits.³⁵

In order to qualify for Project XL approval, a company must propose alternatives that:

- (a) produce environmental performance superior to that which would be achieved under current regulations; (b) be "transparent" and accountable, so that citizens and regulators can examine assumptions and track progress; (c) not create worker safety problems or not result in environmental injustice; (d) enjoy the support of the surrounding community; and (e) be binding and enforceable.³⁶

Once the initial proposal is approved by the EPA, the applicant is then invited to develop a "final project agreement" in conjunction with the EPA, state and local authorities, and other stakeholders (including community organizations, environmental groups, and worker organizations).³⁷ This "final project agreement" includes, among other topics, (1) steps the company plans to take to improve its environmental performance; (2) any exceptions regulators agree to provide; (3) the basis for measuring performance; (4) the role of the community; and (5) a delineation of the expected benefits.³⁸ The company is allowed to implement its program after approval by federal and state regulators, community organizations, and other stakeholders.³⁹

The success of the XL program is not yet clear. By January, 1997, only three XL programs had been approved.⁴⁰ C. Boyden Gray, former White House Counsel, suggested that Project XL has had "virtually no impact" and that a "chasm . . . exists between the Administration's actions and rhetoric when it comes to environmental innovation."⁴¹ There is significant concern

U.S.C. §§ 655(b)(6), 655(d)). See also 29 C.F.R. pt. 1905 (1996) (OSHA variance regulations). The OSHA variance policy has proved cumbersome in practice however attractive in theory.

34. Remarks by President Clinton Launching Project XL, FED. NEWS SERV., Nov. 3, 1995, available in 1995 WL 8793678.

35. See Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. 27,282, 27,282-83 (1995); ASPEN INSTITUTE, THE ALTERNATIVE PATH: A CLEANER, CHEAPER WAY TO PROTECT AND ENHANCE THE ENVIRONMENT 11 (1996) (noting that the EPA's project XL is "a voluntary demonstration of the Alternate Path concept" developed by the Institute).

36. William H. Freedman & Karen A. Caffee, *EPA's Project XL: Regulatory Flexibility*, NAT. RESOURCES & ENV'T, Spring 1996, at 59, 60.

37. See Regulatory Reinvention (XL) Pilot Projects, *supra* note 35, at 27,282-87 (1995); see also Fiorino, *supra* note 9, at 472 (noting that the final project agreement is a legally enforceable contract).

38. See Regulatory Reinvention (XL) Pilot Projects, *supra* note 35, at 27,282-87.

39. See *id.*

40. See Cindy Skrzycki, *Critics See a Playground for Polluters in EPA's XL Plan*, WASH. POST, Jan. 24, 1997, at D1.

41. Prepared Statement of C. Boyden Gray Before the Senate Government Affairs Committee, Subcom-

that agency bureaucracies, still oriented to an adversary model, are resisting cooperative approaches. Perhaps for this reason the 3M Company withdrew from the Project XL process on September 5, 1996, when it could not guarantee that the facility seeking participation would achieve superior environmental performance.⁴²

Project XL is an attempt to replace means-oriented requirements with results-oriented rewards. It is therefore a significant step towards implementing performance regulation in that it offers the company flexibility in determining how it can best meet required environmental benchmarks. As President Clinton has stated, "Here is the bar. If you can figure out how to jump over it . . . the old way, the new way, a different way, forward or backward — all you have to do is jump over the bar."⁴³

2. The EPA Superfund Brownfields Program

Waiver approaches and cooperative agreements like Project XL allow regulated entities, while still meeting applicable performance goals, to seek specific exceptions to regulations under specified conditions. In contrast, flexible alternatives, such as those used by the EPA's "Brownfields Economic Redevelopment Initiative,"⁴⁴ promote significantly greater regulatory flexibility in

mittee on Financial Management and Accountability, FED. NEWS SERV., Sept. 25, 1996.

42. Because it was using an experimental technology, the company could not make that guarantee. *See 3M Decides to Drop Out of Project XL Process After Disagreement Over Performance Guarantees*, 27 Env't Rep. (BNA) No. 19, at 1045 (Sept. 13, 1996). *But see* John H. Cushman, Jr., *EPA and Arizona Factory Agree on Innovative Regulatory Plan*, N.Y. TIMES, Nov. 20, 1996, at A18 (EPA approval of Intel Corporation plan in Arizona).

43. Marianne Lavelle, *Bending the Rules*, NAT'L L.J., June 10, 1996, at A1. A similar type of regulatory reform is being considered in Canada. In 1994, the Canadian Parliament considered and let die legislation that would have allowed persons subject to regulation to propose alternative compliance plans that still meet the regulatory goals of the designated regulation. Canada Legislative Index, 35th Parliament, 1st Sess., Bill C-62 (Jan. 2, 1994 to Feb. 2, 1996). The Regulatory Efficiency Act, as it was popularly known, received a "scathing" report from the Parliament's Committee for the Scrutiny of Regulations. Dennis Bueckert, *Cabinet Gains More Power in New Bill, Report Warns*, OTTAWA CITIZEN, Apr. 22, 1995, at A5. The report found that the bill was "contrary to fundamental constitutional values" because it gave the executive cabinet "unlimited discretion to grant individual exemptions from existing and future subordinate laws." *Id.* The report further noted that the bill would mainly benefit large corporations because small businesses "would lack the resources and expertise to negotiate compliance plans." *Id.* In February 1996, it was uncertain to observers whether a new version of the bill would be introduced at the next Parliament. Neville Nankivell, *Federal Liberals in "Disequilibrium"*, FIN. POST, Feb. 6, 1996, at 17. In March 1996, the Regulations Act, which seeks to reform the regulatory process in general, was introduced and received a second reading. Bill C-25, House of Commons, 35th Parliament, 2nd Sess., (1st reading Mar. 22, 1996; 2d reading June 18, 1996). For a view that the procedural safeguards included in the legislation achieved a proper balance between institutional control and the need for flexibility and discretion in order to regulate in a more efficient manner, see Todd-Jeffrey Weiler, *The Consultation Requirement in Regulatory Reform: Taking a Look at the Proposed Regulatory Efficiency Act*, 8 CAN. J. ADMIN. L. & PRAC. 101 (1994-95).

44. As of October 4, 1996, seventy-six pilot projects had been funded by the EPA under the project. *See Brownfields Grants from \$90,000 to \$200,000 Awarded to 16 Blighted Urban Industrial Areas*, 27 Env't Rep. (BNA) No. 22, at 1241 (Oct. 4, 1996). The 104th Congress' support for this program is illustrated by their \$36.8 million appropriation specifically for the Brownfields program. *See House, Senate Pass Bill Giving EPA \$6.7 Billion; Clinton Plans to Sign Measure*, 27 Env't Rep. (BNA) No. 21, at 1193 (Sept. 27, 1996). The 1996 Republican platform supported the Brownfields program by supporting expanded state participation in the program. *See 1996 Republican Platform Calls for Limits on "Inflexible" Environmental Requirements*, 27 Env't Rep. (BNA) No. 16, at 890 (Aug. 16, 1996). Senate Republican leaders, however, rejected an EPA proposal that would have "authorize[d] start-up funding for state and local governments and indian tribes to de-

the Superfund program not only as to means but as to regulatory goals as well.⁴⁵ "Brownfields are abandoned, idle, or under-utilized industrial sites, usually in urban areas."⁴⁶ Under this program, the EPA funds up to \$200,000 for each two-year pilot project.⁴⁷ Pilots are selected to test whether regulatory barriers can be removed without sacrificing environmental protection,⁴⁸ as well as to improve coordination between federal, state and local authorities.⁴⁹

This flexible regulatory approach is not, however, available for every hazardous site.⁵⁰ Under the program, the government agrees to reduce the liability of prospective purchasers of contaminated property who engage in voluntary cleanup programs that satisfy EPA officials. Under existing law, contaminated soil must often be cleaned to zero pollution. In contrast, under the Brownfields initiative, the extent of the clean-up is determined by government regulators in light of a number of characteristics, including the future use to which the property would be put.⁵¹ Some states, including Connecticut, Missouri, and Pennsylvania,⁵² have enacted cost recovery programs⁵³ which supplement the federal program and support the cleanup efforts of the companies which invest in Brownfields.⁵⁴

velop comprehensive brownfield programs." *Separate EPA Proposal on Brownfields Rejected by Senate Republican Leaders*, 27 Env't Rep. (BNA) No. 12, at 608 (July 19, 1996). The Republican leaders objected to separate Brownfields legislation because they thought it would jeopardize their ability to pass a comprehensive superfund bill. *See id.* *See also* Marianne Lavelle, *Interests in Brownfields Abound Despite Problems*, NAT'L L.J., Oct. 18, 1996, at B1.

45. *See* Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or Superfund, Section 104; Announcement of Application Deadline for the Competition for Brownfields Economic Redevelopment Initiative Pilots, 60 Fed. Reg. 49,276 (1995) [hereinafter *Brownfields Pilots Announcement*].

46. *See* R. Michael Sweeney, *Brownfields Restoration and Voluntary Cleanup Legislation*, 2 ENVTL. L. 101, 105 (1995).

47. *See* *Brownfields Pilots Announcement*, *supra* note 45, at 49,276.

48. *Id.*

49. *See id.* In January, 1995, the EPA announced the inclusion of the original program within a greater Brownfields Action Agenda. EPA, *The Brownfields Action Agenda* (last modified Jan. 25, 1995) <<http://www.epa.gov/swerospa/bf/aa.htm>>. In addition to continued support for the original pilot program, the goals of the Agenda include clarifying "the liability of prospective purchasers, lenders, property owners, and others regarding their association with and activities at a [Brownfield] site," partnership and cooperation with state and local authorities as well as the communities involved, and job development and training. *Id.*

50. *See* Sweeney, *supra* note 46, at 157. Sweeney notes that "Brownfields restoration and redevelopment is not founded upon the concept that the 'polluter pays.' Contrary to traditional hazardous waste remediation programs, voluntary cleanup programs provide private parties with incentives for underwriting the remediation of land they did not pollute." *Id.*

51. *See id.* at 160.

52. According to a survey conducted by Environmental Information, Ltd., "the most complete, sophisticated and effective brownfields redevelopment programs can be found in the Northeast and the Midwest." ENVIRONMENTAL INFORMATION, LTD., *BROWNFIELDS: STATE PROGRAMS AND MARKET OPPORTUNITIES* vi (1996).

53. "Cost recovery in this context is a mechanism by which the agency directly recovers the costs of overseeing the project from whomever signs a voluntary agreement to clean up the site." *Northeast, Midwest Offer Most Support for Companies Investing in Brownfields*, 27 Env't Rep. (BNA) No. 10, at 542 (July 5, 1996).

54. *See id.*

3. Individuated Regulations

Carried to its logical extension, the "Brownfields" approach ineluctably leads to the notion of individuated solutions negotiated between administrative agencies and individual companies to meet the needs of each particular case. As a theoretical matter, some commentators (perhaps even Howard) would view this form of "enforced self-regulation"⁵⁵ as the most creative and efficient use of the administrative process. It reflects a form of "responsive regulation"⁵⁶ where the regulators work creatively with individual corporations (or plant sites) to achieve an individuated level of compliance. Making regulatory agreements more "individualized," however, makes it less likely that consistency will be achieved and general standards followed. This model of the "standardless" administrative state is exactly what an earlier generation of lawyers had in mind when they inveighed against a vision of administrative law they referred to as the "new despotism."⁵⁷

The notion of individually negotiated environmental contracts between an individual plant or industry sector tracks an approach that is growing popular in Europe — the environmental covenant.⁵⁸ The classic example is the Dutch Basic Metal Industry Covenant, signed in 1992.⁵⁹ The covenant is a written agreement between a public body and an individual company or industrial sector in which the regulated party agrees to undertake agreed upon activities that reduce environmental degradation. In return, the government or third party agrees to undertake specific activities or to waive otherwise applicable regulatory procedures.⁶⁰ The danger is that the government will waive statutory requirements in the covenant or make *ultra vires* undertakings. This happened apparently in the Netherlands, where signatories to an herbicide convention were incorrectly told that they need not apply for emission licenses.⁶¹ These individually negotiated agreements are intrinsically suspect in the American

55. IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 101 (1992) ("The enforced self-regulation model. . . is about negotiation occurring between the state and individual firms to establish regulations that are particularized to each firm.").

56. *Id.* at 4-7. This concept has also been referred to as "interactive compliance." See *supra* note 3 and accompanying text.

57. LORD HEWART OF BURY, *THE NEW DESPOTISM* 37 (1929) (asserting that administrative law is substantially the opposite of the "rule of law").

58. See *ENVIRONMENTAL CONTRACTS AND COVENANTS: NEW INSTRUMENTS FOR A REALISTIC ENVIRONMENTAL POLICY* (Jan M. van Dunné ed., 1993) [hereinafter *ENVIRONMENTAL CONTRACTS AND COVENANTS*]; see also MINDY GAMPEL, *INDUSTRY STRATEGY DIVISION, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, THE DUTCH MODEL: LESSONS FOR THE U.S.* (1995) [hereinafter *THE DUTCH MODEL*]; Fiorino, *supra* note 8, at 486; Ronald van de Krol, *Business and the Environment: Partners in Grime: Dutch Industry Has Been Drawing Up Covenants with the Government*, *FIN. TIMES*, May 1, 1996, at 20.

59. See Jit Peters, *Voluntary Agreements Between Government and Industry: The Basic Metal Covenant As Example*, in *ENVIRONMENTAL CONTRACTS AND COVENANTS*, *supra* note 58, at 19-49. Other industries which have been involved in these contracts and covenants include the chemical, primary metals, packaging, and metal products. See *THE DUTCH MODEL*, *supra* note 58, at 1.

60. See *THE DUTCH MODEL*, *supra* note 58, at 1-2.

61. See, as example, the Dutch Covenant Concerning the Reduction of the Emission of Herbicides, where the government wrongly waived the need for emissions licenses under certain circumstances. See Peter J.J. van Buuren, *Environmental Covenants Possibilities and Impossibilities: An Administrative Lawyer's View*, in *ENVIRONMENTAL CONTRACTS AND COVENANTS*, *supra* note 58, at 51.

"rule of law" environment exemplified by the APA. Indeed, as Richard Stewart points out, "in the United States it would require legislation to give both government environmental authorities and industry the legal flexibility to use contracts and covenants to negotiate agreements that would in some respect be inconsistent with existing regulatory requirements and deadlines."⁶²

Without standards, one faces the problem of accountability in its starkest form. The difference between two hypothetical Brownfields settlement agreements may depend as much upon the attitude of the EPA negotiator or the persuasive ability of industry officials as on the objective characteristics of each site. The danger, then, is that flexibility could mean "relaxed standards rather than adapting compliance to circumstances."⁶³ Professor Kenneth Davis, in his insightful work *Discretionary Justice*, has pointed out that while the subjectivity of individual bureaucrats can influence agency practices, discretion can be cabined through the use of structural procedures.⁶⁴ One example of this kind of structural procedure is the extensive list of criteria for eligibility and continuing participation in VPP or ELP that requires applicants and participants to meet objective performance standards.

4. Settlement Agreements

Due to the transaction costs and the publicity attendant on modern litigation, companies often prefer to settle worker safety or environmental complaints with the government. Companies entering into these settlement agreements often agree to conditions that the government could not otherwise enforce, even if won in court, as they go beyond the scope of statutory enforcement authority. For example, many settlement agreements negotiated between employers and OSHA contain provisions requiring safety and health audits, even though such audits are not required by law.⁶⁵ These settlement negotiations raise significant issues of standardless decision making and accountability.

62. Richard B. Stewart, *Environmental Contracts and Covenants: A United States Perspective*, in ENVIRONMENTAL CONTRACTS AND COVENANTS, *supra* note 58, at 148.

63. See Hays, *supra* note 9, at 567.

64. See KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 97 (1969). Professor Davis proposes the use of "open plans, open policy statements, open rules, open findings, open reasons, open precedents, and fair informal procedure" to structure discretionary power. *Id.* at 98. Professor Davis places a premium on openness in the use of discretionary power because openness helps prevent arbitrariness. See *id.* See also KENNETH C. DAVIS, POLICE DISCRETION iii-viii (1975).

65. A good example of these types of agreements are the numerous corporate-wide settlement agreements with the major auto manufacturers dealing with ergonomics issues which provide for safety audits as well as ergonomic studies for each plant. See *GM, UAW Reach Settlement With OSHA on Cumulative Trauma Hazards Cited By Agency*, DAILY LAB. REP. (BNA), Nov. 23, 1990, at A7. See also *Ford to Pay \$1.2 Million Fine, Expand Existing Ergonomics Program Under Settlement*, DAILY LAB. REP. (BNA), July 24, 1990, at A15.

Often a violation in one facility leads to a settlement by which the company is required to conduct comprehensive audits at all its locations. See, e.g., *Paper Company Agrees to Pay \$872,220 Fine, Conduct Corporate-Wide Plant Safety Audit*, DAILY LAB. REP. (BNA), Aug. 1, 1988, at A11 (requiring the company to audit each of its facilities and implement a plan to abate hazards found in the audits); *Simpson Paper Agrees to OSHA Settlement, Will Pay \$300,000, Create Safety Position*, DAILY LAB. REP. (BNA), July 11, 1990, at A11 (where the company was required in the settlement agreement, to create a safety manager position responsible for auditing each of the company's thirty facilities).

One extensively articulated effort to approximate individuated regulation in settlement agreements is the Supplemental Enforcement Program (SEP) of the EPA, in existence since 1991.⁶⁶ The SEP is a program in which environmental violators receive reduced penalties in exchange for undertaking environmental cleanup programs not otherwise part of the EPA's statutory armamentarium. In a sense, a corporation could receive some form of "credit" for undertaking environmentally beneficial activities.⁶⁷

Recognizing that some structuring of agency discretion in the enforcement context is needed, the EPA developed a set of standards which generally require that mitigation or credit programs must "closely address the environmental effects of the violators."⁶⁸ This means that a credit may be given for a program that corrects the damage done by a polluter as, for example where a pollutant was allowed into a stream or river and there was substantial fishkill "and the polluter agreed to restock those fish."⁶⁹

The Reagan Justice Department, however, determined that these standards were too porous and sought to more clearly define the kinds of situations where settlement money (however defined) need not go to the federal treasury and could be used for pro-environmental purposes.⁷⁰ Part of the Justice Department's concern was based on legal grounds. The Miscellaneous Receipts Act⁷¹ makes clear that government agencies cannot finance their own enforcement activity absent special statutory authority. Nor can agencies use such money to reinforce a bureaucrat's conception of the public good. The Supreme Court is clear that all funds paid to an agency in the form of civil penalties must go to the Treasury.⁷² To do otherwise would violate anti-augmentation principles⁷³ which limit federal agencies to the money appropriated by Congress for their work.⁷⁴ The question then becomes whether payments to private

66. See James J. Periconi & David Nelson, *The Precedent-Setting Use of a Pollution Prevention Project in an EPA Enforcement Settlement: The First Dollar-for-Dollar Penalty Offset*, 24 Env't Rep. (BNA) No. 48, at 2049 (April 1, 1994).

67. EPA, Policy on the Use of Supplemental Enforcement Projects in EPA Settlements, 25 Env'tl. L. Rep. (Env'tl. L. Inst.) 35,607 (1991). This policy was revised in 1995 "to provide greater flexibility to EPA in exercising its enforcement discretion." Interim Revised EPA Supplemental Environmental Projects Policy, 60 Fed. Reg. 24,856 (1995).

68. Periconi & Nelson, *supra* note 66, at 2049.

69. *Environmental Credit Projects Under Clean Water Act: Hearing on H.R. 3411 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment and Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries*, 104th Cong. 29-30 (1987) (testimony of Raymond Ludwizewski, Associate Deputy Attorney General).

70. See David S. Mann, Comment, *Polluter-Financed Environmentally Beneficial Expenditures: Effective Use or Improper Abuse of Citizen Suits Under the Clean Water Act?*, 21 ENVTL. L. 175, 178 (1991).

71. 31 U.S.C. § 3302(b) (1994). This matter is discussed in Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General, 4B Op. Off. Legal Counsel 684 (1980).

72. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 53 (1987); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981).

73. See 2 OFFICE OF THE GENERAL COUNSEL, U.S. GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW § E-1, at 6-103 (2d ed. 1992).

74. The purpose of this requirement is to ensure that Congress retains control of the public purse by disallowing agency augmentation of appropriations through agency created settlement programs. See James F. Hinchman, Comptroller General, Statement to the House Committee on Energy and Commerce, 1993 WL 798227 (Mar. 1, 1993); see also 1992 U.S. Comp. Gen. LEXIS 1319 (July 7, 1992) (EPA lacks authority to settle enforcement actions by entering into settlement agreements that allow alleged violators to fund public

parties as part of a consensual settlement or consent judgment in a citizens' enforcement suit are civil penalties.⁷⁵

A larger part of its concern is jurisprudential — both constitutional and otherwise. Traditional doctrines of prosecutorial discretion have given a wide range of discretionary authority to regulators to “plea bargain” or settle cases. As suggested above, they can make arrangements that would produce “enforcement” results beyond that which could be required by law. Certainly they could require an agreement on matters over which the government could choose to sue but did not (e.g., clean up plant 2 as well if we are to settle the citation for plant 1) as well as for cases where the government is asking for a form of penance not specifically within its enforcement authority (e.g., requiring a child labor violator to make contributions to a college scholarship fund for youthful employees). But this principle is not without limits. Under its power of the purse, Congress can constrain regulatory officials to the limits their statutory warrants. And, there is no inherent executive authority to settle cases on terms that have no connection with the agency's statutory warrant. Certainly there is nothing in the Constitution that suggests otherwise.

awareness and other projects in exchange for reductions of civil penalties); *Matter of Nuclear Regulatory Commission's Authority to Mitigate Civil Penalties*, 70 Comp. Gen. 17 (Oct. 9, 1990) (NRC lacks authority to implement options which would allow a violator to, in lieu of civil penalties, to fund research programs).

The rule requiring civil penalties to be paid to the Treasury has been criticized as an inflexible approach that undermines environmental protection efforts. Avoiding the “civil penalty” label has led critics to question whether by calling any payment an aspect of “injunctive” relief a settlement can be structured to avoid classifying a payment as a civil penalty. See Elizabeth R. Thagard, Note, *The Rule That Clean Water Act Penalties Must Go the Treasury and How To Avoid It*, 16 HARV. ENVTL. L. REV. 507 (1992). Courts have steadfastly upheld the rule. The Third Circuit ordered civil penalties placed in a private trust fund to be paid to the Treasury. See *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3rd Cir. 1990). The Ninth Circuit, however, held that payments derived from an out-of-court settlement before liability was found were not civil penalties. See *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350 (9th Cir. 1990). The *Sierra* court concluded, however, that once liability was established, payments must be classified as civil penalties and paid to the Treasury. See *id.* at 1353. Since the *Sierra* decision, courts have classified payments to private parties as civil penalties depending on when liability was found and settlement agreements reached. See Michael Paul Stevens, *Limits on Supplemental Environmental Projects in Consent Agreements to Settle Clean Water Act Citizen Suits*, 10 GA. ST. U. L. REV. 757, 770 77 (1994).

75. A more substantive question remains as to whether payments to private parties that clean up the work of the polluter are acceptable (generally yes) or whether one can rely on a “nexus” between the violation and the remedial act. See EPA, CLEAN WATER ACT PENALTY POLICY FOR CIVIL SETTLEMENT NEGOTIATIONS 7 (Feb. 11, 1986). One may wonder, further, whether an agency can require, as a condition of settlement, a company to engage in conduct unconnected at all with the agency's specific statutory mission. As example, could the Department of Labor condition a child labor settlement on a company's agreement to provide scholarships to youthful employees. The propriety of this extended form of individuated agreement remains unclear.

III. SOME THEORETICAL ISSUES CONCERNING FLEXIBILITY IN ADMINISTRATIVE LAW

A. Introduction

The central theoretical issue for Administrative Law in the twentieth century has been the drive to curtail agency discretion through the use of procedures that structure adjudications or rulemaking as well as judicial review of such agency action. The fear of empowering bureaucrats with untrammelled flexibility reflects a traditional concern that the administrative state, if unchecked, would act arbitrarily and capriciously.

Administrative law has endeavored historically to check the exercise of discretionary power by establishing a variety of procedures that restrict the ambit of government bureaucracies in both the adjudication and rulemaking process. This concern for the value of procedural formalism creates a tension between traditional administrative procedures and the regulatory flexibility approach.⁷⁶ This section will consider some legal issues intrinsic to the notion of regulatory flexibility. Some of these tensions are raised in Philip Howard's recent best-seller, *The Death of Common Sense*. Howard criticizes regulatory excess arguing that "[i]f you spend all your effort trying to comply with regulations, you don't have so much time to use common sense."⁷⁷ He approves of Project XL because "[t]hat's exactly what regulation should be. It doesn't mean you trust people. It means you state goals and you allow people enough room to accomplish those goals instead of just complying with rules."⁷⁸

Although a severe critic of the bureaucratic process,⁷⁹ Howard does not propose fewer rules or no rules;⁸⁰ nor does he propose more detailed rules and more aggressive judicial review as did the Congressional Republicans between 1994 and 1996.⁸¹ Instead, his remedy would empower bureaucrats by giving

76. Proceduralism often leads to a defensive approach to governing which focuses on ensuring that improprieties do not occur in public service. As Professor Jerry Mashaw has shown in his studies of the welfare state, proceduralism puts a premium on fairness, and also leads to centralized bureaucracy. See JERRY L. MASHAW, BUREAUCRATIC JUSTICE 171-72 (1983); JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 158-60 (1985); Jerry L. Mashaw, "Rights" in the Federal Administrative State, 92 YALE L.J. 1129, 1132 (1983).

77. James R. Petersen, *The Death of Common Sense*, PLAYBOY, Sept. 1995, at 41 (interview with Philip K. Howard) [hereinafter Howard Interview].

78. *Id.*

79. HOWARD, *supra* note 9, at 3-5. Howard cites numerous examples of apparent foolishness by government bureaucrats. He points to the example of Mother Teresa, whose Missionaries of Charity set aside \$500,000 to renovate an abandoned building for the homeless in New York City. See *id.* at 4. The Sisters did not believe that modern conveniences such as the dishwasher, washing machine, and elevator were necessary. See *id.* The project stalled when the city demanded that the Charity spend \$100,000 for an elevator which they would never use and failed two years later because the dispute over the elevator could not be resolved. See *id.* "According to [Mother Teresa's] representative, 'The Sisters felt they could use the money much more usefully for soup and sandwiches.'" *Id.* In a letter to the city, the Sisters "noted that the episode, 'served to educate us about the law and its many complexities.'" *Id.*

80. See Howard Interview, *supra* note 77, at 41. Howard was asked, "Are you against all regulation?" He responded, "Of course not. Everyone wants safe planes, honest prospectuses and clean air. The big government-no government debate largely misses the point. The problem is how government works." *Id.*

81. The most forceful expression of the Republican vision can be seen in H.R. 9, 104th Cong., 1st Sess.

them more responsibility (or in administrative law terms, more discretion) to take matters into their own hands.⁸² Howard advocates giving bureaucrats flexibility to decide whether to waive rules, to accept individuated compliance solutions, or to ignore the letter of the law to accomplish its "spirit."⁸³ Commentators, such as Joshua Stein, argue that Howard's project is about "building a better bureaucrat," one who can "make decisions, exercise judgment and grant exceptions when the general rule would produce the wrong result in a specific case."⁸⁴

Critics have charged that contemporary efforts to inject such flexibility into the administrative process should be viewed as an effort to "delegalize the system." The problem, John DiIulio suggests, is that while "there are undoubtedly conditions under which affording bureaucrats greater discretion makes sense[,] . . . we lack the general knowledge necessary to specify these conditions."⁸⁵ Thus, one commentator suggests that "the current push toward delegalization threatens to undermine the American commitment to the rule of law."⁸⁶

B. *The Use of Waivers*

One approach to the concern about inflexible rules is the recent waiver provision in the 1996 revisions to the Florida Administrative Procedure Act.⁸⁷

(1995), which died at the end of the 104th Congress without reaching the floor of the Senate. Title II of that Act would have required major rules to be accompanied by a detailed regulatory impact analysis. *See id.* at § 322. Title IV of the Act would have provided for judicial review for noncompliance with any part of the entire Act. *See id.* at § 441. The Act required, *inter alia*, cost benefit analysis of all major rules, and procedural changes to the APA, including advanced notice of proposed rulemaking, extended comment period, and hearings for all major rules. *See id.* at §§ 413, 322.

82. *See* HOWARD, *supra* note 9, at 180. In explaining what he means by common sense, Howard stated: It's not a single truth, some absolute wisdom, but the responsibility to make sense of any given situation. Often the "common sense solution" is the result of a dialogue or an argument between, say, the safety inspector and the foremen, or between the citizen seeking a permit and the bureaucrat behind the desk. In today's regulatory system, the official has no opportunity to adjust for circumstances.

Regulatory Reform: The Case for Common Sense; An Interview with Philip K. Howard, WASH. MONTHLY, Sept. 1995, at 23 [hereinafter *Regulatory Reform Interview*].

83. *See Regulatory Reform Interview, supra* note 82, at 23.

84. Joshua Stein, *Building a Better Bureaucrat*, REGULATION, No. 3, 1995, at 24, 28.

85. JOHN J. DI IULIO, JR., WHY BUREAUCRATIC DISCRETION IS A PROBLEM: THEORY, STRATEGY, AND HOPE 10 (Am. Enterprise Inst., Conference Paper, Jan. 17, 1996). In DiIulio's view, the "practical and unescapable fact of asymmetric information" between manager and line employees almost invariably allows bureaucrats to "shirk (goof off on the job), subvert (commit acts of administrative malfeasance), or steal (use public office for private gain) without always getting caught or penalized for it (suspended, demoted, fired, criminally prosecuted)." *Id.* at 19. The three possible "organizational strategies for producing principled agents — bureaucrats who refrain from renegade discretion" are "bureaucratization, professionalization and culture-building." *Id.* at 21-22. In DiIulio's view, the only one of these strategies to make a difference is culture-building in the few cases where there is a "strong" agency culture. *See id.* at 33-37. And even here the cultural constraint only works in contexts of promoting more regulatory activity, not less. *See id.*

86. Keith Werhan, *Delegalizing Administrative Law*, 1996 U. ILL. L. REV. 423, 460.

87. *See* FLA. STAT. ANN. §§ 120.52-.81 (West Supp. 1997). That Act was based on a Report issued by the Governor's Administrative Procedure Review Commission after Governor Lawton Chiles vetoed the legislature's 1995 reform efforts which he had himself initially proposed. *See* FINAL REPORT OF THE GOVERNOR'S ADMINISTRATIVE PROCEDURE ACT REVIEW COMMISSION (1996) (report detailing recommendations of the 15-member commission created to study how to best revise the Florida Administrative Procedure Act). In his veto message, Governor Chiles stated that the reform bill was not consistent with the Florida state constitution, which envisioned "a system in which the Legislature charts the direction our state should take

Florida's revised APA is an attempt to achieve greater regulatory flexibility through waivers, and greater accountability through limitations on rulemaking authority. Specifically, the 1996 Florida APA requires agencies to grant waivers of regulations to applicants who can show that (1) "the purpose of the underlying statute will be or has been achieved by other means by the [applicant]" and (2) where "application of a rule would create a substantial hardship or would violate principles of fairness."⁸⁸ By requiring rather than permitting waivers under certain specified conditions, the result of this new mandatory waiver provision may well be to diminish rather than expand agency discretion and flexibility.⁸⁹ Indeed, "to the extent that Florida's new waiver provision takes away, rather than increases, agency discretion, it is not a flexibility provision at all."⁹⁰ It is a mechanistic formula for selective deregulation.⁹¹

The Florida "supermandate" mandating hardship waivers⁹² is a unique regulatory strategy. Under caselaw interpreting the previous statute, waivers were limited to situations in which the agency had expressly provided for them "in published rules, or where agencies met a heightened burden of explanation."⁹³ It is frankly somewhat difficult to understand why a financial hardship in itself is grounds to relieve one of the obligations of a duly constituted rule.

In contrast, as example, the OSHA enabling statute does not allow for individual hardship waivers. While OSHA is obligated to take economic feasibility into account when setting its safety and health standards,⁹⁴ it need only consider the economic feasibility of a standard for an entire industry.

All corporations in an industry are required to meet that industry standard. An individual business cannot jettison worker safety because it finds the cost of worker safety too onerous. The OSHA view that hardship reflects industry feasibility,⁹⁵ not the idiosyncracies of an individual business, reflects the pri-

through broad statements of policy and in which the executive branch makes decisions in individual cases which best accomplish the goals the Legislature has set." Letter of Governor Lawton Chiles to Secretary of State Sandra B. Morham, July 12, 1995, at 2 (on file with the Florida Secretary of State's Office) (vetoing Senate Bill 536). See also William Booth, *Florida Seeks to End Rule by the Book*, WASH. POST, Mar. 14, 1995, at 1; Kevin Metz, *Florida's "New" Face Same as Old; Proposals to Reshape State Government Fizzles*, TAMPA TRIB., May 22, 1995, at 1.

Minnesota has a waiver provision that allows agencies to develop procedures for permissive waivers. See MINN. STAT. ANN. § 465.797 (West Supp. 1997).

88. FLA. STAT. ANN. § 120.542 (West Supp. 1997). The Act defines "substantial hardship" as "a demonstrated economic, technological, legal, or other type of hardship" and states that "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule." *Id.* § 120.542(2).

89. See Jim Rossi, *The 1996 Revised Florida Administrative Procedure Act: A Survey of Major Provisions Affecting Florida Agencies*, 24 FLA. ST. U. L. REV. 283, 293-94 (1997).

90. *Id.* at 304.

91. Whether this provision indeed achieves flexibility depends upon its interpretation by Administrative Law Judges and Courts. This is the view of the expert on the statute, Professor Jim Rossi of Florida State University. See Jim Rossi, *Florida's 1996 Revised APA*, ADMIN. & REG. L. NEWS, Fall 1996, at 9.

92. See FLA. STAT. ANN. § 120.542(2) (West Supp. 1997).

93. Rossi, *supra* note 91, at 9.

94. See 29 U.S.C. § 655(b)(5) (1994) (empowering OSHA to promulgate the standard "which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity"). See also *American Textile Mfrs. v. Donovan*, 452 U.S. 490, 508 (1981) (holding that feasibility means "capable of being done").

95. While the OSHA statute is interpreted to allow the agency to regulate to the level of industry feasi-

macy of the social concern for worker safety that is the very core of the OSHA regulatory scheme.⁹⁶

The OSHA approach, however, may well be too rigid. There may be occasions where the individual hardship is great and a waiver would not impact adversely on safety, health or other regulatory goals. In such a situation, the possibility of a waiver should not be excluded. Far more sophisticated, therefore, is an approach the Iowa bar has proposed to the Iowa legislature which allows for both mandatory waivers when "application of the rule to the petitioner [for a waiver] on the basis of specified facts in the petition would not serve any of the purposes of the rule," and for permissive waivers under various narrowly defined circumstances.⁹⁷ Thus, if application of the rule to the petitioner would cause undue hardship and waiver of the rule would be consistent with the public interest and would not prejudice the substantial rights of another person, granting of a waiver is discretionary.⁹⁸ Indeed, the Small Business Regulatory Enforcement Fairness Act of 1995,⁹⁹ which calls for the reduction or waiver of civil penalties under certain circumstances including "ability to pay," leaves those decisions for the agency to decide "under appropriate circumstances."¹⁰⁰

The notion that agencies should have waiver authority is not new.¹⁰¹ So long as the enabling statute provides for it, regulators have often chosen (usually by regulation) to waive otherwise applicable command and control regulations. For example, the Mine Safety and Health Act of 1977¹⁰² allows the Secretary of Labor to modify any mine safety standard if he "determines that an alternative method of achieving the [same] result . . . will . . . guarantee no less than the same measure of protection afforded . . . by such standard, or that the application of such standard . . . will result in a diminution of safety to the miners in such a mine."¹⁰³ At least 600 petitions for modification were approved in the first five years of the Act's implementation.¹⁰⁴ The Department of Energy had a similar process during the 1970s.¹⁰⁵ In contrast to the Brownfields program, the DOE exceptions process required a structural administrative determination, albeit one classified as informal agency action.¹⁰⁶ The

bility, the regulations appear to provide for some enforcement flexibility where a specific company reaches its individual feasibility level and is still not in compliance. See, e.g., 29 C.F.R. § 1910.1001(f)(1)(ii) (1996) (OSHA asbestos regulation).

96. See *Industrial Union Dept., AFL-CIO v. Hodgson*, 499 F.2d 467, 479 (D.C. Cir. 1974).

97. See IOWA STATE BAR ASSOCIATION, TASK FORCE ON ADMINISTRATIVE LAW REFORM, PROPOSED NEW IOWA ADMINISTRATIVE PROCEDURE ACT § 17A.4106, at 75-76 (Nov. 21, 1996). The Reporter of this draft is Professor Arthur Earl Bonfield of the University of Iowa Law School.

98. See *id.*

99. Pub. L. No. 104-121, §§ 201-253, 1996 U.S.C.A.N. (110 Stat.) 857-74.

100. *Id.* § 223(a), 1996 U.S.C.A.N. (110 Stat.) at 862.

101. See Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277, 278 n.11 (describing a number of statutes and agency rules which give authority and criteria for waivers in an individual case).

102. 30 U.S.C. §§ 801-962 (1994).

103. *Id.* § 811(c).

104. See AYRES & BRAITHWAITE, *supra* note 55, at 116.

105. See Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163, 209-12 (discussing the administrative structure of the exceptions process); see *id.* at 212-63 (describing four exceptions case studies).

106. See *id.* at 210-11 (describing the levels of administrative review of exceptions). Professor Schuck

exceptions process, in fact, often functioned as a substitute for the rulemaking process.¹⁰⁷ At the same time, the exceptions process performed a key “‘safety valve function’ [by] relieving pressure on over-broad rules in individual cases.”¹⁰⁸ While few would argue that the DOE process (or other exception processes) never introduce *ad hoc* and idiosyncratic considerations into the decisional process, the theory of the DOE waiver was that if a firm met the criteria it received a waiver, not that the waiver criteria were to be negotiated *ad hoc*.

One concern about the use of waivers as well as other efforts at regulatory flexibility is that they may well leave out of the discussion the concerns of “stakeholders” other than the two federal government and the regulated entity. This could include public interest groups, state and local governments and concerned private citizens. To this extent, the cooperative impulse may well cut against the participatory model of administrative law that has become current in the discipline since the 1960s.

Part of this concern is endemic to administrative law generally — after all, recent restrictions on standing make intervention of third parties more difficult even where the cooperative agreement is sufficiently formalized to allow for judicial review. At the same time, the lack of an institutional structure to support third party intervention is a not insignificant concern. The extent to which consent decrees, as example, appropriately preclude third party (read public) intervenors has long concerned public interest lawyers.¹⁰⁹ This problem manifested itself in criticism by environmental groups over environmental covenants in Europe in that such groups feared they might lack the ability to fully participate in the process of formulating the covenant.¹¹⁰ To go some way toward meeting this generalized concern, the EPA announced, in early 1997, that it would provide \$25,000 in grants to interested third parties to undertake independent technical assessments of XL proposals and promised more roundtable meetings with the public to discuss an XL proposal.¹¹¹ Indeed, the EPA has underscored that the extent to which project proponents have sought and achieved the support of public interest groups and other stakeholders is an “important factor” in assessing project proposals.¹¹² In another context, the

suggests, however, that this informal structure was not necessarily flawed in practice. *See id.* at 217-20, 230 (describing the manner in which a particular exception evolved into “a full-fledged subsidy program with clearly stated, legislative-type criteria” through “a procedure strikingly similar to informal rulemaking under the APA”).

107. *See id.* at 217-29.

108. *Id.* at 251. One problem with safety valves is that they can encourage an agency “to neglect or defer fundamental policy problems that it ought to have confronted and resolved.” *Id.* at 287. Indeed, one danger is that an agency will decide to leave unstated rules on the books and regulate through waivers.

109. *See* Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 324 (1988); Timothy K. Webster, *Protecting Environmental Consent Decrees from Third Party Challenges*, 10 VA. ENVTL. L.J. 137 (1990).

110. *See* Pieter Winsemius, *Environmental Contracts and Covenants: New Instruments for a Realistic Environmental Policy?*, in ENVIRONMENTAL CONTRACTS AND COVENANTS, *supra* note 58, at 9-10; *see also*, Brian L. Jones, *Environmental Covenants and Environmental Contracts: Comments from a Common Lawyer*, *in id.* at 136-38.

111. *See* Skrzycki, *supra* note 40, at D1.

112. Regulatory Reinvention (XL) Pilot Projects, *supra* note 35, at 27,287.

1996 Florida APA reflected legislative sensitivity to this issue by requiring agencies to allow "interested persons" an opportunity to comment on waiver petitions¹¹³ and to file publicly available reports on the number of waivers granted.¹¹⁴ This underscoring of the need for collective discussion and debate reflects the importance many academic commentators place on "deliberative dialogue"¹¹⁵ by expanding the range of participants in the regulatory debate.¹¹⁶ This does not, of course, solve the argued need for third party initiated judicial review (as exemplified by the American tradition of citizens suits¹¹⁷), but it at least assures that interested parties are aware of such agreements before the fact and have the ability to make reasoned and knowledgeable assessments of them.

C. *The Problem of Accountability*

Waiver provisions and other forms of cooperative activity place unique strains on our system of administrative law. They highlight the need for accountability to prevent arbitrary conduct. This accountability impulse can be satisfied either through Congress or through the courts. It is likely that a number of accountability mechanisms will be heightened to compensate for the increased flexibility that such cooperative activity represents.¹¹⁸ These will occur both through Congressional oversight and through the courts. Some examples of the range of available accountability mechanisms are noted below.

1. The Role of Congress

The recognition of agency empowerment places considerable responsibility on Congress to ensure principles of democratic accountability. After all, Congress, not agencies or bureaucrats, has the responsibility for setting policy parameters for agencies. The sad reality is that Congress often fails to provide agencies with clear and precise statutory directives. In fact, many regulatory statutes contain numerous ambiguous or seemingly contradictory terms "as a result of legislative compromises that are struck to secure votes for the enact-

113. See FLA. STAT. ANN. § 120.542(d) (West Supp. 1997).

114. See *id.* § 120.542.

115. McGarity, *supra* note 6, at 1524-25.

116. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1760-61 (1975).

117. Most major environmental statutes provide for citizen suits and are, therefore, part of the enforcement scheme of federal environmental law. See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 165 (1992). That scheme calls for various *express* private rights of action against a party who has violated a statute. See, e.g., Clean Air Act of 1955, Pub. L. No. 84-159, 69 Stat. 323 (codified as amended at 42 U.S.C. § 7604 (1994)); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1994); Solid Waste Disposal Act, 42 U.S.C. § 6924(o)(2) (1994). At the same time, "private rights of action" are also *implied* through a pervasive regulatory scheme. See generally Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Rights of Action*, 71 NOTRE DAME L. REV. 861 (1996). The withdrawal by the Congress of its enforcement monopoly is based in part on the congressional belief that "the federal government cannot be fully trusted to effectively enforce controls." Stewart, *supra* note 7, at 586.

118. See *infra* notes 122, 125-26, 130 and accompanying text.

ment of a statute."¹¹⁹ Clearer and more precise statutory directives remain the single most effective way that Congress can ensure control over the regulatory landscape. Still, the literature, be it based on "public choice" theory¹²⁰ or pluralism,¹²¹ is replete with theoretical discussion of why Congress will choose ambiguity over precision. The plain fact is that the "sin," such as it is, remains that of Congress and not the bureaucracy.

Congress has made some efforts in recent years to promote regulatory accountability. Most well-known is the so-called "corrections day."¹²² Corrections day is an effort to create an expedited procedure for correcting so-called "mistakes" made by the regulatory apparatus.¹²³ The corrections day concept was first introduced by Congressman Newt Gingrich and later institutionalized in a special calendar passed by the House of Representatives in June, 1995.¹²⁴

Recently, the Small Business Regulatory Enforcement Fairness Act of 1996¹²⁵ established a requirement for Congressional review of agency regulations.¹²⁶ This statute creates a complex procedure which requires agencies to submit proposed rules to each house of Congress where they lay on the table for at least sixty days for Congressional review.¹²⁷ During this time, Congress

119. ABNER J. MIKVA & ERIC LANE, *LEGISLATIVE PROCESS* 769 (1995).

120. See Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 *PUB. CHOICE* 33, 55-57 (1982) (arguing that Members of Congress delegate regulatory authority to agencies in part in order to shift blame to agencies).

121. See Chantal Mouffe, *Democracy and Pluralism: A Critique of the Rationalist Approach*, 16 *CARDOZO L. REV.* 1533 (1995). As Mouffe points out, "for extreme pluralists, there is only a multiplicity of identities without any common denominator." *Id.* at 1535. It is politics that "mediates the struggle among self-interested groups for scarce social resources." Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29, 32 (1985). While some purists believe that the "uninhibited interest-group struggle" is no cause for alarm, *id.* at 33, most accept that some issues are too fractious for a democratic polity to take on. One of the mechanisms democratic institutions use to "reach decisions without resolving certain value conflicts are through [the] practice[] referred to . . . as . . . avoidance." Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism and Democratic Politics*, 90 *COLUM. L. REV.* 2121, 2166 (1990). Ambiguously written statements allow Congress to "shift the institutional site of resolution" to the courts thereby avoiding addressing underlying value conflicts. *Id.* at 2170.

122. For a full review of the possibilities and meaning of corrections day, see John Copeland Nagle, *Corrections Day*, 43 *UCLA L. REV.* 1267 (1996). Some proposals can be found in *INSTITUTE FOR POLICY INNOVATION & THE ALEXIS DE TOCQUEVILLE INSTITUTION, CANDIDATES FOR CORRECTION DAY: THE TEN WORST REGULATIONS OF THE FEDERAL GOVERNMENT* (1996).

123. See NEWT GINGRICH, *TO RENEW AMERICA* 225-27 (1995). It should be obvious that corrections day results from a theory of statutory interpretation that would view Congress as the preferable place to correct statutory error or ambiguity rather than the courts.

124. H.R. Res. 480, 104th Cong. (1995). Corrections are required to be passed by a three-fifths majority to be effective. See David Rogers, *House GOP is Dealt Blow as Bill to End Transit Workers' Protection is Rejected*, *WALL ST. J.*, July 25, 1995, at A2. The first corrections day occurred on July 16, 1995. See *Not Much of a Correction*, *WASH. POST*, July 27, 1995, at A18. The 104th Congress' first correction gave the city of San Diego a permanent waiver to EPA regulations that would have required the city to spend two billion dollars on an additional sewage treatment plant. See *id.* The 103rd Congress had given San Diego a temporary waiver that was subject to mandatory review every five years. See *id.*

125. Pub. L. No. 104-121, §§ 201-253, 1996 U.S.C.A.N. (110 Stat.) 857-74.

126. See *id.* § 251, 1996 U.S.C.A.N. (110 Stat.) at 868 (to be codified at 5 U.S.C. §§ 801-808). Representative David McIntosh (R-Ind.) hailed the bill as a "revolutionary change" which will recreate the role of Vice President Dan Quayle's Council on Competitiveness in the Congress by giving Congress the "chance to reject those rules that are seriously flawed." See Marianne Lavelle, *Why are Regulation Foes Happy?*, *NAT'L L.J.*, July 29, 1996, at A14.

127. Pub. L. No. 104-121, § 251, 1996 U.S.C.A.N. (110 Stat.) at 868 (to be codified at 5 U.S.C.

has the opportunity to pass a Joint Resolution of Disapproval.¹²⁸ Should the President veto the Joint Resolution, there is an expedited process for the veto override.¹²⁹

Likewise, the Congressional Responsibility Act of 1995,¹³⁰ would have required that proposed regulations be submitted to Congress¹³¹ and the majority leader of each house would then submit bills to enact the proposed regulation.¹³² The bills would be placed on a "fast track" that would make them nonamendable and allow for only one hour of debate.¹³³ The "fast track" would also require that a vote take place within 60 days.¹³⁴

Where the drafting of more precise statutory directives fails, this type of Congressional responsibility should, in principle, be encouraged. There are, however, problems with the Congressional Responsibility Act approach. One such problem is the bill's broad definition of what constitutes a "rule." A "rule" is defined so as to include not only legislative rules, but also interpretive rules and general statements of policy as well.¹³⁵ The result of so broad a definition is that Congress would be required to vote on all manner of agency positions whether or not they have the "force of law" with little, if any, time to make considered judgments.

Proposals, like the Congressional Accountability Act of 1995,¹³⁶ are too inefficient to provide a workable means of cabining agency discretion. This draconian approach would ensure that Congress is so flooded by proposed regulations that it could not review any with serious deliberation. More importantly, these approaches reject the notion of agency delegation and will ineluctably force Congress into agency micro-management. This has the potential to make every action of an administrative agency a political act, thereby gutting any notion of agency expertise.¹³⁷ Congress would, for all practical purposes,

§ 801).

128. See *id.* § 251, 1996 U.S.C.C.A.N. (110 Stat.) at 871 (to be codified at 5 U.S.C. § 802).

129. See *id.* The process has been described and criticized as a delaying tactic which allows special interest lobbyists a second opportunity to derail regulations they oppose. See Pantelis Michalopoulos, *Holding Back Time to Hold Back Rules*, LEGAL TIMES, May 13, 1996, at 25.

130. H.R. 2727, 104th Cong. (1995). It should be noted that Justice Stephen Breyer, in the aftermath of the legislative veto case, *INS v. Chadha*, 462 U.S. 919 (1983), advanced a proposal not unlike those mentioned here. See Stephen Breyer, *Reforming Regulation*, 59 TUL. L. REV. 4, 11-14 (1984) (suggesting the creation of a fast track process that would allow for automatic introduction of a bill after an agency submitted a proposal to Congress).

131. H.R. 2727, § 3(b).

132. See *id.* § 4(a).

133. See *id.* §§ 4(c)(2)-4(c)(3).

134. See *id.* § 4(d).

135. See Pub. L. No. 104-121, § 211(1), 1996 U.S.C.C.A.N. (110 Stat.) 857, 858 (adopting the definition of "rule" in 5 U.S.C. § 601 which defines a rule as "any rule for which the agency publishes a general notice of proposed rulemaking pursuant to § 553(b) of this title").

136. Pub. L. No. 104-1, 109 Stat. 3 (1995) (to be codified at 2 U.S.C. §§ 1301-1438). A less severe iteration of this principle can be found in the Significant Regulation Oversight Act of 1996, H.R. 2990, 104th Cong. (1996), which would require significant rules to be affirmatively approved by both houses of Congress before they become effective.

137. In his well argued book opposing delegation, David Schoenbrod, the intellectual guru of the anti-delegation doctrine, would not even go so far. See DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* 180-91 (1993).

become a committee of the whole, running agencies as varied as the Nuclear Regulatory Commission and the Department of State. Of course, Congress does exercise considerable control through appropriations. The Congressional target can be broad — such as an entire department,¹³⁸ or as particularized as a prohibition on spending an appropriations to promulgate a particular rule.¹³⁹

2. The Role of Courts

a. *Judicial Review*

Agency efforts at regulatory flexibility create legal issues that are not generally covered by the APA. These issues involve the treatment of cooperative agreements while the APA is focused on either adjudication or rulemaking. These cooperative impulses can take a range of forms ranging from a closely worked out settlement agreement to an informal “wink and a nod.” The level of formality will impact on the level of accountability.

One need not here propose that regulatory flexibility require a more activist judiciary. The notion of increasing regulatory flexibility by empowering agency officials with added discretion requires, of necessity, significant judicial deference to agency exercise of that discretion. There is no point in fostering administrative discretion if that discretion is checked by a heightened level of judicial review. Strict judicial review is inconsistent with agency empowerment in that, in its “hard look” form,¹⁴⁰ at least, it means reduced deference to the results of agency decision-making or, in Judge Harold Leventhal’s phrase, “an awareness that agencies and courts together constitute a ‘partnership’ in furtherance of the public interest.”¹⁴¹

One must, however, believe the need to ensure accountability for cooperative agreements will require that a number of legal doctrines be fine-tuned and, at points, revived. These include doctrines surrounding the meaning of “final agency action” and “fair warning” of ambiguous regulatory language.¹⁴² It may, as well, require increased incentives for third-party intervention as a mode of providing greater accountability over cooperative enforcement.¹⁴³

138. See Zygmunt J.B. Plater, *Environmental Law as a Mirror of the Future: Civic Values Confronting Market Force Dynamics in a Time of Counter-Revolution*, 23 B.C. ENVTL. AFF. L. REV. 733, 753-54 (1996) (detailing what he calls the “stealth attack” on environmental law by the 104th Congress in its proposed thirty percent cut in the EPA’s program budget, and fifty percent cut in the agency’s enforcement budget).

139. See *infra* note 170 (discussing the Congressional prohibition on OSHA developing an ergonomic rule). See also Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, Tit. II, ch. IV, 109 Stat. 73, 86 (1995) (prohibiting the use of federal money to list a species as threatened or endangered, or for listing a critical habitat).

140. *Greater Boston Tel. Corp. v. F.C.C.*, 444 F.2d 841, 851 (D.C. Cir. 1970).

141. *Id.* See also Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 511 (1974).

142. See *infra* pp. 348-53.

143. See *supra* pp. 343-44.

b. *Selective Enforcement*

One difficult question is how flexibility in enforcement strategy affects the enforcement process. Flexibility in enforcement means, for example, that enforcement agents such as compliance officers in the OSHA enforcement process have discretion in citing companies for violations (a position that has already begun to be accepted).¹⁴⁴ It means that EPA officials would be empowered to tell businesses that they will overlook certain violations if the company engages in certain compliance procedures.¹⁴⁵

This raises, of course, the question of the review of prosecutorial discretion and selective prosecution. The APA provides for review of final agency action and according to the statute, action includes the "failure to act."¹⁴⁶ Indeed, "legislative material elucidating that seminal act [agency action] manifests a congressional intention that it cover a broad spectrum of administrative actions."¹⁴⁷

Nonetheless, under present law, decisions of government officials in declining to act are not normally reviewable unless Congress specifically states otherwise.¹⁴⁸ The Court in *Heckler v. Chaney* makes a distinction between agency action, which is reviewable, and inaction,¹⁴⁹ which is not. As *Chaney* states, agency nonenforcement decisions are "general[ly] unsuitab[le] for judicial review."¹⁵⁰ The *Chaney* principle has been applied to enforcement decisions,¹⁵¹ including settlement agreements.¹⁵² Whatever the merits of Justice Rehnquist's opinion in *Chaney*, it is clear that the increased use of decisions

144. OSHA inspectors were historically understood to have no discretion in issuing citations when they saw a cause for complaint. See 29 U.S.C. § 658(a) (1988) (stating that the inspector, upon finding a violation, "shall . . . issue a citation to the employer") (emphasis added); BENJAMIN W. MINTZ, OSHA: HISTORY, LAW, AND POLICY 358, 482 (1984). Mintz notes that OSHA is "based on the principle that compliance inspections . . . are followed . . . by citations and penalties," *id.* at 358, and notes that OSHA has interpreted the "shall" language in the statute quoted as "mandatory, thus precluding on-site, sanction-free consultation by OSHA representatives," *id.* at 482 n.1. Any decisions to reduce penalties or waive prosecution had to be made by attorneys for OSHA (in the Solicitor of Labor's office). This lack of discretionary authority probably reflected industry's fears that OSHA inspectors possessed too much authority. Under pressure from the Republican Congress, the Clinton administration has found that the OSHA inspectors do have some discretionary authority and have started to develop waiver programs for companies in substantial compliance or who are in a cooperating mode. See *OSHA Policy on Written Program Violations Seeks "Consistent Enforcement" of Standards*, 25 O.S.H. Rep. (BNA) No. 24, at 828 (Nov. 15, 1995).

145. See *supra* notes 30-31.

146. 5 U.S.C. § 553(e) (1994).

147. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967).

148. See *Heckler v. Chaney*, 470 U.S. 821, 837-38 (1985).

149. See *id.* at 831.

150. *Id.*

151. See *Community Nutrition Inst. v. Young*, 818 F.2d 943, 950 (D.C. Cir. 1987) (holding that the FDA's failure to initiate enforcement proceedings under the FCA Act to determine if a product was adulterated was not subject to judicial review under *Chaney*). As *Chaney* holds, however, if an agency has "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities," judicial review is appropriate. *Chaney*, 470 U.S. at 833 n.4; see also *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Brock*, 783 F.2d 237, 245 (D.C. Cir. 1986).

152. See *Schering Corp. v. Heckler*, 779 F.2d 683, 685-87 (D.C. Cir. 1987) (holding that the FDA's decision not to pursue an enforcement action when it reached a settlement agreement was not reviewable under *Chaney*).

“not to act” in a cooperative context makes that distinction even more problematic.¹⁵³ If we are going to expand agency discretion to settle, or to formulate individuated regulatory solutions, then the judiciary’s ability to review decisions “not to act” becomes significant. The D.C. Circuit has already limited the reach of *Chaney* in rulemaking contexts.¹⁵⁴ Settlement agreements, waiver decisions and other cooperative activity require far more complex agency internal decisional activity than traditional nonenforcement decisions or decisions “not to act.” As such efforts at regulatory flexibility increase, it will become vital for the Court to revisit the *Chaney* principle and limit its notion of “non-action” which precludes judicial review.¹⁵⁵

One way to alleviate this difficulty would be to follow the example of the 1996 Florida revisions, which require that an agency decision on a waiver petition include a statement of facts and reasons, whether the agency does or does not decide to grant the waiver.¹⁵⁶ The statement of reasons should provide a reviewing court with “law to apply,” thus ensuring some realistic possibility of accountability through judicial review.¹⁵⁷

c. Fair Warning

Increased use of cooperative and individuated regulatory arrangements will, of necessity, increase the level of ambiguity and unpredictability surrounding legal standards. Legal doctrines regarding clarity and predictability in agency action (or inaction) will have to be monitored closely.

Industry has long argued that regulations should be specific and detailed and that industry should not be punished for failing to meet ambiguous standards. Although at odds with standard criminal law doctrine which teaches that ignorance of the law is no excuse,¹⁵⁸ the opposite view has been followed in administrative law, even where there has been a mistake of law created by governmental error.¹⁵⁹ All of these cases, however, deal with situations where one could have discerned what the law required if one had tried rather than relying on statements by government officials. When there is “regulatory confu-

153. The decision was sharply criticized in Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653 (1985).

154. See *American Horse Protection Ass’n, Inc. v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987) on remand, 681 F. Supp. 949 (D.D.C. 1988) (finding that *Heckler v. Chaney* did not preclude judicial review of an agency’s refusal to initiate rulemaking).

155. In this regard, I concur with Bernard Schwartz who argues that “there is no place for unreviewable discretion in a system such as ours. Provided that the case is justiciable, all discretionary power should be reviewable to determine that the discretion conferred has not been abused.” BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 8.12, at 495 (3rd ed. 1991).

156. See FLA. STAT. ANN. § 120.542(7) (West Supp. 1997).

157. For an example in the Federal context, see *Dunlop v. Bachowski*, 421 U.S. 560 (1975).

158. See *Cheek v. United States*, 498 U.S. 192, 199 (1990).

159. See *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); *Schweiker v. Hansen*, 450 U.S. 785 (1981); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947).

sion," one *cannot* discern what the law is even if one tries.¹⁶⁰ This, of course, is a danger in a regulatory flexibility regime.

For their part, courts have begun to invalidate enforcement that relied on ambiguous regulatory directives. For example, in *General Electric Co. v. EPA*,¹⁶¹ the United States Court of Appeals for the District of Columbia Circuit affirmed the EPA's interpretation of regulations promulgated under the Toxic Substance Control Act,¹⁶² even though the court noted that GE's interpretation "may also be reasonable."¹⁶³ At the same time, the court vacated GE's fine on the grounds that GE did not have fair notice of the EPA's interpretation of the regulations thus raising constitutional due process concerns.¹⁶⁴ In the past, before drastic sanctions could be imposed, courts have held that "elementary fairness compels clarity."¹⁶⁵ This means that "by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify with 'ascertainable certainty' the standards with which the agency expects parties to conform."¹⁶⁶

More recently, an Occupational Safety and Health Administrative Law Judge vacated an OSHA citation against Columbia Presbyterian Hospital for failure to use respirators when treating TB infected patients.¹⁶⁷ Instead of respirators, Columbia's policy required the use of surgical masks.¹⁶⁸ At the time of the alleged violation, the Center for Disease Control allowed use of surgical masks while regional OSHA guidelines seemed to require a respirator.¹⁶⁹ In the absence of a clear rule of conduct, the ALJ found that the hospital could not have reasonably known what standard of conduct to follow and, therefore, could not be sanctioned.¹⁷⁰

This issue is posed even more starkly in *Secretary of Labor v. Pepperidge Farms*, a case now under review by the Occupational Safety and Health Review Commission.¹⁷¹ In *Pepperidge Farms*, OSHA cited the company for violations

160. See Timothy A. Wilkins, *Regulatory Confusion, Ignorance of Law, and Deference to Agencies: General Electric Co. v. EPA*, 49 SMU L. REV. 1561, 1562 (1996). Professor Wilkins defines regulatory confusion as "situations in which the meaning or an agency's interpretations of regulations cannot be readily understood by persons to whom those regulations apply." *Id.*

161. 53 F.3d 1324 (D.C. Cir. 1995).

162. The Act governs the manufacture, use and disposal of PCBs. See 15 U.S.C. § 2605(e) (1994).

163. See *General Electric*, 53 F.3d at 1328. The court implied, however, that "in cases of first impression, if an agency interpretation needs to lean on the principle of deference to successfully obtain a judicial endorsement, then the interpretation is questionable enough to provide constitutionally insufficient warning to the regulated community." Wilkins, *supra* note 145, at 1576.

164. See *id.* at 1331.

165. *Radio Athens, Inc. v. FCC*, 401 F.2d 398, 404 (D.C. Cir 1968).

166. *General Electric*, 53 F.3d at 1329. The *General Electric* court pointed out the danger of obscurity problems, see *id.* at 1331-32, as well as differentiation problems when different parts of an agency take different positions as to the meaning of a regulation, see *id.* at 1332, which lead the court to find that constitutional due process required that the fee be invalidated, see *id.* at 1330.

167. See *Secretary of Labor v. Columbia Presbyterian Hosp.*, No. 93-298, 1996 WL 18880, at *11 (O.S.H.R.C. Jan. 2, 1996).

168. See *id.* at *2.

169. See *id.* at *3.

170. See *id.* at *8.

171. *Secretary of Labor v. Pepperidge Farms Inc.*, No. 89-265, (O.S.H.R.C.) (oral argument held Sept. 20, 1996). For discussion of the case, see Mimi Veis, *Pepperidge Farm Case Sparks Debate on Employer's Role*

of the general duty of care for various ergonomics violations including alleged repetitive motion and back injury hazards. As the government does not yet have an OSHA standard for ergonomics hazards,¹⁷² Campbell's Soup (the owner of Pepperidge Farms) fought back claiming that they should not be held liable for violating the general duty clause of the regulation when no standard of proper conduct exists. Finding that OSHA's allegations could not be upheld because the agency could not specifically show how the problem could be abated, the ALJ agreed with Campbell's. Obviously an employer does not require an OSHA regulation to guide his or her conduct in every general duty case. Some safety measures are obvious, even to a layman, but the company, the ALJ found, cannot be required to "experiment" between different safety options in the absence of clear-cut abatement methods.

This view is flawed. While the ALJ could properly find on the basis of a "fair warning" approach that a company should not be fined for choosing, like GE, one particular abatement option over another, it would seem appropriate to require that a company *make some effort* at abatement. Put otherwise, the failure to make any effort to abate ergonomic concerns may be citeable while the failure to use any particular method (in the absence of an agreed upon standard of care) is not.

Legislation such as the Regulatory Fair Warning Act has been proposed to follow up on this theme.¹⁷³ This legislation would create an affirmative defense against the imposition of penalties when defendants lacked adequate

in Abatement, DAILY LAB. REP. (BNA), Sept. 23, 1996, at 184.

172. Here you cannot blame OSHA. The agency began working on a standard during the last years of the Bush administration. See Curt Suplee, *House to Consider 'Ergo Rider' Restraints on OSHA*, WASH. POST, July 11, 1996, at A4. In May, 1995, OSHA finalized a proposed ergonomic protection standard, but before the agency could publish the proposed standard in the Federal Register, a Congressional rider forbid the agency to continue working on the standard. See *id.* It did this by prohibiting OSHA from spending any appropriations "to promulgate or issue any proposed or final standard or guidelines regarding ergonomic protection." H.R. 1158, 104th Cong., § 601 (1995). A similar rider, however, was removed from the fiscal 1997 Labor Department Appropriations bill, thus leaving OSHA free to return to work on the standard. *Agency Will Explore Options Before Promulgating Final Standard*, 26 O.S.H. Rep. (BNA) No. 8, at 190 (July 24, 1996). In December, 1996, the Clinton Administration announced that it would renew efforts to promulgate an ergonomics standard. See Steve Lohr, *Administration Renews Efforts on Prevention of Repetitive Motion Injuries*, N.Y. TIMES, Dec. 11, 1996, at A24.

173. H.R. 3307, 104th Cong., 2nd Sess. (1996). This act would have limited the sanctions that courts and administrative agencies can impose for rule violations where the alleged violator had not been given fair warning of what conduct would result in a violation of the rule. The bill was reported in the House on September 28, 1996, but failed to be brought to a vote before the end of the session on October 3, 1996. 142 CONG. REC. 12172 (Sept. 28, 1996). The Comprehensive Regulatory Reform Act of 1995, S. 343, 104th Cong., would have allowed the use of a lack of fair warning as a defense to an enforcement action. 141 CONG. REC. S9982-84 (July 14, 1995) (Hutchinson amendment).

The Small Business Regulatory Enforcement Fairness Act of 1995 takes a somewhat different tack where agencies are required to reduce civil penalties when non-compliance results from unclear regulations. See Pub. L. No. 104-121, §§ 201-253, 1996 U.S.C.A.N. (110 Stat.) 857-74. That law would require agencies to develop compliance guides for new rules. See *id.* § 212, 1996 U.S.C.A.N. (110 Stat.) at 858. They would be further required to provide "information to small business concerns regarding compliance with regulatory requirements." See *id.* § 214, 1996 U.S.C.A.N. (110 Stat.) at 859. Further, the agency is authorized to reduce or waive penalties should confusion reign. See *id.* § 223, 1996 U.S.C.A.N. (110 Stat.) at 862. Finally, the above mentioned agency material including compliance guides and responses to small business inquiries can be introduced as mitigating evidence in any agency proceeding. See *id.*

warning of what constitutes appropriate and inappropriate conduct. In this regard, the bill amplifies section 552(a)(2)(c) of the APA which states:

A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if

- (i) it has been indexed and either made available or published as provided by this paragraph, or
- (ii) the party has actual and timely notice of the terms therein.¹⁷⁴

Recognizing this trend, Judge Patricia Wald of the United States Court of Appeals for the District of Columbia has written that "legislators and rulemakers would do well to proceed in the immediate future with even greater caution than in the past in insuring that their rules give forenotice of what is expected of the regulated and fair procedures for disputing alleged violations."¹⁷⁵

Regulatory flexibility, however, would require a markedly different approach. As Philip Howard notes: "[S]everal hundred pages of OSHA rules could be replaced by one sentence: 'Tools and equipment should be reasonably suited for the use intended, in accordance with industry standards.'"¹⁷⁶

Contrary to Howard's view, OSHA's general duty clause, section 5(a)(1), requires just that. Section 5(a)(1) states "[e]ach employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."¹⁷⁷ Recourse to these general principles only masks the tensions that often arise between fair warning concerns and regulatory flexibility. On one hand, industry often reacts with horror to the general duty clause, finding it far too uncertain and ambiguous precisely because it eschews detail for general principles empowering regulators to make use of their discretion. At the same time, industry representatives often criticize many agency rules as inflexible and thus support proposals such as H.R. 9 or S. 343 that place added restrictions on the process of agency rulemaking.¹⁷⁸ "Fair warning" is a valuable principle and it is one that may create a further reason for an agency to regulate by rulemaking rather than adjudication. The notion, however, that case-by-case adjudication violates fair warning principles is unsettling. And,

174. 5 U.S.C. § 552(a)(2)(c) (1994).

175. Hon. Patricia Wald, *Environmental Postcards From the Edge: The Year That Was and the Year That Might Be*, 26 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10182, 10187 (1996).

176. See *Regulatory Reform Interview*, *supra* note 82, at 23. Howard continues: "To be fair, there are some good rules — toxic hazard limits are a good example — where you need explicit limits. No general principle is going to tell you how much benzene or cotton dust is tolerable." *Id.*

177. 29 U.S.C. § 654(a)(1) (1994). The relation between the general duty clause and the common law duty of reasonable care is discussed in David J. Kolesar, Note, *Cumulative Trauma Disorders: OSHA's General Duty Clause and the Need for an Ergonomics Standard*, 90 *MICH. L. REV.* 2079, 2088 n.70 (1992).

178. Already, the additional procedures added to traditional agency rulemaking in recent years by the Congress, the Executive and the courts have caused many agencies to retreat from rulemaking to accomplish their regulatory goals. The most extreme example of this deformation has been the National Highway Traffic Safety Administration which effectively stopped issuing rules in the mid-1970s and began regulating through the use of recalls (a form of case-by-case adjudication). See JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 10-11 (1990).

indeed, it need not be the case as long as the flexibility exercised in a case-by-case approach remains faithful to an agency's statutory charge. While an important limiting condition, fair warning principles should not be used to preclude a flexibility jurisprudence, nor should performance regulations — arguably the most likely formulation of the flexibility approach — if properly implemented.¹⁷⁹

V. CONCLUSION

While only time will tell what the specific permutations of greater regulatory flexibility will be, there is no doubt that this shift is more than a passing phase. In some instances this may mean simply less command and control and more performance regulations. In others it may mean cooperative interaction that places enforcement at least initially on the back burner.

The challenge in all this will be two fold, first, to retain a theory of accountability between legislature and bureaucracy and, second, to implement flexibility in ways that do not forgo traditional notions of fairness and consistency in the administrative process. Thus, as example, performance regulations and waiver mechanisms should be supported to the extent that they are defined by clear statutory standards. Waivers should not be premised on the personal idiosyncracies or personal agendas of agency bureaucrats. The corollary of this general rule, of course, is that to the extent that waivers or settlements such as those in the Brownfields model lack consistent standards, they should be viewed as inappropriate. It further means skepticism for such innovations as hardship waivers, or environmental covenants when they are not structured by objective standards. But this, of course, has always been the challenge of administrative procedure in the modern administrative state.

179. Consider, as example, the following proposal for a regulatory "fix": "Notwithstanding any other provision of law, an agency shall be permitted to use economic incentives to induce industries to eliminate or reduce risks, if it can show that these methods will produce at least equivalent benefits in a more cost-effective manner." Sunstein, *supra* note 7, at 298.

