

ADMINISTRATIVE PROXIES FOR JUDICIAL REVIEW: BUILDING LEGITIMACY FROM THE INSIDE-OUT

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Judicial review is considered an indispensable legitimizer of the administrative state. Not only is it a hallmark feature of the Administrative Procedure Act (“APA”), but the various standards of review reinforce democratic norms, promote accountability, and act as a check against arbitrariness. Unreviewable agency actions, therefore, must find their legitimacy elsewhere. This article evaluates the promise of “inside-out” legitimacy as an alternative or complement to judicial review. We theorize, based on insights from the administrative law and procedural justice literatures, that administrative process design can do much to advance legitimacy without the need to rely on judicial review to check administrative decisionmaking. Next, we connect the theoretical conceptions of legitimacy to administrative behavior by offering metrics for testing intrinsic legitimacy. To demonstrate how these metrics might be applied, we present an empirical study of an innovative administrative fire-alarm process that enables interested parties to petition the Environmental Protection Agency (“EPA”) to withdraw states’ authorization to administer the major environmental statutes. While this process may trigger a variety of responses by EPA, there is generally little recourse to the courts for citizens dissatisfied with the process or its outcomes. Our findings suggest that, even without external checks, EPA engages in numerous behaviors indicative of intrinsic legitimacy. In addition, the process itself produces real substantive outcomes. Armed with these findings, we conclude with an assessment of institutional design features that may contribute to inside-out legitimacy.

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INTRODUCTION

Judicial review is considered a critical legitimizer of the administrative state. In fact, it is hard to overstate the prominence that role takes — whether expressed by statute,¹ judicial opinion,² or in the academic literature.³ There are good reasons for this view; agencies are uncomfortably positioned in the tripartite constitutional structure, and the rigors of judicial scrutiny can further democratic accountability and otherwise incentivize legitimizing behaviors.

But much of the real work of administrative agencies never comes before a court. As an initial matter, the time and resources needed to maintain a suit

¹ *E.g.*, Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–06 (2006).

² *E.g.*, *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489 (1951) (“The legislative history [of the APA] demonstrates a purpose to impose on courts a responsibility which has not always been recognized.”).

³ *E.g.*, M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1413 (2004) (“The dominant narrative of modern administrative law casts judges as key players who help tame, and thereby legitimate, the exercise of administrative power.”).

against a federal agency, coupled with the many deferential standards of review, require potential litigants to carefully evaluate whether bringing a challenge would be worthwhile.⁴ Even presuming a willing litigant, review may not be available for a variety of reasons. Congress sometimes forecloses review,⁵ and constitutional doctrines, like standing, may have the same impact.⁶ Further, many agency policies, such as those expressed in guidance documents and interpretive rules, can be extraordinarily difficult to bring before a court, particularly on pre-enforcement challenges.⁷ Moreover, numerous scholars have raised the concern that agencies can strategically avoid judicial review by choosing policymaking vehicles that take advantage of the many nonreviewability doctrines.⁸

How can the heavy reliance on judicial review for administrative legitimacy be squared with the fact that so many agency decisions are never checked by a court? This issue, one of the great paradoxes in administrative law, raises an obvious question: What else is there to legitimize unreviewable agency action? Some scholars who have examined this question have proposed democratic oversight — especially through the President⁹ and Congress¹⁰ — to supply legitimacy. But there is little question that much of what agencies do receives sparse scrutiny from either the President or Congress because of the volume of work involved and the realities of time, resource, and financial constraints.¹¹

⁴ For the classic litigant-driven theory of how disputes are selected for litigation, see generally George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

⁵ E.g., 5 U.S.C. §§ 701(a)(1)–(2) (providing exceptions to reviewability).

⁶ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (calling the standing requirement an “irreducible constitutional minimum”).

⁷ A number of requirements limit or preclude review. See, e.g., 5 U.S.C. § 702 (agency action requirement); *id.* (zone-of-interests requirement); *id.* § 704 (finality requirement); *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967) (ripeness).

⁸ See, e.g., Bryan Clark & Amanda C. Leiter, *Regulatory Hide and Seek: What Agencies Can (And Can't) Do to Limit Judicial Review*, 52 B.C. L. REV. 1687, 1694 (2011) (suggesting agency manipulation of reviewability doctrines “poses a . . . threat to congressional authority and executive legitimacy”); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 408 (2007) (“by issuing a guidance document, an agency can obtain a rule-like effect while minimizing political oversight and avoiding the procedural discipline, public participation, and judicial accountability required by the APA”); Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331 (2011–2012) (proposing arbitrary-and-capricious review and modifications to finality and ripeness doctrines to counteract potential agency abuse of less participatory and reviewable policy tools); Jim Rossi, *Of Dialogue — and Democracy — in Administrative Law*, 112 COLUM. L. REV. SIDEBAR 147, 150–51 (2012) (suggesting agencies might choose policymaking tools strategically to avoid dialogue with courts); cf. Emily Hammond Mezell, *Dialogue, Deferred and Differentiated*, 112 COLUM. L. REV. SIDEBAR 185, 192 (2012) (noting dialogue may be available elsewhere). Of course, courts and many scholars have also expressed concerns about the potential negative impacts of judicial review, one of us included. See *infra* note 91.

⁹ See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

¹⁰ See, e.g., Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727 (2009).

¹¹ Furthermore, scholars have demonstrated the weaknesses of these models to the extent they depend on notions of political accountability for their legitimacy. E.g., Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2076–98 (2005)

Despite these shortcomings of external oversight, the intrinsic legitimacy of agency behavior — legitimacy from the inside-out¹² — is both under-theorized and under-empiricized.¹³ Professors Sidney A. Shapiro and Ronald F. Wright observe that, “with only a few exceptions . . . administrative law scholars treat agencies as a black box to be controlled from the outside, using political oversight and judicial review.”¹⁴ There is, however, increasing recognition that the vast world of governance that agencies inhabit with relative policymaking freedom deserves close attention, accompanied by the recognition that combinations of internal and external controls may best optimize administrative legitimacy.¹⁵ Indeed, declining levels of trust in government institutions highlight the importance of considering administrative legitimacy from many angles.¹⁶

This Article contributes to both the theory and the empirical analysis of inside-out legitimacy. To develop the theoretical foundation, it begins by examining more precisely the means by which judicial review accomplishes its legitimacy-enhancing role, with a particular emphasis on the reasoned-decision-making requirement.¹⁷ At their core, the various principles of judicial review reinforce administrative law values of participation, deliberation, and transparency, which guard against arbitrariness and foster accountability.¹⁸ As we

(contending electoral accountability is a myth and therefore cannot legitimize federal government); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1267–71 (2009) (demonstrating voters’ inability to link specific policy decisions to congresspeople or President and to sanction such officials by voting).

¹² We use the terminology advanced by Professors Shapiro and Wright. See Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 578 (2011) (defining inside-out legitimacy).

¹³ There is often an assumption in the literature that judicial review is necessary to agency legitimacy. E.g., Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 399 (2009) (describing prospect of judicial review for proposed procedural reforms in creating guidance documents); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1561 (1992) (describing role for courts as external check on agency procedural approaches to civic republicanism).

¹⁴ See Shapiro & Wright, *supra* note 12, at 580. Notably, the field of public administration has contributed much more to the study of inner agency workings than has administrative law. See *id.* at 597–603 (detailing public administration literature).

¹⁵ *Id.* at 579 (“democracies can, under the right conditions, depend on inside-out controls to complement outside-in controls and promote accountability”); see also Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 555–56 (2003) [hereinafter *Arbitrariness*] (arguing for renewed focus on “ordinary” administrative law as opposed to constitutional administrative law).

¹⁶ See Rebecca Bratspies, *Regulatory Trust*, available at <http://ssrn.com/abstract=1364314>, at 579 (2009) (collecting sources for declining levels of trust); Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847, 856 (1998) (describing role of trust in perceptions of legitimacy for government institutions); see also *Trust in Government in Washington Remains Low*, PEW RESEARCH CTR., <http://www.pewresearch.org/daily-number/trust-in-government-in-washington-remains-low/> (last visited Mar. 24, 2013) (“Only about a quarter of Americans say they trust the federal government to do the right thing all or most of the time.”).

¹⁷ See *infra* Part I.B.

¹⁸ By administrative law values, we mean widely accepted norms for administrative legitimacy. See Lisa Schultz Bressman, *Disciplining Delegation After Whitman v. American Trucking Ass’n*, 87 CORNELL L. REV. 452, 460 (2002) (listing democratic values for administrative state of accountability, fairness, rationality, and regularity); David L. Markell, “Slack” in the Administrative

also note, these principles are consistent with the literature on procedural justice, which evaluates the legitimacy of decision-making procedures based on norms of voice, respect, neutrality, and trust.¹⁹ Overall, these principles legitimize by affirming citizenship, reinforcing fidelity to statute, and furthering democratic norms.

But what do these conceptions of legitimacy have to offer for evaluating the legitimacy of unreviewable agency actions? We propose that the insights from judicial review can be used to develop metrics for evaluating administrative governance in action more generally. These metrics include: how an administrative process is used; the agency's responsiveness and reason-giving; and the substantive outcomes reached. Each metric draws on the theoretical conceptions of agency legitimacy as furthered by judicial review, but each is tailored to evaluating that legitimacy from the inside-out.

We test our metrics empirically by applying them to an agency procedure that typically evades judicial review: petitions to withdraw states' authority to administer environmental statutes. To elaborate, the major federal environmental statutes, notably the Clean Air Act ("CAA"),²⁰ Clean Water Act ("CWA"),²¹ and Resource Conservation and Recovery Act ("RCRA"),²² are based on a cooperative federalism structure. Under this structure, EPA is charged with implementing the federal regulatory programs, but the states are authorized to serve as nearly full partners by taking over implementation of the programs, subject to federal approval and oversight.²³ In addition to monitoring state performance, EPA has the power to withdraw the state's authorization if the state is inadequately implementing the environmental laws. But the federal agency has almost never done so.²⁴ Scholars, agency officials, states and inter-

State and its Implications for Governance: The Issue of Accountability, 84 OR. L. REV. 1, 23 (2005) [hereinafter *Slack*] (raising concerns of less transparency and accountability in environmental cooperative federalism); Emily Hammond Mezell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1729 (2011) [hereinafter *Dialogue*] (noting role of courts in furthering such values).

¹⁹ Tom Tyler & David Markell, *The Public Regulation of Land-Use Decisions: Criteria for Evaluating Alternative Procedures*, 7 J. EMPIR. LEGAL STUD. 538, 548 (2010); Tom R. Tyler, *Social Justice, Outcome and Procedure*, 35 INT'L J. OF PSYCHOL. 117, 121 (2000); see also Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 46 HASTINGS L.J. 127, 136 (2012) (collecting further sources).

²⁰ Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C. § 7401-7671q (2006)).

²¹ Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (2006)).

²² Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992k (2006).

²³ CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, *REINVENTING ENVIRONMENTAL ENFORCEMENT & THE STATE/FEDERAL RELATIONSHIP* 15-16 (2003). Congress has adopted a cooperative federalism approach across a range of policy areas. See e.g., Occupational Safety and Health Act, 29 U.S.C. § 667 (2006) (permitting states to assume responsibility for occupational safety and health standards, provided conditions are met); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1253 (2006) (similar for surface coal mining and reclamation operations).

²⁴ Cf. Final Rule, Partial Withdrawal of Approval of 34 Clean Air Act Part 70 Operating Permits Programs in California, 67 Fed. Reg. 63551 (Oct. 15, 2002) (partially withdrawing California's Title V authority); Announcement of a Federal Operating Permits Program Consistent with 40 C.F.R. Part 71, 66 Fed. Reg. 63236 (Dec. 5, 2001) (announcing Maryland would lose its interim

est groups agree that formal withdrawal is an exceedingly unlikely cure for the malady of inadequate state performance.²⁵

In addition to the limitations of resource constraints, EPA's oversight of state performance has been complicated by the design choices inherent in cooperative federalism and the realities of managing a large bureaucratic structure.²⁶ Both the Government Accountability Office and the EPA Office of Inspector General ("OIG") have identified EPA oversight of states as a "management challenge" for the past several fiscal years.²⁷ According to the OIG, these challenges are exacerbated by inconsistent and incomplete data, unclear and conflicting state performance benchmarks, variations in the stringency of regional oversight of states, and regional failure to curtail weak or variable enforcement by the states.²⁸

EPA, however, is not the only actor tasked with ensuring compliance with the environmental regulatory programs. Citizens and other interested parties are also specifically empowered to influence government and regulated party behavior, and one way to do so is to petition EPA to withdraw state authority. This innovative fire-alarm mechanism has the potential to convey important information to EPA about state performance, as well as to signal concerns about state performance and regional oversight to EPA headquarters, Congress, and other stakeholders. Yet EPA has proved reluctant to withdraw a state's authority even in response to petitions. And because decisions whether to initiate withdrawal are within EPA's enforcement discretion, the agency's responses to such petitions largely go unreviewed.²⁹

Standing as the petition process does at the crossroads of administrative law, cooperative federalism, and environmental law, much is at stake. Perhaps surprisingly, then, this process has never been studied empirically; unlike notice-and-comment rulemaking, for example (which is largely reviewable in any event), lessons of administrative legitimacy to be gleaned from the petition process are waiting to be uncovered.³⁰ The process typically lacks the check of judicial review and has generally evaded congressional³¹ and presidential³²

approval status of its state Title V permitting program on Dec. 1, 2001, but would gain full delegation of authority to implement federal permitting program on that same date).

²⁵ See *infra* text accompanying notes 106–114.

²⁶ One of us has detailed the many information disconnects between the states and EPA that hinder transparency and accountability. See generally Markell, *Slack*, *supra* note 18.

²⁷ EPA Office of Inspector General, *EPA Must Improve Oversight of State Enforcement*, Report No. 12-P-0113, at 32 (Dec. 9, 2011) [hereinafter *OIG Report*].

²⁸ *Id.* at 11–15.

²⁹ See *infra* text accompanying notes 150–171 (detailing unreviewability).

³⁰ Cf. Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943 (2006) (suggesting citizen participation in rulemakings is sparse, even with e-rulemaking technologies); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411 (2005) (evaluating type and content of participation in such rulemakings); Cynthia Farina, Mary Newhart & Josiah Heidt, *Rulemaking vs. Democracy: Judging and Nudging Participation that Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123 (2012) (examining effect and value of mass comments for technology-enabled rulemaking).

³¹ Our research revealed only a few discussions of petitions to withdraw in congressional testimony. See, e.g., *Federal-State Relationship: Environmental Self Audits: Hearing Before the H. Comm. on Commerce*, 105th Cong. 9–10, 39, 46, 53, 58, 63, 86, 96 (1998) (discussing withdraw-

oversight, but it goes to the very heart of how major regulatory schemes are managed. Even though EPA has never withdrawn a state's authority in response to a petition, our study, which evaluates a full set of petitions to withdraw over a twenty-five-year period, reveals that the process has enjoyed sustained use over that time.³³ In addition, petitions frequently result in measurable changes in how states administer the environmental regulatory programs — providing a fascinating, counter-intuitive story about agency behavior and legitimacy.³⁴

Our hope is to contribute to the literature on legitimacy in several ways. First, we respond to recent calls for bringing an emphasis on inside-out legitimacy to the conversation about administrative law. Second, we offer a framework for conceptualizing inside-out legitimacy that relies on the lessons of judicial review for insights. Third, we propose specific metrics for evaluating inside-out legitimacy that incorporate the theoretical framework in a pragmatic way. Fourth, we apply our metrics to the petition-to-withdraw process, enabling us to assess our conceptual framework and metrics for evaluating legitimacy. Finally, the framework and methodology developed here provide a solid foundation for further study and raise provocative questions about the ability to incorporate inside-out features that incentivize legitimizing behavior into institutional design. We include some tentative thoughts on what features of the petition process may have a bearing on its intrinsic legitimacy, and how those features might be translated to other contexts to bolster inside-out legitimacy.

We also expect this Article to attract attention for its focus on the petition process itself. To provide a brief preview, our study raises several questions about the adequacy of state performance, the efficacy of EPA oversight, and the effectiveness of the petition process as a check on each. Despite these and other criticisms, our overall assessment of the process suggests that EPA has operated relatively consistently with our metrics for administrative legitimacy. In particular, EPA's responsiveness and reason-giving reflect considerable internalization of legitimacy principles. And even though it is exceedingly rare for the agency to pursue withdrawal, our study documents measurable substantive changes in critical areas such as state law and state agency permitting, investigations, and enforcement. These findings surprised and impressed us. We hope that our effort to create and apply clear legitimacy metrics will stimulate a

als); *Enforcement of Environmental Laws: Hearing before the Sen. Comm. on Env't and Pub. Works*, 105th Cong. 161, 175, 206, 215, 223, 226 (1997) (discussing withdrawals).

³² Unlike rulemaking, the process is not subject to review by the Office of Information and Regulatory Affairs ("OIRA"). See Exec. Order No. 12,866, § 6, 3 C.F.R. 638 (1994), reprinted as amended in 5 U.S.C. § 601 app. at 745 (2006), and 5 U.S.C. § 601 app. at 108 (Supp. IV 2010); see also Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011) (supplementing and reaffirming the "principles, structures, and definitions . . . established in" Executive Order 12,866); Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1794 (2012) [hereinafter *Deference Dilemma*] ("The typical account of OIRA describes it as one of the most important means by which the president exercises control over the executive agencies.").

³³ See *infra* Part III.A (describing extent of use).

³⁴ See *infra* Part III.C (describing substantive outcomes).

conversation about inside-out legitimacy in the specific context of that process, and lead to progress in making the cooperative federalism system more transparent, accountable, and effective in accomplishing its statutory objectives.

This Article proceeds as follows. Part I establishes the theoretical framework. It identifies and describes how the prominent doctrines of judicial review of administrative agencies enhance legitimacy of the administrative state. Next, it proposes metrics for inside-out legitimacy that borrow from the insights of judicial review. In Part II, we lay the groundwork for the empirical component of the Article by setting forth the parameters of environmental cooperative federalism, describing our dataset, and contoured the petition process and how it usually evades judicial review. Part III begins by applying our legitimacy metrics from Part I to the petition process described in Part II. Next, we critique the petition process in light of the norms underlying our metrics. In Part IV, we provide some preliminary thoughts on what our study suggests for institutional design and inside-out legitimacy more broadly. We conclude by inviting further exploration of this important facet of administrative law.

I. AGENCY LEGITIMACY

This section briefly sets forth the APA structure for judicial review before detailing how such review provides legitimacy to the administrative state.³⁵ Although judicial review is imperfect and often unavailable, there is little literature on how to measure agency legitimacy in the absence of that review. As elaborated at the conclusion of this section, we suggest that the theoretical underpinnings of judicial review can be used to develop metrics for gauging agency legitimacy more broadly.

A. *The APA*

As those familiar with the APA know, a major component of that statute is its section providing for judicial review. Indeed, part of the APA's original purpose was to ensure recourse to the courts as a check on agency behavior.³⁶ The statute thus reflects a "basic presumption" in favor of judicial review.³⁷ Nevertheless, it also contemplates that some agency decisions will be exempt from review. Congress might expressly or impliedly preclude review in an

³⁵ We use the word "legitimacy" broadly. See Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U.L. REV. 1657, 1675 n.92 (2004) [hereinafter *Inaction*].

³⁶ See *Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967) ("The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation.") (citations omitted).

³⁷ *Id.* at 140; *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 483–84 (1991) (restrictively interpreting statutory preclusion of judicial review and permitting claim to go forward).

agency's statutory mandate,³⁸ for example, or the type of agency action itself might be unreviewable because there is no law to apply.³⁹ As the Supreme Court held in *Heckler v. Chaney*, the latter category includes an entire class of agency decisions: "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)."⁴⁰

Even though some agency behavior is insulated from judicial review by congressional design, the usual presumption in favor of review reflects deeply held notions about the courts' role in administrative law. A quick look at the standards of review set forth in § 706 of the APA demonstrates this: courts ensure that agencies carry out their mandatory duties,⁴¹ follow proper procedures,⁴² engage in reasonable analyses,⁴³ obey the Constitution,⁴⁴ and act only within the confines of their statutory mandates.⁴⁵ These checks were put in place partly in response to the New Deal — at a time when agencies enjoyed expanding powers and discretionary authority, meaningful review was considered necessary to preserve agencies' constitutional legitimacy and to otherwise serve as a check on their exercises of power.⁴⁶ Since then, the courts themselves have imbued the APA with much more meaning than the statute's language might suggest — and in ways that provide considerable insights for administrative legitimacy.

B. *Judicial Review's Mechanisms for Enhancing Legitimacy*

The various judicial elaborations of administrative law are, in fact, uniquely tailored to addressing considerations of legitimacy. Before discussing those elaborations, it is worth emphasizing that one way judicial review adds legitimacy to administrative actions is by providing a third-party imprimatur of

³⁸ 5 U.S.C. § 701(a)(1) (no judicial review where "statutes preclude judicial review"); see *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 347 (1984) (holding statute's structure evidenced congressional intent to preclude review of milk market orders in suits brought by consumers).

³⁹ 5 U.S.C. § 701(a)(2) (no judicial review where "agency action is committed to agency discretion by law"); see *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) ("The legislative history of the Administrative Procedure Act indicates that [this exemption] is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" (citation omitted)). Numerous other reviewability requirements may be found in the APA. See, e.g., 5 U.S.C. § 702 (agency action requirement); *id.* (zone-of-interests requirement); *id.* § 704 (finality requirement). The Constitution also limits review. See U.S. CONST. art. III, § 2 (case or controversy requirement); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III").

⁴⁰ 470 U.S. 821, 832 (1985).

⁴¹ 5 U.S.C. § 706(1).

⁴² *Id.* § 706(2)(D).

⁴³ *Id.* §§ 706(2)(A), (E).

⁴⁴ *Id.* § 706(2)(B).

⁴⁵ *Id.* § 706(2)(C).

⁴⁶ See Peter L. Strauss, *Legislation that Isn't — Attending to Rulemaking's "Democracy Deficit,"* 98 CAL. L. REV. 1351, 1357 (2010) ("The legitimacy of delegated discretionary authority, that is, is tied directly to the possibility of judicial review for the rationality of its exercise."). For an overview of this history, see Meazell, *Dialogue*, *supra* note 18, at 1735–37.

approval for agency behavior.⁴⁷ While the courts' status as independent third-party reviewers contributes to their capacity to serve this legitimizing role, also important is the actual review courts undertake. Rather than review agency actions based on norms generated in an ad hoc way, courts add legitimacy to agency action because of their approach — notably, their inquiry into whether an agency's performance met relevant standards.

We focus here on the details of those standards, which operate as legitimizing mechanisms when courts review agencies' procedures, substantive reasoning, and conformity with statute.⁴⁸ To show why and how those mechanisms work, we draw from the literature on administrative law values (which includes participation, deliberation, and transparency);⁴⁹ procedural justice (which includes voice, neutrality, trust, and respect);⁵⁰ and the primacy of statutory authority. Taken together, these attributes represent democratic norms that distinguish a legitimate state from an autocratic or authoritarian one.

1. Procedure

When courts review agency actions for conformance to procedural requirements, the starting point is the language of the APA and the requirements it imposes on various agency actions.⁵¹ The requirements, however, are far more robust as a result of judicial interpretation than the text of the APA might suggest. In the rulemaking context, for example, the APA requires agencies to “give interested persons an opportunity to participate,” consider “the relevant matter presented,” and accompany rules with a “concise . . . statement of basis and purpose.”⁵² As interpreted by the courts, this means that agencies must provide the scientific and technical details on which their proposed rules are based in order to allow meaningful commentary.⁵³ Agencies must respond to significant points raised by commenters,⁵⁴ and any changes that are not the logical outgrowth of such proposed rules require new rounds of notice and

⁴⁷ See Frank Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1281–82 (1999) (collecting sources).

⁴⁸ Constitutional compliance is beyond the scope of this Article. For an analysis of some of the issues, see Gillian Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010).

⁴⁹ See *supra* note 18.

⁵⁰ See *supra* note 19.

⁵¹ Of course, statutory mandates may also require more specificity than does the text of the APA. See, e.g., Clean Air Act Amendments of 1977, 42 U.S.C. § 7607(d)(3)(A)–(C) (2006) (mandating statement of basis and purpose include factual data, methodology, and legal interpretations and policy considerations underlying rule).

⁵² 5 U.S.C. § 553(c).

⁵³ Portland Cement Ass'n v. Ruckleshaus, 486 F.2d 375, 393 (D.C. Cir. 1976); see also Engine Mfrs. Ass'n v. EPA, 20 F.3d 1177, 1181 (D.C. Cir. 1994) (“[A] reasonable explanation . . . would be one that the concerned public could understand.”).

⁵⁴ See Reytblatt v. NRC, 105 F.3d 715, 722 (D.C. Cir. 1997) (“An agency need not address every comment, but it must respond in a reasoned manner to those that raise significant problems.”); Home Box Office v. FCC, 567 F.2d 9, 35 (D.C. Cir. 1977) (“To this end there must be an exchange of views, information, and criticism between interested persons and the agency.”); Cuéllar, *supra* note 30, at 421 n.37.

comment.⁵⁵ Resulting statements of basis and purpose, therefore, tend to be “monstrously long and complex document[s].”⁵⁶

Why impose such burdens on agencies, particularly with so little textual support for doing so?⁵⁷ One prominent view is that they reinforce notions of legitimacy. First, they are consistent with participation and voice — attributes considered fundamental to democratic decisionmaking⁵⁸ as well as to the perceived legitimacy of process.⁵⁹ Second, they encourage and reward deliberation and responsiveness. The former furthers neutrality and protects against arbitrariness and extreme outcomes by slowing the pace of decisionmaking and bringing the benefits of dialogue to bear on proposed agency actions.⁶⁰ The latter fosters trust and demonstrates that participants in the process were treated with respect.⁶¹ Finally, these procedural rules are important building blocks for one of administrative law’s ultimate legitimizers: reasoned decisionmaking.⁶²

2. Reason-Giving

The reasoned-decisionmaking requirement is by far the most impactful judicial elaboration of administrative law. Its textual support stems from the

⁵⁵ *Ober v. EPA*, 84 F.3d 304, 313 (9th Cir. 1996) (holding that EPA violated the CAA and the APA by accepting and partly relying on 300 additional pages of post-comment information from an interested party without reopening comment period).

⁵⁶ GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 359 (2013).

⁵⁷ We acknowledge the many criticisms of such rules, as well as the tension they create with *Vermont Yankee*. See *Vt. Yankee Nuclear Power Corp. v. Natural Resources Def. Council*, 435 U.S. 519, 525 (1978) (holding courts may not impose procedures on agencies beyond those set forth in the APA or required by the Constitution); Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 *GEO. WASH. L. REV.* 856, 894 (2007) (arguing these rules turn “the notice of proposed rulemaking into something akin to proposed findings of fact and conclusions of law”).

⁵⁸ David Arkush, *Democracy and Administrative Legitimacy*, 47 *WAKE FOREST L. REV.* —, at 9 (forthcoming 2013) (arguing democratic legitimacy model of administrative law “envision[s] a high degree of citizen participation in the administrative process”); Staszewski, *supra* note 11, at 1253 (“[T]he legitimacy of governmental authority in a democracy is often thought to depend upon the consent of the governed.”).

⁵⁹ See Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 *U. MIAMI L. REV.* 873, 907 (2002) (describing the link between participation and legitimacy in the context of binding arbitration); Bratspies, *supra* note 16, at 615 (suggesting active solicitation of plural voices furthers legitimacy for administrative agencies); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 *Nw. U. L. REV.* 173, 182 (1997) (“Citizen involvement in agency decisions also reinforces proceduralist goals and helps to create and affirm citizenship.”). For a full discussion of the various theories of participation, see *id.*, at 180–88; cf. JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS’ BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* 1–2, 7 (2002) (arguing active participation is less important to citizens than that political decision makers be neutral).

⁶⁰ See Sidney A. Shapiro, Elizabeth Fisher & Wendy E. Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 *WAKE FOREST L. REV.* 463, 470 (2013) (“A deliberative dialogue is transformative in nature because different actors can learn from the process and reconsider their perspectives.”).

⁶¹ See Tyler & Markell, *supra* note 19, at 548 (detailing these principles).

⁶² See *Am. Med. Ass’n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995) (explaining that procedural requirements for notice and comment rulemaking “serve important purposes of agency accountability and reasoned decisionmaking”).

APA's substantial evidence⁶³ and arbitrary and capricious⁶⁴ standards of review;⁶⁵ its judicial gloss takes the form of "hard-look" review.⁶⁶ That is, the agency must consider all the statutorily relevant factors⁶⁷ and draw a rational connection between the facts and the ultimate decision.⁶⁸ Furthermore, the agency's reasoning must be apparent from the record, which is in turn defined as anything the agency had before it when making its decision.⁶⁹ Taken together, the reason-giving and record requirements are meant to ensure that the agency "shows its work," which facilitates external, as well as internal, legitimacy.

To understand why, it is helpful to begin with the origins of hard-look review. The standard arose out of two developments: in the early 1970s, agencies began exercising unprecedented rulemaking authority under the broad delegations of authority in environmental, health and safety statutes;⁷⁰ but at the same time, the interest-group capture model of agency behavior suggested that agencies were not necessarily acting to protect statutory beneficiaries when they exercised this authority.⁷¹ A searching review of agency behavior enabled responses to both these developments. First, hard-look review is recognized as a counter-balance to broad delegations of authority, helping offset constitu-

⁶³ 5 U.S.C. § 706(2)(E) (2006).

⁶⁴ *Id.* § 706 (2)(A).

⁶⁵ As others note, the reason-giving requirement also applies under *Chevron* step two. See Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549, 585 (2009) ("[T]he effect of each is much the same."); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI-KENT L. REV. 1253, 1296 (1997) (predicting increasing overlap between step two and arbitrariness review); cf. Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 603–04 (2009) (condensing *Chevron* into principle that courts must uphold any reasonable agency construction); see also Mark Seidenfeld, *Chevron's Foundation*, 86 NOTRE DAME L. REV. 273, 310–11 (2011) (arguing step two serves Article III function independent of § 706 of APA).

⁶⁶ There is significant variety in the extent to which courts scrutinize agencies under this standard. See Emily Hammond Mezell, *Super Deference, the Science Obsession, and Judicial Review of Agency Science*, 109 MICH. L. REV. 733, 778–84 (2011) [hereinafter *Super Deference*] (documenting extremely deferential judicial review of legislative science); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1064–66 (1995) (describing the "proliferation of manipulable categories to which different degrees of deference apply").

⁶⁷ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); see *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007) (remanding EPA decision not to regulate greenhouse gases under Clean Air Act where decision was based in part on factors not contemplated by statutory scheme).

⁶⁸ *Motor Vehicles Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1982).

⁶⁹ *Overton Park*, 401 U.S. at 420; cf. *Sierra Club v. Costle*, 657 F.2d 298, 407–08 (D.C. Cir. 1981) (permitting ex parte contacts during notice-and-comment rulemaking, with proviso that "the Administrator may not base the rule in whole or in part on any 'information or data' which is not in the record, no matter what the source.").

⁷⁰ For an account of these changes and their relationship to judicial review, see Mezell, *Super Deference*, *supra* note 66, at 756–59.

⁷¹ For an account of hard-look review as a response to the interest-group capture model, see Mark Seidenfeld, *The Irrelevance of Politics in Hard-Look Review*, 90 WASH. U. L. REV. 148–49 (2012) [hereinafter *Irrelevance*].

tional legitimacy concerns by acting as a check on discretion.⁷² Second, hard-look review ensures a baseline fidelity to the statutory mandate; even if agencies have close relationships with regulated entities (or other stakeholders), a careful look by a court helps ensure that the agency's action is at least within the range of possible options that the applicable statute permits.⁷³

Thus, reason-giving furthers the external accountability and legitimacy that courts provide by supplying a transparent decision for review. It facilitates oversight more broadly, however, because it permits other stakeholders — Congress, the executive, regulated entities, and regulatory beneficiaries — to understand the agency's justifications and hold it accountable for its decisions.⁷⁴ In this way, the transparency of reason-giving enables democratic oversight, helping ensure agencies' legitimacy in the constitutional scheme.

But reason-giving does more than facilitate external oversight. It also promotes intrinsic legitimacy.⁷⁵ First, it provides a disciplining check on decisionmakers, protecting against arbitrariness and evidencing a commitment to rationality.⁷⁶ As Professor Glen Staszewski explains, it does so by requiring agencies to explain why their decisions are good for the public as a whole, as

⁷² Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 655–56 (1985) (describing judicial review as a surrogate safeguard of agency legitimacy after the demise of the nondelegation doctrine).

⁷³ *Mass.*, 549 U.S. at 534; Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 468 (2008) (noting that a key reason for reviewability is to maintain statutory supremacy); Meazell, *Deference Dilemma*, *supra* note 32, at 1769 (describing judicial review as furthering fidelity to statute); Seidenfeld, *Irrelevance*, *supra* note 71, at 156 (emphasizing centrality of statutory mandate over political factors); Sunstein, *supra* note 72, at 655 (“Judicial review serves important goals in promoting fidelity to statutory requirements and . . . in increasing the likelihood that the regulatory process will be a reasonable exercise of discretion instead of a bow in the direction of powerful private groups.”). *But see* Wendy E. Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY. L. REV. 1717, 1723 (2011–2012) (arguing threat of judicial review may provide leverage to regulated entities, further reinforcing interest-group capture concerns).

⁷⁴ *See* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1768–69 (2007) [hereinafter *Procedures*] (describing positive political theory's view of administrative procedure as tool for legislative oversight); Matthew McCubbins, Roger Noll & Barry Weingast [hereinafter McNollGast], *The Political Origins of the Administrative Procedure Act*, J.L. ECON & ORG. 180, 185 (1999) (“In practice, Congress and the President possess several tools to influence ongoing agency operations.”); Meazell, *Super Deference*, *supra* note 66, at 778–79 (suggesting hard-look review of agency science can reinforce these norms); Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1131–33 (2009–2010) (explaining President's authority to be involved in rulemaking); Staszewski, *supra* note 11, at 1278–84 (describing the value of requiring public officials in a democracy to give reasoned explanations for their decisions).

⁷⁵ *See* Bressman, *Arbitrariness*, *supra* note 15, at 515 (“A model fixated on accountability cannot adequately address the concerns for arbitrariness necessary for a truly legitimate administrative state.”); *id.* at 528–29 (explaining reason-giving requirement as both promoting accountability and preventing arbitrariness); Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 116 (2007–2008) (arguing accountability is only part of reason-giving's pull because “reason giving is fundamental to the moral and political legitimacy of the American and European legal orders.”).

⁷⁶ Bressman, *Arbitrariness*, *supra* note 15, at 473–74; Mark Elliott, *Has the Common-Law Duty to Give Reasons Come of Age Yet?*, 1 PUBLIC L. 56, 62 (2011); Staszewski, *supra* note 11, at 1278.

opposed to being naked political preferences held by particular officials.⁷⁷ In addition, it imposes discipline by requiring agencies to show how they have treated similarly situated circumstances similarly, or to explain distinctions where those arise.⁷⁸ When an agency provides reasons, impacted individuals are also able to make informed judgments about whether they perceive the action as legitimate.⁷⁹ Further, reason-giving can promote the sense that individuals are treated with respect because — to the extent their views are acknowledged and responded to — the agency demonstrates that those views were taken seriously.⁸⁰ This in turn can enhance broader confidence in the administrative state.⁸¹

3. Fidelity to Statute

Ultimately, agencies' procedures and reason-giving are a means to an end: substantive outcomes. The substantive legitimacy of those outcomes derives from compliance with the statutory mandate.⁸² Although the scope of delegated authority to most agencies is very broad, their actions must nevertheless be authorized by a statute⁸³ that in turn delineates the scope of their discretion.⁸⁴ Once again, the APA reinforces this understanding; in notices of proposed rules, for example, agencies must make "reference to the legal authority under which the rule is proposed."⁸⁵ And ensuring fidelity to statute is one of the key functions of judicial review. While courts provide some measure of deference to agencies' policy decisions, they will first ensure that agencies exercise only such authority as they possess.⁸⁶

4. Procedure, Substance, and Ex Ante Behavior

Presuming agencies act within the bounds of their delegated authority, it is notable that courts themselves recognize that legitimacy stems from both procedure and substance. This point was made quite strikingly in *United States v.*

⁷⁷ Staszewski, *supra* note 11, at 1279–80.

⁷⁸ *Id.* at 1281. Limits on discretion are especially important for furthering legitimacy when other mechanisms, like bureaucratic controls, are lacking — such as where agencies have broadly dispersed internal authority. See Shapiro & Wright, *supra* note 12, at 619 (noting that limits on discretion can offset lack of bureaucratic control).

⁷⁹ Elliott, *supra* note 76, at 61–62.

⁸⁰ *Id.* at 62.

⁸¹ *Id.*; see also Mashaw, *supra* note 75, at 118 (arguing fundamental acceptability of law lies in its ability to provide reasons).

⁸² See Shapiro & Wright, *supra* note 12, at 592.

⁸³ *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 125 (2000).

⁸⁴ *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 475 (2001); see Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 *DUKE L.J.* 1671, 1723 (2011–2012) (noting that all models of administrative legitimacy "take the legitimacy of regulatory intervention itself as a given, so long as the intervention is authorized by the agency's statute").

⁸⁵ 5 U.S.C. § 553(b)(2).

⁸⁶ *Mass.*, 549 U.S. at 530–31 (2007); *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006); *Overton Park*, 401 U.S. at 415.

Mead Corporation, in which the Court reasoned that statutory authority justifying *Chevron* deference might be inferred when Congress contemplates that agencies will use procedures “tending to foster fairness and deliberation.”⁸⁷ By elaborating administrative law, the courts have thus furthered not only the procedural legitimacy of agency behavior, but its substantive legitimacy.

Additionally, it is worth noting that judicial review encourages legitimizing behaviors during the decisionmaking process and *prior* to the possibility for judicial review. As Professor Sunstein explains, “the availability of review will often serve as an important constraint on regulators during the decision-making process long before review actually comes into play.”⁸⁸ This view seems to be the consensus: Professor Bressman, for instance, describes judicial review as “the principal tool for prompting agencies to undertake reason-giving and standard-setting.”⁸⁹ A major concern about nonreviewability doctrines is thus that they may excuse agencies from engaging in key activities that would further legitimacy.⁹⁰

We consider how nonreviewability doctrines operate in the next section, using the petition-to-withdraw process to provide context. Before turning to that context, we complete our development of the ways in which judicial review enhances agency legitimacy by describing how the legitimacy norms promoted by judicial review might be translated into metrics for evaluating inside-out legitimacy. In so doing, we are mindful that judicial review is only one model for legitimizing the administrative state — and an imperfect one at that.⁹¹ But it is both an extraordinarily prominent model and a source of valuable insights into what matters when agencies act.

C. *Developing Metrics for Inside-Out Legitimacy*

As should be clear from the preceding discussion, judicial review brings legitimacy to agencies’ procedures and substantive reasoning while ensuring fidelity to statute. The question we pose is whether insights about the legitimizing quality of judicial review can inform assessment of the legitimacy of

⁸⁷ *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001); see *Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (setting forth two-step analysis for agency interpretations of their statutory mandates); Bressman, *Procedures*, *supra* note 74, at 1791–93 (explaining *Mead* as promoting legislative oversight where more formal procedures are used, and providing enhanced role for courts where political supervision is more difficult because of less formal procedures).

⁸⁸ Sunstein, *supra* note 72, at 656.

⁸⁹ Bressman, *Inaction*, *supra* note 35, at 1691; see Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 *YALE L.J.* 64, 98 (2008); see also Mark Seidenfeld, *Playing Games With the Timing of Judicial Review: An Evaluation of Proposals to Restrict Pre-Enforcement Review of Agency Rules*, 58 *OHIO ST. L.J.* 85, 116 (1997–1998).

⁹⁰ Bressman, *Inaction*, *supra* note 35, at 1691.

⁹¹ The critiques are too numerous to fully detail. See, e.g., Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 *TEX. L. REV.* 525, 528 (1997–1998) (arguing hard-look scrutiny has caused the rulemaking process to ossify significantly); Meazell, *Super Deference*, *supra* note 66, at 778–84 (arguing against overly deferential judicial review of legislative science); Shapiro, Fisher, & Wagner, *supra* note 60, at 15 (elaborating numerous flaws).

agency procedures, even in situations when such review is unlikely. If an agency supports its actions with steps courts consider important when reviewing agency performance, should that at least arguably provide some support for viewing the agency action to have some measure of legitimacy? Put another way, can the “substantive priors” a court brings to its role as an agency reviewer be transferable to the different soil of inside-out legitimacy? Our hypothesis is that the answer to these questions is yes.

With this hypothesis in mind, in this section we propose metrics for assessing intrinsic legitimacy that draw from the mechanisms by which judicial review enhances legitimacy. Although those mechanisms are varied, they include three key considerations: (1) how procedures are implemented; (2) how the agency treats the process; and (3) the substantive outcomes reached.

1. *Metric 1: How the Procedure Is Used*

Especially for citizen-initiated procedures,⁹² metrics concerning how a procedure is used capture important information about the perceived legitimacy of a process as well as the substantive issues that will frame the agency’s response. Thus, while measuring a procedure’s use does not perfectly mirror standards of judicial review, it provides important information about legitimacy in its own right and is a necessary predicate to applying additional legitimacy metrics.

With respect to perceived legitimacy, sustained citizen triggering of a process over time suggests “a sign of vitality”⁹³ for the process, as well as an inference that citizens perceive it as an outlet for voice and as legitimate in other respects. By contrast, decreasing usage over time suggests a process of little perceived value, in which the costs outweigh potential benefits.⁹⁴ In this way, measuring the extent to which a procedure is used permits a backstop assessment of legitimacy: Even if our other metrics revealed indicia of legitimacy, one would need to question whether a procedure that was never or only rarely used could truly be called legitimate.

In addition to the extent to which a procedure is used, *how* it is used provides a commonsense foundation from which to understand and apply our other legitimacy metrics. By “how” a procedure is used, we include the substantive concerns raised but also take note of the relative sophistication with which they are raised. When a citizen triggers an agency procedure, the concerns the citizen raises, and the sophistication with which he or she does so, will frame the dialogue that is to come. Just as agencies must respond to significant points

⁹² There is a range of citizen-initiated procedures in addition to petitions to withdraw, such as petitions for rulemaking and citizen suits. See *infra* text accompanying notes 118–121 (discussing other such procedures). Agency-initiated procedures might also be assessed according to features of their use. For an excellent discussion of the significance of agencies’ choice of policymaking form, see Magill, *supra* note 3.

⁹³ John H. Knox & David L. Markell, *Evaluating Citizen Procedures: Lessons from the Analysis of the NAFTA Environmental Commission*, 47 *TEX. INT’L L.J.* 505, 515 (2012).

⁹⁴ Of course, this default presumption of the meaning of use could be overcome by other more specific indications (or not) of legitimacy. *Id.* at 515 n.52.

raised during a rulemaking — which furthers legitimacy as described above — we would expect them to address concerns raised in other proceedings.⁹⁵ Understanding how a procedure is used is thus a necessary predicate to understanding the legitimacy of how the agency responds.

2. *Metric 2: Treatment — Responsiveness and Reason-Giving*

The way an agency treats the process that has been triggered provides critical information about whether the agency is engaging in legitimizing behaviors. We use the term “treatment” to include an agency’s responsiveness as well as its reason-giving, recognizing that these categories have substantial overlap. Responsiveness refers to the extent to which the agency acknowledges and seeks resolutions of the concerns that were raised. This component of treatment is analogous to the judicially created requirement that agencies respond to significant points raised in the rulemaking context. As described above, when agencies treat processes as opportunities for participation and respond to concerns raised, they build legitimacy by reinforcing participation, deliberation, voice, and trust.

As is also evident from the discussion above, the reason-giving requirement plays a significant role in furthering legitimacy because much of its force comes from its impact on agency behavior *ex ante*. Agencies expecting judicial review will provide rationales for their decisions that reveal deliberations, further transparency, illustrate neutrality, evidence respect for the parties, and demonstrate compliance with statutory mandates. If an agency provides a reasoned explanation for its decisions even when judicial review is not expected, there is reason to think it is building legitimacy by doing so.

3. *Metric 3: Substantive Outcomes*

The ultimate substantive outcome of a process provides a final metric for its legitimacy. First, outcomes help assess a program’s fidelity to statute. If measurable changes are made in statutorily mandated areas of concern, we can infer that using the process helped legitimize agency behavior in a substantive way. Second, outcomes reveal important information about the internal legitimacy of a process as a practical matter. While a pure proceduralist might be satisfied with procedures that seem to further administrative law values and procedural justice norms, most scholars acknowledge that the distributive consequences of a process also are important to assessments of the legitimacy of that process.⁹⁶ Thus, much like our metric for extent of use, substantive outcomes provide a backstop check on legitimacy. Certainly, we would not expect

⁹⁵ See Mantel, *supra* note 13, at 398 (discussing participation-reinforcing value of requiring agencies to respond to meaningful comments raised).

⁹⁶ See Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 790–91 (1993–1994) (noting potential concerns associated with relying on procedural justness to divert attention from substantive outcomes).

outcomes to always favor one side or another, but if change seems unobtainable, a process may be viewed as arbitrary or useless, undermining its overall legitimacy.⁹⁷

In summary, our metrics attempt to capture the key points of emphasis underlying judicial review of agency action. Understanding how judicial review furthers agency legitimacy suggests generally applicable principles that can be translated into metrics for inside-out legitimacy. These metrics can thus serve as proxies for judicial review when that particular legitimizing check is lacking.⁹⁸ In the next section, we begin the process of applying and testing our metrics.

II. CASE STUDY: THE EPA PETITION-TO-WITHDRAW PROCESS

With the theoretical foundations of administrative legitimacy in place, we now shift to the theory's application with a case study of the process whereby interested persons can petition EPA to withdraw state authority. This section starts by situating the petition-to-withdraw process in its cooperative federalism context. We then provide an overview of how we compiled our dataset of information relating to the petitions that have been filed. Next, we describe how the petition process works using observations from our study, contextualized according to: (1) the applicable statutory and regulatory provisions; and (2) how the process avoids judicial review. This background reveals why the petition-to-withdraw process is an ideal context from which to explore inside-out legitimacy and sets the stage for our analysis in the following section.

A. Environmental Regulation Under Cooperative Federalism

Congress's vision for administering the major federal environmental statutes is fairly straightforward when viewed from a big-picture perspective. Congress articulated goals for protecting and preserving the nation's resources, established strategies for achieving these goals, and directed EPA to elaborate and implement these strategies. Congress also directed EPA to authorize states to take over implementation, under laws the states would enact, with EPA performing an oversight responsibility.⁹⁹ The latter facet of this congressional scheme is known as a cooperative federalism approach to regulation.¹⁰⁰

Under this approach, EPA has two main functions: (1) the *ex ante* responsibility of allowing only qualified states to take over a regulatory program in

⁹⁷ We note a limitation of this metric as compared with judicial review. While courts provide a legitimizing check on an agency's exercise of power by assessing what the agency did and why, our substantive outcomes metric is unable to capture that level of detail. In other words, we do not attempt to assess the *quality* of the outcomes achieved but rather the *presence* of outcomes. See *infra* text accompanying notes 210–226 (providing additional analysis).

⁹⁸ Of course, these metrics cannot fully capture external review from an outside institution. See *supra* Part I.B. (describing functions of judicial review).

⁹⁹ For a full description, see RECHTSCHAFFEN & MARKELL, *supra* note 23, at 15–16.

¹⁰⁰ *Id.*

lieu of EPA; and after state approval, (2) the *ex post* responsibility of monitoring state performance.¹⁰¹ The cooperative federalism structure is quite mature at this point; the Environmental Council of the States (“ECOS”) reports that EPA has approved state authorization for approximately 96 percent of the eligible regulatory programs.¹⁰²

Once EPA has exercised its gatekeeper function of authorizing a state to administer a regulatory program, it retains an array of tools to enable it to perform its oversight duties. These include the authority to obtain information from states about program implementation;¹⁰³ the power to review, reject, and ultimately override draft state permits;¹⁰⁴ and the ability to conduct inspections in authorized states and to pursue its own enforcement actions if the state has not acted or EPA views the state’s actions as insufficient.¹⁰⁵

Beyond these types of *ex post* oversight, EPA retains authority to withdraw a state’s authorization under certain circumstances.¹⁰⁶ These include: a state’s legal authority is no longer adequate;¹⁰⁷ its operation of the regulatory program fails to conform to requirements (e.g., permitting is deficient because of inadequate opportunities for public participation);¹⁰⁸ or enforcement does not pass muster (e.g., failure to enforce in circumstances where enforcement is appropriate, failure to seek appropriate relief, or failure to meet inspection expectations).¹⁰⁹

Withdrawal of authority is not a step EPA is to take lightly, and it cannot do so without providing numerous procedural protections for the targeted state.¹¹⁰ Indeed, withdrawing a state’s authorization is the “nuclear weapon” in the toolbox EPA has available to it to promote appropriate state administration of its regulatory program.¹¹¹ The reality is that EPA has rarely initiated a with-

¹⁰¹ EPA continues to operate the federal regulatory programs in states that have not been approved to do so.

¹⁰² Env’tl. Council of the States, Resolution 00-1, *On Environmental Federalism*, at 1 (revised March 20, 2012) (on file with authors).

¹⁰³ See, e.g., 40 C.F.R. § 123.41(a) (allowing EPA access to any information relevant to CWA permit program “upon request without restriction”); *id.* §§ 123.41(a) (specifying that a state must share with EPA information submitted to the state under a claim of confidentiality).

¹⁰⁴ See *id.* § 123.44 (providing for EPA review of and objections to state NPDES permits).

¹⁰⁵ The extent to which the courts have acceded to EPA enforcement in authorized states, particularly under the Resource Conservation and Recovery Act, remains in question to some degree. Compare, e.g., *Harmon Indus. v. Browner*, 191 F.3d 894 (8th Cir. 1999) (holding EPA lacked authority under RCRA when it overfiled state agency’s enforcement efforts), with *United States v. Power Eng’g*, 125 F. Supp. 2d 1050 (D. Colo. 2000) (holding EPA had authority to seek financial assurances despite independent state enforcement proceedings).

¹⁰⁶ E.g., 40 C.F.R. § 123.64 (setting forth procedures for withdrawal of CWA authorization).

¹⁰⁷ E.g., *id.* § 123.62 (setting forth procedures for revision of state CWA programs). A state is responsible for informing EPA of proposed changes to its basic statutory or regulatory authority and for demonstrating to EPA that the state qualifies for continued authorization when its authorities change. *Id.*

¹⁰⁸ *Id.* § 123.63.

¹⁰⁹ E.g., *id.* (setting forth criteria for withdrawal of CWA programs).

¹¹⁰ See *infra text* accompanying note 174 (describing withdrawal procedures).

¹¹¹ See Brigham Daniels, *When Agencies Go Nuclear: A Game Theoretical Approach to the Biggest Sticks in an Agency’s Arsenal*, 80 GEO. WASH. L. REV. 442, 450 (2012) (“A regulatory nuke is a tool with two primary characteristics. First, it packs power sufficient to profoundly impact individual regulatory targets or significantly affect important aspects of society or the economy.

drawal proceeding on its own.¹¹² Some commentators have suggested that this may be because of its signaling effect; the confrontational note it sounds in the state/federal relationship may not be well received by an audience of protective congresspeople and others.¹¹³ Professor Robert Percival invokes related federalism concerns when he characterizes the mechanism as a “crude tool” and suggests that its crudeness has “added even more aggravation to the federal-state maelstrom.”¹¹⁴

In addition, it seems indisputable that the significant resources required to administer a program have deterred EPA from displacing states and reinstating federal programs.¹¹⁵ As Professor Ronald Krotoszynski opines, the withdrawal of a state’s primary status is simply not credible.¹¹⁶ He explains that EPA lacks the resources to take over state programs, stating that EPA “reacted with abject horror” to a state proposal to return a portion of a major federal environmental program and “negotiated a last-minute deal with the [state] to abort the return process.”¹¹⁷

Congress did not rely entirely on EPA and the states for implementing the environmental laws. Instead, it reserved a variety of roles for interested citizens, including the ability to bring suit against individual parties that are allegedly operating in violation of the law and also to sue EPA for failure to perform non-discretionary acts.¹¹⁸ Concerning the latter, the CWA, for example, provides that “any citizen” may “commence a civil action” against EPA “where there is alleged a failure of the Administrator to perform any act or duty . . .

Second, from the perspective of the regulatory agency, it is politically unavailable in all but the most extreme situations.”)

¹¹² Cf. Final Rule, Partial Withdrawal of Approval of 34 Clean Air Act Part 70 Operating Permits Programs in California, 67 Fed. Reg. 63551 (Oct. 15, 2002) (partially withdrawing California’s Title V authority). EPA occasionally threatens withdrawal outside of the petition context. See RECHTSCHAFFEN & MARKELL, *supra* note 23, at 330–31 (describing threats); Markus G. Puder and Michel J. Paque, *Tremors in the Cooperative Environmental Federalism Arena: What Happens When a State Wants to Assume Only Portions of a Primacy Program or Return a Primacy Program? – The Underground Injection Control Program Under the Safe Drinking Water Act as a Case Study*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 71, 87–88 (2005) (describing EPA’s threat to withdraw Illinois UIC program).

¹¹³ Daniels, *supra* note 111, at 463 (describing such tools as “political taboo” because using them would go against Congress’s default scheme, which may have oversight ramifications).

¹¹⁴ Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1144–45 (1995); see also WILLIAM H. RODGERS JR., 4 ENVIRONMENTAL LAW: HAZARDOUS WASTES AND SUBSTANCES § 7.22, at 643 (1992) (calling withdrawal “a remedy strictly confined to unusual legal pathologies”).

¹¹⁵ *OIG Report*, *supra* note 27, at 17. The OIG notes that EPA has power to take a number of steps short of de-authorization to help states improve their programs. *Id.*; see also RECHTSCHAFFEN & MARKELL, *supra* note 23, at 106–07 (discussing alternatives to termination of state primacy status).

¹¹⁶ Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1637 (2012).

¹¹⁷ *Id.* at 1638; see also RECHTSCHAFFEN & MARKELL, *supra* note 23, at 331–32 (identifying resources and politics as primary reasons for EPA reluctance to withdraw programs). The environment itself could also suffer were EPA to engage in widespread withdrawal because of EPA’s resource limitations. See *id.* at 331.

¹¹⁸ For symposium treatment of citizen suits, see *Environmental Citizen Suits at Thirtysomething: A Celebration and Summit*, 10 WIDENER L. REV. 1 (2003).

which is not discretionary with the Administrator.”¹¹⁹ In addition, citizens may sue under the APA in certain circumstances.¹²⁰ Although these statutes authorize suits generally, they also include numerous hurdles to review, some of which are applicable in the petitions context and discussed further below.

It is worth emphasizing that over the past twenty-five years, citizen petitions to withdraw have for the most part been handled within the administrative state rather than in the courts. Thus, the ability of interested persons to petition EPA to withdraw state authorization has played out far differently from the direct access to the courts that citizen suits afford citizens. Perhaps because of this, and despite its potential practical value and theoretical importance as an example of an administrative accountability mechanism, the petition-to-withdraw process has received little scholarly attention.¹²¹ The next section begins to fill that gap by detailing the scope of our study and data collection efforts.

B. *The Scope of the Study and Data Collection Efforts*

To better understand the petition process, we sought to collect all of the petitions filed through December 31, 2011. We confined our analysis to petitions made to EPA seeking withdrawal of state authority; thus, we excluded challenges to EPA’s initial grant of authorization¹²² as well as efforts to use the courts as a forum of first resort to seek withdrawal — i.e., lawsuits filed in court without first filing an administrative petition to withdraw with EPA.¹²³ Using the Freedom of Information Act (“FOIA”)¹²⁴ we asked EPA for all petitions that had been filed, information about each petition, and petition-related materials.¹²⁵ We also used traditional legal search engines and web browser searches to identify petitions and any activity on them, particularly activity in

¹¹⁹ 33 U.S.C. § 1365(a)(2); *see also* CAA, 42 U.S.C. § 7604(a)(2) (“[A]ny person may commence a civil action . . . where there is alleged a failure of the Administrator to perform any act or duty . . . which is not discretionary with the Administrator.”); RCRA, 42 U.S.C. § 6972(a)(2) (same as CAA).

¹²⁰ *See* 5 U.S.C. § 706 (providing grounds for review).

¹²¹ The sparse scholarly discussion focuses on withdrawal generally, rather than the petition process. *Cf.* RECHTSCHAFFEN & MARKELL, *supra* note 23, at 329–35 (describing withdrawal tool); Krotoszynski, *supra* note 116, at 1637–38 (similar).

¹²² *E.g.*, Nat’l Ass’n of Homebuilders v. Defenders of Wildlife, 551 U.S. 644 (2007) (upholding EPA’s decision to authorize Arizona to administer NPDES program without considering endangered species impacts); Akiak Native Cmty. v. EPA, 625 F.3d 1162, 1164 (9th Cir. 2010) (upholding EPA’s decision to authorize Alaska to administer NPDES program).

¹²³ *E.g.*, Save the Valley v. EPA, 223 F. Supp. 2d 997, 1014–15 (S.D. Ind. 2002) (on cross-motions for summary judgment, declining to order EPA to withdraw Indiana’s NPDES authorization but ordering state to bring its program into compliance); Weatherby Lake Improvement Co. v. Browner, No. 96-1155-CV-W-8, 1997 WL 687656 (W.D. Mo. Apr. 17, 1997) (granting EPA motion to dismiss claim against agency for failing to withdraw Missouri’s NPDES authorization). We also excluded various other participation mechanisms, including citizen suits, petitions for rulemaking, and individual permit appeals.

¹²⁴ 5 U.S.C. §552 (2006 & Supp. IV 2010).

¹²⁵ *See* Letter from David L. Markell, Steven M. Goldstein Prof. of Law, Fla. State Univ., to Carol Ann Siciliano, Assoc. Gen. Counsel, EPA (Nov. 9, 2011) (on file with authors) (requesting information about petitions). Related materials included such items as correspondence and reports related to the concerns raised by petitions.

the courts. In an effort to supplement the information we obtained from EPA and our own research, we emailed at least one petitioner for each petition asking for a status update on the petition and other information.¹²⁶ Finally, to check our dataset, we asked EPA officials to review, and as necessary update and correct, the data contained in a spreadsheet we compiled that listed each petition and, for each petition, included the names of the petitioners and the state, EPA region, and regulatory program(s) involved.¹²⁷ We continued to request information from EPA about particular petitions as questions arose during the coding process, and we updated our dataset through June 2012.

There are 58 petitions to withdraw in our dataset; basic details about each are set forth in the Appendix.¹²⁸ We made several judgment calls in creating the dataset. For example, in some instances different petitioners filed separate petitions asking EPA to withdraw a particular program or programs in the same state. When EPA consolidated treatment of those petitions, we did so as well.¹²⁹ The documents we obtained from EPA, through our own research, and from the petitioners provided the raw data from which we coded our variables.¹³⁰

To better understand the way the petition process is actually implemented, we reviewed our files initially to determine: (1) what EPA did after receiving a petition; (2) the dispositions of the petitions; (3) at what procedural stages those dispositions occurred; (4) the extent to which judicial review was sought; and (5) the outcomes of any such judicial challenges. To contextualize this information, below we provide the regulatory and statutory framework for the petitions, including the interpretations courts have given to that framework. Overall, our observations confirm that much of the activity on petitions takes place at a procedural stage in which EPA has great discretion, which means it lacks both mandatory duties and the check that judicial review would provide.

¹²⁶ Because of the age of some of the petitions, we were not able to obtain contact information for a handful of the petitioners.

¹²⁷ See E-mail from David L. Markell, Steven M. Goldstein Prof. of Law, Fla. State Univ., to Carol Ann Siciliano, Assoc. Gen. Counsel, EPA (Nov. 9, 2011, 17:31 EST) (on file with authors) (transmitting spreadsheet). As noted above, we were very impressed by the professionalism and assistance of EPA personnel.

¹²⁸ The petitions and related materials are Bates-stamped as PETN #####. As needed, we cite to the Bates number and/or the File Number listed in the Appendix when discussing particular petitions.

¹²⁹ For example, EPA treated 3 Alabama petitions as a single petition, and one of those petitions included 5 amendments. See Letter from James D. Giattina, Dir., EPA, to Lance R. LeFleur, Dir., Ala. Dep't of Env'tl. Mgmt. (Apr. 15, 2011) (PETN 011508; File No. 33) (on file with author). We similarly followed EPA's lead when EPA treated a petition that involved two or more statutes as separate requests to withdraw. E.g., Letter from Carl E. Edlund, P.E., Dir. Multimedia Planning and Permitting Div. (6PD), to Dorothy Jenkins, President, Concerned Citizens of New Sarpy, and Anne Rolfes, Dir., La. Bucket Brigade (Jun. 11, 2002) (PETN 000594; Files No. 2a, 2b) (on file with author).

¹³⁰ We were unable to obtain the petitions associated with 8 files. However, we verified with EPA, and petitioners if possible, that petitions were indeed filed, which we corroborated using other documents provided by EPA. Coding was conducted by the authors and three research assistants. A pilot study of inter-coder reliability sampled 9 of the 58 petition files (15.5%) and revealed an inter-coder reliability of 0.87 across 61 variables, suggesting no significant reliability problems. Coding disagreements were resolved through mutual consultation and cross-checking. Additional methodological details are on file with the authors.

C. *The Petition-to-Withdraw Process and Hurdles to Review*

There are two phases of a petition process: an initial period of informal investigation; and, should EPA find cause to move forward, the formal procedures by which a withdrawal would be effectuated. Most of the petition activity took place during the informal phase, when judicial review is difficult, if not impossible, to obtain.

1. *Right to Petition and Informal Phase of Petitions' Consideration*

Interested parties may petition EPA for withdrawal of state authorization under either the applicable program's regulations or the APA.¹³¹ Once a petition is filed, there are no mandatory requirements except that EPA must respond in writing to any petition to commence withdrawal proceedings.¹³² Beyond this responsibility, a great deal of discretion is left to EPA. Under the CWA, for example, the regulations provide that EPA *may* conduct an informal investigation of the allegations in the petition to determine whether cause exists to commence withdrawal proceedings.¹³³ Similarly, EPA *may* order commencement of withdrawal proceedings in response to a petition alleging a state's failure to administer the program properly.¹³⁴ The regulations, in short, do not obligate EPA to investigate claims to determine whether they have merit, or to initiate a formal withdrawal proceeding; nor do they establish time frames for EPA to proceed in any particular way.¹³⁵

¹³¹ The regulations promulgated under the CWA and RCRA expressly contemplate such petitions by interested parties. See 40 C.F.R. § 123.64(b)(1) (CWA) ("The Administrator may order the commencement of withdrawal proceedings . . . in response to a petition from an interested person"); Procedures for Withdrawing Approval of State Programs, 40 C.F.R. § 271.23(b)(1) (2013) (similar). While the CAA and SDWA regulations lack similar provisions, there is little doubt that the APA provides the necessary mechanism for petitioning. See 5 U.S.C. § 553(e) (2013) (providing that an interested person may petition for "the issuance, amendment, or repeal of a rule"). Because withdrawal of state authority is considered a rulemaking, a petition under one of these statutes would be considered a petition for issuance or repeal of a rule. See, e.g., Partial Withdrawal of Approval of 34 Clean Air Act Part 70 Operating Permits Programs in Cal., 67 Fed. Reg. 63551 (Oct. 15, 2002) (partially withdrawing California's Title V authority); 42 U.S.C. § 300h-1(b)(2) (2013) (approval of state program is accomplished by rule). The source of a petitioner's ability to petition for withdrawal is immaterial for purposes of this Article, though we note the constitutional foundations. See U.S. CONST. amend. I (petitions clause).

¹³² 40 C.F.R. § 123.64(b)(1) (CWA); Procedures for Withdrawing Approval of State Programs, 40 C.F.R. § 271.23(b)(1) (2013); see also 5 U.S.C. § 555(e) (2013) ("Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. . . . [T]he notice shall be accompanied by a brief statement of the grounds for denial.").

¹³³ 40 C.F.R. § 123.64(b)(1).

¹³⁴ *Id.*

¹³⁵ This is also true of the other regulatory programs. Procedures for Withdrawing Approval of State Programs, 40 C.F.R. § 271.23(b)(1) (2013) (similar); Procedures for Withdrawal of State Programs, 40 C.F.R. § 145.34(b) (2013) (similar); see *Pub. Citizen v. EPA*, 343 F.3d 449, 464 (5th Cir. 2003) (under CAA, EPA has discretion whether to initiate formal withdrawal, even when it is made aware of deficiencies). A May 2000 memorandum issued by the Director of EPA's Water Permits Division established procedures for regions to use in responding to CWA petitions, such as acknowledging receipt of the petition in writing. Memorandum from Charles H. Sutfin to

Nearly all the petition activity that we observed took place as part of an informal EPA investigation, which EPA commenced in response to the vast majority of petitions.¹³⁶ During that informal period, EPA often requested a response from the state agency, interacted with petitioners and the state, and independently researched the concerns raised in the petition.¹³⁷ Usually, EPA and the state arrived at negotiated outcomes and petitions were denied or otherwise considered resolved.¹³⁸

To give a concrete example, in 2008, Illinois Citizens for Clean Air & Water filed a petition with EPA Region 5 seeking withdrawal of the State's NPDES program for failure to regulate discharges from Concentrated Animal Feeding Operations ("CAFOs").¹³⁹ The petitions raised concerns about inadequate citizen participation, permitting, inspections, and enforcement associated with the state's program.¹⁴⁰ EPA developed a protocol for responding to the petition¹⁴¹ and thereafter, it: conducted interviews with Illinois EPA staff and Illinois Attorney General staff; reviewed Illinois CAFO permit applications, compliance inspection reports, complaint investigations, and enforcement actions; reviewed various documents related to the EPA/Illinois partnership; and

Water Permits Program Managers Regions I-X, NPDES State Program Withdrawal Petitions – Response Procedures and Status Update (May 4, 2000) [hereinafter *Withdrawal Guidance*]. The memorandum embodies the stance EPA has taken: Regions should “[m]ake every effort to assist the State and Petitioner(s) to resolve their concerns jointly without necessitating . . . commencement of formal withdrawal proceedings.” *Id.* We did not uncover any further guidance documents relating to how regions were to handle petitions to withdraw.

¹³⁶ We observed informal investigations in response to nearly 95% of the petitions — all but 3. We were unable to code an informal investigation for 2 petitions (Files No. 53 and 74) because our materials contained no information beyond the petitions themselves. A third petition was filed in December 2011 and there was no follow-up to report as of May 2012. *See* Letter from Sparsh Khandeshi, EIntl. Integrity Project, and Anne Rolfes, La. Bucket Brigade, to Lisa Jackson, EPA Adm’r, and Al Armendariz, EPA Regional Adm’r (Dec. 14, 2011) (PETN 013846; File No. 70) (on file with authors); *see also* *Activists Criticize Louisiana Air Program*, INSIDEEPA.COM, May 29, 2012, <http://insideepa.com/201205292400152/EPA-Blog/The-Inside-Story> (stating EPA had yet to respond to December 2011 petition).

¹³⁷ EPA sent an acknowledgment letter to petitioners just over 60% of the time. Inquiry letters from EPA to the relevant state agency were documented about 53% of the time. Furthermore, EPA sent at least one status or follow-up letter to the petitioner nearly 57% of the time. In about 38% of the files, there were indications that informal meetings between EPA and petitioners had taken place. These variables were coded based only on what was apparent from the documents that we obtained from our research outlined above. These data almost certainly understate what EPA did after receiving petitions, particularly to the extent communication took place orally or via e-mail as opposed to hard copy.

¹³⁸ EPA used the word “denied” with about 55% of the petitions. In other circumstances, it called petitions “resolved” or did not label them with a disposition at all. *See, e.g.*, Letter from Wayne Nasti, Reg’l Adm’r, EPA, to Roger Flynn, Western Mining Action Project (Dec. 9, 2008) (PETN 003897; File No. 13) (on file with authors) (“As a result of Nevada’s corrective action, EPA considers the issue resolved.”). We coded petitions as “denied” only when EPA so described its disposition.

¹³⁹ Petition from Kendall M. Thu, Ph.D., Representative, and Danielle J. Diamond, J.D., Representative, Illinois Citizens for Clean Air & Water, to Stephen Johnson, Adm’r, and Mary A. Gade, Reg’l Adm’r, EPA (Mar. 27, 2008) (PETN 011043; File No. 41) (on file with authors).

¹⁴⁰ *See id.* at 5 (permitting and inspections), 9 (participation), 10 (enforcement).

¹⁴¹ Memorandum from Peter G. Swenson, Chief, NPDES Programs Branch, and Sally Swanson, Chief, Water Enforcement and Compliance Branch, to Timothy C. Henry, Acting Dir., Water Div., (undated) (PETN 011059; File No. 41) (on file with authors).

conducted meetings with the petitioners.¹⁴² Following its investigation, EPA determined that the State failed to comply with the CWA and it identified required and recommended actions that Illinois needed to take.¹⁴³ Ultimately, EPA and Illinois entered into a new Memorandum of Agreement and developed a workplan for addressing the concerns raised.¹⁴⁴

As we describe more fully below, numerous petitions similarly resulted in substantive changes following informal investigations.¹⁴⁵ But one concern stood out in the informal investigation stage: some petitions languished in this stage for years.¹⁴⁶ We found that the time it took EPA to finalize its response to petitions ranged from one year to 14 years,¹⁴⁷ with an average time of 4.4 years.¹⁴⁸ Durations of this length are akin to those in major rulemakings,¹⁴⁹ and, as might be expected, a number of petitioners expressed frustration with EPA because of delays.¹⁵⁰

¹⁴² See *Initial Results of an Informal Investigation of the Nat'l Pollutant Discharge Elimination Sys. Program for Concentrated Animal Feeding Operations in the State of Ill.* 7 (Region 5, EPA Working Paper, Sept. 2010) (PETN 011000; File No. 41) (on file with authors) (detailing methodology).

¹⁴³ Letter from Susan Hedman, Reg'l Adm'r, EPA, to Douglas Scott, Dir., Ill. EPA (Sept. 28, 2010) (PETN 010998; File No. 41) (on file with author).

¹⁴⁴ See Ill. Program Work Plan Agreement between Ill. EPA and Region 5, EPA (Feb. 24, 2011) (PETN 011068; File No. 41) (on file with author). Note that our files do not reflect any final communication from EPA to the petitioners stating that the petition was denied, resolved, or otherwise concluded.

¹⁴⁵ See *infra* Part III.C.

¹⁴⁶ While timeliness is not strictly a component of procedural justice, we believe it has important consequences for the perceived legitimacy of a process. See Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?*, 19 BEHAV. SCI. & L. 215, 216, 233 (2001); Tyler & Markell, *supra* note 19, at 548 (noting issues such as cost and delay are not justice issues, but do feature in discussions of public discontent); see also Knox & Markell, *supra* note 93, at 516 ("It seems obvious that a procedure that does not reach timely results is likely to be considered less effective and attractive than one that does, all else remaining equal.").

¹⁴⁷ Files No. 50 and 55 each took 14 years to resolve.

¹⁴⁸ Median = 3; standard deviation = 3.74. We were able to calculate durations for 40 of the petitions by subtracting the variable "year1" from "year2." The variable "year1" reflects the year the petition was initially filed. Ideally, the variable "year2" reflects the year in which EPA issued a final determination on a petition. But because our files did not always include a final determination, we also coded the year in which some other resolution of the petition was reached as "year2." For example, sometimes a state legislature would enact an amendment addressing concerns about legal authority but the petition file did not include any final follow-up communication from EPA to the petitioner. In such circumstances, we coded "year2" to reflect the year the statutory amendment went into effect. Because some petitions are still pending and others' outcomes are unknown, we were not always able to obtain a value for "year2." Further methodological details are on file with the authors.

¹⁴⁹ For empirical studies providing rulemaking details, see generally Government Accountability Office ("GAO"), *Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews* 18 (GAO-09-205 Apr. 2009)). For empirical studies providing rulemaking details, see generally *id.*; Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923 (2007–2008); Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 Nw. L. REV. 471 (2011).

¹⁵⁰ See Letter from Eric Schaeffer, Exec. Dir., Envtl. Integrity Project, to the Honorable Peter Silva, Office of Water Assistant Administrator, EPA (Oct. 7, 2010) [hereinafter *EIP Letter*] (urging timely responses to petitions) (PETN 011288) (on file with authors). EPA itself seems aware

Although the APA contemplates potential recourse to the courts to “compel agency action unlawfully withheld or unreasonably delayed,”¹⁵¹ it is very difficult to prevail on such a claim, particularly in “non-deadline” suits.¹⁵² The typical approach is to balance a number of factors that are sensitive to separation-of-powers and institutional competence concerns:¹⁵³ there is a judicial reluctance to interfere with how an agency prioritizes its work; the absence of a legal standard to apply makes review difficult; and there is lack of an agency decision to help focus the court’s review.¹⁵⁴ Even if a court were sympathetic to a claim of delay, it would likely do no more than impose a timeframe on the agency to provide a response.¹⁵⁵ Our files revealed little traction in the courts on this basis.¹⁵⁶

In addition to courts’ reluctance to interfere with EPA on “delay” grounds in the absence of statutory deadlines for action, courts have also proved averse to suits attempting to require EPA to initiate withdrawal proceedings because doing so is a “wholly discretionary exercise of EPA’s authority.”¹⁵⁷ Here potential plaintiffs have two difficulties. First, the applicable mandates in the or-

of the potential for difficulties in this area. As the *Withdrawal Guidance* notes, it is “important to maintain communications with petitioners regarding the status of a complex petition . . . so that a petitioner does not erroneously conclude that EPA has unreasonably delayed action on its petition.” *Withdrawal Guidance*, *supra* note 135.

¹⁵¹ 5 U.S.C. § 706(1); *Sierra Club v. EPA*, 377 F. Supp. 2d 1205, 1208 (N.D. Fla. 2005) (“Any undue delay by the EPA in making a decision also is reviewable in the court of appeals.”).

¹⁵² For a discussion contrasting courts’ responses to petition and deadline suits under § 706(1), see Mezell, *Dialogue*, *supra* note 18, at 1730–31. For a positive assessment of the usefulness of deadline suits for citizen enforcement of environmental laws, see Wendy E. Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 137 (2011) (documenting empirical study showing domination of industry group contacts in air toxics rule development).

¹⁵³ See *Telecomms. Research & Action Ctr. v. FCC (TRAC)*, 750 F.2d 70, 79–80 (D.C. Cir. 1984) (setting forth multi-factor rule of reason).

¹⁵⁴ As Professor Levin has noted, these same concerns animate the *Heckler* doctrine, which is elaborated *infra* note 162. Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 771 (1990).

¹⁵⁵ See *TRAC*, 750 F.2d at 81 (declining to issue mandamus but retaining jurisdiction while agency developed schedule).

¹⁵⁶ There were two district court challenges raising unreasonable delay claims associated with petition inactivity. However, courts of appeal, not district courts, have jurisdiction over such claims in the CWA context and in neither case was the claim actually considered. See *Johnson Cnty. Citizen Comm. for Clean Air & Water v. EPA*, No. 3:05-0222, 2005 WL 2204953, at *6 (M.D. Tenn. 2005) (Sept. 9, 2005) (File No. 23) (granting EPA’s motion to dismiss APA unreasonable delay claim because district court did not have jurisdiction over such claims); *Sierra Club*, 377 F. Supp. 2d at 1206–07 & n.1 (File No. 25) (describing jurisdictional concerns and plaintiffs’ voluntary dismissal of unreasonable delay claim). In another example, petitioners filed a complaint, again in district court, alleging unreasonable delay on a petition raising CWA and CAA issues; the suit was settled and EPA proceeded to its informal investigation. Compl. at para. 14, *NW Env’tl Def. Ctr. v. Clarke*, No. C97-1005 (W.D. Wash. filed June 17, 1997) (File No. 19a, 19b). We observed no other unreasonable delay claims related to petitions filed in federal courts. One explanation may be that petitioners were able to prompt EPA to respond simply by threatening litigation. See, e.g., Compl. for Decl. and Inj. Relief, *Nw. Env’tl. Def. Ctr., Inc. v. Clarke*, No. C97-1005 (W.D. Wash. June 17, 1997) (PETN 004825; Files No. 19a, 19b) (on file with author).

¹⁵⁷ *Johnson Cnty. Citizen Comm. for Clean Air & Water v. EPA*, No. 305-0222, 2005 WL 2204953, at *4 (D. Tenn. Sept. 9, 2005).

ganic statutes authorize citizen suits only to enforce *non*-discretionary duties.¹⁵⁸ Courts have read withdrawal provisions to mean that the decision whether to commence withdrawal proceedings is discretionary, not mandatory.¹⁵⁹ Second, the APA exempts from review actions “committed to agency discretion by law.”¹⁶⁰ As one court emphasized, “[t]he Administrator is under no mandatory duty to investigate complaints, hold hearings, or make findings of violations”¹⁶¹ As a result, potential claimants can rely on neither the relevant environmental statute nor the APA for their cause of action.¹⁶² A conclusion to the contrary, courts reason, would “eviscerate EPA’s discretionary authority” and interfere with the agency’s ability to efficiently allocate its resources to develop a “rational enforcement approach.”¹⁶³

¹⁵⁸ See, e.g., CWA, 33 U.S.C.A § 1365(a)(2) (authorizing citizen suits where there is failure to perform “any act or duty under this chapter which is not discretionary with the Administrator”); CAA, 42 U.S.C.A. § 7604(a)(2); RCRA, 42 U.S.C. § 6972A(a)(2).

¹⁵⁹ See *Tex. Disposal Sys. Landfill Inc. v. EPA*, 377 Fed. Appx. 406, 408 (5th Cir. 2010) (File No. 7) (holding EPA’s decision not to initiate withdrawal of Texas RCRA program was exercise of unreviewable enforcement discretion); *Del. Cnty. Safe Drinking Water Coal. v. McGinty*, No. 07-1782, 2007 WL 4225580, at *5 (E.D. Pa. Nov. 27, 2007) (“EPA has no non-discretionary duty to withdraw approval of state NPDES programs.”); *Sierra Club*, 377 F. Supp. 2d at 1208 (File No. 25) (“A citizen’s suit to enforce such discretionary duties is not available.”); *Johnson Cnty.*, 2005 WL 2204953, at *4 (“[T]he plain language [of the CWA] does not compel the EPA Administrator to make such a determination by any particular time, or at all”). In a related context, outside the ambit of our study because no petition was filed with EPA prior to initiating a lawsuit, a court proceeded to the merits of a suit seeking withdrawal of Indiana’s NPDES authority. *Save the Valley v. EPA*, 99 F. Supp. 2d 981, 984–85 (S.D. Ind. 2000) (rejecting EPA’s motion to dismiss and holding statutory language compelled conclusion that EPA *must* initiate withdrawal proceedings if it has actual knowledge of widespread state failures); see *Save the Valley v. EPA*, 223 F. Supp. 2d 997, 1014–15 (S.D. Ind. 2002) (holding, on cross-motions for summary judgment, that withdrawal of state authorization was not yet warranted but ordering state to bring program into compliance). Most courts have rejected *Save the Valley*. See, e.g., *Del. Cnty.*, 2007 WL 4225580, at *5 (File No. 22) (calling *Save the Valley* “against the vast weight of authority”); *Sierra Club*, 377 F. Supp. 2d at 1209 (File No. 25) (stating majority approach is better-reasoned); *Johnson Cnty.*, 2005 WL 2204953, at *4 (stating majority of courts have rejected *Save the Valley*).

¹⁶⁰ 5 U.S.C. § 701(a)(2) (2006).

¹⁶¹ *Johnson Cnty.*, 2005 WL 2204953, at *4.

¹⁶² These cases rely on *Heckler v. Chaney*, 470 U.S. 821 (1985). In *Heckler*, the Supreme Court held that the FDA’s decision not to initiate enforcement actions was discretionary and therefore exempted from judicial review under the APA. *Id.* at 831–32.

¹⁶³ *Johnson Cnty.*, 2005 WL 2204953, at *4 (quoting *Dubois v. Thomas*, 820 F.2d 943, 948 (8th Cir. 1987)). Courts have echoed these concerns in a number of closely related contexts that are outside the scope of our study. Some plaintiffs file suits seeking withdrawal, rather than petitioning EPA; courts similarly reject such claims. E.g., *Altman v. United States*, No. 98-CV-237E(F), 2004 WL 3019171, at *3 (W.D.N.Y. Dec. 30, 2004) (dismissing claim seeking withdrawal of New York’s NPDES authority for lack of subject matter jurisdiction; “[t]he statute does not compel the EPA either to hold a hearing or to make such a determination by any specific time, indicating that the withdrawal provision is discretionary.”); *Weatherby Lake Improvement Co. v. Browner*, No. 96-1155-CV-W-8, 1997 WL 687656, at *1 (W.D. Mo. Apr. 17, 1997) (granting EPA’s motion to dismiss; “To hold otherwise would frustrate the purposes of the Act by requiring the EPA to alter its priorities and expend its limited resources to investigate citizen complaints, regardless of their relative importance.”). In another group of cases, EPA invited comments on all Title V programs as a result of a litigation settlement; some commenters challenged EPA’s failure to withdraw state authority after becoming aware of deficiencies. See, e.g., *Ohio Pub. Interest Research Grp. v. Whitman*, 386 F.3d 792, 795–96 (6th Cir. 2004) (refusing to mandate EPA to initiate withdrawal, even though it did not dispute deficiencies, because to do so was within EPA’s discretion); *Pub.*

There is little case law on the question whether judicial review is available in situations in which EPA formally denies a petition without commencing a withdrawal proceeding. We uncovered only one case, *Legal Environmental Assistance Foundation v. EPA* (“*LEAF I*”),¹⁶⁴ in which a court reached the merits at this stage. The *LEAF I* court did not address the threshold issue of reviewability on its way to holding EPA had incorrectly interpreted its statutory mandate in denying a petition to revoke Alabama’s SDWA authorization.¹⁶⁵ By contrast, in another case challenging an EPA denial following an informal investigation, the court dismissed the challenge because of the discretionary nature of the agency decision.¹⁶⁶ In *Texas Disposal Systems Landfill v. EPA*, EPA had provided a detailed rationale for its denial of a petition to withdraw Texas’s RCRA authorization,¹⁶⁷ and the petitioner challenged the denial in the Fifth Circuit Court of Appeals,¹⁶⁸ arguing that EPA’s decision was not simply a refusal to enforce, but an informal adjudication accompanied by reviewable reasoning.¹⁶⁹ The court summarily rejected that argument: “an action committed to agency discretion does not become reviewable merely because the agency gives a reviewable reason for an otherwise unreviewable action.”¹⁷⁰

This judicial stance, combined with EPA’s approach of addressing petitions informally, results in significant leeway and a lack of external checks on EPA. Most petition activity occurred at a stage where EPA’s discretion was at its highest, making judicial review extremely rare for the vast majority of petitions.¹⁷¹

Citizen v. EPA, 343 F.3d 449, 465 (5th Cir. 2003) (same); N.Y. Pub. Interest Research Grp. v. Whitman, 321 F.3d 316, 332 (2d Cir. 2003) (same).

¹⁶⁴ 118 F.3d 1467 (1997) (File No. 29).

¹⁶⁵ The fact of review is reconcilable with *Heckler*, which left open the possibility that review might be available where the agency’s inaction was “based solely on the belief that it lacks jurisdiction.” *Heckler*, 470 U.S. at 843 n.4 (1985); see also Levin, *supra* note 154, at 759–60 (stating review should be available notwithstanding *Heckler* for questions of law, which are within judicial competence to resolve).

¹⁶⁶ This is true even though a denial meets the finality requirement for purposes of reviewability. See 5 U.S.C. § 704; 40 C.F.R. § 123.64(b)(8)(ii) (decision not to withdraw is “final agency action”); *Johnson Cnty.*, 2005 WL 2204953, at *6 (noting decision to withdraw or not to withdraw CWA Petition would be final agency action reviewable in court of appeals).

¹⁶⁷ See Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program, Docket No. TX/RCRA-06-2006-0001 (May 17, 2006) (File No. 7) (denying petition).

¹⁶⁸ 377 Fed. Appx. 406, 407 (5th Cir. 2010).

¹⁶⁹ *Id.* at 408.

¹⁷⁰ *Id.*; see *ICC v. Bhd. of Locomotive Eng’rs*, 482 U.S. 270, 283 (1987) (rejecting principle that “if the agency gives a ‘reviewable’ reason for otherwise unreviewable action, the action becomes reviewable”); see also *Heckler v. Chaney*, 470 U.S. 821, 824–25 (1985) (holding unreviewable FDA’s decision not to enforce; FDA had provided explanation for its decision). Courts have responded similarly in related contexts, albeit outside the scope of our study. See *Ohio Pub. Interest Research Grp. v. Whitman*, 386 F.3d 792, 795 (6th Cir. 2004) (describing EPA’s written response to commenters’ request for issuance of NOD but dismissing for lack of subject-matter jurisdiction); *Pub. Citizen v. EPA*, 343 F.3d 449, 455 (5th Cir. 2004) (same); N.Y. Pub. Interest Research Grp. v. Whitman, 321 F.3d 316, 322 (2d Cir. 2003) (same).

¹⁷¹ There have been occasional judicial challenges to initial authorizations over the years. *E.g.*, *Citizens for a Better Env’t v. EPA*, 596 F.2d 720 (7th Cir. 1979) (overturning EPA approval of Illinois NPDES program); *Natural Res. Def. Council v. EPA*, 859 F.2d 156, 172–189 (D.C. Cir. 1988) (upholding EPA’s regulations specifying requirements for states to gain NPDES authority). These are beyond the scope of our study.

2. *Withdrawal Proceedings*

Once EPA commences a withdrawal proceeding, there appears to be little question that its final determination would be reviewable.¹⁷² But over the past twenty-five years, EPA has initiated a formal withdrawal proceeding on its own¹⁷³ for only four petitions.¹⁷⁴ One proceeding took place in connection with a RCRA program, and the other three involved Notices of Deficiency (“NODs”) issued in connection with CAA Title V programs.¹⁷⁵ None of these proceedings resulted in a withdrawal of state authority, and only the RCRA petition resulted in a judicial challenge, which was unsuccessful on the merits.¹⁷⁶

To summarize, our results reflect a strong EPA preference to resolve petitions informally rather than through formal withdrawal proceedings. Further, EPA has been able to act on its preferences and largely avoid such proceedings. It is likely that EPA’s approach has been motivated by several factors. Among others, EPA would prefer not to take over program administration, but it is obligated to do so upon finding that a state is not meeting the applicable criteria

¹⁷² Were EPA to withdraw a state’s authorization, that action would not be subject to *Heckler*, because as described by that Court: “[W]hen an agency does act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner.” *Heckler*, 470 U.S. at 832 (1985). Were EPA to decline to withdraw authorization, a suit to enforce nondiscretionary duties would lie because the relevant statutes provide that EPA “shall” or “will” withdraw approval after making certain findings and if the state fails to cure deficiencies. See *Sierra Club*, 377 F. Supp. 2d at 1207 (emphasizing mandatory nature of word “shall” in CWA, 33 U.S.C. 1342(c)(3)); see also RCRA, 42 U.S.C. § 6926(e) (2006) (providing Administrator “shall” withdraw when certain conditions are met); 40 C.F.R. § 70.10(b)(3) & (4) (2013) (establishing when CAA withdrawal is mandatory).

¹⁷³ With respect to the *LEAF* petition, EPA initiated proceedings to withdraw Alabama’s SDWA program to comply with a judicial mandate. See *Legal Envtl. Assistance Found. v. EPA (LEAF II)*, 276 F.3d 1253, 1255–1256 (11th Cir. 2001) (describing history) (File No. 29); *supra* text accompanying notes 164–165 (same).

¹⁷⁴ Formal withdrawal proceedings entail notice, opportunities for states and others to be heard, and opportunities for states to correct any deficiencies prior to a final withdrawal decision. See, e.g., 40 C.F.R. § 123.64 (setting forth withdrawal procedures for revoking CWA authorization). The other regulatory schemes operate similarly, providing notice-and-hearing procedures for the state and opportunities for the state to correct any deficiencies before a final withdrawal decision is made. See *Procedures for Withdrawing Approval of State Programs*, 40 C.F.R. § 271.23(b)(1)–(8) (2013) (detailing procedures under RCRA); 42 U.S.C. § 7661a(i)(1)–(4) (detailing Notice of Deficiency procedures under CAA); 40 C.F.R. § 70.10(b)(2)(i) (describing further CAA procedures); *Procedures for Withdrawal of State Programs*, 40 C.F.R. § 145.34(b) (2013) (detailing procedures under SDWA).

¹⁷⁵ *In re Proceedings to Determine Whether to Withdraw Approval of North Carolina’s Hazardous Waste Management Program*, No. RCRA-SHWPAAW-IV-01-87, at 2 (Apr. 11, 1990) (PETN 003235; File No. 9); Notice of Deficiency for Clean Air Act Operating Permit Program in Wisconsin, 69 Fed. Reg. 10,167 (Mar. 4, 2004) (File No. 10); Notice of Deficiency for Clean Air Act Operating Permits Program in Ohio, 67 Fed. Reg. 19,175 (Apr. 18, 2002) (File No. 8); Notice of Deficiency for Clean Air Act Operating Permits Program in Oregon, 63 Fed. Reg. 65,783 (Nov. 30, 1998) (File No. 9b). The states took corrective actions in response to the NODs, and the matters proceeded no further.

¹⁷⁶ See *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390, 1395–96 (D.C. Cir. 1991) (File No. 9) (upholding EPA denial of Petition, which was based on interpretation of RCRA regulations, under highly deferential *Seminole Rock* standard).

and has failed to cure deficiencies. This state of affairs provides a strong incentive to avoid initiating a formal withdrawal process at all.

The implications for legitimacy are two-fold. First, recall from the discussion above that courts have elaborated procedural requirements for some decision-making procedures, such as those applicable to rulemakings, in ways that further agency legitimacy. Those constraints are not present in the petition-to-withdraw context because there are no mandatory duties except that EPA respond to petitions. Instead, the nature, speed, and scope of the response are within the agency's discretion. Second, because EPA has such discretion at the informal stage and because most petitions proceed no further, EPA's decisions rarely are scrutinized by the courts. Our study, therefore, asks how EPA behaves without this external mechanism for legitimacy — a question to which we now turn.

III. APPLICATION OF INSIDE-OUT LEGITIMACY METRICS TO EPA PETITION-TO-WITHDRAW PROCESS

In this section, we apply the legitimacy metrics developed in Part I to the petition context and data described in Part II. In order to assess the legitimacy of the process from the inside-out, we considered: (1) how the process is used; (2) EPA's treatment of petitions, including responsiveness and reason-giving; and (3) substantive outcomes.¹⁷⁷

A. *Metric 1: How the Petition Process Is Used*

As noted above, evaluating how the process is used performs two functions. First, the extent of use provides a critical check on our conception of legitimacy. Even if EPA treats petitions in ways that further legitimacy according to our metrics, we would need to question whether the process could be called legitimate if it were not used. Second, how the procedure is used provides insights about the concerns that have been raised and who has raised them (which relates to access to the process). These details also provide predicate information for the legitimacy analysis that follows from our other metrics.

To consider the process's extent of use, we wanted to understand: (1) how many petitions have been filed; (2) trends over time in the filing of petitions; (3) for which statutory programs petitions have sought withdrawal and whether particular programs were targeted more than others; (4) whether the number of petitions varied by region and state; (5) the types of concerns about program implementation the petitions raised; and (6) the characteristics of the petitioners themselves.

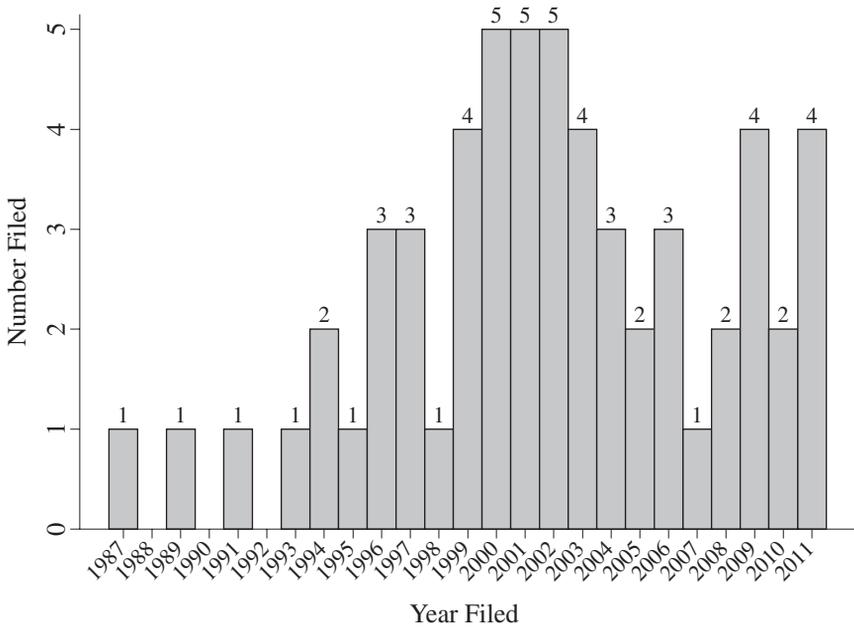
Of the 58 petitions we studied, the first was filed in 1987 and the most recent was filed in December 2011.¹⁷⁸ Initially, there were very few petitions,

¹⁷⁷ See *supra* Part I.C. (developing framework).

¹⁷⁸ Mean = 2.6 per year; median = 2.5; mode = 1; standard deviation = 1.5.

until the pace picked up slightly beginning in 1996.¹⁷⁹ Over the next sixteen years (through the end of 2011), fifty-one petitions were filed, averaging slightly more than three per year.¹⁸⁰

FIGURE 1: NUMBER OF PETITIONS FILED PER YEAR, 1987–2011



Given the small number of petitions filed each year, it is not appropriate to draw strong conclusions about variations in use of the process over time, other than to observe that over the past several years, use has been modest but sustained. Interested parties have neither abandoned the process, which would signal a perception that it lacks value compared to the effort required and alternatives available, nor have they significantly increased their use, which would signal petitioners' view that the benefits of the process made it worthwhile to pursue.¹⁸¹

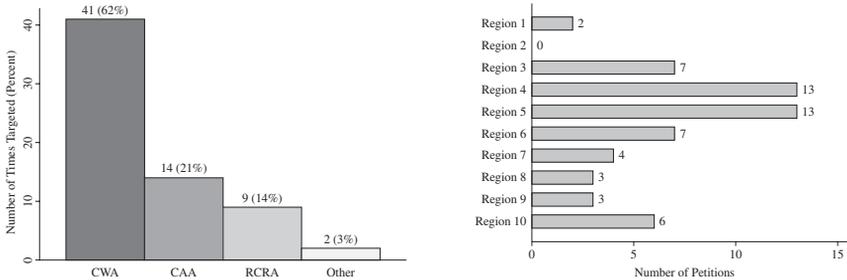
¹⁷⁹ Congress enacted and amended the various environmental regulatory statutes at different times. Further, states sought and EPA delegated authority for program implementation over an extended time period. See EPA, STATE REVIEW FRAMEWORK, available at <http://www.epa.gov/ocearth/state/srf/index.html> (last updated Nov. 21, 2012) (presenting map showing state authorizations).

¹⁸⁰ For statistics about the level of citizen suit activity during this time period, see James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 2 (2003) (providing overview).

¹⁸¹ The NAFTA Labor Commission experience is an example of the former type of process. See David Markell, *The Role of Spotlighting Procedures in Promoting Citizen Participation, Transparency, and Accountability*, 45 WAKE FOREST L. REV. 425, 434 (2010) (describing decline in petitions submitted under NAFTA labor side agreement). For an example showing variable use of a process by citizens in Canada, Mexico, and the United States, see Knox & Markell, *supra* note 93, at 520–21 (empirically describing use of citizen petition process before Commission for Envi-

We also considered the statutes at issue in the petitions. The CWA was at the heart of petition activity; other statutes received more limited attention. Allegedly deficient state performance of CWA-related duties was raised in more than two-thirds of the petitions (41), almost three times more than with any other statute.¹⁸² Other than the CWA, the statutory programs for which petitions sought withdrawal included the CAA, RCRA, SDWA, and CERCLA.¹⁸³ Figure 2 (on the left side) presents the statutes petitioners targeted.

FIGURE 2: REGULATORY PROGRAMS TARGETED & NUMBER OF PETITIONS BY EPA REGION



Our data also revealed considerable geographic variability in the number of petitions filed. As Figure 2 (on the right side) reflects, almost half of the petitions were filed in two EPA regions, Regions 4 and 5, accounting for twenty-six of the petitions.¹⁸⁴ On the other hand, no petitions were filed in Region 2 and only two were filed involving Region 1.¹⁸⁵

To understand the types of concerns petitioners raised, we developed six variables based on the statutory and regulatory requirements for authorization: opportunities for citizen participation, permitting, inspections, enforcement, state resources, and state legal authorities.¹⁸⁶ As described in Part II, a state

ronmental Cooperation). For other examples, see David L. Markell, *Understanding Citizen Perspectives on Government Decision Making Processes as a Way to Improve the Administrative State*, 36 ENVTL. L. 651, 666–670 (2006).

¹⁸² Six petitions sought revocation for more than one statutory program. For details, see the Appendix.

¹⁸³ With respect to CERCLA, we note that this statutory scheme does not include state authorization. See ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 857–62 (6th ed. 2011) (providing overview of CERCLA).

¹⁸⁴ Region 5 covers the Great Lakes, while Region 4 covers the Southeast.

¹⁸⁵ Region 1 covers New England, while Region 2 includes New Jersey and New York. Targeting by state varied as well. Alabama, which is in Region 4, was targeted in seven petitions, which was the greatest number of any state. Most states had fewer than three petitions. Petitioners in different regions also varied which regulatory programs they targeted. For example, about 85% of the petitioners in Region 5 focused on the CWA, while in Region 4, about 54% of the petitions involved the CWA. Additional information about the states, regions, and programs targeted by petitions is presented in the Appendix.

¹⁸⁶ Our initial review of the petitions revealed that most concerns raised fit easily within the six categories, but we also included a catch-all “other” category to capture any additional concerns raised. Examples of concerns coded as “other” included environmental justice, conflicts of interest, and data management issues.

must show that it meets these requirements before EPA will authorize the state to administer a program, and widespread failure to perform in one or more of these areas provides grounds for EPA to withdraw state authority.

Table 1 reflects that inadequate state legal authorities were the focus of petitions more often than any other complaint. Permitting concerns ranked a close second.

TABLE 1. CONCERNS RAISED
(Includes all petitions; n = 58)

<i>Concern</i>	<i>Number of Times Raised</i>	<i>Percentage of Total Petitions</i>
Inadequate citizen participation	32	55.2%
Inadequate permitting	43	74.1%
Inadequate inspections	25	43.1%
Inadequate enforcement	31	53.4%
Inadequate state resources	17	29.3%
Inadequate state authorities	46	79.3%
Other	11	19.0%

We also investigated the identity and backgrounds of the petitioners. We evaluated petitioners to determine whether they were local environmental non-governmental organizations (“*ENGOS*”), national *ENGOS*, individuals, corporate entities, or government entities. Several findings were of interest. First, local participation in the process was high, with local *ENGOS* participating in 46 of the 58 petitions (nearly 80%). In addition, individuals participated in 9 (16%) of the petitions.¹⁸⁷ National *ENGOS* were active as well, participating in 28, or 48%, of the petitions.¹⁸⁸ Further, the local *ENGOS* often collaborated with national *ENGOS* in developing petitions; 82% of petitions filed by national *ENGOS* (23 of the 28) were joined by local *ENGOS*.¹⁸⁹ Corporate entities filed two petitions.¹⁹⁰

¹⁸⁷ Although we were not able to verify every individual’s place of residence, it seems reasonable to presume they were citizens of the states for which they sought withdrawal. So understood, local petitioners were represented in nearly 90% of the petitions.

¹⁸⁸ Coders distinguished local and national *ENGOS* based on their affiliations. For example, Sierra Club chapters were coded as national *ENGOS* because of their national affiliations, even though they also have a local focus.

¹⁸⁹ Local governments were petitioners along with nine environmental groups seeking withdrawal of Virginia’s authority to administer the NPDES program because of Virginia’s limitations on judicial review of final NPDES permits. See Letter from Robert Perciasepe, Assistant Adm’r, EPA, to Katherine E. Slaughter, S. Env’tl. Law Ctr. (Dec. 8, 1993) (PETN 011435; File No. 50) (describing petitioners and concerns raised).

¹⁹⁰ These petitions were of special interest because it may seem counter-intuitive for a regulated entity to argue that a state is failing to effectuate the minimum federal environmental requirements. One of the petitions filed by a corporate entity sought withdrawal of North Carolina’s authority to administer the RCRA program after the state legislature passed a law that prevented the corporation from siting a hazardous waste treatment facility in a particular geographic area. *In re Proceedings to Determine Whether to Withdraw Approval of North Carolina’s Hazardous*

Related to access to the petition process, more than 80% of the petitions were filed by attorneys.¹⁹¹ Consistent with the significant extent of attorney involvement, the petitions were very sophisticated. The vast majority of petitions cited the applicable statute, evidenced an understanding of the petition-to-withdraw process, supported concerns with factual specificity, and applied the legal standards to the facts in supporting their claims.¹⁹²

The above extent-of-use data suggest several insights about the legitimacy of the petition process. First, the generally sustained, though modest, use of the process over time lends some support to the idea that it enjoys at least some level of legitimacy or usefulness. Second, the many variations in petitioners' use of the process (by region, state, and program area) and types of concerns raised suggest a host of important questions that deserve further study. We consider some of these issues in Part IV. For now, we note that the concerns raised generally track the statutory requirements for program implementation, making them useful for assessing conformity to statute.

Finally, the identity of the users of the process raises important questions about accessibility. Sophisticated petitions developed by sophisticated petitioners may be more likely to elicit a meaningful response from EPA and lead to measurable outcomes. On the other hand, barriers to access, real or perceived, may narrow the universe of potential participants and undermine the value of petitions as an outlet for voice.¹⁹³ The interactions between petitioners and the roles of petitions in ENGOs' overall strategies also merit further study.¹⁹⁴

Waste Management Program, No. RCRA-SHWPAAW-IV-01-87, at 1 (Apr. 11, 1990) (PETN 003235; File No. 9) (describing facts); *see also* *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390 (D.C. Cir. 1991) (upholding EPA decision not to withdraw). The other petition similarly related to a corporation's specific circumstances as a regulated entity under RCRA. *See generally* Letter from Richard W. Lowerre & James B. Blackburn, Jr., to Stephen L. Johnson, EPA Adm'r, & Richard Green, EPA Regional Adm'r, Region VI (Nov. 14, 2005) (PETN 001884; File No. 7) (Re: Petition for Withdrawal of Program Approval for Texas RCRA Hazardous Waste Program). An attempt to challenge EPA's denial of the petition was dismissed in federal court for lack of subject-matter jurisdiction. *Tex. Disposal Sys. Landfill v. EPA*, 377 Fed. Appx. 406, 408 (5th Cir. 2010) (upholding dismissal and citing *Heckler v. Chaney*, 470 U.S. 821 (1985)).

¹⁹¹ We initially coded for attorney involvement if apparent from the face of a petition, such as where bar numbers were used. If it was not apparent whether an individual associated with a petition was an attorney, we used Google to search the individual's name to identify any bar memberships.

¹⁹² Additional information about the petitions' sophistication and coding methodology is on file with the authors.

¹⁹³ On the trade-offs between access and other process-design features, see David L. Markell & Tom R. Tyler, *Using Empirical Research to Design Government Citizen Participation Mechanisms: A Case Study of Citizens' Roles in Environmental Compliance and Enforcement*, 57 U. KAN. L. REV. 1, 9–12 (2008).

¹⁹⁴ For example, the coordination between the local and national ENGOs raises questions about the extent to which procedures may provide a mechanism for enriching civil society. *See* Knox & Markell, *supra* note 93, at 528 (suggesting citizen petition process for CEC has resulted in increased civic engagement, in part through greater coordination between environmental organizations in multiple countries). In addition, the relationship between the ENGOs' petitions, other activities, and funding sources may be of interest. *See* Mark Seidenfeld, *Empowering Stakeholders: Limits On Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 463 (2000) (evaluating relationship between citizen suits and interest groups' funding).

In summary, our use metrics provide both a potential backstop on our conceptions of legitimacy and a detailed understanding of how petitioners have used the process throughout the country to raise concerns about different regulatory programs. Our findings raise some concerns about variability and access, which we take up in more detail in Part III.D. below. First, we consider the results of our other legitimacy metrics, beginning with how EPA treated the petitions.

B. Metric 2: Treatment of Petitions — Responsiveness and Reason-Giving

EPA's treatment of petitions provides the major testing ground for considering EPA behavior under our framework. As described above, measures of EPA's responsiveness to the petitions and reason-giving for outcomes are critical in assessing legitimacy for several reasons. Taken together, responsiveness and reason-giving reinforce participation, voice, respectful treatment, and trust; they also provide evidence of deliberation, transparency, and neutrality, and further accountability. In addition, to the extent reason-giving reflects an analysis of how the facts relate to the governing environmental statute, it promotes fidelity to the statutory mandate. This section explains the questions we asked about the petitions' treatment, how we developed the related variables, and the findings that emerged from the data.

As described above, judicial review of agency procedures enhances legitimacy in part by ensuring at least some responsiveness by the agency. In the rulemaking context, for example, courts check agency behavior to evaluate whether agencies have fulfilled their obligation to respond to significant comments raised. Borrowing from this legitimizing doctrine, we coded whether and how often EPA acknowledged concerns raised and described an outcome with respect to each.¹⁹⁵ As Table 2 reflects, EPA referenced concerns and described outcomes about 82% of the time.¹⁹⁶ For concerns about inadequate citizen participation, EPA acknowledged such concerns and explained the outcome of EPA's efforts to address them more than 90% of the time. EPA was not as responsive with respect to concerns about state resources, permitting, and inspections, but it still acknowledged the concerns raised and explained the outcome of EPA's investigation of them for over 70% of the petitions that raised them. These data show a considerable degree of agency responsiveness; EPA regularly acknowledged and responded to significant issues petitioners raised.

¹⁹⁵ Often, EPA sent a letter to petitioners describing the agency's final decision on the petition. If such a letter was present, we used it as our source for coding the variables. If such a letter was not present, we obtained our information from interim status letters to petitioners, EPA notices in the Federal Register, written agreements between EPA and the state agency that were provided to petitioners, and other written communications sent directly to petitioners or to which petitioners were given access.

¹⁹⁶ We omitted those petitions coded as still pending from our analysis. Petitions were coded as still pending where our files evidenced activity after December 31, 2009, but where a final decision or resolution had not been reached. Recall as well that we expect our data to under-represent responsiveness. See *supra* notes 131, 137 (explaining limitations of source documents).

TABLE 2. RESPONSIVENESS BY TYPE OF CONCERN RAISED
(Petitions still pending omitted; n = 46)¹⁹⁷

	<i>Number of Times Concern Was Raised</i>	<i>Percent of Responses Acknowledging Concern (Frequency)</i>	<i>Percent of Responses Describing Outcome (Frequency)</i>
Inadequate citizen participation	25	96.0% (24)	92.0% (23)
Inadequate permitting	33	75.7% (25)	75.7% (25)
Inadequate inspections	17	76.5% (13)	82.4% (14)
Inadequate enforcement	20	85.0% (17)	90.0% (18)
Inadequate state resources	11	72.7% (8)	72.7% (8)
Inadequate state authorities	38	81.6% (31)	81.6% (31)
Other	9	77.8% (7)	77.8% (7)
Aggregate	153	81.7% (125)	82.4% (126)

In addition to assessing EPA's responsiveness to petitioner concerns, we developed metrics to evaluate EPA's performance in reason-giving. As emphasized above, the courts' requirement that agencies give reasons for their actions is a feature of hard-look review, which provides a fundamental bulwark for the legitimacy of agency actions. Using the typical formulations of the hard-look standard, we assessed whether EPA explained its outcomes using the data or information on which the decisions were based, and in light of the applicable legal standards.¹⁹⁸ We also coded whether EPA explained the process it used in reaching its decision.¹⁹⁹

As Table 3 reflects, EPA included the data upon which it based its decision, and explained its decision in light of legal standards, nearly 70% of the time. That is, EPA appears to have conformed, at least at a basic level, to the norms of reasoned decisionmaking about 70% of the time.

These findings strike us as meaningful because of what they suggest about the promise of agency procedures to provide inside-out legitimacy. EPA typically was responsive and engaged in reason-giving even though there was no statutory or judicial requirement that it do so and even though the likelihood of judicial review was remote. With respect to responsiveness specifically, our data suggest that EPA performed well, describing concerns and outcomes reached over 80% of the time. As noted previously, this agency behavior reinforces the value of participation, and promotes transparency and accountability.

¹⁹⁷ In two instances — one each for inspections and enforcement — EPA described an outcome that was not raised in a petition.

¹⁹⁸ Due to data constraints and related variability and reliability concerns, we did not code the reason-giving variables according to each concern raised. Although EPA often engaged in reason-giving as it discussed each concern raised, it sometimes referenced each concern and described each outcome, but later aggregated its discussion of legal standards and data. This may explain why EPA did better in aggregate responsiveness than it did in aggregate reason-giving.

¹⁹⁹ While not strictly a component of the judicial formulation of the reason-giving requirement, explaining the procedures used furthers other legitimizing principles associated with reason-giving, like treatment with respect.

TABLE 3. REASON-GIVING
(Petitions still pending omitted; n = 46)

	<i>Explained Process</i>	<i>Included Data</i>	<i>Used Legal Standards</i>	<i>Both Data & Legal Standards</i>	<i>Process, Data, & Legal Standards</i>
Percent of petitions for which reason-giving occurred (frequency)	71.7% (33)	78.3% (36)	76.1% (35)	69.6% (32)	65.2% (30)

It also provides a disciplining check on agency discretion, which protects against arbitrariness.²⁰⁰

Reason-giving, of course, does heavy lifting for legitimacy, so EPA's providing reasons in its treatment of more than 2/3 of the petitions similarly is a promising sign about the possibilities for inside-out legitimacy. Reason-giving provides evidence of deliberation; it also provides justifications, furthering the perception that decisions were reached fairly and not arbitrarily. Additionally, reason-giving is a critical component of transparency, which in turn enables accountability. Thus, the reason-giving we observed here ought to facilitate both outside-in and inside-out legitimacy.

We highlight one important limitation to our findings. While we measured the extent to which EPA gave reasons, we were not able to measure the *quality* of EPA's reason-giving.²⁰¹ Nor can we presume, based simply on the *presence* of reason-giving, that those reasons would satisfy courts or other stakeholders.²⁰² Even so, we view the high rates of reason-giving as a useful indicator of baseline legitimacy because if an agency does not even make an effort to explain itself in the first place, it is difficult to hold it accountable or consider its behavior internally legitimate, whether in court or otherwise.

²⁰⁰ Borrowing from the procedural justice literature, such behavior strengthens voice and reflects respect for participants, and also reinforces a sense of neutrality and builds trust. *See supra* Part I.B.2.

²⁰¹ Doing so would have required substantive assessment of the merits of the petitioners' claims and EPA's and the states' responses, which was beyond the scope of this study and furthermore would have introduced significant reliability and replicability problems into our dataset.

²⁰² To put this limitation in perspective, empirical research shows that EPA prevails on the substantive merits between one-half and two-thirds of the time when its rules are challenged. *See, e.g.,* Jonathan H. Adler, *No Intelligible Principles: The EPA's Record in Federal Court*, REASON FOUNDATION 10–11 (May 1, 2000), available at <http://reason.org/news/show/no-intelligible-principles> (presenting empirical results showing EPA won only about two-thirds of substantive challenges to its rules in the D.C. Circuit); Christopher H. Schroeder & Robert L. Glicksman, *Chevron, State Farm, and EPA in the Courts of Appeals During the 1990s*, 31 ENVTL. L. REP. 10371, 10374 (2001) (presenting empirical results showing EPA won only about half of substantive challenges to its rules between 1990 and 1999). Because rules are generally reviewable, we would expect EPA to engage in the various judicially created reasoning and analysis requirements described above. Thus, we would expect EPA to have scored well had we evaluated rulemakings for the presence of reason-giving — even if the quality of that reasoning was deficient.

C. Metric 3: Substantive Outcomes

Our final metric, substantive outcomes, is crucial to a complete understanding of the petition process and its legitimacy. When courts evaluate agency actions, they consider whether the outcomes are within the parameters of the statutory mandate. This check furthers legitimacy by ensuring that agencies exercise only the power they are given. Additionally, the desirability of a procedure depends in part on its ability to generate meaningful outcomes. If results seem unobtainable, or failures a foregone conclusion, the process will be perceived as arbitrary, inaccessible, and otherwise illegitimate. Thus, this metric helps evaluate how substantive outcomes may impact the legitimacy of the administrative state.²⁰³

One plausible measure for evaluating substantive outcomes of the petition process is whether EPA ultimately withdrew authority in response to petitions; after all, that is the petitions' purported purpose. On this measure, the process might look like a resounding failure: as noted above, EPA initiated a withdrawal proceeding less than 10% of the time, in only 4 instances,²⁰⁴ and never withdrew state authorization.²⁰⁵

Yet there are good reasons why withdrawal should not be viewed as the exclusive (or even a particularly good) measure of desirable substantive outcomes. A cooperative federalism system that produces outcomes in which the federal government withdraws a state's authorization — on the ground that state performance is so bad that salvaging the partnership is beyond the realm of possibility — is difficult to conceive of as a benchmark demonstrating the success of such a system.²⁰⁶ For these reasons, it is not surprising that our data are consistent with the perception of commentators and insiders alike: withdrawal is a “nuclear weapon” that is likely to be used rarely if at all.

As Professor Brigham Daniels notes in his analysis of agencies' nuclear options, however, “[w]hat we don't hear enough about is what falls between a dud and regulatory Armageddon.”²⁰⁷ While EPA never formally withdrew a

²⁰³ The political science literature makes a distinction between procedural accomplishments, like writing rules or bringing enforcement actions, and outcomes, like reducing pollution or diminishing health risks. See RENA STEINZOR & SID SHAPIRO, *THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC 188–89* (2010) (describing distinction and collecting sources). Our study focuses on the former; we are not able to assess, for example, whether state water quality is better overall because of a petition being filed. See GAO, *Water Quality: Inconsistent State Approaches Complicate Nation's Efforts to Identify Its Most Polluted Waters*, GAO-02-186 (Jan. 11, 2002), available at <http://www.gao.gov/products/GAO-02-186> (identifying obstacles to EPA's attempt to inventory impaired waters); Markell, *Slack*, *supra* note 18, at 28 (explaining why cooperative federalism model has made it more difficult to assess what government officials accomplish).

²⁰⁴ See *supra* text accompanying notes 173–176 (describing these results).

²⁰⁵ Our research revealed two instances where EPA withdrew state programs (in California and Maryland), but those were not in response to petitions and were therefore outside the scope of our study. See *supra* note 24 (collecting sources).

²⁰⁶ Of course, an alternative perspective is that making an example of a recalcitrant state may set a more constructive tone for cooperative federalism and ultimately yield improved results generally and in that state itself. RECHTSCHAFFEN & MARKELL, *supra* note 23, at 332.

²⁰⁷ Daniels, *supra* note 111, at 471.

program and rarely commenced proceedings, it also virtually never simply denied a petition or ignored it. Instead, we documented that EPA nearly always engaged in an informal investigation following receipt of a petition. And in many instances, the agency investigated the concerns in depth, agreed that deficiencies existed, and worked with the state to address those concerns.²⁰⁸ Furthermore, we noticed that substantive outcomes short of withdrawal proceedings were achieved in many instances.

In short, based on the premise that final withdrawal should not be considered the only important substantive outcome of the petition process, we created outcome variables based on the six types of concerns that correlate with the statutory criteria for authorization and withdrawal: whether there were measurable changes in citizen participation, permitting, inspections, enforcement, state resources, state legal authority, and in “other” areas of concern raised.²⁰⁹

As Table 4 reflects, in the aggregate, states made measurable changes in how they administer environmental programs 53% of the time. The highest percentage of changes was in enforcement, while the lowest was in state resources.

TABLE 4. SUBSTANTIVE OUTCOMES BY TYPE OF CONCERN
(Petitions still pending omitted; n = 46)

	<i>Number of Times Concern Was Raised</i>	<i>Percentage of Times Outcome Was Achieved (Frequency)</i>
Inadequate citizen participation	25	52.0% (13)
Inadequate permitting	33	51.5% (17)
Inadequate inspections	17	52.9% (9)
Inadequate enforcement	20	65.0% (13)
Inadequate state resources	11	45.4% (5)
Inadequate state legal authorities	38	50.0% (19)
Other	9	55.6% (5)
Aggregate	153	52.9% (81)

It may be helpful to contextualize our data regarding substantive outcomes. As noted above, the most frequently raised concern was inadequate

²⁰⁸ See *supra* text accompanying notes 139–144 (providing example).

²⁰⁹ We use the word “measurable” to convey that the state committed to making changes in a given category that would be capable of independent verification. We did not independently verify (a) the baseline level of compliance with statutory criteria; (b) whether these changes were actually made; or (c) whether the petitions caused the changes. For purposes of our study, we presume that the baseline performance of states in areas of concern raised were lower than those achieved following a petition. But any number of factors may engender changes in state performance, such as routine EPA oversight, developments at the state level, etc. We were not able to control for factors that, in addition to or instead of the petitions, may have caused these substantive changes. Based on our review of the files, however, we believe the petitions provided at least some of the impetus for many of the changes.

state authorities, with petitions helping to produce substantive outcomes addressing these concerns 50% of the time these concerns were raised. To provide an example, in 1996 various ENGOs sought withdrawal of Oregon's CAA Title V and CWA NPDES authorizations, arguing that under a new Oregon Supreme Court decision, the state fell short of EPA's public participation requirements because it no longer recognized representational standing.²¹⁰ After EPA received an opinion from the Oregon Department of Justice questioning whether Title V required state programs to provide representational standing, EPA issued a Notice of Deficiency.²¹¹ Thereafter, the state legislature amended its Title V statute to meet federal representational standing requirements, which EPA approved.²¹² As for the NPDES program, EPA continued to encourage the state to amend that program's statutes as well, expressing its view that that program remained deficient.²¹³ Ultimately, the state department of justice provided an interpretation of intervening case law that satisfied EPA that the state's representational standing for NPDES programs met federal requirements.²¹⁴

A 2001 petition filed by the Tulane Environmental Law Clinic asking EPA to withdraw Louisiana's NPDES program provides another example. The Governor of Louisiana convened a special Governor's Task Force to investigate the issues raised in the Petition while Region 6 initiated an informal investigation.²¹⁵ EPA's activities included on-site reviews of Louisiana's files, interviews with state management staff, and the region's review of program implementation information that the state provided to EPA.²¹⁶ After EPA reported that it had "serious concerns" with aspects of the NPDES programs, the state developed a series of performance measures to address these concerns.²¹⁷ The measures included improving permit issuance, enhancing public access to its files, and improving its enforcement penalty calculation methodology to recover economic benefit from non-compliance.²¹⁸ The state agreed to address these concerns,²¹⁹ and EPA determined that cause did not exist to initiate withdrawal proceedings.²²⁰ In doing so EPA noted that it had established seven perform-

²¹⁰ See Letter from Karl G. Anuta, Esq., to Michael Clark, Reg'l Dir., EPA Region 10 (Aug. 1, 1996) (PETN 004768; File No. 19a) (citing Local No. 290, Plumbers and Pipefitters v. Or. Dep't of Env'tl. Quality, 919 P.2d 1168 (Or. 1996)).

²¹¹ Notice of Deficiency for Clean Air Act Operating Permits Program in Oregon, 63 Fed. Reg. 65,783, 65,784 (Nov. 30, 1998).

²¹² Clean Air Act Approval of Revisions to Operating Permits Program in Oregon, 67 Fed. Reg. 39,630, 39,631 (June 10, 2002).

²¹³ See Letter from Charles E. Findlay, Reg'l Adm'r, EPA Region 10, to Stephanie Hallock, Or. Dep't of Env'tl. Quality (Feb. 8, 2001) (PETN 004867; File No. 19b).

²¹⁴ Letter from Elin D. Miller, Reg'l Adm'r, EPA Region 10, to Karl G. Anuta, Esq. (Mar. 27, 2007) (PETN 004733; File No. 19b).

²¹⁵ Letter from G. Tracy Mehan, III, Assistant Adm'r for Water, and John Peter Suarez, Assistant Adm'r for Enforcement and Compliance Assurance, to the Honorable M.J. Foster, Jr., Governor of La. (Feb. 14, 2003) (PETN 005910; File No. 27a).

²¹⁶ *Id.*

²¹⁷ See *id.* at 2.

²¹⁸ *Id.* (Enclosure).

²¹⁹ Letter from the Honorable M.J. Foster, Jr., Governor of La., to the Honorable Christine Todd Whitman, Adm'r, EPA (Mar. 27, 2003) (PETN 005901; File No. 27a).

²²⁰ Letter from Richard E. Greene, Reg'l. Adm'r., EPA Region 6, to Adam Babich, Tulane Env'tl. Law Clinic, at 2 (Dec. 29, 2004) (PETN 005802) (on file with authors).

ance measures “aimed at addressing EPA’s and citizen’s concerns with the program,” and that “[w]e believe that [the state] has successfully completed all seven performance measures and . . . that [it] is implementing the changes agreed to as a result of the performance measures. The [state] program has shown marked improvement.”²²¹

The experience of the 2001 Louisiana petition helps illustrate a further point, as well as a qualification for our results. Despite EPA’s and others’²²² view that the state met program requirements, others hold opposing views. As explained by the OIG in 2012: “Although the state completed the recommended actions, the state’s poor performance persisted; our analysis found that Louisiana has the lowest enforcement levels in Region 6 and is ranked in the lower half for CWA and the lowest quartile for CAA and RCRA.”²²³ In other words, it is not possible to gauge from the petitions how well a particular state was performing when a petition was filed, or whether changes in state performance following a petition were sufficient to bring a state up to EPA expectations or beyond. Much of the difficulty stems from the dysfunctionality of the cooperative federalism approach, including confusion about metrics and lack of data to evaluate performance.²²⁴ We consider this issue further below, noting for now our reluctance to make overbroad inferences about what the petitions’ outcomes mean in terms of how the various state programs are performing.

Even so, our results as to substantive outcomes overall are remarkable because they run counter to the typical account of the potential for withdrawal, which dismisses it as meaningless because withdrawal itself is so rare.²²⁵ Instead, the data reveal that changes in state performance occurred over half the time following a petition. At a minimum, the outcomes suggest that EPA worked with states to make changes to improve performance in the program areas the petitioners identified as deficient. Ultimately, in many cases states changed their behavior at least partially in response to the concerns raised. Because our outcomes are linked to statutory requirements, moreover, we can conclude that the petitions process furthered fidelity to statute, reinforcing the legitimacy of agency behavior in that regard.²²⁶ In addition, these outcomes suggest that the petition process is a meaningful procedure; its legitimacy is reinforced because it can make a difference.

IV. INSIDE-OUT LEGITIMACY AND IMPLICATIONS FOR INSTITUTIONAL DESIGN

As should be apparent from the above discussion, our study of the petition-to-withdraw process offers many insights into the theory of inside-out legitimacy and its practical implications. Although we found many reasons to be

²²¹ *Id.* at 1.

²²² *EIP Letter*, *supra* note 150.

²²³ *OIG Report*, *supra* note 27, at 70.

²²⁴ We consider these issues *infra* Part IV.B.

²²⁵ *See, e.g.*, Krotoszynski, *supra* note 116, at 1635–36.

²²⁶ Although we are not able to quantify compliance with statutory mandate, it is reasonable to assume these changes bring performance closer to statutory requirements.

optimistic about agency behavior, we also identified areas that could be improved and raised questions that deserve future study. In this section, we detail these considerations and highlight their significance.

A. *Promoting Inside-Out Legitimacy*

Though we suggest room for improvement and further study below, the extent to which the petition process shows indicia of legitimacy is remarkable, notwithstanding widespread agreement that EPA's nuclear option of withdrawal is really a paper tiger. If that is true, and all the relevant actors know it, what features of the system's design might incentivize the agency behavior we documented, particularly when there is little chance of judicial review?

Here we suggest some possibilities. These include agency culture and professionalism; proximity to constituencies; the fire-alarm tool; and the presence of a nuclear option. We do not argue that any of these possibilities would independently suffice to promote the intrinsic legitimacy we observed; rather, most scholars agree that various institutional-design features ought to be layered to promote legitimacy.²²⁷ Nor do we claim that these possibilities are exhaustive.²²⁸ Rather, they are features of the institutional structure surrounding the petition process that seem especially likely to hold explanatory power for the inside-out legitimacy we observed and that hold promise for institutional design more broadly. In suggesting them here, our hope is to push the conversation about legitimacy towards a greater focus on the relationship between institutional structures, the details of agency behavior on the ground, and inside-out legitimacy.

1. *Professionalism and Agency Culture*

Agency culture and professionalism can serve as internal legitimizers for agency behavior.²²⁹ Together, they can promote neutral expertise²³⁰ and encourage agency professionals to serve as honest brokers²³¹ in communicating applicable scientific and technical information to higher-ups as well as their

²²⁷ *E.g.*, Mendelson, *supra* note 8, at 419–20 (suggesting need for external controls even where internal legitimizing procedures, such as increased participation, have been implemented); *see* Shapiro et al., *supra* note 60, at 486 (invoking notion of redundancy checks that utilize external and internal controls).

²²⁸ In particular, political control and centralization of power, at both the federal and state levels, may hold explanatory value for agency behavior. *See, e.g.*, Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Administrative State*, 94 VA. L. REV. 889 (2008) (considering rulemaking behavior during political transitions in executive and legislative branches).

²²⁹ *See* Shapiro & Wright, *supra* note 12, at 580. Professors Shapiro and Wright identify bureaucratic controls and professionalism as two key inside-out legitimizers. *Id.* Of course, agency culture can also undermine legitimacy.

²³⁰ *See* Shapiro et al., *supra* note 60, at 471, 484.

²³¹ *See generally* ROGER A. PIELKE, JR., *THE HONEST BROKER: MAKING SENSE OF SCIENCE IN POLICY AND POLITICS* (2007) (suggesting roles for scientists in contributing to democracy in ways consistent with ethics of their profession).

views whether proposed policies are consistent with the statutory mandate.²³² Culture and professionalism can foster an inclination to reach out to stakeholders in search of dialogue²³³ and to be responsive to concerns raised.²³⁴ In addition, a professionally compiled record will facilitate transparency and, thus, external accountability as well as intrinsic legitimacy.²³⁵ Collectively, these behaviors can further administrative law values, procedural justice, and fidelity to statute.

A number of our files revealed that EPA's regional staff exhibited many professional attributes. For example, our files included numerous letters from EPA to other stakeholders; EPA often thanked the petitioners for their participation and otherwise conveyed that the petitions were being taken seriously. In addition, we note that attorneys often signed the documents in which EPA communicated its reasoning and outcomes to petitioners. Attorneys, trained as they are in providing explanations, may have contributed their professionalism in this way. Agency culture may have also contributed to the overall good performance of EPA. One consideration is whether EPA has so internalized the expectation of judicial review that it treats even informal matters according to the norms resulting from hard-look review. Alternatively, the mere chance of review — albeit remote — may supply the impetus for the legitimizing behavior we observed. Determining the extent to which judicial review has such spillover effects might be a fruitful area for further study.

2. *Proximity to Constituencies and “Nesting” of the Petition Process in Ongoing Relationships*

Another possible contribution to inside-out legitimacy involves the agency's proximity to constituencies and the way the petition process is nested within ongoing relationships. For example, like many agencies, EPA has regional offices throughout the country that are physically located nearer corresponding state offices than the agency's Washington, D.C. headquarters. EPA's regional offices have much closer institutional ties and relationships with state officials than their headquarters' counterparts; regional staff also may have closer relationships with regulated entities and regulatory beneficiaries than would exist between those same groups and agency headquarters.

While proximity and ongoing interactions could give rise to tight, exclusionary relationships that undermine legitimacy, agencies have natural incentives to cultivate cordial relations with their stakeholders.²³⁶ The petition files

²³² See Shapiro et al., *supra* note 60, at 487.

²³³ *Id.*

²³⁴ See Bratspies, *supra* note 16, at 619 (describing “internal cultures of accessibility and responsiveness” as key components for building trust in regulators).

²³⁵ See Shapiro et al., *supra* note 60, at 497; see also Mendelson, *supra* note 8, at 435 (asserting that good-government concerns may motivate agencies to act transparently because they wish to foster the perception that regulated entities are treated fairly).

²³⁶ See, e.g., Mendelson, *supra* note 8, at 435 (“Agency officials typically like relationships with regulated entities to remain cordial, not only because they frequently interact with regulated entities, but also because those entities can be a critical source of information.”). Additionally, the

revealed that the vast majority of EPA work on the petitions was done at the regional level, with little evidence of significant headquarters involvement, as is the case for many EPA/state interactions. Discussions took place against a backdrop of relationships — relationships that existed prior to when petitions were filed and that would persist after petitions were resolved.²³⁷ Though fraught with considerable risks,²³⁸ this institutional arrangement presumably increased the likelihood that the federal and state personnel working on the petitions were also working closely together otherwise. The presence of local ENGO petitioners, in tandem with national groups, likely added spice to this ongoing relationship and put pressure on both EPA and the states to produce results responsive to the ENGOs' concerns.²³⁹ In this way, the governance structure positioned EPA as a mediator between states and ENGOs, perhaps contributing to the availability and achievability of negotiated outcomes.

At the very least, our study suggests that further research might explore whether there are benefits — in addition to the oft-touted detriments — to organizing government in ways that facilitate proximity, particularly when there is a prompt from outside parties that requires cooperation to advance. The nesting of the process in a context of ongoing relationships between EPA and a state likely means that the government actors have some incentive to get along over the long term. Thus, the fact that the petitions are handled in the regions, like most program oversight, makes it more likely that the role of preserving ongoing relationships will be important.

3. *The Fire-Alarm Tool*

The classic account of fire alarms provides that they are a means of converting “the oversight job of a politician from active monitor to reactive servant of affected constituencies.”²⁴⁰ In other words, it is very costly for political actors to track every decision an agency makes, but fire-alarm tools enable those

nested relationship promotes EPA's incentives both to cooperate, and to avoid using the ultimate threat of withdrawal too casually. See *infra* notes 271, 272 (noting importance of incremental options).

²³⁷ Professor Daniels describes this “related interdependence,” where repeat players are engaged in many different negotiations, as a component of successful use of nuclear tools. Daniels, *supra* note 111, at 484–85 (explaining nuclear threats are more credible where they are tied to programmatic concerns that relate to how parties will behave in the future).

²³⁸ Some constituencies might prefer interaction with a single headquarters because of limited resources or the inaccessibility of regional offices. See, e.g., Markell, *Slack, supra* note 18, at 44 (describing difficulty interested parties face in obtaining information from scattered state offices). Further, lack of centralized EPA Headquarters oversight and direction has contributed to dramatic disparities in agency behavior across regions, including in interactions with the states. See, e.g., *OIG Report, supra* note 27, at 11 (describing lack of direct authority).

²³⁹ Moreover, the potential for withdrawal creates unusual alliances between ENGOs and the regulated community; ENGOs can use it to “win political support for invigorating the state infrastructure,” while regulated entities may prefer enhanced state performance as “the devil they know.” RECHTSCHAFFEN & MARKELL, *supra* note 23, at 333.

²⁴⁰ McNollgast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 434 (1989) [hereinafter *Structure*]; see also McNollgast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) [hereinafter *Instruments*].

actors to wait to be notified by stakeholders if the implementation of a statutory program is failing in some way.²⁴¹ Once notified, those actors can exercise their authority to put out fires should they see fit.

Although the origins of the fire-alarm theory lie in a traditional principal-agent conceptualization of administrative law — the theory originally focused on congressional oversight²⁴² — fire alarms can provide notification to many different actors. In the petition context, for example, a petition can serve as a fire alarm to state political actors, to EPA’s headquarters, to politicians in the executive or legislative branches, and to other stakeholders. One puzzle of the petition process lies in the effectiveness of the fire alarm. Traditional theory holds that the effectiveness of fire alarms depends on the credibility of potential consequences.²⁴³ Even though EPA’s “nuclear bomb” of withdrawal is not likely a credible threat, the presence of a fire alarm may nevertheless further administrative legitimacy by focusing both the immediately responsible government actors and the wide array of less directly involved players on the concerns raised.²⁴⁴

This consequence of the petition process is consistent with the insights of McNollgast and others, notably that procedures can induce improved agency behavior by providing information to political and other actors and by enfranchising stakeholders in the agency decisionmaking process.²⁴⁵ Much like judicial review, then, fire alarms can facilitate both outside-in and inside-out legitimacy. By creating procedures that benefit certain types of stakeholders, moreover, fire alarms can enhance (or undermine) substantive legitimacy by channeling agency decisionmaking toward outcomes that would be most favored by the regulatory beneficiaries.

4. *Presence of a Nuclear Option*

Though rarely deployed, the mere presence of a nuclear option may also drive legitimizing behavior. Professor Daniels has cataloged the numerous design choices surrounding nuclear options and how those choices impact their desirability and effectiveness as bargaining tools.²⁴⁶ We consider three such design features of the petition-to-withdraw process that seem particularly salient: third-party access, opportunities for shaming, and incremental options.

First, as noted above, one reason for EPA’s reluctance to withdraw state authority lies in the immense political ramifications that would attend such an action. Not only would withdrawal signal a dismal view of the cooperative federalism relationship, it would upset the default system Congress put in

²⁴¹ See also Bressman, *Procedures*, *supra* note 74, at 1752 (describing how administrative procedures function as, and facilitate, fire alarms).

²⁴² Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 167 (1984).

²⁴³ McNollgast, *Structure*, *supra* note 240, at 434.

²⁴⁴ For example, we documented governor involvement in 8 of the petitions.

²⁴⁵ McNollgast, *Instruments*, *supra* note 240, at 244.

²⁴⁶ For an exhaustive analysis of the many options and an insightful exploration of nuclear tools generally, see Daniels, *supra* note 111.

place. The potential for intense oversight and scrutiny — such as might come from a state's congresspeople were withdrawal to take place — serves as a strong incentive for the agency to avoid even initiating such proceedings on its own.²⁴⁷ With the ability of interested parties to at least partially access the procedure, however, the dynamic shifts. EPA must at the very least respond to petitions. In so doing, it is incentivized to treat this political hot potato with care; whether or not it eventually finds cause to initiate proceedings, providing a record of its analysis and showing some progress towards addressing concerns supports the legitimacy of agency behavior in the eyes of potential stakeholders.

Further, that interested parties rather than the agency itself can trigger the process provides political cover to EPA.²⁴⁸ Because it must respond to petitions to withdraw, it can use the mere fact of a petition to take a close look at how a given state is performing and to press the state for changes. Thus, EPA may face less criticism — for being obtrusive or for abusing the cooperative federalism relationship — when it can point to an outside petition rather than its own initiative as the impetus for investigating a state program. By framing its reasons for an investigation in this way, EPA may preserve for itself more negotiating power that, in the end, translates into measurable outcomes.

Additionally, the state and federal actors are undoubtedly familiar with many of the ENGOs, but the petition process operates to formalize the role of such ENGOs. The process does not give the ENGOs a veto. The impediments to judicial review also limit ENGOs' leverage. But the procedure puts ENGOs squarely at the table in the sense that they get to drive the conversation by identifying their concerns. Their presence as formal participants is also likely to increase the governments' incentives to be responsive to their concerns. It may give EPA leverage to encourage improvements in state performance; it may also give state officials immediately responsible for performance leverage with higher-up officials, legislators, the governor's office, and others to shift resources and make other changes likely to respond to concerns.

The process also both creates heightened opportunity for shaming for affected states, and it may provide them with political cover to make changes. Each of these dimensions of the process may motivate states to seek negotiated resolutions that appear to be responsive to citizen concerns, especially if EPA piles on with its independent assessment that deficiencies exist.

The most obvious incentive to be responsive is the embarrassment that a withdrawal proceeding would cause a state.²⁴⁹ The desire to avoid such an impact may well contribute to the states' willingness to negotiate with EPA and reach substantively meaningful outcomes. The petition process provides op-

²⁴⁷ See *supra* text accompanying note 113 (describing these reasons).

²⁴⁸ Third-party access to nuclear options can also enhance the credibility of the threat and leverage uncertainty; petitioners increase the likelihood of withdrawal, which is more threatening than the abstract possibility of it occurring. See Daniels, *supra* note 111, at 480, 483.

²⁴⁹ RECHTSCHAFFEN & MARKELL, *supra* note 23, at 332 (A withdrawal proceeding “represents a public statement by EPA that the state’s program is entirely inadequate. The prospect of being branded in this way might well serve as strong motivation to state officials.”).

portunities for shaming EPA as well. For example, petitioners regularly make use of the press to announce their petitions; while these articles focus on condemnation of state behavior, they also express similar disappointment with EPA's oversight of state programs.²⁵⁰ In addition, some petitioners take advantage of EPA's structure and notify headquarters of their petitions, suggesting that the regions are failing to meet their responsibilities.²⁵¹ In this way, petitioners can use EPA's own nuclear tool against it to incentivize responsiveness, reason-giving, and substantive outcomes.

Finally, one benefit of the informality of the petition process as it currently stands is the flexibility it gives EPA for addressing concerns and reaching solutions. The agency has a nuclear option, but all the participants know that changes short of withdrawal are within the agency's discretion.²⁵² This may incentivize a more cooperative series of negotiations than would be achievable if EPA were to immediately initiate withdrawal proceedings. If more cooperative negotiations are likely to also be more successful — in terms of being invested in the process as well as in reaching beneficial substantive outcomes — then this facet of the petition-to-withdraw process may also contribute to the legitimacy we observed in EPA's handling of petitions.

B. *Improving Inside-Out Legitimacy*

Despite our overall assessment that the petition process works, we observed several possibilities for improvement, particularly in timeliness and increased transparency and access. In addition, the variability of our observations and difficulty evaluating substantive outcomes suggest the importance of future research. Ultimately, our results raise provocative questions about agencies' ability to construct their own legitimacy.

1. *Timeliness*

As noted above, the timeliness of a process has implications for its perceived legitimacy as well as its attractiveness to stakeholders.²⁵³ Our study of the petition process revealed a concern, therefore, regarding the time it took from when a petition was filed until EPA completed its treatment of the con-

²⁵⁰ See, e.g., Press Release, Nat'l Wildlife Fed'n, Environmental Groups Request Federal Investigation Into Reorganization of Michigan DNR (Dec. 3, 1991) (PETN 012394; File No. 55).

²⁵¹ See, e.g., Letter from Tarah Heinzen, Env'tl. Integrity Project, to the Honorable Peter Silva, Office of Water Assistant Adm'r, EPA, at 3 (July 7, 2010) (providing list of CAFO-related petitions).

²⁵² See RECHTSCHAFFEN & MARKELL, *supra* note 23, at 333–34 (noting that low likelihood of withdrawal highlights need for more graduated sanctions, and suggesting one option is to work closely with states to help them meet the applicable requirements); see also Daniels, *supra* note 111, at 485 (suggesting flexibility and discretion to take intermediate steps is important for reaching outcomes under the threat of nuclear options).

²⁵³ See *supra* note 146. Timeliness is an issue in many contexts; and we recognize that agencies have many demands on their time. See, e.g., Alan Kovski, *Regulatory Policy: Public Citizen Finds Deadlines Missed 78 Percent of Time on Federal Regulations*, 43 ENVTL. REP. (BNA) 1700 (June 29, 2012) (reporting that EPA missed 78% of statutory deadlines).

cerns. Admittedly, the petitions are aimed at broad issues that would predictably take time to investigate, negotiate, and resolve. Changes in personnel, and administrations — both federal and state — could further slow the process. Even so, it is expensive and frustrating for petitioners and agencies alike for the petition process to be so long. Ten years ago, one of us recommended that EPA develop timeframes for itself within which it would investigate petitions and make recommendations.²⁵⁴ The need to do so remains.

2. *Transparency and Access*

The roles played by transparency and access in facilitating legitimacy are also central components of our analysis. Reason-giving, of course, promotes these norms and enhances accountability. EPA's record for each petition was relatively good in this regard, in terms of transparency for the petitioners. What was lacking was transparency for broader audiences. Most regions do not include information on their websites,²⁵⁵ and our dataset was built primarily from documents available through FOIA requests. EPA's periodic reports to Congress generally do not include information about state performance,²⁵⁶ and even in a recent report by the OIG, only one petition was discussed.²⁵⁷

Ideally, inside-out legitimacy should facilitate outside oversight in addition to bolstering legitimacy in its own right.²⁵⁸ A central issue for the administrative state is who is watching the administrators. In the cooperative federalism context, moreover, the administrators include both EPA and the states. As is always the case, Congress retains the power to oversee operation of the system it created, and it has periodically convened hearings to assess performance of this cooperative federalism approach to environmental protection; occasionally petitions to withdraw are part of the conversation.²⁵⁹ We believe that enhanced transparency of the petition process would facilitate the many forms of oversight that provide accountability for agency behavior. The variability we observed among regions, states, and programs suggests the importance of enhanced transparency as a strategy to promote accountability for different policy choices and to reduce arbitrariness.

Increasing transparency may also attract a broader set of stakeholders to the petition process. Most petitioners have been ENGOs, and we saw very

²⁵⁴ RECHTSCHAFFEN & MARKELL, *supra* note 23, at 334–35; *cf.* Knox & Markell, *supra* note 93, at 522–24 (describing timeliness concern with CEC process). The CEC Council recently adopted timeframes in its Guidelines for the Submissions on Enforcement Matters Process because of concerns raised about the slow pace of the process. Comm'n for Env'tl. Cooperation, *Council Resolution 12-06* (July 11, 2012), available at <http://www.cec.org/Page.asp?PageID=122&ContentID=25243>.

²⁵⁵ We uncovered some information about petitions on the websites of Regions 5 and 7.

²⁵⁶ Annual reports are available on EPA's website at <http://www.epa.gov/planandbudget>. A review of the reports from the past several years revealed little mention of state performance.

²⁵⁷ See *OIG Report*, *supra* note 27, at 45 (discussing 2001 Louisiana petition; File No. 27a). Others have raised concerns about the lack of transparency of the process. See *EIP Letter*, *supra* note 150, at 2 (encouraging EPA to develop online database of petitions).

²⁵⁸ See Shapiro et al., *supra* note 231, at 496.

²⁵⁹ See *supra* note 31 (collecting examples).

little evidence of participation by regulated entities either in filing petitions, or in negotiating outcomes of petitions that were filed.²⁶⁰ For those concerned about industry capture or the disproportionate share of contacts regulated entities have with EPA in connection with rulemakings,²⁶¹ perhaps the petition process provides a small counter-balance by giving statutory beneficiaries a different forum for voice. To the extent one prefers that processes be open to all, and believes that deliberations among a range of stakeholders is likely to better inform decisionmakers,²⁶² greater transparency — such as posting notices about petitions and key developments in their treatment in the Federal Register and including materials on agency websites — would facilitate more opportunities for the rich deliberation of many voices.

We highlight one additional transparency issue that relates to the legitimacy of the broader cooperative federalism approach. Numerous reviews have identified deficiencies in EPA's oversight and in state performance, as well as a lack of data from which stakeholders can easily identify and understand such deficiencies.²⁶³ These challenges raise a question about the extent to which significant deficiencies identified in other reviews have not received attention in petitions. To the extent this is the case, it would be worthwhile to examine why not. It could be that the issues do not lend themselves to triggering via fire alarm because of their technical complexity or for other reasons. But lack of fire-alarm attention could also signal shadows in the operation of the administrative state — areas in which transparency and accountability are not what they could be — such that a lack of information was what prevented citizens from raising concerns. Process design changes to improve transparency would be worth considering if these shadows prove significant in scope.

3. *Variability*

Variability in terms of how a process is used and applied can raise numerous legitimacy concerns. We note a great deal of variability in three areas: the types of concerns raised; the statutory programs targeted; and the states and regions targeted. A full development of explanations for this variability is beyond the scope of our study, but we highlight some possibilities, and their implications for inside-out legitimacy, here.

The variability in types of concerns raised by the petitions raises fascinating issues about how the petition process is situated within the broader regulatory context. As noted previously, EPA has a number of top-down oversight responsibilities even when states have authority to implement the major pro-

²⁶⁰ Cf. Letter from Richard E. Greene, Reg'l Adm'r, EPA Region 6, to Dan S. Borne, President, La. Chem. Ass'n (Mar. 31, 2003) (PETN 00608778; File No. 27) (acknowledging correspondence from industry group expressing view that NPDES program should not be withdrawn).

²⁶¹ E.g., Wagner et al., *supra* note 152, at 143 (empirically describing contacts between EPA and regulated entities).

²⁶² E.g., Seidenfeld, *supra* note 13, at 1528 (defining civic republicanism).

²⁶³ See generally *OIG Report*, *supra* note 27; Markell, *Slack*, *supra* note 18.

grams.²⁶⁴ It seems possible that the variability in concerns raised might point to weak spots in the federal-state relationship.²⁶⁵ Consider, for example, that concerns about state legal authority were raised more than any other — and state laws were often changed following the filing of petitions. Even though states are supposed to keep EPA apprised of changes in legal authorities, to what extent did the states do so? And if EPA failed to discover those changes on its own, then perhaps that reflects a weakness in top-down oversight of this key area. If the petitions provided information to EPA that EPA was not aware of, the petitions would be serving an oft-touted, but rarely documented, benefit of procedures that promote citizen participation and reinforce legitimacy.²⁶⁶

Likewise, the heavy emphasis on the CWA could reflect particular weaknesses in EPA oversight relative to the other statutes. On the other hand, the CWA, with its liberal citizen participation features and transparency with respect to permit compliance,²⁶⁷ may be more accessible and familiar to prospective petitioners, making it an easier target than the other statutory schemes. It is worth noting that more citizen suits are filed under the CWA than the other statutes, presumably for these reasons.

Finally, with respect to the state and regional variability, insights from the cooperative federalism and political science literatures may have explanatory power. Certainly the cooperative federalism approach to program implementation poses management challenges because of the dispersal of authority.²⁶⁸ The inconsistencies we noticed may simply be manifestations of these other, broader challenges. Regional differences might also be explained by differences in actual state or region performance; differences in state politics; variations in the organization, interests, and motivations of ENGOs; and the like.

4. *The Need for Substantive Metrics*

In addition to the issues raised above, we encountered an obstacle to fully measuring legitimacy because of shortcomings in the metrics for the substantive performance of the major environmental programs. This deficiency has two legitimacy-related implications. First, fidelity to statute is of paramount importance in the administrative state. Although we were able to measure the presence of responsiveness, reason-giving, and substantive outcomes according to statutory goals, we were unable to assess their quality.²⁶⁹ This problem is

²⁶⁴ See *supra* text accompanying notes 103–106 (describing responsibilities).

²⁶⁵ Alternatively, some concerns may be easier to monitor and raise than others. For example, the concern of inadequate legal authorities is a question of law that requires less factual development than inadequate enforcement. The resources available to petitioners may also contribute to the variability we observed.

²⁶⁶ This information gap is also relevant to the need for substantive metrics, described in the next section.

²⁶⁷ The CWA requires permit holders to provide monthly Discharge Monitoring Reports (DMRs), which are publicly available.

²⁶⁸ See *EIP Letter*, *supra* note 150, at 2 (describing inconsistent treatment of petitions in regions 5 and 7).

²⁶⁹ For example, the efficacy of the 2001 Louisiana petition, described *supra* text accompanying notes 215–221, appears to be disputed. See *OIG Report*, *supra* note 27, at 45 (discussing flaws in

pervasive: The GAO and OIG have continually found inconsistencies in objectives, measures of performance, and results produced in the cooperative federalism approach to environmental regulation.²⁷⁰

Second, one concern about citizen-initiated processes is that they can distract agencies from more pressing priorities. One way to offset this concern would be to put meaningful and transparent metrics in place. If interested persons had access to clear indicators of state and EPA performance, they could direct their efforts more efficiently and, possibly, more effectively.

With respect to developing substantive metrics more generally, we acknowledge that this is easier said than done.²⁷¹ Indeed, it appears that the OIG and EPA agree that, to the extent metrics exist for EPA oversight of state programs, those metrics are both poorly applied and applied to poorly chosen data.²⁷² But our study only highlights the point: problems with substantive metrics have serious ramifications for the ongoing legitimacy of the cooperative federalism approach to environmental regulation.

Finally, these needs for further developments and research underscore broader issues not just for environmental law, but for administrative law generally. To the extent the agency here constructed its own intrinsic legitimacy, what are the boundaries of agencies' ability to do so?²⁷³ And within those boundaries — assuming we can delineate them — to what extent is it normatively desirable for agencies to do so? It is our hope that this Article provides both practical and theoretical perspectives from which to consider these questions.

Louisiana's program); *id.* at 69–70 (EPA response arguing significant changes were made in response to petition); *id.* at 71 (OIG reply criticizing program even after state completed recommended actions).

²⁷⁰ See generally *OIG Report*, *supra* note 27. For what is only a sampling of others, see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-422T, ENVIRONMENTAL PROTECTION AGENCY: MAJOR MANAGEMENT CHALLENGES (2011); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-1111R, ENVIRONMENTAL ENFORCEMENT: EPA NEEDS TO IMPROVE THE ACCURACY AND TRANSPARENCY OF MEASURES USED TO REPORT ON PROGRAM EFFECTIVENESS (2008).

²⁷¹ For an overview of the difficulties associated with determining regulatory performance, and suggestions for developing positive metrics, see STEINZOR & SHAPIRO, *supra* note 203, at 173–91.

²⁷² See *OIG Report*, *supra* note 27, at 14 (OIG describing inconsistencies in how State Review Framework metrics have been applied); *id.* at 22 (describing EPA's concerns about quality of underlying data used for OIG metrics). Consider the following statement by EPA:

Complete data and valid, meaningful measures are key to understanding state performance. Gaps in our current data make it difficult to develop measures that tell a complete story across all media and regulated sectors. Limited resources at both the state and federal levels make it more difficult to address these gaps. Measures based on the data that EPA does have may not focus on the right things.

Id. at 46. With respect to State Review Frameworks ("SRFs") generally, these may not provide the depth and consistency needed to evaluate programs over time. See Email from David A. Ludder, Esq., to author (Feb. 13, 2013, 16:01 EST) (on file with authors) (describing the SRFs as having limited value because they do not address all program requirements).

²⁷³ For example, agencies may not cure constitutionally flawed delegations by adopting limiting constructions. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 473 (2001). On the other hand, *Mead* teaches that agencies may influence the scope of judicial review at least somewhat via their choice of procedures. *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001); see also *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 707 (2011).

CONCLUSION

This Article contributes to both the theory and empirical assessment of the inside-out legitimacy of the administrative state. It begins with the hypothesis that many of the judicial legitimacy-forcing norms can be developed into metrics for assessing the intrinsic legitimacy of agency behavior. To demonstrate the metrics' usefulness, this study both offers a set of such metrics and applies them to an innovative citizen fire-alarm procedure that largely takes place informally inside the administrative arena, with little likelihood for judicial review. The results tell a promising story of agency legitimacy from the inside-out, holding lessons for governance, institutional design, and ultimately, the promotion of administrative law values, procedural justness, and fidelity to statute.