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Regulatory Police

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REGULATORY POLICE

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The front line for business regulation—Environmental Protection Agency (EPA) engineers, Consumer Financial Protection Bureau (CFPB) examiners, and Nuclear Regulatory Commission (NRC) inspectors, among others—guard against toxic air, financial ruin, and deadly explosions. Like police officers patrolling the streets for crime, this federal regulatory front line decides when and how to enforce the law. Yet whereas scholars devote considerable attention to the role of police officers in criminal law enforcement, they have paid limited attention to their civil law counterparts, regulatory police. This Article is the first to chronicle the statutory rise of regulatory police and to situate them empirically at the core of modern administrative power. Since the Civil War, often in response to crises, the largest federal regulators have steadily accrued authority to collect documents remotely and enter private space without any suspicion of wrongdoing. Those exercising this monitoring authority within agencies administer the law at least as much as the groups that are the focus of legal scholarship: enforcement lawyers, administrative law judges, and rule writers. Regulatory police wield sanctions, influence rulemaking, and create quasi-common law. Moreover, they offer a better fit than lawyers for the modern era of "collaborative governance" and compliance, because their principal function—information collection—is less adversarial. Yet unlike lawsuits and rulemaking, monitoring-based decisions are largely unobservable by the public, often unreviewable by courts, and explicitly excluded by the Administrative Procedures Act (APA). The regulatory police function can thus be more easily ramped up or deconstructed by the President, interest groups, and agency directors. A better understanding of regulatory police—and their relationship with agency lawyers—is vital to designing democratic accountability not only during times of political transition, but as long as they remain a central pillar of the administrative state.

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INTRODUCTION

Upton Sinclair's 1906 novel *The Jungle* provoked public outcry by graphically exposing American meatpacking industry health violations such as vermin infestations.[1] Lawmakers swiftly passed the Meat Inspection Act, which charged the U.S. Department of Agriculture (USDA) with inspecting facilities nationwide.[2] After the subprime mortgage crisis helped push the economy to the edge of a cliff in 2008, a new agency was created, the CFPB, with the first mandate to routinely examine mortgage servicers and payday lenders.[3] When the Deepwater Horizon oil rig exploded and sank off the Gulf coast in 2010, arguably the "worst environmental disaster in U.S. history,"[4] Congress dissolved the responsible agency, created three in its place, and has since doubled the number of offshore energy inspectors.[5]

These incidents expanded administrative agencies' authority not only to litigate, but also to monitor. Monitoring authority enables regulators to regularly collect non-public information from firms without suspicion of wrongdoing. Under the Bush and Obama administrations alone, in addition to the subprime mortgage crisis and Deepwater oil spill, public backlash prompted monitor-enhancing legislation to keep lead out of children's toys;[6] prevent salmonella deaths from tainted peanut butter, ice cream, and other packaged foods;[7] and reduce prescription drug price manipulation, among other goals.[8] Whereas the literature has paid considerable attention to administrative rulemaking and adjudication, it has left the story of the rise of regulatory monitoring largely untold.[9]

Some agencies describe monitoring as their "backbone"[10] or "core,"[11] and it is surely not lost

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[1] *See* Roger Roots, *A Muckraker's Aftermath: The Jungle of Meat-Packing Regulation After a Century*, 27 WM. MITCHELL L. REV. 2413, 2413 (2001).

[2] Meat Inspection Act, Pub. L. No. 59-242, 34 Stat. 1260 (1907).

[3] Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5321, 5322(a)(2), 5491(a) (2012).

[4] *See* David M. Uhlmann, *After the Spill Is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law*, 109 MICH. L. REV. 1413, 1413 (2011).

[5] NAT'L COMMISSION ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 28-30, 78-79 (2011) [hereinafter DEEPWATER REPORT]; U.S. DEP'T OF THE INTERIOR, BUDGET JUSTIFICATIONS & PERFORMANCE INFO. FISCAL YEAR 2017, BUREAU OF SAFETY & ENVTL. ENFORCEMENT 55-56 (2017).

[6] Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016 (codified in scattered sections of 15 U.S.C (2006)) (expanding inspections).

[7] FDA Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (2011) (codified in scattered sections of the U.S.C.).

[8] *See infra* Part I.

[9] The literature also has provided broad accounts of administrative surveillance aimed at private individuals for other purposes. *See, e.g.*, Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN L. REV. 1039 (2016). It has also covered court-ordered monitoring. *See, e.g.*, Veronica Root, *The Monitor-Client Relationship*, 100 VA. L. REV. 523, 531–33 (2014).

[10] Guy Hayes, *A Day in the Life of an Inspector*, BUREAU OF SAFETY & ENVTL. ENFORCEMENT, https://www.bsee.gov/newsroom/feature-stories/a-day-in-the-life-of-an-inspector (last visited Mar. 29, 2017).

on administrative observers that it is a meaningful part of what agencies *do*.[12] Less obvious is why the responsible bureaucrats—some of whom wear hard hats and goggles to inspect dangerous machinery, search for "black rot, white rot, yellow rot" in food manufacturing plants,[13] or pore through accounting ledgers—merit the kind of sustained *legal* attention given to those writing rules and litigating cases.

This Article's primary goal is to sketch regulatory police's place in the federal regulatory architecture. It examines their statutory rise and workforce size at all large federal regulators.[14] By drawing on employee manuals, agency annual reports, Congressional budget requests, job postings, and interviews, it also begins to piece together the enforcement role that regulatory police play, and how that role relates to agency functions occupied by lawyers.[15] In short, it situates regulatory police at the center of administrative power.

Just as it would be incomplete to analyze criminal law enforcement without distinguishing police officers from prosecutors, this Article shows that a part of administrative law is missing without distinguishing regulatory police from agency enforcement lawyers. Regulatory police do not wield guns, but they stand between life and death through safety inspections of airplanes, nuclear facilities, large trucks, and workplaces. They also protect against non-physical threats, such as by patrolling financial institutions for conduct that could cost families their homes. As many agencies' front line, they decide which cases reach trial. But, like police officers, regulatory police do not depend on litigators for impact. They independently exact punishment ranging from multimillion-dollar bank refunds[16] to oil rig operational shut-downs.[17] Furthermore,

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[11] U.S. DEP'T OF AGRIC., FOOD SAFETY & INSPECTION SERV. 15 (2013) [hereinafter USDA INSPECTION].

[12] *Cf.* Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133, 142 (2014) ("Topics such as…inspections and monitoring…deserve more attention than we can give here."); William H. Simon, THE ORGANIZATIONAL PREMISES OF ADMINISTRATIVE LAW, LAW & CONTEMP. PROBS., 2015, at 61, 70 (describing both main administrative law paradigms after World War II as relying on monitoring by agencies); *see also* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 47 (6th ed. 2007) (acknowledging that most agency activity lies outside of lawyerly roles); Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. 369, 396 (2016) ("[T]he two modalities [of rulemaking and adjudication] are not so much opposites as they are endpoints on a continuum, and [] a great deal of agency activity occurs in the space between them.").

[13] FDA, U.S. DEP'T OF HEALTH & HUMAN SERVICES, NO. PB2013-110462, FOOD CODE 468 (2013).

[14] While the examples throughout the Article discuss a variety of regulators, the empirical analysis and statutory history focus on all "large" federal regulators, which amount to nineteen. The U.S. Office of Personnel Management (OPM) classifies any agency with more than 1,000 employees as "Large." To identify the set of all large regulators, I located every agency with over 1,000 employees and a mission focused on regulating businesses in OPM's "Cabinet-Level" agencies and "Large Independent Agencies." *See FedScope, Employment Cubes*, U.S. OFF. OF PERS. MGMT., https://www.fedscope.opm.gov/employment.asp. (last visited April 14, 2017) (on file with the author). For a list of the agencies, see Appendix A.

[15] Publicly available documents were sufficient for most of agencies' roles and responsibilities, but to fill in some gaps and to improve accuracy at least one interview was conducted with a current or former employee at each of the agencies or departments studied. Interviews were semi-structured with anonymous interviewees located through chain-referral. For a similar interview methodology and review of the literature discussing limitations of such an approach, see, e.g., John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1551 (2017).

[16] *See infra* Part III.B.

[17] BUREAU OF SAFETY & ENVTL. ENFORCEMENT, ANNUAL REPORT 2015 23-24,

regulatory police have a forceful informal sanction: the ability to ramp up inspection frequency and intensity, which itself inflicts pain and costs.[18] With monitoring, as with policing, sometimes the process is the punishment.[19]

The analogy to police officers is illustrative because both groups have a patrol function at their core, and exercise front-line law enforcement. But the distinction is porous, since regulatory police may identify criminal wrongdoing, such as embezzlement, leading to imprisonment.[20] Moreover, the comparison structurally understates regulatory police authority in three main ways. First, police have more constitutional constraints placed on them. Whereas police officers must generally have probable cause or a search warrant to enter private space, The Supreme Court has held that the Fourth Amendment constrains regulatory police activity far less.[21] Unlike police officers, for instance, EPA inspectors can enter private spaces without any suspicion of wrongdoing to make observations or collect samples.[22]

Second, the power of regulatory police in many agencies extends further along the spectrum of enforcement authority. According to one prominent account, "the most significant design flaw in the federal criminal system" is prosecutors' ability to enforce and adjudicate laws.[23] In many agencies, regulatory police combine prosecutors' enforcement and adjudication authority with the patrol function of police officers and investigatory function of detectives: They not only identify wrongdoers, but also investigate, submit charges, and ultimately determine the fate of regulated entities.[24]

Third, regulatory police may have greater influence on policy making. Police officers have tremendous ability to arrest people in light of the breadth of potential violations on the books. Those violations are, however, part of a detailed code. Some regulatory police can go further by requesting internal business changes that advance principles, even if the original behavior was not clearly illegal—such as when a CFPB examiner believes a bank's internal review process for loan files is likely to miss future violations.[25] In terms of rulemaking, regulatory police post their employee manuals online, which businesses study intently to build compliance systems. Those

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https://www.bsee.gov/sites/bsee_prod.opengov.ibmcloud.com/files/bsee_final_annual_report_2015.pdf (last visited Mar. 31, 2017) [hereinafter BSEE ANNUAL REPORT].

[18] *See infra* Part III.B.1.

[19] On process punishment in criminal law, see, e.g., MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (2d ed. 1979).

[20] *See, e.g.,* National Banking Act of 1864, Pub. L. No. 103-325, § 55, 13 Stat. 99 (1864) (charging bank examiners with identifying embezzlement and stating that deceiving a bank examiner is punishable by imprisonment).

[21] Marshall v. Barlow's, Inc., 436 U.S. 307, 313-14, 321 (1978); City of L.A. v. Patel, 135 S. Ct. 2443, 2452 (2015) ("Search regimes where no warrant is ever required may be reasonable where 'special needs . . . make the warrant and probable-cause requirement impracticable' and where the 'primary purpose' of the searches is '[d]istinguishable from the general interest in crime control.'").

[22] National-Standard Co. v. Adamkus, 881 F.2d 352 (7th Cir. 1989) (holding that EPA inspectors can conduct warrantless searches).

[23] *See* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 870 (2009).

[24] *See infra* Part III.B.1.

[25] *See infra* Part III.B.1.

manuals thereby shape industry behavior without any notice and comment process.[26] Additionally, post-visit examination and inspection reports have become a meaningful body of common law, used by businesses to make their case in subsequent inspections.[27]

A key backstory to regulatory police's current status is the advent in recent decades of "new governance" models emphasizing collaborative regulation.[28] As I argue below, the emphasis on collaborative regulation syncs better with inspectors and examiners—who "work alongside, not against industry"[29]—than with litigators, who rely more on adversarial legal authority proceedings. Current governance models also emphasize "continuous" information flows so that rules respond rapidly to firms' conduct,[30] inducing greater reliance on regulatory police's real-time data. Moreover, as courts, Congress, and the President have increasingly constrained agency rule writing and litigation,[31] agencies would be expected to rely more on less-constrained monitoring activities to exercise authority.

This Article's conceptualization of regulatory police places them at the intersection of leading public law conversations. One strand of scholarship has stressed the importance of the structural design of public institutions in incentivizing optimal acquisition of information—the "lifeblood of effective governance."[32] A major reason Congress created agencies was to undertake "specialized information-gathering" ill-suited for courts.[33] This literature has also analyzed agencies' external strategies for acquiring information—but focusing on agencies as *unitary* entities.[34]

Another related strand of scholarship argues that standard depictions of administrative law "are incomplete because agencies are typically treated as unitary entities."[35] Congress and

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[26] Courts have not, however, treated manuals as substantive rules having the force and effect of law in adjudications. United States v. Bioclinical Sys., Inc., 666 F. Supp. 82, 84 (D. Md. 1987).

[27] *See infra* Part III.C.2.

[28] *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 350-51 (2004).

[29] *See* Hayes, *supra* note 10.

[30] *See* Freeman, *supra* note 28, at 22, 28. Although the literature leaves little doubt that monitoring is an important part of newer governance models, there is a lack of sustained attention to the topic, and relevant discussions focus on *how* an agency regulates, not on *who* within the agency regulates.

[31] *See infra* Part II.A.3.

[32] Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1422 (2011).

[33] *See* Cass R. Sunstein & Richard B. Stewart, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1322 (1982).

[34] *See, e.g.*, Cary Coglianese et al., *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 281-85 (2004) ("In this Article, we analyze regulators' gathering of information from firms as a strategic game."). Coglianese et al. do mention regulatory police roles only in passing, as they examine a broader set of information collection mechanisms, such as phone conversations, for a broader array of purposes, such as one-time rulemaking studies. *See id.* at 288-289, 305.

[35] Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011) ("Standard questions in the theory of administrative law involve the allocation of power among legislatures, courts, the President, and various types of agencies."); *see also* Jerry L. Mashaw, *Federal Administration and*

agency leaders allocate clout among various sub-agency offices, divisions, and decision makers.[36] These internal allocations "point[] the way toward a superior understanding of administrative law."[37] Early studies provided rich insights into agency organizational design, including of inspectors,[38] "but the bulk of this work was done decades ago, largely in the context of administrative adjudication."[39] Since then, agencies' regulatory approaches have shifted significantly, and adjudication has declined.[40] Consequently, scholars have recently revived the project of "cracking open the black box of agencies to peer inside"[41] the organizational structure of both rulemaking[42] and enforcement.[43] Others have looked more broadly at how to improve front-line decision makers, a category that includes inspectors and administrative law judges.[44]

Despite the lack of sustained attention to regulatory police or articulation of their distinct role in the modern administrative state,[45] these strands of literature indirectly lay the foundations for understanding how regulatory police are crucial to administrative law. For most agencies, regulatory police are an organizationally distinct group at the heart of the policymaking and

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Administrative Law in the Gilded Age, 119 YALE L.J. 1362, 1470 (2010) (noting recent growing attention to "internal administrative law" after long being "ignored by modern [] scholarship.").

[36] *See* Magill & Vermeule, *supra* note 35, at 1032.

[37] *See id*.

[38] *See, e.g.*, John Braithwaite et al., *An Enforcement Taxonomy of Regulatory Agencies*, 9 LAW & POL'Y 323, 324 (1987); EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 73 (1982). This Article draws on those early studies. However, that literature focuses on (a) mostly inspectors, (b) a different set of agencies, including state and local but excluding trade and finance, and (c) most importantly, agencies' overall regulatory approach rather than a sustained focus on regulatory police. *See, e.g.*, *id.* at 7 ("The focus of this book is on the social dimension of unreasonableness: the experience of being subjected to inefficient regulatory requirements."). The literature thus lacks any systematic study of regulatory police as a distinct group across the largest federal agencies, leaving open the question of regulatory police's origins and power in the modern administrative state.

[39] *See* Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 429-30 (2015).

[40] *See, e.g.*, *id*; *infra* Part II.

[41] *See* Magill & Vermeule, *supra* note 35, at 1035.

[42] *See* Nou, *supra* note 39. Professor Nou does not mention regulatory police, and instead focuses on organizational mechanisms that give agency leaders control over information vital for decision making, especially related to rulemaking. *See id.* at 429-31.

[43] Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1129 (2016) ("As a matter of administrative law doctrine []enforcement discretion plays a lesser role."); Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. (forthcoming) ("It is difficult to overstate the importance of the rulemaking/adjudication distinction for administrative law.").

[44] *See* Daniel E. Ho, *Does Peer Review Work? An Experiment of Experimentalism*, 69 STAN. L. REV. 1 (2017). Professor Ho underscores regulatory police's importance by closely studying inspectors and emphasizing the "extensive discretion" of "frontline government officials carry[ing] out the law." *See id.* at 5. His focus is on a broader function—front-line decision making, which is exercised by other groups such as lawyers and judges—and a broader set of agencies, including local agencies that adjudicate *individuals*. *See id.* Nonetheless, his work produces valuable empirical and policy insights into regulatory police. *See infra* Part IV.A. For earlier valuable empirical studies of inspectors, see, e.g., Braithwaite et al., *supra* note 38; Bardach & Kagan, *supra* note 38.

[45] When broad administrative law conversations mention monitoring, it is often of agencies, not firms. *See* Nou, *supra* note 39, at 423 (noting "administrative law's overwhelming focus on the influence of agencies' external monitors").

enforcement black boxes.[46] They are the gatekeepers for information, and thus for the "lifeblood" of agencies.[47]

As such, regulatory police are relevant to administrative law's central preoccupations. The overriding purpose of administrative law is the accountability of delegated authority. The 1946 APA enables courts and the public to check agencies.[48] Yet regulatory police operate in the "soft administrative law"[49] space largely exempted from the APA.[50] Since regulatory police actions are less reviewable than those of more formal legal actors, and the technical process of collecting information remains out of sight between crises, the rise of regulatory police potentially insulates agencies from public accountability.

Finally, scholars have debated how the law should address external stakeholders competing for influence over agencies. The literature identifies mechanisms, such as cost-benefit analysis, that alter the President's ability to control a defiant bureaucracy.[51] It also explores organizational design features that insulate agencies from industry capture.[52] Regulatory police add another dimension to these discussions. For instance, in 1961, six weeks into a new job as a front-line Food and Drug Administration (FDA) examiner, Dr. Frances Kelsey received what her supervisors described as routine papers submitted for a new sleep aid used off-label for morning sickness.[53] Despite intense pressure from the drug's manufacturer, she withheld approval by repeatedly demanding more rigorous clinical evidence than the FDA typically required.[54] It was ultimately discovered that in Germany alone the drug, thalidomide, had caused an estimated 10,000 incidences of deaths or shrunken or missing limbs in babies born to mothers who had taken the drug.[55] Mass harm was averted in the U.S. because a front-line examiner stood firm in exercising her agency's statutory power.[56]

As powerful actors, regulatory police have in recent decades served as an important lever for

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[46] *See infra* Part I.A.

[47] *See infra* Part I.B. & III.

[48] It does so by, for example, involving the public in notice and comment rulemaking. 5 U.S.C. § 553 (2012). It also specifies court review of final agency action. 5 U.S.C. § 702 (2012).

[49] Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 HARV. L. REV. 1991, 2044 (2014).

[50] 5 U.S.C. § 554(a) (2006) (omitting "proceedings in which decisions rest solely on inspections.").

[51] *See, e.g.*, Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Michael A. Livermore, *Cost-Benefit Analysis and Agency Independence*, 81 U. CHI. L. REV. 609 (2014); Kevin Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006).

[52] *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010).

[53] James L. Zelenay, Jr., *The Prescription Drug User Fee Act: Is a Faster Food and Drug Administration Always a Better Food and Drug Administration?*, 60 FOOD & DRUG L.J. 261, 265 (2005).

[54] *See* S. REP. NO. 1744 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2884, 2906-07 (detailing over 46 contacts by the drug's manufacturer attempting to "expedite clearance," including one with Dr. Kelsey's immediate supervisor calling her letter "libelous" and requesting that pressure be applied to her).

[55] *See* Frederick Dove, *What's Happened to Thalidomide Babies?*, BBC (Nov. 3, 2011), http://www.bbc.com/news/magazine-15536544.

[56] *See infra* Part I.B.

any presidential ramp-up or drop off in regulation.[57] Most recently, as part of a planned "deconstruction of the administrative state,"[58] President Trump has taken steps to make the FDA drug approval process "much faster,"[59] and his appointees have moved to decrease federal inspections of polluting factories, examinations of banks, and monitoring of offshore oil platforms.[60] The ease with which such changes can be made varies by agency. At the FDA today, external influence faces more structural constraints than in the 1950s. Following the thalidomide incident, Congress codified the type of higher reporting requirements Dr. Kelsey had sought.[61] Streamlining the drug approval process would now largely depend on changes to the law rather than convincing a front-line examiner. This opens the door for court, legislative, and public involvement. By contrast, in agencies such as the EPA and the Federal Reserve, legal rules and organizational structure leave regulatory police more susceptible to discretionary change.[62]

The analysis below maps out this underappreciated administrative law of monitoring.[63] An understanding of regulatory police and their surrounding legal framework is vital to improving the institutional design of agencies. Given that monitoring makes up so much of agency activity, updating the legal framework for the modern era of monitoring would contribute to the important project of "making administrative law more administrative."[64] Most significantly, a team paradigm may be needed of the administrative state, with regulatory lawyers and regulatory police as co-equal branches of administration.

The discussion is structured as follows. Part I provides an overview of regulatory police by defining their distinct role in agencies and surveying their statutory emergence. Part II articulates the changes in governance and markets that have organizationally favored regulatory police more than rule writers and litigators. Part III begins to map out major organizational design choices. It provides the first quantitative and qualitative evidence indicating regulatory police's presence and influence across the largest independent and Cabinet-level regulators. Part IV considers how

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[57] *See* Holly Doremus, *Data Gaps in Natural Resource Management: Sniffing for Leaks Along the Information Pipeline*, 83 IND. L.J. 407, 427-29 (2008) (identifying "information extraction" programs as early cuts during environmental deregulation); OMB WATCH, THE OBAMA APPROACH TO PUBLIC PROTECTION: ENFORCEMENT 4 (2010), http://www.foreffectivegov.org/sites/default/files/regs/obamamidtermenforcementreport.pdf (citing an increase in regulatory police activity under President Obama).

[58] Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 2 (2017) ("President Trump's administration has proclaimed the "deconstruction of the administrative state" to be one of its main objectives.").

[59] *See, e.g.*, David Crow, *Trump Drugs Pledge Sparks Sector Rally: Pharmaceuticals*, FIN. TIMES, Feb. 1, 2017, at 12 (quoting President Trump).

[60] Eric Lipton & Danielle Ivory, *E.P.A.'s Polluter Playbook Takes a Turn to Leniency*, Dec. 11, 2017, at A1 (citing an EPA deputy administrator as stating that the agency "would back off some inspection" activity); Ted Mann, *Drilling Plan Eases Rules*, WALL ST. J., Dec. 25, 2017 at A2.

[61] Sam Peltzman, *An Evaluation of Consumer Protection Legislation: The 1962 Drug Amendments*, 81 J. POLIT. ECON. 1049, 1049 (1973).

[62] *See infra* Part IV.A.

[63] Administrative law here is meant in its broader sense. *See* Magill & Vermeule, *supra* note 35, at 1056 ("Judicial review is but one corner of administrative law, which also involves statutes, executive orders, and other legal instruments that structure the agencies and the procedures they use.").

[64] Edward Rubin, *It's Time To Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 136 (2003).

future agency architects might improve the regulatory police framework for more optimal governance. Designers could improve many agencies through process transparency, mandated regulatory police minimums, and intra-agency coordination among lawyers and regulatory police. Judicial oversight is less promising but could still in some contexts benefit from viewing regulatory police as what they have become: dominant state actors vital to the well-being of firms and citizens.

I. THE STATUTORY RISE OF MONITORING

Unlike other actors in the typical administrative narrative, such as the rule writer and enforcement lawyer, regulatory police have a less well documented core power. Accordingly, this Part begins by providing a definition and then offers a brief historical overview of the accumulation of monitoring statutory authority across the largest regulators.

A. Regulatory Police as Distinct Actors

This Article defines regulatory police as those whose core power is to regularly obtain non-public information from businesses outside of the legal investigatory process. Monitoring can be broken down into two main types: visitation and reporting. *Visitation* authority allows regulators to physically enter private business space to observe or collect information. *Reporting* requires firms to remotely transmit information, such as business records, which are then received by regulatory police within the agency.[65]

This seemingly straightforward authority does not easily fit into common descriptions of the administrative state. Legal treatments of administrative agencies typically break down their activities into rulemaking and enforcement, or sometimes into ex ante rulemaking and ex post enforcement.[66] Regulatory police are arguably ex ante because they aim to "secure compliance before violations occur."[67] But securing compliance is a very different function than writing rules.

That leaves ex post enforcement as a more natural place for monitoring in the standard depiction. But as the Supreme Court explained, "Our cases have always understood 'visitation' as this right to oversee corporate affairs, quite separate from the power to enforce the law."[68] When in its first year the CFPB broke with tradition by sending enforcement lawyers along on its early regular on-site visits, called bank exams, the practice was met with "relentless opposition

[65] These two categories are distinct from agencies monitoring publicly available data, which has been called "ambient" monitoring. *See* Eric Biber, *The Problem of Environmental Monitoring*, 83 U. COLO. L. REV. 1, 8 (2011) (developing "the distinction between monitoring to determine whether private parties are in compliance with the law and ambient monitoring of environmental conditions").

[66] *See, e.g.*, James C. Cooper, *The Costs of Regulatory Redundancy: Consumer Protection Oversight of Online Travel Agents and the Advantages of Sole FTC Jurisdiction*, 17 N.C. J. L. & TECH. 179, 204 (2015).

[67] Heidi Mandanis Schooner, *Consuming Debt: Structuring the Federal Response to Abuses in Consumer Credit*, 18 LOY. CONSUMER L. REV. 43, 49 (2005).

[68] Cuomo v. Clearing House Ass'n., *LLC*, 557 U.S. 519, 526 (2009).

from bankers."[69] The agency ultimately ended the practice, with one former CFPB official explaining, "The bureau learned that the nature and logistics of the two jobs are very different . . ."[70]

Regulatory police thus fall neatly into neither ex ante rulemaking nor ex post enforcement. The U.S. Office of Personnel Management recognizes regulatory police's distinct role, classifying attorneys in the "Legal and Kindred" category. It lists the titles used for most regulatory police elsewhere: Inspectors, Auditors, and Examiners.[71] Legal scholars' frequent omission of regulatory police reflects the common view that this group is doing something apart from "Legal and Kindred" actors.[72]

Despite the confusion by scholars and government leaders about the roles, it is important to recognize that internal agency groups can be distinguished by their core legal powers. Litigators hold the keys to the courts. Rule writers author text enacted as law. Regulatory police exercise statutory authority to peer inside firms to assess behavior.

B. The Statutory Evolution of Monitoring Authority

The modern monitoring framework is the product of numerous ad hoc statutes that give different agencies very different monitoring powers within visitation and reporting. Today's large business regulators[73] can be historically classified into one of three categories: strong monitoring authority from the outset, gradual accumulation of monitoring authority, and limited monitoring power.

1. Original Monitors: Banking, Transportation, and Utilities

Although historical treatments of the administrative state typically begin with federal control of the railroads of the 1880s,[74] the first of today's large business regulators was born in the Civil War, at a time when states implemented most inspection regimes.[75] In 1864, recognizing that a

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[69] Rachel Witkowski, *CFPB Pulls Enforcement Attorneys from Its Exams*, AM. BANKER (Oct. 9, 2013, 8:33 PM), https://www.americanbanker.com/news/cfpb-pulls-enforcement-attorneys-from-its-exams.

[70] *See* Witkowski, *supra* note 69.

[71] *FedScope, Employment Cubes*, U.S. OFF. OF PERS. MGMT., https://www.fedscope.opm.gov/employment.asp. (last visited April 14, 2017) (on file with the author).

[72] *See infra* Part II.B.

[73] For a description of how the agencies were chosen, *see supra* note 14.

[74] *See, e.g.*, Jed Handelsman Shugerman, *The Dependent Origins of Independent Agencies: The Interstate Commerce Commission, the Tenure of Office Act, and the Rise of Modern Campaign Finance*, 31 J.L. & POL. 139 (2015); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1671 (1975).

[75] *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 88-89, 205-206 (1996); ROSS M. ROBERTSON, THE COMPTROLLER AND BANK SUPERVISION 25-26 (1995) (describing state examination of banks prior to the Civil War). Monitoring has long been fundamental to federal administration. Jennifer L. Mascott, *Who Are "Officers of the United States"?* 70 STAN. L. REV. (forthcoming) (noting inspections of cargo ships and warehouses from the beginning of the United States); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1197 (1986) (concluding that businesses were

successful military campaign required a stable financial system, President Lincoln declared that a “national system will create a reliable and permanent influence in support of national credit and protect the people against losses in the use of paper money.”[76] Later that year, he signed the National Bank Act, creating the Office of the Comptroller of the Currency (OCC).[77] The OCC’s main mission was to ensure compliance with federal banking laws,[78] which sought to ensure a bank did not fail and thereby spark bank runs that could collapse the economy.[79]

To pursue those goals, Congress structured the OCC around monitoring. The OCC could not litigate. Although the agency could write rules,[80] it rarely used that authority.[81] Its chief sanction was revoking a bank’s national charter,[82] a seldom-used option given the OCC’s need to *prevent* bank closings.[83] OCC examiners still had the effect, when they appeared unannounced, of “terrorizing” lower-level bank cashiers.[84] But as a statutory matter, the agency was built to monitor, not to litigate.

Initially, the OCC focused on reviewing quarterly bank reports and monthly statements.[85] It soon became clear that this enabled bankers to “window dress” reports.[86] Congress responded by requiring a minimum of two surprise annual examinations of each national bank.[87] The OCC already had the ability to conduct examinations in its originating statute.[88] As a former bank teller recounted, an OCC examiner “One day . . . inserted an official-looking card between the bars of the cashier’s window. Five minutes later the bank force was dancing at the beck and call of a national bank examiner.”[89] Examiners had the authority to enter any room, open any drawer, and look at any document.[90]

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rarely inspected prior to the 1880s).

[76] *Lincoln and the Founding of the National Banking System*, OFF. OF THE COMPTROLLER OF THE CURRENCY, https://www.occ.gov/about/what-we-do/history/lincoln-founding-national-banking-system.html (last visited Apr. 13, 2017).

[77] National Banking Act of 1864, Pub. L. No. 103-325, 13 Stat. 99 (1864); *see also* OCC, Bank Activities and Operations, 69 Fed. Reg. 1895 (2004).

[78] EUGENE N. WHITE, LESSONS FROM EXAMINATION AND SUPERVISION IN THE UNITED STATES, 1863-2008, IN FINANCIAL MARKET REGULATION IN THE WAKE OF FINANCIAL CRISES (2009) [hereinafter WHITE, BANK HISTORY].

[79] *See id.*

[80] National Banking Act of 1864, Pub. L. No. 103-325, § 24, 13 Stat. 99 (1864).

[81] *See* WHITE, BANK HISTORY, *supra* note 78, at 21.

[82] National Banking Act of 1864, Pub. L. No. 103-325, 13 Stat. 99 (1864). Such decisions triggered formal procedures, such as appeals and hearings. *See id.*

[83] Eugene N. White, *Lessons from American Bank Supervision from the Nineteenth Century to the Great Depression*, *in* 17 MACROPRUDENTIAL REGULATORY POLICIES: THE NEW ROAD TO FINANCIAL STABILITY? 48 (Stijn Claessens et al. eds., 2011).

[84] *See* John D. Hawke, Jr., Credit Rating and Scoring Models (May 17, 2004), https://www.occ.gov/static/news-issuances/speeches/2004/pub-speech-2004-36.pdf (“Sometimes it seemed as though terrorizing bankers was almost a requirement of the examiner’s job.”).

[85] National Banking Act of 1864, Pub. L. No. 103-325, § 34, 13 Stat. 99 (1864).

[86] *See* WHITE, BANK HISTORY, *supra* note 78, at 21.

[87] *See id*.

[88] National Banking Act of 1864, Pub. L. No. 103-325, § 54, 13 Stat. 99 (1864).

[89] O. HENRY, A CALL LOAN (1902); Hawke, *supra* note 84 (confirming O. Henry’s accounts of OCC bank examiners).

[90] WHITE, BANK HISTORY, *supra* note 78, at 21.

Bank examinations advanced President Lincoln's vision by reducing information asymmetries. Private parties who entrust their money to banks cannot practically monitor them to make sure they are not, for example, investing deposits in high-risk ventures. By collecting information and looking for problematic behavior, the OCC reduces those information asymmetries. At a basic level, monitoring thus results from (1) a company's capacity to cause harm; (2) a customer's lack of trust that the company will do as expected; and (3) an outsider's inability to detect misbehavior.

Although the basic examination tool remained largely unchanged until recently,[91] the institutional and legal framework has swelled steadily. The 1907 financial panic led Congress to create the Federal Reserve,[92] which could conduct examinations of national banks—like the OCC—and of state banks that chose to become "members."[93] After depositor panics sparked bank runs that nearly collapsed the banking system and the stock market crashed in the 1920s, more agencies were added, including the Federal Deposit Insurance Corporation (FDIC) to insure bank deposits,[94] and the SEC "to protect [] the national banking system and . . . investors."[95]

This early visitorial authority can also be seen in the infrastructure services industries of transportation, energy, and telecommunications agencies. The largest modern transportation agency, the Federal Aviation Administration (FAA), in 1932 built an early model for its modern safety program.[96] The country was divided into six "Lighthouse districts," within which a single "patrol pilot" would fly around, able to enter any airplane, open any airport door, or review any flight-related document.[97] Like bank examiners, patrol pilots could sanction by recommending

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[91] *See* PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE (2015). Minor changes were made, such as expanding the scope of what regulators could examine to include potential future earnings, management quality, and the local community's needs. Banking Act of 1935, Pub. L. No. 74-305, 49 Stat. 684 (1935).

[92] Federal Reserve Act, Pub. L. No. 63-43, 38 Stat. 251 (1913).

[93] *Id*.

[94] Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162 (1933). To become insured, banks had to accept federal examinations. *Id*. At first, the FDIC required approval from other banking regulators to examine, but in 1950 received broader discretion to conduct examinations of its member banks. WHITE, BANK HISTORY, *supra* note 78, at 26. While only some state banks had joined the Federal Reserve, "virtually all banks" signed up for FDIC oversight, thereby greatly expanding monitoring's reach. *Id.*

[95] The Securities Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (1934). The SEC had visitation comparable to that of banking regulators, but over securities exchanges, credit rating organizations and securities brokers and dealers. The SEC could require "reasonable periodic, special, or other examinations" of "accounts, correspondence, memoranda, papers, books, and other records []at any time . . .". The Securities Act of 1934, Pub. L. No. 73-291, § 17a, 48 Stat. 881 (1934). Credit unions were also subject to federal examination. Federal Credit Union Act, Pub L. No. 86-354, 48 Stat. 1216 (1934). Authority was assumed in 1970 by the National Credit Union Administration (NCUA). *See* NCUA, *A Brief History of Credit Unions*, https://www.ncua.gov/About/Pages/history.aspx.

[96] The FAA describes this program today as its "little-seen but still important . . . flight inspection program." Scott Thompson, *Flight Inspection History*, FED. AVIATION ADMIN. (May 2008), https://www.faa.gov/air_traffic/flight_info/avn/flightinspection/fihistory. Federal regulators conducted inspections of steamboats decades before. Jonathan Burke, *Bursting Boilers and the Federal Power*, 7 TECH. & CULTURE 1, 1 (1966).

[97] SCOTT A. THOMPSON, FLIGHT CHECK!: THE STORY OF FAA FLIGHT INSPECTION, 21 (1990). The modern FAA

the "suspension and revocation" of licenses.[98] Similarly extensive visitation can be found in the origins of today's largest agencies overseeing energy and telecommunications, the Federal Regulatory Energy Commission (FERC)[99] and Federal Communications Commission (FCC).[100]

As these financial, transportation, telecommunications and energy industries have evolved, monitoring statutes have mostly kept pace. Congress updated monitoring to reach new financial organizations such as hedge funds, new products such as credit cards, and even a shadow banking system that had by some measures become larger than the traditional banking system.[101] The FAA today has visitorial and surveillance drone capabilities.[102] Regulators' initial oversight of hydroelectric dams has extended to other energy sources such as nuclear power.[103] The FCC,

originated in the Aeronatics Branch of the Department of Commerce. *Id.* That predecessor's authority originated in the Air Commerce Act of 1926. Air Commerce Act of 1926, Pub. L. No. 69-251, 44 Stat. 568 (1926). That Act gave the FAA's predecessor the power to conduct "periodic examinations of aircraft, [] airmen serving in connection with the aircraft as to their qualifications . . . [and] facilities." *Id.* at § 3(b)-(d). Nationwide inspections of airports began the next year. FED. AVIATION ADMIN., FAA HISTORICAL CHRONOLOGY, 1926-1996 https://www.faa.gov/about/media/b-chron.pdf (last visited Apr. 9, 2017).

[98] *See* Air Commerce Act of 1926, Pub. L. No. 69-251, §(3)(f), 44 Stat. 568 (1926).

[99] The predecessor of today's largest energy regulator, FERC, began in 1920 overseeing hydroelectric facilities. *See FERC Timeline*, FED. ENERGY REG. COMM'N, https://www.ferc.gov/students/ferc/timeline.asp (last visited Apr. 7, 2017). The commission's originating statute listed, as the first of its "General powers," the authority "to collect and record data concerning . . . the water-power industry." Federal Power Act of 1920, Pub. L. No. 66-280, § 4, 41 Stat. 1063 (1920). When Congress expanded the commission's authority in 1935 to include electricity, it also more explicitly authorized inspections for both areas. *See* Richard A. Rosan, *On the Fiftieth Anniversary of the Federal Energy Bar Association*, 17 ENERGY L.J. 1, 25 (1996).

[100] The FCC's 1934 originating statute grants authority to "inspect all transmitting apparatus . . ." Federal Communications Commission Act of 1934, Pub. L. No. 73-416, § 303(n), 48 Stat. 1064 (1934). The FCC assumed responsibilities and personnel previously of the Federal Radio Commission. *See id.* at § 603(a). For common carriers such as telephone companies, the Act provides that "The Commission shall examine into transactions entered into by any common carrier . . . and shall have access to and the right of inspection and examination of all accounts, records, and memoranda including all documents, papers, and correspondence now or hereafter existing . . ." Federal Communications Commission Act of 1934, Pub. L. No. 73-416, § 215(a), 48 Stat. 1064 (1934). This includes the submission of reports and inquiries into management. *Id.* § 218.

[101] For instance, some banks reorganized themselves by forming bank holding companies and thereby shielding new lines of business from examinations. WHITE, BANK HISTORY, *supra* note 78, at 28. Congress responded by extending Federal Reserve examinations to cover bank holding companies and subsidiaries. Bank Holding Company Act of 1956, Pub. L. No. 84-511, 70 Stat. 133 (1956); Banking Holding Company Act Amendments of 1970, Pub. L. No. 91-607, 84 Stat. 1760 (1970). Within the past few years, financial regulators also gained examination authority over hedge funds. *See* Dodd-Frank Act § 404. As banks offered more products, such as credit cards, Congress enacted more laws, such as the 1968 Truth-in-Lending Act, thus widening the scope of examination. The Truth in Lending Act, 15 U.S.C. §§ 1601-1667(f) (2012). Banking crises between the 1980s and 2000s forced more comprehensive disclosures in regulatory reports. *See* WHITE, BANK HISTORY, *supra* note 78, at 34. Even third-party service providers that banks use—such as Amazon, IBM, Google, or other technology firms—have come under monitoring authority. 12 USC 1464(d)(7), 1867(c)(1). The CFPB has gained visitorial authority over most of the shadow banking system. Dodd-Frank Act, 12 U.S.C. §§ 5321, 5322(a)(2) (2012); Steven L. Schwarcz, *Regulating Shadow Banking Inaugural Address for the Inaugural Symposium of the Review of Banking & Financial Law*, 31 REV. BANKING & FIN. L. 619, 620 (2012) (defining shadow banking and noting it had grown larger than traditional banking).

[102] 49 U.S.C. § 40103 (2012).

[103] Atomic Energy Act of 1946, Pub. L. No. 79-585, § 10(6)(c), 60 Stat. 755 (nuclear energy); 42 U.S.C. § 2201

by classifying wireless phone companies as common carriers, broadened its visitation authority originally intended for landline telephone companies.[104]

2. Gradual Monitors: Health, Safety, and the Environment

Another set of agencies has gained monitoring authority more incrementally. Those focused on protecting from physical harm, including environment regulators, most closely fit this development pattern. The earliest arose in pharmaceuticals. After twenty-two children died from tainted vaccines in 1902,[105] Congress authorized federal agents to "enter and inspect any establishment for the propagation and preparation of any virus, serum, toxin, [or] antitoxin."[106] Related visitorial statutes soon followed for meat and therapeutic drugs.[107] These powers were more limited than those of banking and transportation regulators,[108] since inspectors could not examine documents.[109]

A shift began in 1938 when scores of people died after ingesting a new elixir used to treat sore throats.[110] Had the company run tests, the poisonous properties would have been evident.[111] This prompted legislation requiring pharmaceutical companies to submit to the FDA information about drugs before any sale.[112] The FDA had a 60-day window after each submission,[113] during which it could intervene.[114] Examiners could also ask for more information, triggering another 60-day window.[115] But the legislation did not set a minimum threshold for the rigor of test data, nor did it require a drug company to gain approval. Approval happened automatically if the FDA examiner failed to respond in time—which happened regularly.[116] Also, the number of times the

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(2012); *see also* 15 U.S.C. § 717(g) (2012) (gas); 16 U.S.C. § 825(b) (2012) (electricity); 43 U.S.C. § 1348 (2012) (offshore oil and gas).

[104] *See* Pub. L. No. 104-104, 110 Stat. 5 (1996) (codified at 47 U.S.C. § 215(a)). Cable systems also came under FCC jurisdiction. *See* United States v. Southwestern Cable Co., 392 U.S. 157 (1968). Deregulation in these areas has not removed broad authority to extract information. *See* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1323 (1998). Internet providers also are subject to FCC monitoring, and had been classified as common carriers. *See* Open Internet Order, 80 Fed. Reg. 19737 (Apr. 13, 2015). That classification was removed in December of 2017. *See* FED. COMM. COMM'N, *Restoring Internet Freedom*, https://www.fcc.gov/restoring-internet-freedom (last visited Jan. 2, 2018).

[105] Sharon B. Jacobs, *Crises, Congress, and Cognitive Biases: A Critical Examination of Food and Drug Legislation in the United States*, 64 FOOD & DRUG L.J. 599, 601 (2009).

[106] Biologics Control Act of 1902, Pub. L. No. 57-244, § 3, 32 Stat. 728 (1902). This function ultimately went to the FDA. *See* Bryan A. Liang, *Regulating Follow-on Biologics*, 44 HARV. J. ON LEGIS. 363, 433 (2007).

[107] Food and Drugs Act of 1906, ch. 3915, 34 Stat. 768 (1907); Meat Inspection Act, *supra* note 2.

[108] *See supra* Part I.A.

[109] Winton B. Rankin, *Inspection Authority*, 18 FOOD DRUG COSM. L. J. 673 (1963).

[110] David F. Cavers, *The Food, Drug, and Cosmetic Act of 1938: Its Legislative History and Its Substantive Provisions*, 6 LAW & CONTEMP. PROBS. 2, 20 (1939).

[111] *See id.*

[112] Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938).

[113] *Id.* at § 505(c).

[114] *Id.*

[115] *Id.*

[116] *See* Frances Oldham Kelsey, Autobiographical Reflections 48-49 (unpublished manuscript) (on file with the

FDA could follow up was limited.[117] Thus, the laws allowed drug companies to engage in similar "window dressing" that plagued banks' early reports to the OCC.[118]

It was in this statutory context that Dr. Kelsey received, in her first month on the job in 1961, the four-volume submission for thalidomide. Her supervisor observed that "[T]his is a very easy one. There will be no problems with sleeping pills."[119] Even though Dr. Kelsey repeatedly requested more scientific evidence before each 60-day window expired, the company did not have the data she sought, and the FDA lacked the authority to compel the production of that data.[120] Consequently, her ability to block the drug had almost expired when reports of widespread birth defects emerged from Germany, which had approved the drug years earlier.[121]

Fueled by public alarm that the U.S. had barely avoided tragedy,[122] President Kennedy signed a law requiring pharmaceutical companies to submit heightened scientific evidence—a precursor to the FDA's modern clinical trials.[123] Even without evidence of safety, starting in the 1960s FDA officials could withhold drug approval,[124] and "inspect records, files, papers, processes, controls, and facilities."[125] In 2011, after deaths and illnesses from tainted peanut butter, cookies and ice cream products, Congress gave the FDA broad food inspection powers, matching those the agency had received for drugs.[126]

The thalidomide incident marked the beginning of a period of rapid growth in health monitoring. Amidst worsening air quality and related health concerns,[127] the federal government obtained inspection authority over air polluters in the 1967 Air Quality Act.[128] Since the EPA launched in 1970,[129] it has regularly received new visitation over private companies in a range of

author).

[117] *Id.* at § 505(c).

[118] *See supra* Part I.B.1.

[119] *See* Kelsey, *supra* note 116.

[120] *See* Zelenay, *supra* note 53.

[121] *See* Peltzman, *supra* note 61.

[122] Jacobs, *supra* note 105, at 609-12.

[123] 21 C.F.R. § 312.1. Drug companies were also required to submit any reports of adverse effects, which they previously could have withheld. Zelenay, *supra* note 53, at 266.

[124] 21 C.F.R. § 312.1.

[125] *See* Rankin, *supra* note 109.

[126] FDA Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (2011) (codified in scattered sections of the U.S.C.); *Regulatory Design-Food Safety Modernization Act Implements Private Regulatory Scheme*, 125 HARV. L. REV. 859, 859-60 (2012). Most notably among business records, facilities must maintain food safety plans. *See* 21 U.S.C. § 350c(a)(2) (2012). Federal on-site food and drug surveillance programs today reach manufacturers, distribution warehouses, grocery stores, and restaurants. *See id.*

[127] Despite a broader mission, the EPA's origins lie in health-related incidents. *See* William S. Eubanks II, *The Clean Air Act's New Source Review Program: Beneficial to Public Health or Merely A Smoke-and-Mirrors Scheme?*, 29 J. LAND RESOURCES & ENVTL. L. 361, 362 (2009) (discussing thousands of sicknesses and deaths from clouds of smog contributed to early air pollution control legislation).

[128] Air Quality Act, Pub. L. No. 91-604, 81 Stat. 485 (1967); Eubanks, *supra* note 127, at 362. That authority grew in 1970. The Clean Air Act, 42 U.S.C. § 7414 (2012).

[129] Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623 (1970). The agency assumed duties from several existing agencies. *See The Origins of EPA*, U.S. ENVTL. PROTECTION AGENCY, https://www.epa.gov/history/origins-epa (last visited Apr. 9, 2017).

sectors.[130] In the same year as the EPA launched, Congress created the Occupational Safety and Health Administration (OSHA),[131] whose originating statute empowered it to enter workplaces to conduct inspections, examine documents, and question employees.[132]

Whereas prior federal visitorial powers targeted specific industries—drugs, food, banking, mining,[133] or transportation—the EPA and OSHA obtained cross-industry reach, enabling the federal government to look inside almost every private business across the country. In 1978, in *Marshall v. Barlow's*, the Supreme Court would find a Fourth Amendment search warrant requirement for industries without "a long tradition of close government supervision."[134] But this ruling has left many domains subject to warrantless monitoring searches.[135] Moreover, inspectors in other industries regularly give a *Miranda*-style[136] warning that the employer has the right to request a warrant, which businesses rarely exercise.[137] Thus, despite some obstacles along the way, the largest federal health, safety, and environmental regulators incrementally over the past century obtained the type of visitorial tools that the OCC received for banks during the

[130] The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9604 (2012); The Resource Conservation and Recovery Act, 42 U.S.C. § 6927 (2012); Toxic Substances Control Act, 15 U.S.C. § 2601 (2012) (toxic substances); The Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (2012) (selling or distributing pesticides); The Safe Drinking Water Act, 42 U.S.C. § 300 (2012) (drinking water suppliers); The Federal Water Pollution Control Act, 33 U.S.C. § 1254 (transporting oil). For a more detailed summary of these various inspection provisions, see generally James A. Holtkamp & Linda W. Magleby, *The Scope of EPA's Inspection Authority*, 5 NAT. RES. & ENV'T. 16 (1990). This authority covers organizational processes; remotely installed monitoring devices; and entrance onto private property to examine records, take samples, and inspect facilities. *See id*. Congress also requires firms to notify the EPA of new chemicals. 15 U.S.C. § 2604(5)(a) (giving the EPA 90 days to write a rule following notice).

[131] Occupational Safety and Health Act, Pub. L. No. 91-596, 84 Stat. 1590 (1970).

[132] 29 U.S.C. § 657(a)-(c) (2012).

[133] The federal government first gained inspection authority over mines in 1941, through the Department of the Interior. *See* Coal Mine Health and Safety Act of 1941, Pub. L. No. 77-49, 55 Stat. 177 (1941). Inspections for non-coal mines came in the 1960s. *See* 1961 Public Law 87-300. That authority was later transferred to the Department of Labor, through a newly created Mine Safety and Health Administration, in 1977. Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 (1977).

[134] Marshall v. Barlow's, Inc., 436 U.S. 307, 307, 313 (1978). The EPA is held to similar standards. National-Standard Co. v. Adamkus, 881 F.2d 352 (7th Cir. 1989). In industries with a history of close regulatory oversight, an exception to the Fourth Amendment's search warrant requirement is appropriate. *See Marshall*, 436 U.S. at 313-14.

[135] *Marshall* does not prevent warrantless administrative searches in various heavily regulated industries such as banking and mining. National-Standard Co. v. Adamkus, 881 F.2d 352 (7th Cir. 1989) (holding that EPA inspectors can conduct warrantless searches); Donovan v. Dewey, 452 U.S. 594 (1982) (allowing the Department of Labor to conduct warrantless searches for worker health and safety); Dow Chemical v. United States, 476 U.S. 227 (1986) (allowing the EPA to conduct warrantless aerial surveillance of private property).

[136] Miranda v. Arizona, 384 U.S. 436 (1966).

[137] Interview with OSHA Deputy Regional Administrator and Regional Administrator (Apr., 2017). Despite the significance of a constitutional protection, *Marshall*'s practical impact is limited. The Court acknowledged that the Fourth Amendment was less relevant to OSHA than to criminal searches. *See Marshall*, 436 U.S. at 320. Unlike police, OSHA would not need "probable cause . . . based [] on specific evidence of an existing violation." *Id.* The agency could instead obtain a warrant if the search was part of a "general administrative plan." *See id.* at 320-21. This ruling forced OSHA to develop national inspection plans. Interview with OSHA, *supra* note 137. If needed, an OSHA inspector can easily obtain a warrant without probable cause by showing the magistrate its plan. *Id.*

Civil War.[138]

3. Limited Monitors: Trade and Labor

Agencies focused on protecting individuals from economic harms have more limited monitoring authority than others.[139] Spurred by Ida Tarbell's popular writings about the "autocratic powers in commerce" of John D. Rockefeller's Standard Oil Company,[140] and the activism of President Theodore Roosevelt,[141] the Federal Trade Commission (FTC) was founded in 1914.[142] Its two main missions were to protect consumers and to promote competition. The FTC had from the outset the power "[t]o require . . . corporations engaged in commerce . . . to file with the commission . . . both annual and special reports or answers in writing to specific questions as to organization, business, conduct, practices, and management."[143] President Theodore Roosevelt had unsuccessfully advocated for a stronger monitoring framework: mandatory notifications prior to mergers and acquisitions.[144] In 1976, Congress extended that authority.[145] Despite its extensive report-collecting tools, the agency has never had explicit visitation authority for either competition or consumer protection.

The two leading regulators of employment have even more limited monitoring authority than the FTC. Amidst the labor unrest of the Great Depression, Congress tasked the National Labor Relations Board (NLRB) with "the protection by law of the right of employees to organize and bargain collectively."[146] The NLRB's originating statute did not mention monitoring in the traditional sense.[147] The agency arguably exercises a form of monitoring through its on-site observation of union elections.[148]

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[138] *See supra* Part I.B.1. Agencies' visitorial tools vary in scope of data that can be requested.

[139] The Securities and Exchange Commission (SEC) protects investors, but those investors are often institutional. Also, the agency was formed as part of a broader goal of protecting the financial system rather than individuals. *See supra* note 95 and accompanying text.

[140] IDA M. TARBELL, THE HISTORY OF THE STANDARD OIL COMPANY 158 (1904) (concluding that Standard Oil had "great power…resistless, silent, perfect in its might…"). Tarbell's writings would ultimately contribute to the breakup of Standard Oil. STEVE WEINBERG, TAKING ON THE TRUST: HOW IDA TARBELL BROUGHT DOWN JOHN D. ROCKEFELLER AND STANDARD Oil 246-51 (2008).

[141] FTC Act of 1914, Pub. L. No. 63-203, 38 Stat. 717 (1914). The FTC assumed the duties and personnel of the Bureau of Corporations, started by President Roosevelt. *See* F. M. Scherer, *Sunlight and Sunset at the Federal Trade Commission*, 42 ADMIN. L. REV. 461, 462 (1990).

[142] FTC Act, Pub. L. No. 63-203, § 6, 38 Stat. 717 (1914).

[143] FTC Act, Pub. L. No. 63-203, § 6, 38 Stat. 717 (1914).

[144] *See* Scherer, *supra* note 141, at 462.

[145] Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 940-435, 90 Stat. 1383 (1976). In 2003, Congress added further mandatory notifications contractual agreements between brand-name and generic drug companies. Pub. L. No. 108-173, 117 Stat. 2066 (codified as amended in scattered sections of the U.S.C., 21 U.S.C. § 355(j) (Section 1102), 21 U.S.C. § 355 note (Sections 1111-1118)).

[146] National Labor Relations Act of 1935, Pub. L. No. 74-198, § 1, 49 Stat. 449 (1935).

[147] *Id.*

[148] *Number of Elections Held in FY2016*, NAT'L LAB. REL. BD., https://www.nlrb.gov/news-outreach/graphs-data.

In the face of nationwide protests and unrest, the 1964 Civil Rights Act[149] established the Equal Employment Opportunity Commission (EEOC) and required companies to maintain employment records.[150] The original House bill for the agency had put forth information collection authority modeled after the FTC, but that language was removed in the face of intense Senate opposition.[151] The final legislation specified that to collect records the EEOC must write rules.[152] In both the EEOC and NLRB, "examination" occurs mostly after a firm is accused.[153] But the EEOC has used its original statutory authority to write rules to require businesses to submit to the EEOC confidential employee data broken down by race, gender, and other categories.[154]

As yet, no crisis or national outcry has driven Congress to give explicit visitorial authority to these three agencies. But the creation of the CFPB represented a break with the traditional economic regulatory mold. The FTC had previously exercised consumer protection authority for many financial institutions implicated in the subprime mortgage crisis, such as nonbank mortgage servicers.[155] Congress moved most of that authority to the CFPB only after millions of families lost their homes to foreclosure between 2005 and 2010, many due to unscrupulous lending.[156] Unlike the FTC, the CFPB was given broad visitorial authority to regularly appear on-site.[157] Thus, despite remaining more limited than other spheres, the largest regulators of individual economic rights can monitor to some extent. Additionally, between the launch of the CFPB and the increase in FTC antitrust reporting, the overall trajectory of this sphere of regulation has been toward more statutory monitoring authority.

C. Summary of the Statutory Rise

Across diverse industries and under both Democratic and Republican party leadership, Congress has since the mid-1800s steadily expanded federal agencies' ability to monitor private firms. This historical accumulation of federal authority spans other areas monitored outside "large regulators," including offshore oil drilling,[158] liquor stores,[159] and firearm

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[149] Civil Rights Act of 1964, Pub. L. No. 88-352, § 705, 78 Stat. 241 (1964).

[150] *Id.* at § 709(c).

[151] Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 320 (2001).

[152] *Id.*

[153] National Labor Relations Act of 1935, Pub. L. No. 74-198, § 11, 49 Stat. 449 (1935); Civil Rights Act of 1964, Pub. L. No. 88-352, § 709c, 78 Stat. 241 (1964); EEOC v. Shell Oil Co., 466 U.S. 54, 64 (1984) ("[EEOC] power to conduct an investigation can be exercised only after a specific charge has been filed in writing.").

[154] 29 C.F.R. § 1602.7 (2012).

[155] Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5321, 5322(a)(2), 5491(a) (2012).

[156] Laura Kusisto, *U.S. News: After Foreclosure, Fewer Buy Homes*, WALL STREET J., Apr. 21, 2015, at A2. Some remaining overlap of authority exists between the FTC and CFPB, but "sometimes authority is not crisply allocated." Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689, 707 (2013).

[157] Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5514.

[158] 43 U.S.C. § 1348 (2012).

manufacturers.[160] Overall, among the nineteen large federal regulators, only the NLRB is without substantial monitoring authority. Two others, the FTC and the EEOC, have the meaningful ability to collect records, but not to conduct on-site inspections. Sixteen of the nineteen largest agencies have both strong visitorial monitoring and record collection authority.[161] The laws are in place for a formidable regulatory police state.

II. THE INSTITUTIONAL RISE OF MONITORING

Agency behavior is determined by more than its underlying statutes. As then-Professor Elena Kagan recounted, "The history of the American administrative state is the history of competition among different entities for control of its policies . . . At the dawn of the regulatory state, Congress controlled administrative action by legislating precisely and clearly; agencies . . . functioned as mere transmission belt[s] to carry out legislative directives."[162] This approach proved untenable as the administrative state grew, requiring delegation of "unfettered discretion" to an expanding bureaucracy.[163] Dissatisfaction with bureaucratic independence led to mechanisms giving interest groups more influence, which had its shortcomings. Kagan argued that President Clinton ushered in "an era of presidential administration."[164]

Internal agency groups also compete for control, but their history is more difficult to generalize. From a functional perspective, a standard account holds that adjudication dominated agency policymaking until the 1970s, when agencies entered "an age of rulemaking."[165] The internal narrative then becomes vague, despite general recognition that in the 1990s and 2000s new governance models took hold.[166] Some observers believe that rulemaking still remains the dominant policy instrument,[167] while others see a shift to either "policy through litigation, negotiated settlements, or the waiver of rules in individual contexts."[168]

This Part adds an unexamined dimension to that internal organization narrative by filling out the role of the monitoring group.[169] Although the focus is on recent historical shifts, the main

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[159] Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (upholding warrantless searches).

[160] United States v. Biswell, 406 U.S. 311 (1972) (upholding warrantless searches).

[161] *See* Appendix A; *supra* Part I.B.

[162] *See* Kagan, *supra* note 51, at 2253 (citing Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975)).

[163] *See id.* at 2253 (summarizing the literature).

[164] *See id.* at 2246.

[165] *See* J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 375-76 (1974); Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1447 (2004); Stewart, *supra* note 162, at 1671.

[166] *See infra* Part II.A.

[167] Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 2017 (2012) ("[S]ince the 1970s, informal rulemaking has been the preferred means of implementing agency policy.").

[168] *See* Magill, *supra* note 165, at 1398. Professors Magill and Vermeule identify various factors that reallocate power toward and away from lawyers, without distinguishing regulatory police or overall seeing a trend. *See* Magill & Vermeule, *supra* note 35, at 1077.

[169] At the core of existing internal narratives is a recognition that organizational dynamics of administrative

goal is to lay the foundations for understanding the role of regulatory police today.

A. Governance Shifts

Over the past thirty years, agencies have adopted new approaches to governing firms. Prominent observers attribute the change to a "crisis in confidence"[170] in regulation, or the perception that in "the administrative state . . . much is terribly wrong."[171] Regardless of its origins, three main features of new governance make regulatory police more internally important: emphasis on collaboration between regulators and regulated entities, reliance on business self-regulation, and oversight of agencies by external stakeholders.

1. Collaborative Governance

One major shift in the modern regulatory approach is a greater emphasis on collaboration.[172] The U.S. House Budget Committee displayed this philosophy in OSHA's 2017 budget hearing, encouraging the agency to minimize punishment and instead "partner with businesses to create safer workplaces."[173] The extent to which any given agency has adopted this model varies, but one of its features is seeing rules as provisional, requiring the parties to flexibly "devise solutions to regulatory problems."[174]

The emphasis on partnership is important, in part, for the acquisition of information. Agencies today generally believe rules should be "responsive to the particular contexts in which they are deployed" by relying on "feedback mechanisms" that are "continuous."[175] Firms that are less afraid of punishment, it is thought, become more willing to share information. For instance, the EPA's new cooperative model gave it "open access" to citrus-juice plants, whereas in the prior relationship "companies resist[ed] inspection and cooperate[d] with the EPA only grudgingly."[176] Under a cooperative model, the parties can allegedly focus their energies on fixing mistakes and identifying causes instead of fighting over whether anything was wrong.

Litigation groups are less well-suited to this model. Legal investigations cause information exchange to become "bogged down as target firms resist[] compliance and pursue[] blocking actions in the courts."[177] Consider, again, the example of how the CFPB in its early financial

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agencies have shifted in response to new governance paradigms and market evolutions, but how those dynamics intersect with regulatory police has yet to be explored.

[170] AYRES & BRAITHWAITE, *supra* note 28, at 158.

[171] *See* Freeman, *supra* note 28, at 2 (discussing widespread critiques of ossified regulation).

[172] *See* Freeman, *supra* note 28, at 2, 22 (identifying an emerging "collaborative governance model"); *see also* Lobel, *supra* note 28 at 343.

[173] *See* OCCUPATIONAL SAFETY & HEALTH ADMIN., OSHA FACTS SHEET 14-16 (2016), https://www.osha.gov/OshDoc/data_General_Facts/factsheet-inspections.pdf.

[174] Freeman, *supra* note 28, at 22. This depiction intersects with elements of Professors Ayres and Braithwaite's "responsive regulation." *See* AYRES & BRAITHWAITE, *supra* note 28, at 35.

[175] *Id.* at 22, 28.

[176] *Id.* at 61.

[177] F.M. Scherer, *Sunlight and Sunset at the Federal Trade Commission*, 42 ADMIN. L. REV. 461, 471 (1990) (former FTC economist observing dynamics in the 1970s).

examinations brought along enforcement lawyers.[178] Industry groups had criticized the practice, saying that "the presence of enforcement attorneys at routine examinations created a hostile regulatory environment."[179] The CFPB's Ombudsman had studied the matter and warned that the presence of attorneys would serve as "a barrier to a free exchange."[180] Asked to explain its subsequent termination of the policy, the CFPB said that it "wasn't efficient."[181]

A collaborative relationship with continuous information flow would naturally propel an agency to become more dependent on regulatory police, who regularly collect data from firms. Although regulatory police can be viewed as "nitpicky,"[182] their information collection does not assume the regulated entity has misbehaved. Indeed, the collaborative model matches some historical descriptions of early bank examiners, who because of limited sanction authority "recommended"[183] rather than commanded, and relied on "cooperation" to achieve compliance.[184] Banking regulators have remained "famously nonadversarial,"[185] and energy inspectors have retained a team-oriented approach.[186] An agency adopting collaborative governance might thus shift more interactions from litigators to regulatory police.

2. Self-Regulation and Private Monitoring

Governance has also shifted toward managed self-regulation. Fiscal constraints simply make it impossible to monitor all private actions taken even for the most dangerous activities: Only one to two percent of all nuclear plant activities are subject to government inspection in the U.S.[187] Under the new governance model, self-regulation does not necessarily mean an absence of oversight, but "that regulation should respond to . . . how effectively industry is making private regulation work."[188] This self-regulatory model encourages regulatory experimentalism.[189] Instead of a bottom-up approach of examining every product or document or facility, the agency considers top-down organizational improvements.[190] In essence, it assesses a firm's self-monitoring.

Self-monitoring typically occurs in a company's compliance department. As Professor Sean

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[178] *See supra* note 69 and accompanying text.

[179] *Financial Briefing Book*, WALL STREET J., Oct. 10, 2013, at C2.

[180] CONSUMER FINANCIAL PROTECTION BUREAU, OMBUDSMAN'S OFFICE, FY2012 ANNUAL REPORT TO THE DIRECTOR 13 (2012).

[181] Witkowski, *supra* note 69.

[182] *See* Hawke, *supra* note 84 at 8.

[183] *See* WHITE, BANK HISTORY, *supra* note 78, at 21, 48.

[184] *See* ROBERTSON, *supra* note 75, at 71.

[185] David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 208 (2010).

[186] *See* Hayes, *supra* note 10.

[187] Peter K. Manning, *The Limits of Knowledge*, in MAKING REGULATORY POLICY (Keith Hawkins and John Thomas, eds., 1989).

[188] *See* AYRES & BRAITHWAITE, *supra* note 28, at 4.

[189] *Cf.* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 373-80 (1998).

[190] *See* Cary Coglianese, *The Managerial Turn in Environmental Policy*, 17 N.Y.U. ENVTL. L.J. 54 (2008); CONTI-BROWN, *supra* note 91, at 167.

Griffith has explained, "American corporate governance . . . has been overtaken by compliance. . . . Over the past decade, compliance has blossomed into a thriving industry, and the compliance department has emerged, in many firms, as the co-equal of the legal department."[191] These departments are charged with reviewing employees' practices or consumer complaints to ensure that the company is not breaking the law. Then, perhaps in consultation with the legal department, the compliance department recommends preventative process changes. Internal records are kept of violations and responses.[192]

EPA rules, for example, require companies producing hazardous chemicals to build a Risk Management Plan and perform inspections of their equipment.[193] Companies must regularly submit the documentation to authorities, listing all incidents that have occurred.[194] Environmental agencies then audit those internal reports,[195] which may result in a "determination of necessary revisions" to the company's systems.[196] Agencies also enlist a growing number of private third-party monitors to assess compliance.[197]

Depending on how it is implemented, self-regulation can diminish the role of regulatory police relative to other agency groups because it privatizes core monitoring tasks.[198] This is particularly true when the agency delegates all monitoring to third parties.[199] But replacement is not how agencies have mostly approached self-regulation. Many still conduct their own inspections, alongside industry self-monitoring.[200] Rather, the model transforms the agency into a manager of private monitors.

From an internal perspective, agencies' regulatory police—not their litigators—normally assume this managerial role.[201] Thus, this managerial model moves regulatory police from examining the details of paperwork or safety valves to making sure others do those jobs. In some sense, this amounts to promoting regulatory police to a more senior supervisory role. As

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[191] Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2077 (2016).

[192] *See generally id.*

[193] Clean Air Act, 40 C.F.R. § 68.73 (2007).

[194] *Id.* at § 68.220.

[195] *Id.*

[196] *Id.*

[197] *See* Jodi L. Short & Michael W. Toffel, *The Integrity of Private Third-Party Compliance Monitoring*, ADMIN. & REG. L. NEWS, Fall 2016, at 22 (noting that third-party certification is used in "a wide array of domains, including food safety, pollution control, product safety, medical devices, and financial accounting"); Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53 (1986). The SEC uses a related model by overseeing a private regulator, the Financial Industry Regulatory Authority (FINRA), which performs examinations and has its own enforcement group. FIN. INDUS. REG. AUTH., FINRA 2015 YEAR IN REVIEW AND ANNUAL FINANCIAL REPORT 5 (2016), https://www.finra.org/sites/default/files/2015_YIR_AFR.pdf.

[198] Ryan Beene, *Is NHTSA Nominee Up to the Task?*, AUTO. NEWS, Dec. 1, 2014, at 4.

[199] Third-party private auditing has grown in recent years. *See* Lesley K. McAllister, *Regulation by Third-Party Verification*, 53 B.C. L. REV. 1, 6 (2012). Private parties also often serve as monitors after courts determine wrongdoing. *See* Root, *supra* note 9.

[200] *See, e.g.*, Clean Air Act, 40 C.F.R. § 68.220 (2007).

[201] *See, e.g.*, U.S. SEC. EXCH. COMM'N, AGENCY FINANCIAL REPORT FISCAL YEAR 2016 9 (2016) [hereinafter SEC FINANCIAL REPORT], https://www.sec.gov/about/secpar/secafr2016.pdf. The agency group most knowledgeable about monitoring would be the natural home for such activities.

supervisors of large business departments rather than individual documents or equipment, regulatory police can collect more information in the same amount of time, because the company's compliance employees create a data report that the regulatory police would have previously compiled.

Moreover, the compliance department is prominent inside large businesses, with the Chief Compliance Officer typically reporting to the CEO and often the board.[202] Consequently, any regulatory police recommendation for improving a firm's compliance system can affect a broader portion of the business on a more enduring basis. Imagine, for instance, that a credit card company has been found to have illegally charged consumers fees. In a pre-compliance world, the regulator might rely on a legal settlement or court order requiring the company to stop charging that fee moving forward. In the era of compliance management, the regulator (today, the CFPB) can compel the company to develop a system for internally reviewing customer complaints for legal violations. That internal change means that the compliance department moving forward will catch not only this particular illegal credit card fee but other improper fees that might arise in the future. Furthermore, the CFPB examination group regularly checks to make sure financial institutions have such customer complaint monitoring systems in place, even without any evidence that the firm has done anything wrong.[203]

In other words, the firm's compliance team essentially serves as the regulatory police's agents. Griffith concludes that this "revolution" in corporate governance means that "prosecutors can externalize a portion of their budget."[204] While that may be true, in terms of internal organizational dynamics, agencies would be expected to shift some of what was previously prosecutors' domain—promoting compliance through litigation—to regulatory police.

The move to compliance management may also reallocate responsibilities between regulatory police and rule makers. Compliance management reflects how "[b]est practices are the new means through which Congress and federal agencies are making administrative law."[205] In the Clean Water Act, Congress mandated that states and the EPA identify "best management practices" for tackling the biggest source of water pollution: runoff from cities and farms.[206] The EPA then shares "success stories" that can be adopted elsewhere.[207] In a world of formal rules that must be strictly applied, the rulemaking group spells out the particular steps a firm must take to comply with the law. Conversely, in a world of best practices, there are often multiple ways to satisfy the mandate. A best practices regime thereby allows agency regulatory police not only to identify the best practices in the first place, but also to assess whether a given firm's practices come close enough to "best."

3. Heightened Stakeholder Oversight

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[202] Griffith, *supra* note 191, at 2127.
[203] Interview with former CFPB employee (Mar., 2017).
[204] Griffith, *supra* note 191, at 2127.
[205] David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 296 (2006).
[206] 33 U.S.C. § 1329(a)(1)(C) (2000); Zaring, *supra* note 205, at 326, 329.
[207] *See* Zaring, *supra* note 326, at 331.

Agencies have come under increasing scrutiny from Congress,[208] the President,[209] and courts.[210] This oversight may drive agencies toward greater reliance on regulatory police for three main reasons. First, as a general matter, "[a]dministrative agencies, like trial judges facing appellate review, dislike having their decisions reversed."[211] To avoid wasted efforts and delays, agencies insulate themselves from oversight.[212] They have substituted policy statements and interpretative guidelines for official rules to avoid having to go through notice and comment.[213] For enforcement, agencies have turned to extrajudicial strategies such as settlements and recommendations.[214] As the FDA explains of a regulatory police tool it has used increasingly in recent years, "Warning letters are informal and advisory . . . FDA does not consider Warning Letters to be final agency action on which it can be sued."[215] Courts have agreed.[216]

The same rulemaking and litigation groups could control informal activities. However, informal tools move further from the distinct functions and skillsets of legal actors, opening the door for other groups to assume related responsibilities. Moreover, court oversight has restricted even rule makers' informal alternatives. After industry complaints that the FDA was using "Good Guidance Practices"[217] to write de facto rules, Congress required the agency to solicit public notice and comment prior to issuing major guidelines.[218] However, those constraints did not address regulatory police's main textual outlets, such as their industry-wide inspection manuals and case-by-case recommendations.[219]

Second, rulemaking has slowed considerably. Under the recent Bush and Clinton administrations, it took on average over eight hundred days between a rule's agenda publication and final adoption.[220] When rules are not updated, front-line regulatory police or their supervisors must interpret old laws to apply them to new practices. If agencies are largely unable

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[208] *See* Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 606-07 (2008).

[209] *See, e.g.*, Kagan, *supra* note 51.

[210] *See, e.g.*, Jerry L. Mashaw & David L. Harfst, *Inside the National Highway Traffic Safety Administration: Legal Determinants of Bureaucratic Organization and Performance*, 57 U. CHI. L. REV. 443 (1990).

[211] Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1756 (2013).

[212] *See* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 932 (2008); Nou, *supra* note 211.

[213] Thomas McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1393 (1992) (observing the "increasing tendency of agencies to engage in 'nonrule rulemaking'"); Zaring, *supra* note 205 at 295 (showing that from 1990 to 2004 agencies increasingly referred to best practices as a form of informal rulemaking).

[214] Mashaw & Harfst, *supra* note 423, at 443.

[215] *See* U.S. FOOD & DRUG ADMIN., REGULATORY PROCEDURES MANUAL 37 (Apr., 2017).

[216] Holistic Candlers and Consumers Ass'n v. FDA, 664 F.3d 940, 944 (D.C. Cir. 2012) ("The letters plainly do not mark the consummation of FDA's decisionmaking.").

[217] The FDA's Development, Issuance, and Use of Guidance Documents, 62 Fed. Reg. 8961 (Feb. 27, 1997).

[218] FDA Modernization Act, Pub. L. No. 105-115, § 405 (1997) (codified at 21 U.S.C.§ 371(h)) ("The Secretary shall develop guidance documents with public participation . . ."); Lars Noah, *Governance by the Backdoor: Administrative Law(lessness?) at the FDA*, 93 NEB. L. REV. 89 (2014).

[219] *See infra* Part III.C.

[220] Stuart Shapiro, *Presidents and Process: A Comparison of the Regulatory Process Under the Clinton and Bush (43) Administrations*, 23 J.L. & POL. 393, 416 (2007).

to write formal rules, and instead engage in soft rulemaking, agencies may be incentivized to write vaguer rules that are nonbinding.[221] Imprecise rules force agencies to rely more on front-line actors' persuasion and judgment. Instead of following a lawyer's written instructions (the legal rule), regulatory police in such agencies can act more like clients, consulting lawyers only as needed with help in interpretation.[222]

Third, one of the impulses behind greater external oversight is "to ensure that regulatory agencies exercise their policymaking discretion in a manner that is reasoned."[223] Most prominently, courts and the President have imposed cost-benefit analyses,[224] and "lawyers will have little to contribute to this quintessentially technocratic problem."[225] Additionally, the Paperwork Reduction Act (PRA) constrains rule writers' ability to collect supportive information from firms.[226]

In contrast to these legal constraints on lawyers' core activities, in recent years Congress has imposed widespread monitoring *minimums*, such as annual or more frequent on-site examinations of credit rating organizations,[227] food manufacturers,[228] and oil producers.[229] To be sure, statutes in some contexts require regular actions by rule writers and litigators *if* an agency chooses to act. For the EPA to ban a chemical, for instance, it must write a rule.[230] But Congress does not mandate annual minimums for the number of chemicals banned, rules written, or trials litigated. Thus, whereas the external pressure for informed regulatory decisions slows down rule writers' core activity—producing rules—it expands regulatory police's basic function.

B. Market Transformations

Whatever the inherent democratic accountability deficiencies of older governance models may have been, new regulatory strategies were perhaps inevitable given the market transformations during that period. These changes have lessened or eliminated the sophistication gap between regulatory police and lawyers, expanded information asymmetries between regulatory police and legal groups, and provided regulatory police with technological tools that are more helpful to them than to rule makers or litigators.

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[221] Zaring, *supra* note 185, at 208.

[222] *See, e.g.*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, FISCAL YEAR 2015 PERFORMANCE AND ACCOUNTABILITY REPORT https://www.eeoc.gov/eeoc/plan/upload/2015par.pdf (mentioning how the EEOC engaged in 60 "technical assistance" visits).

[223] Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 NYU L. REV. 437, 439 (2003).

[224] *See, e.g.*, Corrosion Proof Fittings v. EPA, 947 F2d 1201 (5th Cir 1991) (striking down an EPA rule for inadequate cost-benefit support); Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981) (prohibiting regulatory actions unless the benefits exceed the costs).

[225] Magill & Vermeule, *supra* note 35, at 1051.

[226] 44 U.S.C. §§ 3501-3521 (1980).

[227] Dodd-Frank Act §§ 932(a)(8) (codified at 15 U.S.C. § 78).

[228] FDA Food Safety Modernization Act, Pub. L. No. 111-353, § 201, 124 Stat. 3885, 3885 (2011) (codified as amended at 21 U.S.C. § 350j(a)(1) (2011)). High-risk facilities must be inspected at least every three years. 21 U.S.C. § 421(a)(2)(B).

[229] 43 U.S.C. § 1348(c) (2012).

[230] *See, e.g.*, 15 U.S.C. § 2604(5)(a).

1. Increased Sophistication

Modern businesses have reached unprecedented size and complexity. All major industries have become more concentrated, creating bigger organizations with separate multimillion dollar product lines. Oil companies have built ever larger floating cities drilling miles deeper under the ocean floor,[231] manufacturers release thousands of new chemicals into the environment annually,[232] and large businesses deploy big data computer algorithms for key decisions.[233]

These transformations mean that an agency seeking to continue performing the same level of monitoring must now deploy more regulatory police. Until recently, an examiner could "storm in [to a fair-sized national bank], count the cash, add up the deposits, look at the sampling of the loans, and pronounce the work done."[234] Today, "[t]he sheer depth of complexity that afflicts bank balance sheets prevents even experts from discerning what banks own and owe, what they sold and received, and whether they are compliant with [] hundreds of banking statutes."[235] At large banks, it takes a team of examiners many months to do what used to be wrapped up by one examiner in a half-day visit.[236]

More complex markets also require greater expertise, including advanced degrees, continuing education, and "leading experts in esoteric [] fields."[237] Regulatory police have varying backgrounds. In banking, examiners tend to have finance backgrounds. Oil inspectors often have engineering degrees. FDA drug reviewers are typically scientists, doctors, or statisticians,[238] and many USDA facilities inspectors are veterinarians.[239] Agencies have raised salaries to accommodate the additional educational requirements.[240]

Greater technical expertise elevates regulatory police's status within agencies. The internal sophistication gap between regulatory police and lawyers has decreased as the gap between their objects of analysis—markets and laws—has shrunk.

2. Information Monopolies

Regulatory police may hold information monopolies compared not only to other legal actors, but also to other technocrats in the agency. Even if legal actors had access to all information that

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[231] *See* BSEE ANNUAL REPORT, *supra* note 17, at 15 (noting the increase in drill rigs).

[232] Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115, 156 (2004).

[233] *See* Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311, 1311 (2015).

[234] *See* Hawke, *supra* note 84, at 2.

[235] CONTI-BROWN, *supra* note 91, at 165.

[236] *See* Hawke, *supra* note 84, at 2.

[237] *See id.*

[238] *FDA's Drug Review Process*, U.S. FOOD & DRUG ADMIN. (Aug. 24, 2015), https://www.fda.gov/Drugs/ResourcesForYou/Consumers/ucm289601.htm.

[239] USDA INSPECTION, *supra* note 11, at 15.

[240] U.S. DEP'T OF THE INTERIOR, *supra* note 5, at 55, 64 (requesting more funding for inspectors due to "increased complexity in OCS oil and gas activities").

regulatory police collected, it would be of limited value because particular skills are required to find and understand the relevant parts of a large data set.

Moreover, the *rate* of market changes has accelerated to unprecedented levels, meaning that many of today's "routine" products were until recently "exotic or nonexistent."[241] Therefore, a new employee who joins an agency will soon have large knowledge gaps without continual updates. They can obtain some of this through phone calls, conferences, and other voluntary mechanisms.[242] Yet much of the relevant information—the nature of Bank of America's latest automated financial advisor, or Ford's self-driving car—is closely guarded as a trade secret and impenetrable from the outside. Complexity, secrecy, and innovation mean that inspectors "rely on industry representatives to explain the technology at a facility."[243]

Those explanations will not be expressed in regulatory police reports, which focus on violations. Thus, agencies' other internal experts, such as scientists in the rulemaking division, may on their own lack insights indispensable for dynamic regulation. Rapidly changing markets shift the locus of business expertise further inside the firm, and thereby shift expertise within the agency more toward those who regularly interact with the firm: regulatory police.

3. Technological Tools

Every bureaucrat, including litigators, has more access to information than ever before. However, while information technologies can speed up legal research, they are less able to speed up court dockets or public notice and comment periods. To the contrary, information technologies enable more parties to participate in formal agency decision making processes, even submitting tens of thousands of fake comments for proposed rules.[244] These advances slow down rulemaking by increasing the information that must be processed and the stakeholders that must be managed.

In contrast, because regulatory police do not have the same external procedural constraints, their most substantial limit is the resources required to transmit and analyze information. When information submission becomes too burdensome, businesses may object. Additionally, regulatory police travel to business locations to look through paperwork has traditionally consumed considerable monitoring funds and time. Even if volumes of paperwork were obtained, human resources constrained regulatory police's ability to sift through that paperwork.

Technologies have reduced these barriers by providing remote monitoring devices that "continuously transmit data" to agencies.[245] EPA sensory equipment on space satellites and inside factories can track businesses' pollution.[246] Billions of daily transactional data flow from energy companies to FERC[247] and from securities firms to the SEC.[248] Inter-agency pooling of

[241] *See, e.g.*, Hawke, *supra* note 84, at 2.
[242] Coglianese et al., *supra* note 34.
[243] DEEPWATER REPORT, *supra* note 5, at 77; s*ee also* CONTI-BROWN, *supra* note 91, at 165.
[244] James Grimaldi, *Fiduciary Rule Draws A Lot of Fake Critics Fake Remarks Litter U.S. Government Site*, WALL STREET. J. Dec. 28, 2017, at A1.
[245] U.S. DEP'T OF THE INTERIOR, *supra* note 5, at 57.
[246] *See* Esty, *supra* note 232, at 156.
[247] FED. ENERGY REGULATORY COMM'N, 2016 REPORT ON ENFORCEMENT 5 (Nov. 17,

these technologies multiplies the available data.[249] Regulatory police then analyze these big data sets with advanced modeling and machine learning algorithms.[250] As a result, in various agencies, "on-site time as a percentage of overall examination hours dropped,"[251] and "inspectors [] conduct more thorough inspections."[252] Today, holding employees constant, regulatory police can process more non-public data more thoroughly, extending the reach of their core authority.

Thus, unlike in the mid-1800s, national bank examiners' appearance today is less likely to get "the bank force dancing at [their] beck and call."[253] Instead, modern regulatory police more suitably meet with a senior executive or engineer running a large, self-regulating compliance system. Technologies convert what was previously a "one-time snapshot of performance taken on a particular inspection day" to a "movie of the plant's processes."[254] Disruption is minimized because in some industries firms never stop working for—or collaborating with—regulatory police.

III. AN OVERVIEW OF REGULATORY POLICE TODAY

The discussion so far has shown that changes over the past century in statutes, governance, and markets have formed the foundation for regulatory police's ascendancy to a lead role within the administrative state. But authority on the books and authority demanded by external realities does not necessarily translate into authority used. Courts have held that an agency's decision about the extent to which it "monitors as well as enforces compliance fall squarely within the agency's exercise of discretion."[255] Inertia and internal politics influence organizational design. While the recent literature has helped lay the foundations for understanding why monitoring has become important, empirical evidence of actual regulatory police exercising that authority has been anecdotal or localized.

A fundamental empirical question thus remains unanswered: How big a role do regulatory police play in the regulatory state today? More specifically, how do regulatory police influence the administration of the law? While recognizing that "the sheer bewildering heterogeneity of the administrative state makes it impossible to generalize about the allocation effects of agency

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2016), https://www.ferc.gov/legal/staff-reports/2016/11-17-16-enforcement.pdf [hereinafter, FERC REPORT].

[248] FIN. INDUS. REG. AUTH., *supra* note 197, at 1.

[249] *See, e.g.*, *Reportable Food Registry for Industry*, U.S. FOOD & DRUG ADMIN. (May 24, 2016), https://www.fda.gov/Food/ComplianceEnforcement/RFR/default.htm (describing how the FDA's registry is linked to the NIH).

[250] *See* Cary Coglianese & David Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, GEO. L. J., at 14 (forthcoming).

[251] *See* FIN. INDUS. REG. AUTH., *supra* note 197, at 5 (estimating a decrease from 32 to 19%).

[252] U.S. DEP'T OF THE INTERIOR, *supra* note 5, at 24 (estimating 30% to 40% savings).

[253] *See* O'Henry, *supra* note 89; Hawke, *supra* note 84.

[254] *See* Freeman, *supra* note 28, at 60 (describing EPA upgrades); *see also* Hawke, *supra* note 84 (describing the OCC's "ongoing . . . on- and off-site monitoring").

[255] Gillis v. U.S. Dep't of Health & Human Servs., 759 F.2d 565, 576 (6th Cir. 1985); Madison-Hughes v. Shalala, 80 F.3d 1121, 1129-31 (6th Cir. 1996) (ruling that the Department of Health and Human Service's decision not to collect data about racial disparities in health services was unreviewable) (internal quotations removed).

structure,"[256] this Part provides the first systematic empirical evidence of the role that regulatory police play in the federal regulatory process. The evidence not only indicates the scope of regulatory police's presence in the administrative process, but begins to map out key agency organizational design choices shaping regulatory police influence.

A. Monitoring Firms

Resource allocation is one of many "modes of governance"[257] through which political leaders "exercise power."[258] Statutes commonly provide an "incomplete design," leaving agency heads to finish the task of deciding how many regulatory police and lawyers to hire, and how to use them.[259] This section provides the first data on how these decisions have allocated regulatory police and legal resources across all large U.S. regulators.[260]

Due to data constraints, the legal figures combine all legal positions—including those working in litigation, rule writing, and the office of the general counsel. Comparisons between regulatory police and any single legal role would thus yield even higher regulatory police proportions than the figures offered below.

Among the nineteen agencies studied, only three—the FTC, NLRB, and EEOC—have relatively few regulatory police personnel. These three are *litigator-dominant*, with law-related employees comprising over 85% of the total regulatory police/legal personnel.[261] Those three are also the only agencies in the set that have no visitation authority.[262] Interviews confirmed that most of these agencies' lawyers litigate.[263] This classification as litigator-dominant differs from a prominent 1980s descriptor of some agency groups as "legalistic," which could apply to regulatory police.[264]

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[256] Magill & Vermeule, *supra* note 35, at 1059.

[257] *See* Rubin, *supra* note 63, at 97.

[258] Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN L. REV. 1, 16 (2008); *see also* Oil, Chem. & Atomic Workers Union v. OSHA, 145 F.3d 120, 123 (3d Cir. 1998).

[259] *See, e.g.*, Federal Communications Commission Act of 1934, Pub. L. No. 73-416, § 4(f), 48 Stat. 1064 (1934); Mitchell Pearsall Reich, *Incomplete Designs*, 94 TEX. L. REV. 807, 807 (2016). Design of the CFPB fell on Professor Warren, after President Obama appointed her to set up the agency. *See* Zixta Q. Martinez, *Consumers Count: Five Years Standing Up For You*, CFPB (July 14, 2016) https://www.consumerfinance.gov/about-us/blog/consumers-count-five-years-standing-you.

[260] For a description of how the agencies were chosen, *see supra* note 14. The figures are mostly from the OPM. *See* U.S. OFF. OF PERS. MGMT., *supra* note 71. They are supplemented by interviews, annual reports, and other sources as necessary. For instance, the Federal Reserve does not report its personnel, which meant relying on annual reports and interviews. In some agencies, such as the FDA and EPA, regulatory police are spread throughout categories such as scientists, doctors, veterinarians, and engineers. Those groups were only counted when other sources indicated that they played a regulatory police role. It is possible the figures omit some regulatory police, thereby understating their presence.

[261] *See* Appendix A.

[262] *See supra* Part I.B.

[263] Interview with EEOC employee (Apr., 2017); Interview with NLRB employee (Apr., 2017); Interview with FTC Bureau of Consumer Protection employee (Apr., 2017); Interview with former FTC Bureau of Competition employee (Mar., 2017).

[264] The term "legalistic" is a broader concept that was used to describe, for example, some types of inspectors

The remaining fifteen agencies all have material numbers of regulatory police in both an absolute sense and relative to legal personnel. Five have some balance between the groups—the *hybrids*: the CFPB, EPA, FCC, FERC, and SEC.[265] In the remaining eleven agencies, regulatory police make up over 85% of the combined regulatory police and legal workforce, making them *monitor-dominant*.[266]

To what extent do personnel reflect monitoring activity? That question is one of the many in administrative law lacking empirical evidence showing the connection between agency design and agency behavior.[267] Activity data is less consistently available than human resource data.[268] Nor can I establish a definitive link between design and behavior. Nonetheless, one indication from the data available reflects common sense: Agencies with sizeable regulatory police workforces extensively exercise statutory monitoring authority.

To a much lesser extent, even litigator-dominant agencies exercise some amount of statutory monitoring authority. For example, the litigator-dominant EEOC uses its confidential data collected on gender and racial breakdowns to launch systemic discrimination investigations, but those account for less than one percent of its total investigations.[269] Although FTC competition lawyers regularly rely on key monitoring program—pre-merger report submissions—for consumer protection the agency depends on non-statutorily acquired information sources such as industry conferences, online consumer complaints, or litigators watching television in search of deceptive ads.[270]

The remaining fifteen agencies—83% of the group—monitor significantly.[271] Even hybrid agencies engage in sometimes over ten thousand inspections annually (e.g., the EPA) or regular analysis of private transactional data (FERC and the SEC).[272] Monitor-dominant agencies tend to have higher monitoring volumes and greater likelihood of continuous presence. In 2016, the FDA conducted 164,696 surprise *tobacco* inspections alone, of retailers ranging from CVS to mom-and-pop stores.[273] The NRC's "resident inspectors"[274] and the Federal Reserve's "resident

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who operated in a more legalistic (by the book) manner. *See* BARDACH & KAGAN, *supra* note 38, at 93.

[265] *See* Appendix A.

[266] *See id*.

[267] *See* Christopher R. Berry & Jacob E. Gersen, *Agency Design and Political Control*, 126 YALE L.J. 1002 (2017) ("Unfortunately, there is virtually no empirical scholarship that demonstrates a link between agency design and political responsiveness or agency behavior.").

[268] *See infra* Part IV.A.1.

[269] U.S. EQUAL EMP. OPPORTUNITY COMM'N, FISCAL YEAR 2016 PERFORMANCE AND ACCOUNTABILITY REPORT 93 (identifying 245 Commissioner charges and directed investigations out of a total of 91,503 charges investigated). The EEOC receives cases mostly from employees. *See id*.

[270] Lesley Fair, The Truth About False Advertising (Apr. 14, 2017) (FTC attorney explaining the FTC's "Ad Monitoring" and other sources) (on file with the author).

[271] *See* Appendix A.

[272] *See id*.

[273] *See Compliance Check Inspections of Tobacco Product Retailers*, U.S. FOOD & DRUG ADMIN. (Apr. 14, 2017), http://www.accessdata.fda.gov/scripts/oce/inspections/oce_insp_searching.cfm.

[274] NUCLEAR REGULATORY COMM'N, ASSESSMENT OF EFFICIENCIES TO BE GAINED FROM CONSOLIDATING OR ELIMINATING REGIONAL OFFICES (June 26, 2003), http://www.nrc.gov/docs/ML0314/ML031470121.pdf.

examiners"[275] provide a year-round presence at nuclear plants and the largest banks.

Personnel numbers have limits in what they say about an institution. Agencies with the same proportion of employees may distribute authority dissimilarly through divergent structural decisions. The following sections discuss those and other high-impact design choices. Nonetheless, if the literature is correct that personnel numbers reflect power and priorities, only sixteen percent of the major regulators studied clearly favor lawyers, while more than half prioritize regulatory police.[276]

B. Enforcing Law

Regulatory police, like police officers, do more than patrol. To varying degrees across agencies, they also make enforcement decisions. Agencies have a "graduated enforcement continuum"[277] ranging from warning letters to prosecution. An agency's designers can set up organizational processes that require regulatory police to hand over a case at the first sign of wrongdoing, reserving all major enforcement decisions for other groups, such as enforcement lawyers. Litigator-dominant agencies tend to adopt such a structure. Regulatory police at hybrid and monitor-dominant agencies, however, play a meaningful role in decisions far along the enforcement spectrum. Some regulatory police even play something close to a prosecutorial role. A taxonomy of that participation follows.

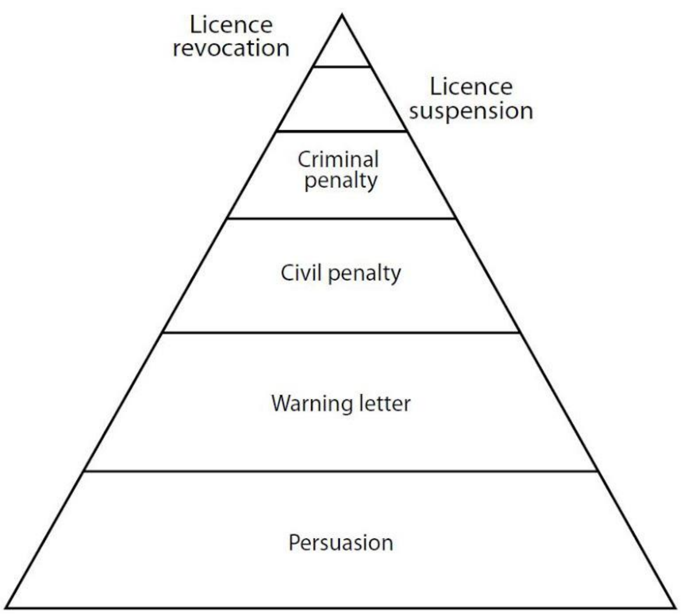

DIAGRAM I[278]

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[275] *See* Levitin, *supra* note 49, at 2044.
[276] *See* Appendix A.
[277] *See* BSEE ANNUAL REPORT, *supra* note 17, at 23.
[278] Based on AYRES & BRAITHWAITE, *supra* note 28, at 35.

1. Citations, Recommendations, and Warnings

In 1992, Professors Ayres and Braithwaite articulated an emerging "responsive regulation" through a conceptual pyramid, replicated in Diagram I, in which "the proportion of space at each layer represents the proportion of enforcement activity."[279] At the larger bottom layer of their pyramid are persuasion and warning letters, and above is smaller space for formal procedures such as civil penalties.[280] Ayres and Braithwaite provide examples of regulatory police only in passing, and were not exploring the implications of responsive regulation for various internal agency groups. But their pyramid implies that the group managing the bottom layer of mostly unreviewable conduct controls a large portion of enforcement.[281]

At fifteen of the nineteen largest regulators, there is evidence that regulatory police drive this activity at the base of the pyramid,[282] which includes public "noncompliance" notifications and confidential "resolutions."[283] Although not all agencies release such figures, those available reflect the pyramid's space allocation in that the quantity of less formal activity dwarfs more formal proceedings.[284] For instance, in 2016, the FDA's inspections group issued 14,590 warning letters, while its legal division took only twenty-one enforcement actions.[285]

In terms of behavioral impact, these recommendations can be far-reaching. Compliance varies across time and agencies, but there are indications that in diverse industries companies cooperate when informally advised to take a course of action.[286] Even the recommendations of regulatory police at hybrid agencies can lead to substantial payouts, albeit less than those of litigators. In a recent six-month period, CFPB examinations prompted financial institutions to refund $44 million to consumers, while the enforcement group secured $82 million.[287]

Why would a firm comply with these expensive recommendations? Despite being "advisory," they carry the threat of harsher follow-up. As the FDA's manual notes, the warning letter provides "an opportunity to take voluntary and prompt corrective action before [FDA]

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[279] *See* AYRES & BRAITHWAITE, *supra* note 28, at 35.

[280] *See id.*

[281] *See supra* Part II.A.3.

[282] This includes all agencies except the FCC, EEOC, NLRB, and FTC. *See* Appendix B.

[283] *See, e.g.*, FERC REPORT, *supra* note 247, at 39.

[284] *See* Appendix B.

[285] *Enforcement Activity*, U.S. FOOD & DRUG ADMIN. (Feb. 17, 2017), https://www.fda.gov/ICECI/EnforcementActions/ucm247813.htm.

[286] FERC REPORT, *supra* note 247, at 35 (reporting that energy companies implement 98 percent of FERC's "audit recommendations" within six months.); Richard M. Cooper & John R. Fleder, *Responding to A Form 483 or Warning Letter: A Practical Guide*, 60 FOOD & DRUG L.J. 479, 480 (2005) (noting that food companies typically comply with FDA inspectors' requests); Interview with former FDIC employee (Mar., 2017) (stating that financial institutions "almost always" comply with examiners' requests).

[287] CONSUMER FIN. PROT. BUREAU, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 11 (Spring, 2016). At FERC, auditors identified energy company noncompliance that led to customer refunds and price reductions amounting to $5.3 million, less than a third of the $18 million for litigators. *See* FERC REPORT, *supra* note 247, at 39.

initiates an enforcement action."[288] Moreover, regulatory police requests may not need backup from an agency's litigation group, as the rest of this section explains.

2. Blocking Business Activity

In at least eleven of the nineteen agencies, regulatory police can ex ante block a product from entering the market or ex post suspend access.[289] Pre-approval may be required only for new activities, such as launching new medical devices or opening a new bank branch.[290] Other times agencies must approve every product, as is the case for every chicken carcass sold in the U.S.[291] Even when agencies set up an appeals process for regulatory police decisions, that option may not be practical, and the appeals process often runs through the regulatory police.[292]

After a product enters the market, many regulatory police can order or request a halt in operations. Federal regulators can recall toys, automobiles, and food based on health or safety concerns.[293] Environmental inspectors can shut down companies that are discharging hazardous chemicals.[294]

3. The Process as Punishment

Agencies have discretion to increase monitoring intensity, whether officially or unofficially.[295] They stop short of publicly describing monitoring as punishment, which might provoke court challenges.[296] Nonetheless, some agencies communicate that monitoring is both a consequence and a reward. OSHA, for instance, has a Voluntary Protection Program "in recognition of outstanding efforts of employers,"[297] which awards firms by subjecting them to fewer inspections.[298] OSHA's "Severe Violator Enforcement Program" involves higher penalties and "increased OSHA inspections in these worksites, including mandatory OSHA follow-up

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[288] *See* REGULATORY PROCEDURES MANUAL, *supra* note 215, at 2.

[289] The eleven agencies are the FDA, OCC, USDA (FSIS), FAA, FCC, FDIC, Federal Reserve, FMCSA, MSHA, SEC, and NRC. *See* Appendix B.

[290] *Fact Sheets & Presentations*, U.S. FOOD & DRUG ADMIN. (Aug. 16, 2016), https://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm247546.htm.

[291] *See* USDA INSPECTION, *supra* note 11, at 15.

[292] *See infra* Part IV.B.

[293] *See, e.g.*, Fact Sheets & Presentations, *supra* note 290.

[294] *See* BSEE ANNUAL REPORT, *supra* note 17, at 23-24; 30 C.F.R. 250.10 (2012); Interview with former EPA employee A (Apr., 2017).

[295] *See, e.g.*, Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective* 45, 52 ADMIN. CONF. OF THE U.S., ("The relationship between an agency and a regulated party . . . may operate at an institutional and official level, if, say, the agency has an announced policy of reducing the frequency of inspections for parties who have a good track record.").

[296] For example, that could imply the inspection was a final determination of rights or not part of an "administrative plan." *See Marshall*, 436 U.S.

[297] *All About VPP*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/dcsp/vpp/all_about_vpp.html.

[298] *See* OMB Watch, *supra* note 57, at 6-7.

inspections, and inspections of other worksites [owned by the violator]."[299] The agency explains this policy by noting that "[h]igher penalties and more aggressive, targeted enforcement will provide a greater deterrent."[300] The EPA's audit policy program officially only offers reduced penalties for violations as a reward for good behavior, but a statistical study found that well-behaving firms also were subject to fewer inspections, even controlling for other factors.[301]

Regulatory police's scrutiny can be costly to firms,[302] and firms predictably seek to avoid intense monitoring.[303] In environmental negotiated rulemaking, industry representatives have pushed for rewarding exemplary firms by giving them "tax credits" and "less frequent inspection audits."[304] Thus, the threat of increased scrutiny provides one avenue for regulatory police to obtain compliance even without direct sanction authority.

4. Investigations and Charges

Regulators can allocate investigatory control to different groups. At agencies with sizeable litigation divisions, such as at the SEC, enforcement lawyers control much of the investigatory function because they have their own investigation resources. Even at such agencies, regulatory police's influence can extend beyond the handoff if the enforcement lawyer seeks regulatory police's expertise or if regulatory police originated the case. But regulatory police wield less influence overall in such agencies.[305]

Agencies with smaller legal groups rely more on the inspector to investigate. FAA inspectors will investigate and recommend an airline's civil penalty or a pilot's suspension before attorneys take over the case.[306] The SEC and FAA models allow attorneys to decide the formal charges, but still reflect the relationships in federal criminal law enforcement, where "iterated interactions between agents and prosecutors will affect investigative and adjudicative decisionmaking."[307]

Alternatively, regulatory police may lead cases through the formal charge phase. When an explosion or death occurs on an offshore oil platform, inspectors investigate and build the "case" for civil penalties.[308] Based on the inspector's case and the company's response, "the Reviewing

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[299] *US Department of Labor's OSHA Takes Action To Protect America's Workers with Severe Violator Program and Increased Penalties*, OCCUPATIONAL SAFETY & HEALTH ADMIN. (2010), https://www.osha.gov/pls/oshaweb.

[300] *See id*.

[301] *See* Parrillo, *supra* note 295, at 52.

[302] *See* Freeman, *supra* note 28, at 67.

[303] For instance, lawyers warn that a firm ignoring an FDA inspector's request is "likely to be subject to extraordinarily intense and more frequent inspections." Cooper & John R. Fleder, *supra* note 286, at 480.

[304] *See id*.

[305] *See id.*

[306] *See* L. Ronald Jorgensen, *The Defense of Aviation Mechanics and Repair Facilities from Enforcement Actions of the Federal Aviation Administration*, 54 J. AIR L. & COM. 349, 375 (1988); Peyton H. Robinson, *An Overview of FAA Enforcement Actions*, UTAH BAR J., November/December 2012, at 29.

[307] *See* Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 751-52, 767 (2003).

[308] *Civil Penalties Assessments and Appeals*, BUREAU OF SAFETY & ENVTL. ENFORCEMENT, https://www.bsee.gov/what-we-do/safety-enforcement/civil-penalties-assessments-and-appeals (last visited Apr. 25, 2017); Interview with Bureau of Safety and Environmental Enforcement (BSEE) employees (Mar., 2017).

Officer will issue a decision identifying the amount of any *final* civil penalty."[309] That process led to $3.7 million in civil penalties in 2015.[310] OSHA inspectors in the vast majority of cases set fines and negotiate final settlements with businesses without ever involving litigators.[311] Thus, regulatory police may serve as investigators, prosecutors, and *de facto* final decision makers.

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The confluence of case-specific sanction control, as well as the degree of regulatory police's information monopoly,[312] provides an overall sense of regulatory police influence over agency enforcement. Difficulties arise in comparing the external impact of regulatory police and litigators. One legal case or rule can establish an industry standard. Tens of thousands of warning letters, Incidences of Noncompliance, and citations do not attract as much attention as a $415 million SEC legal settlement with Merrill Lynch.[313] But institutionalized through large firms' compliance systems, and spread across millions of transactions, even non-quantifiable regulatory police interventions can have far-reaching impact.

Despite variation and comparison difficulties, at sixteen of nineteen major agencies studied—all except the FTC, EEOC, and NLRB—regulatory police have significant enforcement influence.[314] Multiple levers—including statutory authority, workforce size, internal information reliance, formal sanctions, and planning—can shift influence away from the legal division. As more of these levers align at a given agency and across the administrative state, regulatory police become the drivers of regulatory enforcement.

C. Making Law

Agencies make law through their determinations in individual cases and by issuing broader rules. Regulatory police contribute to each of these areas of policy development.

1. Creating Common Law

Professors Daniel Solove and Woodrow Hartzog have documented how, since the 1990s, FTC enforcement lawyers have created a common law of privacy "without a meaningful body of judicial decisions."[315] FTC lawyers have done so through settlement agreements, which set

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[309] *See* Civil Penalties Assessments and Appeals, *supra* note 308 (emphasis added).

[310] *See* BSEE ANNUAL REPORT, *supra* note 17, at 23-24.

[311] After OSHA inspectors and their supervisors decide on civil penalties, companies may then pay, negotiate, or file a legal appeal. By one regional leadership's estimate, firms rarely appeal, and about eighty percent of the time a negotiation ensues. OSHA inspectors do not usually involve solicitors unless the negotiations falter. Interview with OSHA, *supra* note 137.

[312] *See supra* Part II.B.2.

[313] *See* SEC FINANCIAL REPORT, *supra* note 201, at 16.

[314] *See* Appendix B.

[315] *See* Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 583 (2014).

industry-wide practices.[316] Individual regulatory police determinations can have a similar effect. The Freedom of Information Act, executive orders, and the information age have combined to make hundreds of thousands of regulatory police reports and warning letters available. These documents offer great detail. For instance, one of the FDA's 17,000 warning letters from 2015 reveals that during a Deerfield, Illinois inspection of Walgreens over-the-counter drug preparation, "a technician leaned forward into the ISO 5 hood resting both elbows on the hood and covering the ventilation grid . . . hundreds of dead insects" lay throughout the facilities, and a follow-up laboratory analysis revealed "spore-forming bacteria."[317] The FDA's recommendations to Walgreens regarding behavioral changes are also specific.[318]

Like a lawyer to a judge, firms use these texts to plead their case.[319] The firm might argue that in a prior inspection at a different firm, similar observations led to different recommendations. The EPA has warned its inspectors to follow national procedures because "[p]olicy decisions at one facility can have a precedential effect on all other facilities."[320] Firms study regulatory police reports to learn how to operate in the future. Since the reports can contain specific recommendations not required by law,[321] these regulatory police—and those who oversee them—wield the ability to not only interpret law, but to create it.

2. Writing Rules

Regulatory police's most straightforward form of soft rulemaking is the writing of their employee manuals. These manuals give instructions as to what information the regulatory police should collect and how they should analyze the data they do observe, often running close to a thousand pages in length.[322] Firms meticulously study these texts to adjust behavior.[323] Manuals are most influential in industries governed by best practices and principles-based rules, which are more subject to interpretation than industries with detailed codes for every violation.[324] Manuals do not serve as the sole basis for court enforcement unless the agency treats them as substantive law and processes them through notice and comment.[325] But a firm may still choose to follow the manual simply because it reflects the expectations of a powerful government actor.[326]

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[316] *See id.*

[317] *Walgreens Infusion Services 10/19/16*, U.S. FOOD & DRUG ADMIN. (Oct. 19, 2016), https://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2016/ucm526853.htm.

[318] *See id.*

[319] Interview with OSHA, *supra* note 137; Interview with EPA, *supra* note 294.

[320] U.S. ENVTL. PROTECTION AGENCY, FINAL NATIONAL POLICY: ROLE OF THE EPA INSPECTOR IN PROVIDING COMPLIANCE ASSISTANCE DURING INSPECTIONS (Jun. 25. 2003), https://www.epa.gov/sites/production/files/2013-09/documents/inspectorrole.pdf.

[321] *See supra* Part II.A.2.

[322] CONSUMER FIN. PROT. BUREAU, CFPB SUPERVISION AND EXAMINATION MANUAL (Oct. 1, 2012), http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf (totaling 924 pages); U.S. ENVTL. PROTECTION AGENCY, NPDES COMPLIANCE INSPECTION MANUAL (Jan. 2017) (918 pages).

[323] *See* McGarity, *supra* note 213, at 1393-96.

[324] *See supra* Part II.A.2.

[325] United States v. Bioclinical Sys., Inc., 666 F. Supp. 82, 84 (D. Md. 1987).

[326] *See supra* Part III.B.1.

In a minority of industries, such as finance and securities, regulatory police also lead formal rulemaking related to their expertise.[327] In those agencies, it would be standard for agency directors or the general counsel ultimately to approve any rules written by regulatory police before subjecting them to notice and comment.[328]

Regulatory police's expertise enables them to influence both formal and soft rulemaking, but organizational configurations can lessen information asymmetries. Some agencies mandate the sharing of regulatory police reports with a separate rulemaking group, which analyzes the reports for trends.[329] At many agencies, the regulatory police division leads authorship of manuals, subject to legal review.[330] Others assign the manual writing to the rulemaking group, giving external groups more control over regulatory police-related policy making.[331]

However, the location of the individuals managing the process does not give the full picture. The manuals are hundreds of pages long and often delve into esoteric considerations such as, in the case of FAA flight inspectors, the need to avoid "signals [] that are greater than 48 μA in the 90 Hz direction from the glide slope crosspointer value."[332] The rules themselves may be similarly detailed. Due to the technical density, even when the rulemaking group writes manuals or rules they may need help drafting the text unless they previously served as regulatory police. As a former EPA senior attorney described the process, the manual writer in DC may have no field experience, and instead manages a working group of regional inspectors to draft the actual text.[333]

3. Public Shaming

Many agencies publicly post the name of the business alongside the violations identified by regulatory police.[334] One can learn, for example, that in 2014, oil inspectors shut down certain offshore Exxon operations thirteen times.[335] A January 27, 2017 OSHA inspection of an Amazon warehouse uncovered a "serious" worker health violation leading to a $5,975 fine.[336] On March

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[327] *See* FERC REPORT, *supra* note 247, at 52, 58 (describing a FERC regulatory police's recent writing of a rule for notice and comment); Interview with BSEE, *supra* note 308 (stating that Department of the Interior regulatory police draft offshore energy regulations).

[328] *See id.*

[329] *See supra* Part II.B; *cf.* Nou, *supra* note 39, at 425-31 (discussing broadly similar mechanisms).

[330] *See* United States v. Bioclinical Sys., Inc., 666 F. Supp. 82, 84 (D. Md. 1987) (specifying that the FDA's Office of Compliance writes its "inspectional guidelines"); Interview with OSHA, *supra* note 137; Interview with former CFPB employee (Mar., 2017).

[331] *See, e.g.*, USDA INSPECTION, *supra* note 11, at 19 ("[The Office of] Policy and Program Development develops regulations as well instructions for inspectors to implement these regulations.").

[332] FED. AVIATION ADMIN., UNITED STATES STANDARD FLIGHT INSPECTION MANUAL 15-65 (Apr., 2015).

[333] Interview with EPA, *supra* note 294.

[334] In other industries, such as finance, examiners' reports are private. The CFPB aggregate reports provide some detail about its examiners' findings without identifying companies. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 287, at 75.

[335] *BSEE Data Center*, BUREAU OF SAFETY & ENVTL. ENFORCEMENT, https://www.data.bsee.gov (last visited Apr. 16, 2017).

[336] *Inspection Detail*, OCCUPATIONAL SAFETY & HEALTH ADMIN.,

2, 2017, FDA inspectors caught Wal-Mart selling tobacco to minors in cities ranging from Memphis, TN, to Scottsdale, AZ.[337] Companies fear bad regulatory publicity, a risk that has grown in the Internet era because sanction results can spread more easily.[338] Consequently, the public shaming function provides a potentially powerful mechanism for regulatory police to inflict direct punishment.

D. Summary of Regulatory Police Today

An individual monitor's impact is rarely as salient as Dr. Kelsey's was during the thalidomide period. Instead, such life-altering regulatory police impact is broadly institutionalized. The FAA articulates the organizational trifecta by describing its inspectors as serving to "develop, administer, and enforce the regulations and standards relating to aviation safety."[339] These functions create a virtuous cycle. Regulatory police regularly write or advocate for rules and policies that give them more data.[340] Better data equips them to more forcefully advocate policy and enforcement priorities. As would be expected in an administrative state beset by rule ossification and intent on informed collaboration with industry, regulatory police have emerged in the modern state wielding considerable administrative power.

IV. IMPLICATIONS FOR LEGAL DESIGN

The claim that regulatory police lie at the heart of the regulatory state implicates prominent administrative law and policy debates. With the administrative lens adjusted for regulatory police's full status, they inevitably become targets in the tug-of-war among Congress, the President, and interest groups for external control over agencies. Regulatory police also necessarily compete with other internal groups for influence over the agency's actions. This Part takes up the questions of external and internal influence in turn, and identifies a set of legal and organizational design choices that determine how regulatory police can best serve their agencies' missions.

A. Regulatory Police as Constitutional Custodians

One of the central questions in administrative law is the appropriate level of influence that

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https://www.osha.gov/pls/imis/establishment.inspection_detail?id=1206314.015.

[337] *Wal-Mart #1248 3/2/17*, U.S. FOOD & DRUG ADMIN. (Mar. 28, 2017), https://www.fda.gov/ICECI/EnforcementActions/WarningLetters/Tobacco/ucm549089.htm; *Wal-Mart 3/2/17*, U.S. FOOD & DRUG ADMIN. (Mar. 27, 2017), https://www.fda.gov/ICECI/EnforcementActions/WarningLetters/Tobacco/ucm548852.htm.

[338] Nathan Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, 2011 BYU L. REV. 1371 (2011).

[339] U.S. OFF. OF PERS. MGMT., AVIATION SAFETY SERIES, OPM GS-1825 (Oct. 1973).

[340] *See, e.g.*, Amendments to a Form & Investment Advisers Act Rules, 80 Fed. Reg. 33717 (Jun. 12, 2015) (proposing "significant new reporting requirements for mutual funds and other registered investment companies."); FERC REPORT, *supra* note 247, at 52, 58 (proposing new energy data submission).

elected politicians should wield over bureaucrats. A watchdog group's study of President Obama's first year cited mostly regulatory police activity in concluding that agencies "appear to be exercising their enforcement authority more strenuously than they had in recent years."[341] As President Trump seeks to "reorganize[] the executive branch,"[342] regulatory police have already provided options.[343] Although greater influence by elected politicians is generally seen as advancing majoritarian preferences, "a majority of the electorate is still better off with some degree of bureaucratic insulation from political control."[344] An emerging legal and organizational web of constraints evinces some degree of existing bureacuratic insulation, and also indicates mechanisms for making external influence by the President and other external stakeholders more accountable, should such reforms be desired.[345]

1. Public Transparency

Transparency has its limits, and has in recent decades been increasingly deployed as a deregulatory tool.[346] But visibility can bring accountability to unelected officials, in the broader sense of improving the exercise of authority. Immediately after her 1981 appointment by President Reagan, EPA Administrator Ann Gorsuch[347] suspended hazardous waste rules and reduced legal cases by 84 percent.[348] An "awakened, angry and energized public,"[349] sensing that businesses had captured the agency, paved the way for Gorsuch's resignation in less than two years.[350] Visibility can also curtail excesses, as demonstrated by videos of police officers prompting greater oversight.[351]

Changes to regulatory police are less salient. Whereas agency rules and litigation are by default public, regulatory police's reports need not be. Bank examiners and occupational inspectors—unlike police officers and enforcement lawyers—operate mostly in private spaces, making it difficult for third parties to document excesses.[352]

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[341] *See* OMB Watch, *supra* note 57, at 4.

[342] Exec. Order No. 13781, 82 Fed. Reg. 13,959 (Mar. 13, 2017).

[343] *See supra* note 60 and accompanying text.

[344] *See, e.g.*, Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 54 (2008) ("The degree to which elected politicians ought to influence bureaucratic policymaking is one of the most important and contested questions in public law.").

[345] The calibration of accountability is complex, and more accountability is not always necessarily in the public's best interests. Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEG. ANALYSIS 185 (2014).

[346] *See generally* David Pozen, *Transparency's Ideological Drift*, 128 YALE L. J. (forthcoming 2018).

[347] *See* Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 311, 344-46 (1991).

[348] *See* Lazarus, *supra* note 347, at 345-46.

[349] *See* William D. Ruckelshaus, *A Lesson Trump and the E.P.A. Should Heed*, N.Y. TIMES (Mar. 7, 2017), at A14.

[350] *See* Lazarus, *supra* note 347, at 344-46.

[351] Scott Calvert and Valerie Bauerlein, *Viral Videos Shape Views of Police Conduct*, WALL STREET J., Dec. 30, 2015, at A2.

[352] *See, e.g.*, OFF. OF THE COMPTROLLER OF THE CURRENCY, POLICIES AND PROCEDURES MANUAL: BANK SUPERVISION 15 (Sept. 9, 2011), https://www.occ.gov/static/publications/ppm-5310-3.pdf; OFF. OF THE

Elected officials have begun to chip away at regulatory police secrecy. In 2011, President Obama ordered agencies to "make [] information concerning their regulatory compliance and enforcement activities" such as "administrative inspections, examinations, reviews, warnings, [and] citations" available for online search.[353] Executive agencies have accommodated. For instance, the FDA posts for each inspection any noncompliance identified, "voluntary" recommendation made,[354] and overturned findings.[355] The Trump administration attracted considerable attention when it cut off public access in other areas, such as White House visitor logs.[356] President Obama's directive thus may subtly constrain the Trump administration from taking contrary action.

Congress has also contributed to the transparency framework. In 2010 it required agencies to publicize "the tabulation, calculation, or recording of activity or effort that can be expressed in a quantitative or qualitative manner."[357] Although this law does not mention regulatory police, major regulators release statistics such as the number of examinations.[358] Consequently, aggregate changes, like cuts in examination numbers, are now more visible in many agencies.

In some agency-specific statutes, Congress has gone further. The Clean Air Act, for example, requires publication of any auditor's "preliminary determination" that an internal system should be revised.[359] Dodd-Frank mandated that the SEC release reports summarizing examination findings,[360] a break with the financial regulation tradition of "on-site examiners who enforce quite informally and often on a face-to-face and confidential, instead of a written and public, basis."[361]

This transparency framework, despite some value, is variant and unstable. Independent agencies, except when required by statute,[362] have complied less thoroughly with President Obama's directive than have executive agencies,[363] and a new president could easily issue a contrary order. Additionally, in many agency-specific statutes, Congress overlooked monitoring. The main regulator of offshore oil platforms, for instance, must publish information about its post-accident *investigations*, but not its regular *inspections*.[364]

COMPTROLLER OF THE CURRENCY, POLICIES AND PROCEDURES MANUAL: BANK SUPERVISION 4-7 (Feb. 26, 2016), https://www.occ.gov/news-issuances/bulletins/2016/bulletin-2016-5a.pdf.

[353] *See* Memorandum on Regulatory Compliance, 76 Fed. Reg. 3825 (Jan. 18, 2011).

[354] *Data Dashboard*, U.S. FOOD & DRUG ADMIN., https://datadashboard.fda.gov (last visited Dec. 30, 2017).

[355] *See Inspection Classification Definitions*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/ICECI/Inspections/ucm223231.htm (last visited Apr. 25, 2017); *see also* BSEE Data Center, *supra* note 335 (providing similar information for oil regulation).

[356] Julie Hirschfeld Davis, *White House To Keep Its Visitor Logs Secret*, N.Y. TIMES, Apr. 14, 2017, at A1.

[357] GPRA Modernization Act, Pub. L. No. 111-352, 124 Stat. 3866 (2010).

[358] *See* Appendix A.

[359] Clean Air Act, 40 C.F.R. § 68.220(e) (2007).

[360] Dodd Frank § 932(a)(8) (codified at 15 U.S.C. § 78(o)-7(p)(3)(C)).

[361] *See* Zaring, *supra* note 185.

[362] *See supra* note 359 and accompanying text.

[363] They do not, for instance, post company-specific or inspection-specific information. *See, e.g.*, *Compliance*, FED. ENERGY REGULATORY COMM'N, https://www.ferc.gov/enforcement/compliance.asp (last visited Nov. 17, 2016).

[364] Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356b (2012) (detailing the Department of the

Moreover, these transparency mandates focus on aggregate disclosures, which provide limited insight. An agency that conducts fewer examinations over time may be doing so because industry has captured it or because it is conducting more thorough examinations. An agency meting out fewer regulatory police sanctions for violations could mean less vigilant agencies or more compliant firms.

One policy response would be to require more comprehensive transparency. Default requirements might include those adopted by the FDA, such as (1) visibility into the entire regulatory police chain-of-command; and (2) identification of the company. Transparency has well-known drawbacks that would need to be considered. In particular, transparency could prompt firms to stem the exchange of information to avoid bad publicity.[365] Chain-of-command disclosures may also leave much unclear, as "the inner workings of complex bureaucracies [cannot] be captured neatly in charts or guidelines."[366]

But even in anonymous form, such reports can have value. If the number of overturned front-line regulatory police decisions changes significantly over time, the reports could suggest that leaders are captured by industry or inadequately supervising. The data could also enable third parties to identify regulatory police best practices or abuse of power. Professor Daniel Ho's recent study of publicly available health inspection microdata found that inconsistent application of the law subjected restaurants to an "inspector lottery."[367] At least one agency subsequently adopted institutional improvements indicated by his findings.[368] For such advancements to be made, external parties need access to data. Despite limits, transparency mechanisms can improve public oversight of regulatory police.

2. Internal Paper Trails

Transparency mandates for regulatory police must be nuanced because so much of what they do is informal. Some activities might need to remain private due to the necessity to protect companies' trade secrets. Also, mandating the release of reports may have limited efficacy because regulatory police's decisions might not produce reports. For example, although the Clean Air Act mandates the publication of any preliminary audit determinations, it does not require a decision or report, stating only that regulators "*may* issue the owner or operator of a stationary source a written preliminary determination."[369] Agency leaders thus might handle corrections informally or not at all, thereby circumventing disclosure.

Congress has forced some regulatory police to document their initial perspectives. In the Food, Drug, and Cosmetic Act, Congress mandated that "prior to leaving the premises, the officer or employee making the inspection *shall* give to the owner, operator, or agent in charge a

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Interior's responsibilities).

[365] *See* Coglianese et al., *supra* note 34.

[366] *See* Nou, *supra* note 39, at 482.

[367] *See* Daniel E. Ho, *Fudging the Nudge: Information Disclosure and Restaurant Grading*, 122 YALE L.J. 574, 574, 610 (2012).

[368] Ho, *supra* note 44, at 1. This field experiment tested a mechanism indicated as significant by the original database study. *See id*; Ho, *supra* note 367, at 653.

[369] 40 C.F.R. § 68.220(e) (emphasis added).

report in writing . . . A copy of such report shall be sent promptly to the [Health and Human Services] Secretary."[370] Forcing regulatory police to record and disclose their judgements would improve identification of employee-specific outliers.[371]

Even when kept private, an agency paper trail could deter problematic managerial behavior. For example, OCC examiner Victor Del Tredici caught a bank president illegally diverting loan fees into his personal account,[372] but Del Tredici's superiors ignored his report for nine months.[373] After the bank failed and its president went to jail, Congressional inquiries into the agency's inaction on the report publicly embarrassed OCC leadership, even though the report itself had been private.[374] The paper trail also helped restore Del Tredici's standing after OCC leadership had stripped him of his authorities over the incident.[375] A manager made aware of the possibility of subsequent legal investigations or public criticism is more likely to internalize diverse constituents' views—an "observer effect."[376]

Mandated paper trails for manager reviews have other accountability benefits, which can be more broadly defined to include the effective exercise of government power. A paper trail makes reviews more likely to happen in the first place, which is important because reviews can improve the accuracy of front-line decisions.[377] Also, managerial reviews of regulatory police help fulfill what Professor Gillian Metzger has argued is a "Constitutional duty to supervise" agency employees.[378]

3. Statutory Minimums

Congress deploys statutory "timing rules"[379] by requiring an agency to complete a minimal amount of monitoring each year. Lawmakers sometimes imposed a minimum frequency of inspections along with the original authorization of monitoring authority.[380] More often, however, minimums were mandated or increased in response to an often-observed regulatory pattern in which "history keeps repeating itself."[381] After monitoring authority *already* existed in

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[370] *See, e.g.*, 21 U.S.C. § 374(b) (2012).

[371] *See supra* Part IV.A.2.

[372] OFF. OF THE COMPTROLLER OF THE CURRENCY, QUIET HERO: VICTOR DEL TREDICI AND THE FALL OF THE SAN FRANCISCO NATIONAL BANK, https://www.occ.treas.gov/about/what-we-do/history/victor-del-tredici-article.pdf (last visited Apr. 17, 2017).

[373] *See id.*

[374] EUGENE N. WHITE, THE COMPTROLLER AND THE TRANSFORMATION OF AMERICAN BANKING, 1960-1990 7 (1992).

[375] *See id.*

[376] Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827 (2013).

[377] *See, e.g.*, Ho, *supra* note 44, at 96.

[378] *See* Gillian E. Metzger, *The Constitutional Duty To Supervise*, 124 YALE L.J. 1836 (2015).

[379] Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543 (2007) ("A timing rule, as we define it, is a rule that substantially affects the timing of a government action, including legislation and executive action.").

[380] *See, e.g.*, Burke, *supra* note x, at 15 (noting semiannual inspections of steamboats).

[381] George M. Burditt, *History of Food Law*, 50 FOOD & DRUG L.J. 197, 200 (1995).

an industry, subsequent oil spills,[382] economic crises,[383] mining deaths,[384] and food poisoning outbreaks[385] have led Congress to impose activity floors, such as annual inspections. These minimums guard against the "problem of public underinvestment in information."[386]

Minimums alone, like transparency or paper trails, have limits. Regulatory police may not comply with legislative agendas,[387] particularly following budget cuts.[388] Indeed, agencies such as the EPA usually face more than ten deadlines in a given year across all of its activities, and sometimes over fifty deadlines.[389] Courts have shown a willingness to compel agencies to take action after missing deadlines.[390] But the "end-game" in such situations is unclear because higher courts "have exhibited a virtually complete unwillingness" to imprison agency leaders.[391] Moreover, agencies can satisfy minimums perfunctorily, such as when bank regulators conducted "drive-by examinations" leading up to the financial crisis.[392] Minimums may also hinder agencies' ability to adjust to fast-changing markets if, for example, effective remote monitoring becomes achievable.

Still, legislative strictures generally, and deadlines in particular, likely influence agencies.[393] Even independent regulators, over which Congress has less influence, report compliance with statutory floors.[394] Regulatory police are highly skilled and likely could have earned more

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[382] DEEPWATER REPORT, *supra* note 5, at 28-30; 43 U.S.C. § 1348(c) (2012).

[383] WHITE, BANK HISTORY, *supra* note 78, at 31; 15 U.S.C. § 78.

[384] Federal Coal Mine Safety Act of 1952, Pub. L. No. 82-552, 66 Stat. 692 (1952) (requiring annual inspections in some coal mines); Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (1969) (mandating four annual inspections at each underground and two annual inspections at each surface coal mine); Federal Mine Safety and Health Act of 1977 (Public Law 95-164) (requiring four annual inspections for all underground mines and two annual inspections for all surface mines); Anne Marie Lofaso, *What We Owe Our Coal Miners*, 5 HARV. L. & POL'Y REV. 87, 98 (2011) ("[T]he Federal Coal Mine Health and Safety Act of 1969[] came after the Farmington No. 9 mine explosion in West Virginia, which claimed the lives of seventy-eight coal miners . . . In response to the 1976 Scotia mine disaster in Kentucky, which took the lives of twenty-six miners and rescue workers in two explosions, Congress passed the 1977 Federal Mine Safety and Health Act.").

[385] *See* Jacobs, *supra* note 105; FDA Food Safety Modernization Act, Pub. L. No. 111-353, § 201, 124 Stat 3885, 3885 (2011) (codified as amended at 21 U.S.C. § 350j(a)(1) (2011)). High-risk facilities must be inspected at least every three years. 21 U.S.C. § 350(j).

[386] *See* Stephenson, *supra* note 32, at 1427-37.

[387] JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 254-55 (1989).

[388] *See, e.g.*, U.S. DEP'T OF LABOR, NO. 05-08-001-06-001, UNDERGROUND COAL MINE INSPECTION MANDATE NOT FULFILLED DUE TO RESOURCE LIMITATIONS AND LACK OF MANAGEMENT EMPHASIS 1 (2007).

[389] Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 939, Figure 2 (2008).

[390] *See id.* at 952-54.

[391] Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 686 (2018); Gersen & O'Connell, *supra* note 389, at 964 ("Most statutes that impose deadlines are silent about what should happen if the agency misses the deadline.")

[392] *See, e.g.*, Levitin, *supra* note 49, at 2040-43.

[393] *See* Gersen & O'Connell, *supra* note 389, at 977 ("Deadlines likely force agencies to reallocate resources away from programs without deadlines and toward programs with deadlines."); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 383 (2000).

[394] *See, e.g.*, FED. DEPOSIT INS. CORP., 2016 ANNUAL REPORT 25 (2016) (stating in its annual report that "the

working elsewhere, which means some are presumably driven by a sense of public service. Allowing these employees to evaluate questionable business conduct could provide avenues for prompting enforcement, even in a captured agency. For example, the regulatory police might convince reluctant superiors to take action.

Statutory minimums also undermine industry capture of agencies because of leaks. In 2013, Federal Reserve compliance examiner Carmen Segarra unsuccessfully asked her superiors to take action against Goldman Sachs.[395] She later released forty-six taped hours of "cozy" conversations between examiners and bankers, and non-action despite "window dressing" of reports and "shady" behavior.[396] The incident prompted Congressional scrutiny, and foreshadowed later criminal charges resulting from blurred lines between the regulator and bank.[397] Other bureaucrats have used Wikileaks to reveal documents.[398] Whether these avenues improve governance is beyond the scope of the current discussion. Nonetheless, minimums can stifle complacency and capture by forcing agencies to deploy resolute regulatory police.

4. Formal Appeals

Some regulatory police enforcement decisions, such as those suspending access to markets, constitute final agency actions, trigger formal administrative processes, and will likely get transferred to legal groups and ultimately public courts if appealed.[399] However, Congress has typically imposed far lower procedural oversight of regulatory police. A Department of the Interior authorizing statute requires formal adjudicative processes mirroring those in "the district courts of the United States" for offshore oil platform investigations, but not for inspections.[400] The CFPB's founding statute requires administrative law appeals for CFPB enforcement actions but not for examination findings.[401] Such agency-specific statutes mirror the APA's exemption of "proceedings in which decisions rest solely on inspections."[402]

Statutory lenience regarding regulatory police appeals has afforded many agency leaders great discretion regarding how to structure regulatory police-related decisions. Many agencies have nonetheless built formal processes enabling firms to appeal regulatory police decisions, even when not required by statute. Some agencies leave appeals within the regulatory police chain of command.[403] Others route regulatory police appeals through administrative law

FDIC conducted all required [] examinations").

[395] Jake Bernstein, *The Carmen Segarra Tapes*, PROPUBLICA (Nov. 17, 2014), https://www.propublica.org/article/the-carmen-segarra-tapes.

[396] *See id.*

[397] Ben Protess & Peter Eavis, *Ex-Goldman Banker to Plead Guilty in Fed Leak*, N.Y. TIMES (Oct. 26, 2015), at A1.

[398] David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 514 (2013).

[399] *See, e.g.*, Biber & Ruhl, *supra* note 12, at 145-48.

[400] 43 U.S.C. § 1348 (c)-(d), (f) (2012).

[401] 12 U.S.C. §§ 5321, 5322(a)(2).

[402] 5 U.S.C. § 554(a) (2006).

[403] CONSUMER FIN. PROT. BUREAU, APPEAL OF SUPERVISORY MATTERS (Nov. 3, 2015), http://files.consumerfinance.gov/f/201510_cfpb_appeals-of-supervisory-matters.pdf; Cooper & John R. Fleder,

judges.[404]

The fact that agencies have implemented appeals processes even when not required may reflect a recognition of the value of having some kind of formal process. Or it could be a response to industry lobbying. Regardless, the variation underscores the need for greater understanding of what constitutes optimal design of regulatory police adjudication processes.

B. Regulatory Police as Administrative Branch

Scholars have in recent years shown how "internal administrative rivals—perhaps as much as Congress, the President, and the courts—shape agency behavior."[405] The literature on internal rivals as checks and balances on administrative power has yet to consider regulatory police.[406] One of the implications of this Article is that agency directors' decisions on regulatory police resource allocation and organizational design determine whether and the extent to which regulatory police operate as agency rivals.

The great variability in agencies' allocation of resources to regulatory police—ranging from almost all to almost none of their enforcement personnel—could, in theory, offer diverse models for optimal monitoring.[407] But there are several reasons to suspect that some large agencies today reflect suboptimal structures: the reactive nature of monitoring legislation, the limited empirical study of the question, and the persistent challenge of institutional inertia in sizable organizations. How might policy makers improve the organizational design surrounding regulatory police?

Definitive answers to such complex questions must await empirical studies comparing different models in similar contexts, but this Article's findings can inform the particular hypotheses worthy of testing. One such hypothesis is whether a balance of powers provides benefits over the alternatives. At one extreme, agencies with limited regulatory police power presumably risk being too blind to regulate effectively. The many historical examples of crises associated with insufficient monitoring lend support to this hypothesis. Additionally, observers in different regulatory spheres have recently identified many legal problems in need of greater agency monitoring, particularly in areas governed by litigator-dominant agencies. Professor Scott Hemphill and I have, for different reasons, called for the FTC to use monitoring authority more for antitrust and consumer protection.[408] A government task force concluded that the EEOC

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supra note 286, at 492 (FDA appeals).

[404] *See, e.g.,* 30 CFR 290.2 (Department of the Interior appeals).

[405] Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 227 (2016); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2010).

[406] This issue touches on two larger debates that have been covered. The first is the tradeoffs between lawyers and technocrats. *See generally* FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING (2009). Second, scholars have explored how to design agencies for the optimal collection of information. *See* Stephenson, *supra* note 32 (offering a framework for designing public institutions with adequate incentives for acquiring policy-relevant information).

[407] *See supra* Part III.A.

[408] *See* C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 643 (2009); Rory Van Loo, *Helping Buyers Beware: The Need for*

should collect more data to identify systemic wage discrimination.[409] And Frank Pasquale has argued that more monitoring of medical devices could save lives.[410]

At the other extreme, it is important to study the potential pitfalls of over-reliance on regulatory police. This inquiry takes on particular importance in light of new governance models that might drive the administrative state toward greater reliance on administrative police.[411] Policy makers have repeatedly turned to litigators following monitor-dominant regulators' failures. After the 1990 Exxon *Valdez* oil tanker crashed into an Alaskan reef, releasing eleven million barrels of oil,[412] Congress passed the Oil Pollution Act to strengthen oil regulators' civil penalties.[413] The 2002 Enron scandal "converted FERC from an economic regulator to an enforcement agency" by prompting an expansion of FERC's ability to prosecute "market manipulation."[414] Following the 2008 financial crisis, lawyers began to play a larger role at bank regulators.[415] Each of these agencies, prior to the scandal, was monitor-dominant.[416] Capture by industry is a common explanation for such failures.[417] Capture is difficult to prove, and lawyers are not immune.[418] But regulatory police's non-adversarial function, and their regular and frequent contact with businesses,[419] may make them particularly susceptible.

Even hybrid agencies have deployed greatly divergent models for how their powerful groups of monitors and lawyers should interact. The CFPB has organizationally designed more separation between the two groups. CFPB examiners and lawyers have visibility into each others' activities, and may consult one another, but typically pursue enforcement cases largely independently. In contrast, at the EPA, once inspectors identify anything beyond a minor violation, they work side by side with lawyers. EPA collaboration means that both engineers and lawyers are often involved in deciding on sanctions, negotiating with firms, and even co-authoring legal briefs.[420] Consequently, each meaningful regulatory police decision is peer-reviewed by someone trained within a professional code of ethics and the administration of justice.[421] While empirical studies have produced strong evidence that peer review improves

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Supervision of Big Retail, 163 U. PA. L. REV. 1311, 1311 (2015).

[409] *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N., SYSTEMIC TASK FORCE REPORT (March 2006), https://www.eeoc.gov/eeoc/task_reports/systemic.cfm.

[410] Frank Pasquale, *Grand Bargains for Big Data: The Emerging Law of Health Information*, 72 MD. L. REV. 682, 683 (2013).

[411] *See supra* Part II.A.

[412] Alan Taylor, *The Exxon Valdez Oil Spill: 25 Years Ago Today*, ATLANTIC (Mar. 24, 2014), at 6.

[413] The Oil Pollution Act of 1990 (OPA), (Pub. L. 101–380).

[414] Principal, SJC Energy Consultants, http://courtenergy.com (former Director of Enforcement describing effect of Energy Policy Act of 2005); Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) (codified at 16 USC§ 824-825).

[415] *See* CONTI-BROWN, *supra* note 91, at 93.

[416] The Enron scandal shifted FERC from a regulatory police-driven to a litigator-driven agency. *See* Principal, *supra* note 414; Interview with FERC employee (Apr., 2017). Banking and oil regulators remain regulatory police-dominant. *See* Appendix A.

[417] *See* Levitin, *supra* note 49, at 2041; DEEPWATER REPORT, *supra* note 5, at 78.

[418] See, e.g., Mashaw et al., Administrative Law, p. 33.

[419] *See supra* note 274.

[420] Interview with EPA, *supra* note 294; JOEL A. MINTZ, ENFORCEMENT AT THE EPA 113 (2012).

[421] Interview with EPA, *supra* note 294; *Cf.* Schauer, *supra* note 406 (discussing lawyer's approach to

regulatory police performance, they have not looked at whether peer review across these two major groups provides additional benefits given their varying expertise, worldviews, and legal authority. It is plausible that a set of agency-mandated processes for cross-functional peer review and information-sharing could better organizationally set regulators up for success in the modern era of institutionally complex, technologically advanced, and politically powerful businesses.

C. Summary of Implications

Agencies have, through their manifold mistakes and reflexive post-crisis transformations, offered a laboratory of regulatory experiments for regulatory policing.[422] Regulators currently deploy diverse design mechanisms for regulatory police accountability. These include familiar mechanisms that are seldom discussed in reference to regulatory police: disclosures to the public, mandated paper trails, statutory minimums, and formal appeals. Agency leaders also make less familiar institutional design decisions about the allocation of resources and organizational processes requiring cross-functional teamwork.

This largely unexplored and self-regulating administrative monitoring ecosystem is ripe for systematic study to identify best practices for weeding out extremes of overbearing, blind, or captured agencies. Also, the President and agency leaders can rapidly change much of the existing accountability blueprint. A key question is how much of the existing regulatory police structure should be ingrained in the law, rather than left to bureaucratic discretion.

CONCLUSION

Scholars commonly describe agencies as engaging in ex ante rulemaking and ex post enforcement. Ongoing monitoring should be added to that standard account and studied more closely. Regardless, the traditional aims of administrative law—designing accountability mechanisms such as transparency and appeals—could better reflect the tripartite nature of regulators' legal functions.

Additionally, those who regularly extract information from firms influence much of the administrative state's law-related activity. Any regulatory analysis that ignores regulatory police or groups them together with enforcement risks obscuring agencies' vital "internal laws."[423] Regulatory police resource allocation and inter-group processes should be added to the toolbox for designing agencies to increase effectiveness and accountability.[424]

Regulatory police are vital to the front line of business compliance. But lawyers—as judges, drafters of laws, and intra-agency rivals—"are the foot soldiers of our Constitution."[425] The

reasoning). Peer review alone can improve regulatory police performance. *See* Ho, *supra* note 44.

[422] *Cf.* Dorf & Sabel, *supra* note x, at 267 (generally discussing the importance of democratic experimentalism).

[423] Mashaw & Harfst, *supra* note 210, at 443 ("Bureaucratic institutions have their own internal laws, expressed both in regulation and in routine.").

[424] *See, e.g.*, Barkow *supra* note 52 (offering other anti-capture features); Gersen & Stephenson, *supra* note 345 (providing an overview of over-accountability and possible solutions).

[425] Hon. Lee R. West, *Judicial Independence: Our Fragile Fortress Against Elective Tyranny*, 34 OKLA. CITY U. L. REV. 59, 73 (2009) (quoting Rennard Stickland).

organizational design of these two groups' intersection is crucial to a healthy system of checks and balances with regulatory police as a powerful internal branch of administration.

* * *

APPENDIX A

Employees and Monitoring[426]

Agency	Monitor Personnel	Legal Personnel	Monitor Percent	Annual Monitor Activity
CFPB	416	349	54%	177 examinations and related[427]
Food Safety & Inspection Service (FSIS)	8,107	440	95%	1.7 million products inspected[428]
FERC	509[429]	308	62%	398 account reviews, 423 reports, 2,330 inspections[430]
FDA	11,493[431]	203	98%	>160,000 inspections[432]
Mine Safety & Health Admin. (MSHA)	1,521[433]	141[434]	91%	19,642 inspections[435]
OSHA	1,827[436]	277[437]	93%	35,822 inspections[438]

[426] Unless otherwise specified, figures are all examiner/inspection/compliance positions for regulatory police and all Legal and Kindred employees from U.S. OFF. OF PERS. MGMT., *supra* note 71. Monitor Percent = Regulatory police/(Regulatory police + Legal). Figures reflect those reported by the end of 2016, although figures have been updated slightly since then.

[427] CONSUMER FIN. PROT. BUREAU, CFPB STRATEGIC PLAN, BUDGET, AND PERFORMANCE PLAN AND REPORT 38-40 (2016), https://www.consumerfinance.gov/about-us/budget-strategy/budget-and-performance (listing "supervisory activities"). For a review of the CFPB's early examination activities, *see* Jean Braucher & Angela Littwin, *Examination as a Method of Consumer Protection*, 87 TEMP. L. REV. 807 (2015).

[428] U.S. DEP'T OF AGRIC., QUARTERLY ENFORCEMENT REPORT 1 https://www.fsis.usda.gov/wps/wcm/connect/2065d220-1e88-4cf4-bdf9-d02a8618d9c0/QER-Q1-FY17-Tables.pdf?MOD=AJPERES.

[429] Includes Accounting, Auditing, Engineering, and General Business. Interview with FERC, *supra* note 416 (clarifying classifications).

[430] *See* FED. ENERGY REGULATORY COMM'N, FY 2017 CONGRESSIONAL PERFORMANCE BUDGET REQUEST 48-51 (2017).

[431] Includes scientists, engineers, consumer protection, and medical officers. Interview with FDA, *supra* note 289 (describing job responsibilities).

[432] *See Compliance Check Inspections*, *supra* note 273.

[433] Of these, about 1,145 actually conduct inspections, whereas the rest engage in related monitoring support and oversight activities. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF LABOR, NO. 05-10-001-06-001, JOURNEYMAN MINE INSPECTORS DO NOT RECEIVE REQUIRED PERIODIC RETRAINING 1-2 (2010).

[434] *See supra* note 437.

[435] U.S. DEPT. OF LABOR, AGENCY FINANCIAL REPORT 19 (2016), https://www.dol.gov/sites/default/files/media_0/_Sec/2016annualreport.pdf (putting the figure at 3,095 for coal mines and 16,547 for metal and other non-coal mines).

[436] OCCUPATIONAL SAFETY & HEALTH ADMIN., FY 2017 CONGRESSIONAL BUDGET JUSTIFICATION 28-29 (last visited Dec. 28, 2017).

[437] Legal employees are listed as zero for OSHA in the database, because legal is centralized in the Department of Labor (DOL). This figure is calculated as "Legal and kindred" (except Worker's Compensation Claims examiners) from DOL proportioned out to OSHA's percent of DOL employees. *See* Employment Cubes, *supra* note 426; Interview with OSHA, *supra* note 137 (explaining how DOL solicitors serve the department's various agencies).

Agency	**Monitor Personnel**	**Legal Personnel**	**Monitor Percent**	**Annual Monitor Activity**
FAA	4,388	342	93%	Inspect 227,900 aircraft[439]
Fed. Motor Carrier Safety Admin. (FMCSA)	644[440]	46	93%	118,494 inspections[441]
OCC	2,715	209	93%	768 applications[442]
EPA	1,682[443]	1,102	60%	13,500[444] inspections[445]
EEOC	N/A	522	0%	Analyses of EEO-1 data[446]
FCC	308[447]	602[448]	34%	Inspections, transaction review[449]
FDIC	2,719	454	86%	6,892 examinations[450]
Federal Reserve	1,382[451]	69[452]	95%	4,190[453]
FTC	20[454]	711	3%	1,200 merger notifications[455]

[438] OCCUPATIONAL SAFETY & HEALTH ADMIN., *supra* note 436, at 45.

[439] FED. AVIATION ADMIN., FY 2009 CITIZENS' REPORT 4 (2009), https://www.faa.gov/about/plans_reports/media/2009_Citizens_Report.pdf.

[440] Broken down into the federal level, these employees are classified as "Motor Carrier Safety" and "Highway Safety." *See* OFF. OF PERS. MGMT., *supra* note 71. Of these, 506 perform inspections, while the rest play support and oversight roles for monitoring. *See* FED. MOTOR CARRIER SAFETY ADMIN., *2017 Pocket Guide to Large Truck and Bus Statistics* 18, (Jun. 2017), https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/safety/data-and-statistics/81121/2017-pocket-guide-large-truck-and-bus-statistics-final-508c-0001.pdf. . Federal inspectors represent 5% of the total inspector force, most of whom are state employed. *See id.*

[441] *See* FED. MOTOR CARRIER SAFETY ADMIN., *supra* note 440, at 18.

[442] OCC 2016 ANNUAL REPORT, *supra* note 334.

[443] Engineers; see also JOEL A. MINTZ, ENFORCEMENT AT THE EPA 11 (rev. ed. 2012).

[444] *See Enforcement Annual Results Numbers at a Glance for Fiscal Year 2016*, U.S. ENVTL. PROTECTION AGENCY, https://www.epa.gov/enforcement/enforcement-annual-results-numbers-glance-fiscal-year-2016.

[445] *See Enforcement Annual Results, supra* note 444.

[446] Large volume of data analyzed. *See supra* note 269, and accompanying text.

[447] Figure reflects Engineers and Analysts from U.S. OFF. OF PERS. MGMT., *supra* note 71. Interview with FCC Senior Attorney (April, 2017) (explaining employee breakdowns).

[448] This figure is roughly evenly divided between enforcement and other legal functions, such as central legal staff and rule writers. *See* FED. COMM. COMM'N, FISCAL YEAR 2017 BUDGET ESTIMATES TO CONGRESS 12 (Feb. 2016) (stating the enforcement division has 240 total employees).

[449] *See id.* at 19, 53.

[450] FED. DEPOSIT INS. CORP., 2016 ANNUAL REPORT 25 (2016), https://www.fdic.gov/about/strategic/report/2016annualreport/2016ar_final.pdf [hereinafter FDIC 2016 ANNUAL REPORT].

[451] BD. OF GOVERNORS OF THE FED. RES. SYS., 102ND ANNUAL REPORT 2015 308 (2015), https://www.federalreserve.gov/publications/annual-report/files/2015-annual-report.pdf; (putting Boston office as 5.8% of 16,686 total employees); Interview with Federal Reserve employee (March, 2017) (estimating 80 examiners and 4 lawyers in Boston). Figures assume Boston reflects national Federal Reserve breakdown. The Federal Reserve is not included in the OPM data and does not release examiner breakdowns.

[452] *See id.*

[453] *See* FEDERAL RESERVE ANNUAL REPORT, *supra* note 451.

[454] Estimate of the Consumer Sentinel group. Interview with FTC, *supra* note 263.

[455] FED. TRADE COMM'N, HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2015 TABLE I (2015) (assumes

Agency	**Monitor Personnel**	**Legal Personnel**	**Monitor Percent**	**Annual Monitor Activity**
NCUA	886	31	97%	9,465 contacts[456]
NLRB	0	797	0%	Supervised 1,624 elections[457]
NRC	1,641	115	93%	Continual presence, 100 plants[458]
SEC	1,521[459]	1,331[460]	53%	2,400 examinations[461]

APPENDIX B
Sanction Control

Dep't (Agency)	**Monitor Citations, Voluntary actions**	**Monitor Blocking Access**	**Monitor Formal Charges[462]**
CFPB	$44 million in redress[463]	--	--
FSIS	25,516 compliance notifications[464]	Pre-approve each meat and poultry product	--
FERC	214 recommendations, $5.3 million in refunds[465]	--	*Charge*: license revocation[466]
FDA	14,590 warning letters[467]	2,847 Recalls[468]	*Investigate*: penalties & recommend charge[469]
MSHA	97,25 citations and orders[470]	Inspectors order mine evacuations[471]	*Charge*: $48 million in civil penalties[472]

proportional DOJ/FTC breakdown).

456 NAT'L CREDIT UNION ADMIN., 2016 ANNUAL REPORT 13 (2016), https://www.ncua.gov/Legal/Documents/Reports/annual-report-2016.pdf.

457 NAT'L LAB. REL. BD., *supra* note 148.

458 *Power Reactors*, NUCLEAR REG. COMM'N (Feb. 27, 2017), https://www.nrc.gov/reactors/power.html.

459 *See Economic Risk Analysis*, U.S. SEC. & EXCH. COMM'N (Jan. 17, 2017), https://www.sec.gov/dera; U.S. SEC. EXCH. COMM'N, FY 2017 CONGRESSIONAL BUDGET JUSTIFICATION 14 (2016), https://www.sec.gov/about/reports/secfy17congbudgjust.pdf (providing figures).

460 *Id.* Reflects enforcement group total, since database left breakdowns unclear.

461 U.S. SEC. EXCH. COMM'N, AGENCY FINANCIAL REPORT FISCAL YEAR 2016 i-ii (2016), https://www.sec.gov/about/secpar/secafr2016.pdf.

462 Reflects most recent period for which data is available.

463 CONSUMER FIN. PROT. BUREAU, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 11 (2016), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Report.Spring_2016_SAR.06.28.16.Final.pdf. Figures are for six-month period.

464 *See* Quarterly Enforcement Report, *supra* note 428.

465 *See* FERC REPORT, *supra* note 247, at 5.

466 Interview with FERC, *supra* note 416.

467 *See* Enforcement Activity, *supra* note 285, at 1.

468 *See id.*; DEP'T OF HEALTH & HUM. SERVICES, EARLY ALERT (A-01-15-01500) (Jun. 8, 2016), https://oig.hhs.gov/oas/reports/region1/11501500.pdf.

469 REGULATORY PROCEDURES MANUAL, *supra* note 215, at 5.87.

470 MINE SAFETY & HEALTH ADMIN., MINE SAFETY AND HEALTH AT A GLANCE 2 (2016), https://www.msha.gov/sites/default/files/Data_Reports/msha-at-a-glance-7-7-2017.pdf.

Dep't (Agency)	**Monitor Citations, Voluntary actions**	**Monitor Blocking Access**	**Monitor Formal Charges[462]**
OSHA	17,444 warnings;[473] 65,044 violations[474]	--	Charge: civil fines[475]
FAA	Warning letters, pilot retraining[476]	Pre-approve aircraft design[477]	*Investigate:* civil penalties, license[478]
FMCSA	35,756 Warning Letters[479]	Entry permits[480]	
OCC	Non-public MOUs and Commitment Letters[481]	Pre-approve branches, notified of mergers[482]	*Charge*: civil penalties, $226 million[483]
EPA	Minor citations[484]	--	*Joint charge*: $5.8 billion in civil penalties[485]
EEOC	--	--	--
FCC	Joint[486]	Changes by licensees[487]	*Joint charge*: license revocation[488]
FDIC	Noncompliance notifications[489]	Pre-approve new branches	*Charge*: civil money penalties[490]

[471] Laura E. Beverage, *Litigation Under the Federal Mine Safety and Health Act Today: A Practical Guide*, 16 AM. J. TRIAL ADVOC. 305, 310-312 (1992) ("The inspector may issue a withdrawal order for the affected area.").

[472] MINE SAFETY AND HEALTH ADMIN., MSHA AT A GLANCE (FY 1978-2016), https://arlweb.msha.gov/mshainfo/factsheets/fy/at-a-glance-fy1984-2016.pdf (providing 2016 figures); MINE SAFETY AND HEALTH ADMIN., *Mine Inspections*, https://www.msha.gov/compliance-enforcement/mine-inspections.

[473] OCCUPATIONAL SAFETY & HEALTH ADMIN., *supra* note 436, at 45.

[474] *Occupational Safety and Health Administration Enforcement*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/dep/2015_enforcement_summary.html.

[475] *See supra* note 311.

[476] *See, e.g.*, Robinson, *supra* note 306, at 29.

[477] *See* FED. AVIATION ADMIN., *supra* note 439. Prior to issuing a voluntary automobile recalls, the DOT requires monitoring groups to obtain consent from the legal department. Interview with DOT employee (Mar., 2017).

[478] *See* Robinson, *supra* note 306, at 31.

[479] FED. MOTOR CARRIER SAFETY ADMIN., *supra* note 440, at 28.

[480] *See id.* at 30.

[481] OFF. OF THE COMPTROLLER OF THE CURRENCY, POLICIES AND PROCEDURES MANUAL 15, 18 (Sep. 9, 2011), https://www.occ.gov/static/publications/ppm-5310-3.pdf.

[482] *See* OCC 2016 ANNUAL REPORT, *supra* note 334, at 31.

[483] *See id.* at 32; OFF. OF THE COMPTROLLER OF THE CURRENCY, *supra* note 352, at 4-7.

[484] *See Enforcement Annual Results for Fiscal Year 2016*, U.S. ENVTL. PROTECTION AGENCY, https://www.epa.gov/enforcement/enforcement-annual-results-fiscal-year-2016; Interview with EPA employee B (April, 2017).

[485] *See id.*; Interview with EPA, *supra* note 294.

[486] Interview with FCC, *supra* note 447.

[487] *Id.*

[488] *Id.*

[489] FDIC 2016 ANNUAL REPORT, *supra* note 450, at 25-27.

[490] Interview with FDIC, *supra* note 286.

Dep't (Agency)	**Monitor Citations, Voluntary actions**	**Monitor Blocking Access**	**Monitor Formal Charges[462]**
Federal Reserve	Noncompliance notifications	Pre-approve branches, notified of mergers	*Charge*: $2.2 billion in civil penalties[491]
FTC	--	--	--
NCUA	294 actions[492]	--	*Charge*: civil penalties[493]
NLRB	--	--	--
NRC	715 Non-cited violations; 61 cited violations[494]	Pre-approve equipment changes and construction[495]	*Investigate*: civil money penalties & recommend charge[496]
SEC	$60 million returned to investors in 2016[497]	Firm licenses and issuance of securities[498]	*Charge:* license[499] *Manage*: $94 million in SRO fines[500]

[491] *See* FEDERAL RESERVE ANNUAL REPORT 2015, *supra* note 451, at 57.
[492] *See* NAT'L CREDIT UNION ADMIN., *supra* note 456, at 16.
[493] Interview with NCUA employee (April, 2017).
[494] *See* NUCLEAR REG. COMM'N, ENFORCEMENT PROGRAM ANNUAL REPORT 4, 18 (2015), https://www.nrc.gov/docs/ML1606/ML16069A146.pdf; NUCLEAR REG. COMM'N, ENFORCEMENT MANUAL (March 3, 2017), https://www.nrc.gov/docs/ML1026/ML102630150.pdf (explaining how inspections document violations).
[495] *See* ENFORCEMENT PROGRAM ANNUAL REPORT, *supra* note 494, at 26.
[496] Interview with NRC employee (April, 2017); U.S. NUCLEAR REG. COMM'N, NRC ENFORCEMENT POLICY 16-25 (Nov. 2016) https://www.nrc.gov/docs/ML1627/ML16271A446.pdf.
[497] *See* U.S. SEC. EXCH. COMM'N, *supra* note 461.
[498] U.S. SEC. EXCH. COMM'N, *supra* note 461.
[499] 17 C.F.R. § 240.15c3-1(c)(2)(vi)-(vii) (1990).
[500] FIN. INDUS. REG. AUTH., *supra* note 197, at 3.