Litigating within Relationships: Disputes and Disturbance in the Regulatory Process

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This article reports data that contrast with an extended tradition of viewing litigation as incompatible with ongoing relationships. Within the regulatory process at the U.S. Environmental Protection Agency (EPA), nongovernmental actors having the most sustained relationships with EPA are the ones most likely to engage in litigation against the agency. Litigation within regulatory relationships is not explained by existing theory, which treats litigation largely as a function of relationships. A disturbance theory of disputing, which focuses on how litigation interacts with existing relationships, provides a more robust account of litigation generally and of its compatibility with ongoing regulatory relationships.

Conflicts pervade society, and legal institutions provide means of resolving those conflicts. The role courts play in society depends in part on when (and why) people seek out these institutions to resolve disputes. Over the years, researchers from several disciplines have extensively examined what leads people to step outside their ordinary patterns of interacting to resolve disputes through litigation. Past research provides remarkably consistent findings: Litigation usually arises as a last resort, signaling either a breakdown in social relationships or a lack of close relationships at the outset (e.g., Macaulay 1963; Galanter 1983; Ellickson 1991). Most people do not rush to sue each other when confronted with a dispute. When litigation does ensue, the disputants are almost always outsiders, strangers, or others who lack any anticipated future relationships.

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By now the proposition that litigation arises mostly between strangers seems commonplace. But exactly why is litigation reserved mainly for those people having the most social distance between them? The answer to be drawn from past research is that litigation amounts to a form of social defection which either breaks down working relationships or keeps those who want to preserve their relationships from suing in the first place. Short of physical violence, litigation is taken to be one of the worst kinds of social interaction.

When viewed as something inherently adversarial and punishing, litigation assumes a set of invariant qualities. One lawsuit is thought to be like any other. Under this assumption, differences in relationships have been the primary explanation advanced for why people resort to litigation. Yet the research giving rise to the dominant view of "litigation as defection" has examined disputing in only a limited number of social realms, such as those involving neighbors or businesses. Disputing in other arenas, where the structure or social meaning of litigation may be different, has received much less scrutiny.

Notably lacking has been attention to disputing in the context of regulatory policymaking by government agencies. Scholars do recognize that regulatory policymaking is a social process, one constituted by intricate social networks (Heinz et al. 1993) and enveloped in a "regulatory culture" (Meidinger 1987). Despite claims that regulatory relationships are exceedingly adversarial and legalistic (Kagan 1991; Stewart 1985), the role that litigation plays in relationships between government regulators and interest group representatives has remained virtually unexamined. This lack of research is striking given two well-accepted propositions found in the literature on the U.S. regulatory process, namely, (1) that regulators and interest groups work closely together on an ongoing basis and (2) that they also take many of their disputes to court. These propositions seem puzzling from the standpoint of a "relationship theory" of disputing. If litigation amounts to a form of defection, what explains the presence of recurrent litigation within ongoing regulatory relationships?

The answer to this puzzle emerges from a closer examination of how litigation affects ongoing patterns of interaction between regulators and interest groups. In this article, I examine the effects of litigation on relationships between interest groups and the U.S. Environmental Protection Agency (EPA). My findings, reported in the sections to follow, directly contrast with the prevailing relationship theory of disputing. Unlike in other settings, litigation in the context of interest group disputes over EPA regulations occurs within established relationships between interest group representatives and agency staff. More surprising still, those interest groups having the most extensive, long-standing relationships with EPA tend to be the ones most likely to go to

court challenging the agency's regulations. By comparing regulatory disputing with disputing outside the regulatory realm, I find support for an alternative theory that both explains the puzzling findings of my research and builds toward a more robust account of the use of litigation as a means of resolving conflict.

The disturbance theory developed here takes account of the different ways litigation can affect prior modes of interacting. It draws attention to differences in litigation as well as in relationships. In the regulatory setting, the type of litigation employed creates at most a small disturbance to relationships between interest groups and the EPA. Litigation challenging EPA rules does not signal an end to relationships, but is usually just another round of an ongoing process of bargaining.

I. Theories of Disputing and Ongoing Relationships

Before turning to a discussion of my findings, I provide a brief overview of past research suggesting that litigation is incompatible with ongoing relationships. Three theories of disputing converge on the prevailing view that lawsuits arise when relationships between disputants are distant, fleeting, or simply over. Sociolegal research on disputing, game-theoretic analysis of cooperation, and political science research on interest group litigation all lead to the prediction that those who work together on an ongoing basis, and who expect to continue to do so over time, will typically find ways to resolve their differences without going to court.

The first of these three research traditions, the sociolegal tradition, follows from Stewart Macaulay's (1963) classic study of disputes occurring in business relationships. Macaulay found that persons engaged in business relations seldom worried about the precise formalities of contract law. Moreover, when disputes arose over business transactions, they were usually resolved informally between the parties without any resort to lawyers or litigation. It was mainly when a relationship had come to an end, such as in disputes over the termination of franchises, that business partners were willing to go to court to settle a dispute.

The thrust of Macaulay's findings has been confirmed in other settings, principally business situations (Palay 1984) and local neighborhoods (Engel 1984; Merry 1979). Sociolegal scholars typically find that litigation is a matter of last resort (cf. Bohannan 1965; see also Yngvesson 1985). Their research indicates two principal elements of a relationship that are crucial in understanding how people will choose to resolve disputes: (1) the closeness of the relationship and (2) its future (Lempert & Sanders 1986:235). The latter has been identified as most important. As Sally Engle Merry (1979:920) observed, "[a] limited future changes the calculations of costs and gains, making confronta-

tion cheaper. It is the expectation of the future to the relationship, rather than its simple duration, which constrains residents . . . from taking one another to court over their conflicts."

The conclusions reached by sociolegal scholars share an affinity with those of a second research tradition, that of game theory. Game-theoretical analysis, particularly analysis of iterated prisoner dilemma games, suggests that over time persons continually relating with each other develop cooperative modes of acting (Axelrod 1984). Like sociolegal scholars, game theorists emphasize the importance of a relationship's future. Game theorists predict that when people expect to be dealing with each other repeatedly in the future, cooperation will begin to emerge even though it might not seem in each party's initial interest to do so (Murninghan & Roth 1983). Repetitive, long-term relationships create incentives for actors to cooperate to reduce the risk of noncooperation by the other party in the future (Baird, Gertner, & Picker 1994:173–74). Axelrod (1984:178–79) explicitly discussed Macaulay's research as an example of how "the anticipation of mutually rewarding transactions in the future" keeps disputes out of court.

Robert Ellickson (1991) applied the insights derived from the analysis of iterated games to disputing and litigation among neighbors living in Shasta County, California. Ellickson investigated disputes arising out of situations such as straying cattle and automobile accidents, and he found that neighbors in Shasta County tended to use informal, nonlegal means of resolving disputes with one another. Disputes that resulted in the use of lawyers and litigation arose primarily between strangers, such as in automobile accidents. Ellickson (p. 55) explained his findings by relying primarily on a "fundamental feature" of rural life: "Rural residents deal with one another on a large number of fronts, and most residents expect those interactions to continue far into the future." Continuing relationships kept disputes out of court as neighbors preferred to settle their differences themselves.

A third scholarly tradition—political science research on interest group litigation—has long treated litigation as an "outside" political strategy. The political disadvantage theory, for example, predicts that groups which are disadvantaged in the normal political process will be the ones that tend to rely most heavily on litigation (Cortner 1968). Recent research has drawn the political disadvantage theory into question, and other theories can also explain why some groups litigate more than others (Olson 1990). Yet treating litigation as an outsider's strategy remains a tendency in political science. Political scientists continue to acknowledge the special attraction of litigation for outside groups (Schlozman & Tierney 1986), and the political disadvantage theory may still explain litigation tactics by at least some interest groups (Scheppele & Walker 1991). To the extent that political

science research on interest groups suggests that litigation is a strategy used by groups more distant from the normal political process, this research reinforces the findings from sociolegal research and game theory analysis.[1]

The accumulated findings of these three research traditions support the notion that litigation arises mainly to resolve disputes between those with distant or ending relationships. Of course, none of these traditions precludes the additional influence of other factors affecting disputing behavior (e.g., stakes, resources and costs, and chances of success). What past research shares, however, is a common emphasis on the relationships between disputants, especially on how the distance and futurity of these relationships affect the invocation of legal methods of resolving disputes. Past research suggests that, regardless of other factors, litigation is simnply incompatible with ongoing relationships and that only in the most exceptional cases will disputants risk damaging an ongoing relationship by going to court. Macaulay (1985), for example, refers to business litigation prompted by economic or energy crises as instances where consideration for relationships could give way to a compelling need to prevent the destruction of a major corporation. Yet even here the underlying premise is that relationships must give way in the face of litigation because filing a lawsuit by itself amounts to a serious form of social defection.

II. Litigation Challenging Environmental Regulations

If litigation constitutes a form of social defection, it is reasonable to expect that those who work most often with each other, and on the most sustained basis, will be the ones least likely to find themselves engaged in litigation with each other. In this section, I examine how well this expectation holds in the context of disputes over regulations adopted by the EPA. I focus on disputing in the regulatory arena so that I can interpret my findings against the backdrop of past research on disputing in neighborhoods and between business organizations. In this way, I aim to draw additional inferential value by comparing my findings with those of past studies (King, Keohane, & Verba 1994).

To test whether organizations involved in ongoing relationships with a regulatory agency also tend to avoid litigation with that agency, it is necessary to determine who works most closely with the agency and who challenges its regulations in court. It also helps to select an agency that deals in varying degrees with a broad range of interest groups and one that finds itself getting

[1] Some legal anthropology research on disputing by individuals closely parallels the political disadvantage theory. Yngvesson (1985:638–39), for example, notes a general pattern "of relatively less powerful individuals in multiplex relations seeking out distant fora, and particularly government courts."

sued with some frequency. The EPA seemed an especially promising site for investigation because its regulations have been widely believed to generate much litigation. In addition, since EPA regulates almost every sector of the economy, different rules can be expected to invoke participation by various interest groups, thereby providing variation in the relationships disputants and litigants have with agency staff.

Furthermore, the EPA is the only major agency with active rulemaking under a statute which requires that any litigation challenging agency rules be filed in a single court, the U.S. Court of Appeals for the District of Columbia Circuit (DC Circuit). Since challenges to a single regulation are often brought by more than one party and since not every challenge results in a published court decision, an on-site search of court records is the only way to identify all the parties involved in legal challenges to agency rules. I collected data directly from the docket of the DC Circuit on challenges to EPA hazardous waste regulations issued between 1988 and 1990. By statute, any petitions for review of hazardous waste rules must be filed in the DC Circuit within 90 days following EPA's final promulgation of the rule (Resource Conservation & Recovery Act §§ 6976, 7006.

To measure the participation of interest groups in the rulemaking process at EPA, I collected data on the written comments submitted on all significant hazardous waste rules issued from 1988 to 1990. Although interest groups participate in agency rulemaking in ways other than by filing comments, most groups file comments on the rules in which they are involved (Kerwin 1994). I supplemented my archival data with about 50 semistructured interviews with interest group representatives and EPA personnel, as well as with additional interviews with sources involved in rulemaking at other regulatory agencies.[2]

A. Interest Group Participation in EPA Rulemakings

Interest group representatives, both from environmental groups and industry organizations, interact with the EPA across several stages of rulemaking and over a range of issues. The types of participants in EPA rulemakings are remarkably diverse: from individual citizens to individual members of Congress, from local commissions to federal agencies, from small gas stations to giant petroleum corporations. Environmental groups include the Environmental Defense Fund (EDF) and the Natural Resources Defense Council. Industry groups include corporations such as Chemical Waste Management or trade associations such as the Chemical Manufacturers Association.

[2] The main interviews were conducted with representatives of environmental groups, trade associations, major corporations, and the EPA. These interviews lasted on average more than an hour and, with few exceptions, were tape-recorded and transcribed.

During the period 1988–90, the EPA promulgated 28 significant hazardous waste regulations. These were rules issued under the Resource Conservation and Recovery Act (RCRA) and listed in the EPA's regulatory agenda, a semiannual list of the agency's most significant rulemakings. A total of 1,275 organizations and individuals filed comments on at least one of these rules. Since some participants commented on more than one rule, the total number of comments amounted to 1,668.

Despite the diversity of organizational types, industry groups (i.e., business firms and trade associations) participated the most. Nearly 67% of all the participants came from industry; only 2% were from environmental groups. The remaining commenters included representatives of state and local government, members of Congress, individuals, and representatives of other federal agencies. The high level of involvement by industry was also indicated by the fact that business firms participated in 89% of the hazardous waste rulemakings during this time period and national trade associations in 75%. In contrast, national environmental groups participated in only 50% of the rulemaking proceedings.

As suggested by the differing rates of participation by industry and environmental groups, some organizations are involved in more rulemakings than others. By far, most groups and individuals participate infrequently. Of the 1,275 participants examined, 87% (1,106) participated by commenting on only 1 of the 28 hazardous waste rules. Some groups, though, participated by commenting on as many as 11 of these rules. The most active stratum of participants, those that were involved on average in more than 2 rules per year (or 7 or more total for the three-year period) consisted of only 16 organizations, or little more than 1% percent of all participants. Of these, 9 were corporations and 5 were trade associations. The remaining 2 were a federal agency, the Department of Energy, and a national environmental group, the Environmental Defense Fund (EDF). An additional 64 organizations were involved in 3–6 hazardous waste rulemakings during the same three-year period.

The most active organizations involved in EPA rulemakings (a category that includes groups such as the Chemical Manufacturers Association and EDF) have developed long-term relationships with the agency. They work with agency staff across all aspects of the rulemaking process, across many different rules, and over an extended period of time. According to past theory and research, these groups should be among the ones least likely to sue the EPA.

B. Interest Group Litigation Against EPA

Which groups *do* sue EPA? Past research suggests two diverging hypotheses about the relative amount of litigation initiated by industry versus the amount brought by environmental groups. Corporations and industry trade associations, making up as they do the largest proportion of organizations involved in agency rulemaking, might be expected to become involved in more litigation against the agency. The greater organizational resources of industry groups, combined with the high economic stakes they face, could be expected to lead these groups to file more lawsuits. Lettie McSpadden Wenner's (1982:41, 1990:46) research on reported court opinions in environmental cases, although not confined specifically to the EPA, suggests that industry groups bring more litigation overall than do environmental groups.

However, if litigation is principally an "outside" strategy, something used by the groups that are outnumbered or disadvantaged in the regulatory process, then environmental groups might well bring more litigation challenging EPA rules. The conventional history of the environmental movement suggests that these groups do rely on litigation as central strategy (Rosenberg 1991; Turner 1988; Trubek 1978; Trubek & Gillen 1978). According to Mandelker (1981:57), these "groups seek judicial remedies to bypass the political process in which the objectives they seek are imperfectly realized and difficult to obtain." Litigation is thought to counteract the disadvantages these groups experience outside of court. As a consequence, it is sometimes argued that environmental groups are the major litigants challenging EPA rules. In his important volume on regulation, for example, James Q. Wilson (1980:385) claimed that "EPA has had to deal with as many complaints and lawsuits from environmentalists as from industry, despite the economic and political advantage industry presumably enjoys."

It has been difficult to reconcile these diverging accounts because past research on regulatory litigation has examined only published court decisions, which reveal at best a partial picture of the community of groups that file litigation challenging EPA rules (cf. Siegelman & Donohue 1990). To overcome this limitation, I collected data on *filings* of litigation challenging EPA hazardous waste rules issued between 1988 and 1990. Any challenge to one of these rules must be filed within 90 days following promulgation of the final rule. For the years 1988–90, 13 of the 28 significant and major hazardous waste rules EPA issued ended up getting challenged in court.[3] The number of litigants in each of

[3] Although my focus in this article is on whether litigation interferes with interest groups' relationships with the EPA, a related research question would place the rule as the unit of analysis and ask why some of these rules get challenged but not others. A complete answer to this question is beyond the scope of this article. However, when asked about what leads them to challenge certain rules, representatives of the groups reported

these cases ranged from 1 to 32, with 64 groups involved in these challenges. Of these, 91% of the groups were corporations or trade associations, and 8% were environmental organizations. A similar distribution of group types appears when considering the number of "appearances" in litigation, thereby taking into account that some groups participate in more than one rule challenge. Of the 100 appearances, 90% were by industry groups and 9% were by environmental groups.

On the one hand, these data suggest that environmental groups do more readily resort to litigation. Environmental groups made up about 2% of all the commenters but 8% percent of the litigants challenging these same rules. Their overall litigation rate (i.e., the number of rules challenged divided by the number of rules commented on) also indicates that environmental groups have a greater relative propensity to use the courts. Environmental groups had a litigation rate of 26.5% compared with 20.2% for trade associations and 4.6% for corporations.

On the other hand, these data still show that environmental groups are not, in overall terms, primary or even equal litigants in challenges to EPA rules. Instead of being a strategy principally used by comparatively disadvantaged groups, most litigation actually gets employed by the same types of groups that are most active in agency rulemaking. Industry groups filed 67% of the comments and 90% of appearances in the challenges to EPA rules. Both in rulemaking and in litigation, industry groups are the most common players.

Of course, even though most litigation may be brought by industry-type groups, the specific groups litigating might still not be the same ones that are most active in EPA rulemakings. In other words, the industry groups suing EPA might just be the ones that rarely work with the agency. Similarly, even though the overall litigation rate for environmental groups may be higher than for other groups, this does not tell us which specific environmental groups file court actions. It could be that the environmental groups most involved in rulemakings tend to use litigation less.

An examination of data on litigants indicates that extensive relationships do not keep interest groups from litigating against the EPA. Although past research suggests that litigation only rarely arises between parties engaged in an ongoing relationship (and then coming at a considerable cost to that relationship), in the regulatory context it is quite common for active groups to

relying mainly on two factors: (1) the importance of the rule to their groups' goals and (2) the strength of the legal arguments they could advance against the rule. Those rules having the largest impact on the economy or those likely to have a larger effect on environmental quality can therefore be expected to be the ones more likely to be challenged in court. The significant hazardous waste regulations used in this study are therefore among the regulations most likely to be challenged. Indeed, the litigation rate for these rules (46%) is about twice that for EPA rules generally (Coglianese 1994).

have filed suit against the EPA. Of the most active groups (those with 7 or more comments), 63% had been involved in at least one lawsuit challenging a hazardous waste regulation issued between 1988 and 1990. The comparable rate for groups with 3–6 comments (32%) was lower but still substantially higher than the rate for groups with 2 or fewer comments (3%). The groups that get involved in litigation tend to be the ones that are more active in rulemaking. Of the 100 appearances filed challenging the hazardous rules issued in 1988–90, 26% were filed by the most active groups and another 36% were filed by groups that commented on 3–6 rules. In other words, 62% of all the judicial petitions were filed by the most active 5% of the commenters. Not surprisingly, there is a positive correlation (0.51) between the number of rules over which groups get involved and the number of lawsuits they file.

Organizations most active in rulemaking tend to be most active in litigation. For example, Chemical Waste Management participated in 7 rules and challenged 5; the Chemical Manufacturers Association challenged 5 of the 10 rules over which it got involved; and EDF challenged 3 of the 9 rules on which it filed comments. Most of the commenters dropping out of the process after rulemaking were individuals, members of Congress, federal agencies, and, to only a slightly lesser extent, state and local governments. Indeed, roughly 99% of the litigants in the period studied were corporations, trade associations, and environmental groups. (One litigant was an organization of local municipal pollution control agencies.)

When the data are analyzed for just industry and environmental groups, the positive relationship between litigation and active participation with the EPA remains. I examined the litigation rates for the 888 corporations, trade associations, and environmental groups involved during this period. These industry and environmental groups were divided into three categories (arranged by rows in Tables 1 and 2) based on the total number of 1988–90 rules on which each group filed comments. The litigation rate is the number of petitions for review filed in court divided by the number of comments filed with the agency. As Table 1 shows, the rate of the most active groups is roughly five times that of the least active groups. Moreover, taking together all the industry and environmental groups filing comments in the 1988–90 rulemakings, the litigation rate for each group is positively correlated (0.23) to the number of comments filed by that group. Thus, not only does the overall amount of litigation increase with an interest group's participation in agency rulemaking, but so too does the relative frequency with which a group goes to court.

These data show that litigation coexists with regulatory relationships to the extent that the more active groups tend to liti-

Table 1. Litigation Rate for Corporations, Trade Associations, and Environmental Groups Involved in EPA Rulemakings, 1988–1990

No. of Comments Filed	Litigation Rate[a]	No. of Groups
7 or more	20.5% (26/127)	15
3 to 6	18.6% (38/204)	52
2 or fewer	4.0% (35/883)	821

[a] For each category of interest groups shown in the rows, the litigation rate is based on (1) the total number of judicial petitions challenging 1988–90 rules filed by the groups in the row (the numerator in the parentheses); and (2) the total number of comments filed by the groups in the row (the denominator). The third row (2 or fewer) includes a small number of groups that did not file comments on any 1988–90 rule but that nevertheless joined in a legal challenge to one of those rules.

Table 2. 1985–1987 Litigation by Corporations, Trade Associations, and Environmental Groups Involved in 1988–1990 Rulemakings

No. of Comments Filed, 1988–1990	% of Groups Involved in Litigation, 1985–1987[a] (1)	Average No. of 1985–1987 Lawsuits[b] (2)
7 or more	33.3% (5/15)	4.2
3 to 6	23.1% (12/52)	2.2
2 or fewer	1.2% (10/821)	1.1

[a] Col. (1) shows the percentage of groups within each row that filed a petition challenging an EPA rule issued in 1985–87. The denominator in the parentheses is the total number of groups in the row. The numerator is the number of groups in the row that filed litigation over at least one rule issued in 1985–87. The third row (2 or fewer) includes a small number of groups that did not file comments on any 1988–90 rule but that nevertheless filed a legal challenge to one of those rules. Except for two state government petitioners, all parties engaged in litigation over 1985–87 rules are included in this analysis.

[b] Col. (2) shows the average number of 1985–87 rules challenged by the litigants in each row.

gate at a higher rate than the less active ones. This analysis, though, at best only indirectly reflects the impact that expectations about the future may have on litigation. To test whether the extent of future relationships might lead groups to litigate less, I collected additional data on litigation challenging hazardous waste rules for an earlier three-year period (1985–87). The first thing that becomes apparent is that 76% (29/38) of those organizations challenging EPA rules in 1985–87 were involved in at least one rulemaking in the 1988–90 period. The second is that the correlation between the amount of rules challenged during 1985–87 and the number of rules a group participated in during 1988–90 remains positive and is even stronger (0.61). Finally, as

Table 2 indicates, the percentage of subsequent commenters that also filed litigation in the earlier period is larger for the more active groups, as is the average number of lawsuits filed between 1985 and 1987.

These findings admittedly do not purport to account for all the variation in litigation across groups. Rather, they stand in sharp contrast to the several research traditions holding that litigation seldom arises between those who are engaged in ongoing interactions. The results reported here conflict with the expectations generated by past research by showing litigation to be more often employed by those having the most extensive relationships with agency officials.

These results are further supported by an examination of those groups still actively involved with the EPA several years later, at least as measured by membership on an agency roundtable group convened in 1993. In planning programs and developing rules, agencies sometimes create and consult with advisory committees consisting of outside parties. During the time period included in this study, the EPA had no official advisory committee dealing with RCRA matters, but it did occasionally convene public roundtable meetings with outside organizations. In January 1993 the agency held a major roundtable meeting to evaluate the effectiveness of its program to control the land disposal of hazardous wastes. The EPA invited major trade associations and environmental organizations to nominate up to two staff members or representatives to participate in the roundtable meeting. The two-day meeting was conducted mainly in small break-out sessions, with a general session at the end to report on the small group discussions. Among the 16 invited interest groups represented at the roundtable meeting, 14 were national trade associations, 1 was a corporation (Chemical Waste Management), and 1 an environmental group (EDF). Eleven of these 16 groups, still working closely with the agency after several years, had challenged in court an average of three RCRA rules each between 1988 and 1990, nearly twice the average for all litigants involved in those challenges.

C. The Compatibility of Litigation

Interest group representatives who work with the EPA on a regular basis do not express any concern for how the filing of a petition might affect their relationship with agency staff. When asked about the possible impact, both environmental and industry group representatives consistently reported that litigation did not adversely affect relationships with agency staff on other is-

sues. Some of their responses illustrate litigation's compatibility with their ongoing relationships:[4]

> [I]n my experience it's rarely acrimonious. It's a pretty small community. The environmental bar is not that extensive. Every one knows one another and has worked with one another over the years and so it's almost, it is sort of "clubby" if you will.
>
> [I]t is accepted as part of the process.
>
> Everybody knows that's the way the game is played. Litigation isn't a major issue affecting relations with the agency. Some of our staff are involved in the legislative process, the administrative process, and the litigation process all at the same time.
>
> I don't think the agency, if you will, takes it personally or feels that it is some sort of hostile attack against the agency itself. They realize that there can be legitimate disagreements that can persist after the final rule is out. . . .
>
> I know most of the people we sue. I mean, you have to put a name in there, so you generally sue the administrator of EPA basically. And back when Lee Thomas was the administrator, Lee was one of my better friends here in Washington and we were suing him. But we would still go have a beer.

Agency staff similarly expressed little resentment about having a rule challenged. As one EPA attorney put it, "It is not considered a failure." Indeed for some, it is actually taken as a sign of success. If a rule prompts court filings by industry and the environmental groups, then some staff think "we must have done the right thing." Another staff member admitted that the agency does sometimes make mistakes: "I think it is their duty to keep us in check. Some of the things that we are doing are screwing up. . . . It keeps us in check from a legal standpoint."

Only an attorney in private practice reported on any hesitancy about challenging a rule for fear of upsetting agency personnel. His account is instructive:

> Actually the client for the case I was working on this morning was very hesitant to challenge the EPA rule. I had to tell the client that these suits happen all the time and that the agency wasn't going to hold it against them. Only after I reassured them in this way did they agree to go ahead, but they were still a bit hesitant.

The client in this case, a highly specialized trade association, had not participated in many EPA rulemakings before, and this was the first time it had considered challenging a rule.

The mere act of filing a petition for review does not signal a breakdown in relationships or constitute a form of defection in

[4] These quotations, as with the others appearing throughout the text, come from the many interviews with agency and interest group staff members conducted as part of this study. To maximize rapport and promote candor on the part of respondents, these interviews were conducted on a not-for-attribution basis. As a result, the names and precise affiliations of the quoted respondents are not reported.

agency-interest group relations. Although there appears to be some support for the political disadvantage theory in that environmental groups have somewhat higher litigation rates than industry trade associations, overall most litigation is filed by industry organizations. Litigation is also not limited to those interest groups having only fleeting contacts with the EPA. Rather, the groups that participate most in rulemaking also participate the most in litigation. The litigation rate for the more active groups substantially exceeds that for infrequent participants in the rulemaking process, most of whom are involved on a one-shot basis. Finally, no adverse impacts on relationships appear to result from the filing of a petition for review. Interest group representatives and agency staff members reported no disruptions in their mutual exchanges arising out of litigation.

To assess whether the regulatory relationships at EPA might be unique in their compatibility with litigation, I conducted a number of less systematic interviews with individuals involved with other federal regulatory agencies.[5] Nothing in these interviews signaled that the EPA is unique in any substantial way. Across federal agency practice, litigation generally does not seem to disrupt ongoing relationships between interest group representatives and agency staff. Indeed, one need only casually reflect on the names of organizations involved in reported court decisions involving other agencies to suspect this would be the case. Groups having extensive relationships with other agencies also file lawsuits against those agencies. Labor groups bring legal actions against the Occupational Safety and Health Administration. Automobile manufacturers and consumer safety groups file suit against the National Highway Traffic Safety Administration (NHTSA). One NHTSA official captured the overall tenor of most respondents' views about judicial review litigation when he said: "It's business as usual. . . . We know we can't please everyone every time. There's not any animosity."

III. Explaining Regulatory Disputing: Relationships

In direct contrast to disputing in neighborhoods and between certain businesses, litigation in the regulatory process seems to coexist with, rather than disrupt, ongoing relationships. Why is this so? An initial response would be to point out the obvious differences between neighborly or business relations and the relations between interest group representatives and EPA staff. There are real differences. Lawyers routinely participate in EPA

[5] Included in these interviews were government and nongovernmental sources that have experience with regulatory matters at the Occupational Safety and Health Administration, National Highway Traffic Safety Administration, Federal Trade Commission, Consumer Product Safety Commission, Department of Energy, as well as several financial regulatory agencies.

rulemaking proceedings (cf. Nelson et al. 1988). Rulemaking proceedings involve debates about legal and technical issues. The participants observe formalities in carrying out their relationships, such as communicating in writing and memorializing telephone conversations. The disputes are formally those between organizations rather than individuals. In short, the analysts and lawyers working for interest groups and the EPA in Washington, DC, live in a world vastly different from Ellickson's (1991) ranchers in Shasta County or Macaulay's (1963) purchasing agents in Wisconsin.

The differences that exist in the regulatory relationships in Washington, however, are insufficient by themselves to explain the compatibility of litigation with cooperation in EPA rulemaking. Nothing in existing research suggests that it should matter whether relationships are more or less formal or involve more or fewer legal professionals. Moreover, disputes in the business world also involve organizations and, in any case, even within organizations relationships between individuals inevitably develop. Existing theories of disputing emphasize the continuing, future-oriented, and multifaceted nature of relationships. Along these dimensions, interest group-agency relations do not seem to differ all that much.

A. How Environmental Professionals Are Like Neighbors

As those who study bureaucratic politics have shown, interest group-agency relationships possess the characteristics of closeness and futurity that are associated in other contexts with nonlitigious forms of dispute resolution. Although agencies vary, and the relevant interest groups can be corporations, trade associations, unions, or citizen groups, one general conclusion about interest group-agency relations seems to hold constant: Active interest groups' relationships with agencies are usually close, ongoing, and multifaceted (Schlozman & Tierney 1986:339). Representatives of active interest groups repeatedly interact with agency staff in the development of regulatory policy (Kerwin 1994).

At their closest, relationships between interest groups and agencies have been characterized in terms of "agency capture." Capture occurs when an agency and its regulated community become so intertwined that the agency eventually works to advance the interests of those it regulates instead of the broader public interest or statutory mandate. Although capture may be less pronounced in recent years (Heclo 1978; Gais, Peterson, & Walker 1984; Baumgartner & Jones 1993), and the extent of interest group dominance certainly varies from agency to agency, many agencies still exhibit two characteristics that typically have been associated with capture. First, agency staff members depend heav-

ily on outside groups for information. Effective regulation of an industry depends, after all, on knowledge of how that industry works. Agency staff members routinely turn to organizations in the regulated community to provide this information. Second, many agencies have a proverbial "revolving door" with the regulated community. Administrators and staff can come into the agency from the regulated firms, or they can leave government service to go work in these firms. The revolving door may contribute to a shared mindset between those in an agency and those outside of it (see Quirk 1981).

Even without leading to agency capture, therefore, informational dependence and a "revolving door" lead interest group representatives and agency staff to find themselves engaged in ongoing and often mutually beneficial relationships. Interest group activity at the EPA is no exception to this pattern. Exchange of personnel between the EPA and outside groups certainly occurs with regularity. Moreover, agency staff and interest group representatives constantly rely on each other for access to information. As one EPA engineer put it to me in an interview, "We help them; they help us."

During multiple stages of agency rulemaking, interest group representatives find extended opportunities to work with agency staff. A single rule can take years to develop, providing agency and interest group staff members with numerous occasions to work with each other. In discussing a rule that was originally issued in 1990 and later amended in 1992, one EPA staff member described his opportunities to work with industry groups:

> I worked on that [rule] since about 1988 or so and when I am working very closely with people like that you get to know the industry quite well. You attend, you are invited to meetings, annual meetings, you are asked to speak and give a synopsis of what EPA expects. . . .

Environmental trade publications are filled with announcements for meetings and conferences at which both interest group representatives and agency staff members make presentations. Such public engagements, which come in addition to the many smaller meetings held in agency offices or conversations on the telephone, make up a part of the social interactions that are reflected in what Errol Meidinger (1987) terms a "regulatory culture."

Being part of these ongoing interactions between EPA and interest groups yields mutual advantages. Participants in rulemaking need information that other participants hold, and by exchanging information, interest group representatives and agency staff members facilitate each other's work. The same EPA staff member just quoted elaborated on his relations with industry:

> We try to bring them in as early as possible on what we are required to do and request their help very early on. And usually this is appreciated because that way they have input as opposed to EPA unilaterally going out and looking at various textbooks and writing rules that are ridiculous because we don't fully understand what the hell we are regulating. So it works out better by working very closely with the people that we are going to regulate and we do this in various ways . . . . We meet with them, we have industry-agency workgroups that will meet together.

Another EPA staffer put the same point more succinctly: "The more information [outside groups] can help us with, the better the rule will turn out—in their interest as well as everyone else's."

Since outside groups are not represented on the internal agency committees charged with drafting rules, interest groups must rely on informal contacts with agency staff in order to monitor the EPA's internal stages of rulemaking. In trying to persuade the agency to adopt a certain policy approach, interest groups find it invaluable to know what agency staff members are planning and thinking (see DeLong 1982). Interest groups acquire such knowledge by cultivating close relations with EPA staff. As one corporate vice-president in charge of regulatory affairs explained:

> [O]ur Washington office—they know the EPA regulators down in the bowels of that agency personally. They are over there all the time; they've become friends with them; they supply data and assist them in any way that it's legitimate to do. So we have open communications constantly about what they're thinking, what we'd like them to do, what we think they're gonna do. It's almost like becoming joined at the hip with the staff over there. That's how you really influence regulations.

Both interest group representatives and agency staff members regularly interact with each other in mutually supportive ways.

On closer examination, the continuing relationships of the regulatory process bear a close resemblance, at least on the dimensions that would seem to matter most, to relationships between neighbors or business persons. If anything, the mutual dependence of interest group representatives and agency staff members could perhaps be considered greater than that between neighbors or certain business partners.

B. The Significance of Mutual Dependence

The high degree of mutual dependence in regulatory relationships has been noted as a possible explanation for litigation between regulated groups and government regulators. In his seminal article on the limits of legal change (which is also one of the few published works that addresses disputing in the regulatory process), Marc Galanter (1974) speculated that regulatory

arenas are likely to generate disproportionately more litigation *precisely because* regulators and regulatees are locked in a relationship from which they cannot exit. Drawing on Hirschman's (1970) work on exit and loyalty, Galanter seemed to suggest that regulators and regulatees could do practically anything to each other, including haling each other into court. Cooperation was not seen as necessary because in the regulatory environment actors are compelled by circumstance to deal with each other regardless of whether they are nice to one another.[6]

Others have since endorsed Galanter's "no exit" theory (Ellickson 1991; Stewart 1985), but it appears to run directly counter to the intuitions generated by game theory. One of the conditions for the iterated prisoner's dilemma, after all, is that the parties have no exit from the interaction. It is precisely this unavailability of exit that creates incentives for cooperation. If litigation constitutes a form of defection, its use against a party with whom one is locked into a relationship risks eliciting some type of retaliation. To avoid a mutually undesirable, spiraling downturn in interactions, parties locked into relationships can be expected to avoid litigation. At least that is the implication suggested by the analysis of iterated prisoner's dilemmas and Ellickson's (1991) own empirical work on neighbors locked into relationships with one another in rural Shasta County.

Furthermore, even if parties locked into regulatory relationships needed to sanction each other's noncooperation from time to time, they do have mechanisms available other than exit. Relationships in the regulatory context are much more dense than the "no exit" theory would suggest. Regulators have many ways to make life more difficult for noncooperative regulatees, and vice versa. The "no exit" theory seems to presume that the only incentive for cooperation is the desire to keep a relationship together. Under the "no exit" theory, the mere existence of the relationship appears more important than the terms or results of the relationship. Yet even if two parties are locked into a relationship, it is usually still advantageous to have that relationship maintained on congenial rather than antagonistic terms.

In addition, empirical evidence suggests that interest groups simply cannot do anything to the EPA (or vice versa) just because they are locked in a mutually dependent relationship. Both inter-

[6] In a later work, Galanter (1983:25) repeated a similar argument, citing Yeazell's (1977) study of 17th-century group litigation as evidence for the claim that "where parties are locked into a relationship with no chance of exit . . . litigation may proceed side-by-side with the continuation of that relationship." Yet central to Yeazell's (p. 871) study was an alternative argument that "it may be deceptive even to conceive of these early [17th-century] cases *as* litigation—at least as we usually understand that term in a modern context." Yeazell (p. 882) drew explicit attention to the structural aspects of 17th-century Chancery litigation that made it "far less likely to have the disruptive effects on the relationship [between litigants] that we associate with modern judicial declarations." In this regard, Yeazell's work lends at least as much support to the disturbance theory I present in part V of this article as it does the "no exit" theory advanced by Galanter.

est group and agency staff members reported the existence of cooperative norms of what might broadly be called norms of honesty and fair play. Interest group respondents indicated that litigation could become a problem, but only if in filing a petition they violated one of these other principles of cooperation. As one respondent put it, "I guess you could do it [i.e., file suit] in a manner that would create some residual problems with the agency, but we try not to do that obviously." According to another respondent, litigation might become a problem

> only if it comes as a surprise to them, a shock to them, and it totally contradicts what they were led to believe your position was at some earlier point. But I don't think that just the fact that the agencies get sued is taken personally by anybody who is involved in the process. . . . I just don't see anyone taking offense.

Still another trade association attorney, reflecting on past government experience, emphasized:

> I was on the other side for ten years, and the one thing you never want to do, you never want to denigrate staff in anything you say. Even if the staff is wrong. They stay a long time. We didn't like that if anyone personalized or denigrated staff. If they said we were wrong, we didn't care about that. But to say that the staff was incompetent or anything like that would be foolish.

How litigation gets handled, therefore, is much more important than the mere filing of a suit.

Interest groups and agencies, much like neighbors, will not suffer any and all harms against each other just because they find themselves in long-term, mutually dependent relationships. The explanation for why regulatory relationships coexist with litigation does not rest, therefore, with the relationships themselves. These relationships are neither immune to nor somehow specially adapted for absorbing harms, such as litigation. Rather, those involved in these relationships simply do not consider regulatory litigation to be a harm. Understanding why interest group representatives and agency staff members do not consider litigation challenging EPA rules as a harm leads ultimately to a more robust theory of disputing.

IV. Explaining Regulatory Disputing: Litigation

Instead of looking just at relationships, we sensibly might look more closely at *litigation.* It is widely recognized that relationships can vary in assorted ways; however, much less acknowledged in the literature on disputing are the ways in which litiga-

tion varies as well.[7] Differences between types of litigation begin to explain the convergence of litigation and ongoing relationships in the regulatory process. The type of litigation used to challenge EPA rules permits, if not even fosters in some ways, cooperation between interest groups and the EPA.

A. The Typical Harms of Litigation

I begin by examining four reasons why, in many contexts, litigation gets interpreted as a harm. First, litigation requires the other party to incur expenses that could otherwise be avoided (Trubek et al. 1983). The other party needs to find and hire an attorney. Experts and court costs may need to be paid. Disruptions for document searches, depositions, and trial testimony may need to be endured. Ultimately an award of damages may be imposed.

Second, litigation brings third parties into the dispute, complicating the bilateral relationship between the parties. These third parties, such as lawyers and judges, may impose a different style of reasoning and communicating on the relationship than previously existed (cf. Sarat & Felstiner 1986). Third parties, especially when they make their records available to the public, may also destroy privacy the parties value.

Third, litigation proceeds with formalities—certified letters, oaths, signed affidavits, and the like—that themselves can put distance into a relationship. Some individuals may take these formalities to mean that the other side no longer trusts them. To the business staff in Macaulay's (1963) study, a mere letter on a lawyer's letterhead was viewed as threatening.

Finally, litigation typically makes accusations. Lawsuits implicitly attack people's character. They make problems personal (cf. Fisher & Ury 1981). They allege that the other party broke a promise, made a mistake, or did something wrong. Ultimately they can result in a court passing judgment on the parties, which often takes the form of an all-or-nothing outcome (Yeazell 1977:882).

Despite the disruptions that lawsuits can impose, not all lawsuits are the same. Some types impose lesser costs than others. Some do not require that lawyers be retained, while in others the involvement of judges is minimal. Some lawsuits require fewer formalities, and some make less inflammatory accusations than others. For example, appellate court litigation, which is conducted largely on paper, may exhibit less visible hostility than do jury trials. In the American legal system, where litigation is largely party-driven, litigation itself may possess both cooperative

[7] To be sure, some important work has focused on differences in litigation (e.g., Chayes 1976; Damaska 1986; Sellers 1995). Yet, the connection between such differences and patterns of disputing has been little explored in the sociolegal literature.

and noncooperative qualities (Galanter 1984; Gilson & Mnookin 1994). Much can depend on the parties and their lawyers. As a consequence, litigation need not be considered as inherently harmful conduct.

B. The Nature of Litigation Challenging EPA Rules

At least when compared with other types of litigation, regulatory litigation challenging EPA rules proceeds quite unobtrusively. Suits for judicial review of EPA rules begin quite prosaically. A one-paragraph petition for review gets filed with the appeals court listing the rule being challenged and the party challenging it. Within 20 days of filing a petition, the challenging group or groups must file with the court a docketing statement and a preliminary statement of issues. These statements, which together run no more than two or three pages, describe briefly the parties, the challenged rule, and the issues raised by the petition. At this stage the issues are usually expressed in boilerplate terms that borrow the language of the Administrative Procedure Act: for example, simply whether the agency rule exceeded statutory authority or was arbitrary and capricious.

Unlike civil litigation at the trial court level, the agency need not file an answer or any other paper defending its decision against the petitioners' challenge. It only submits the names of its attorneys and a list of the documents and comments contained in the agency's docket for the challenged rule. In this way, litigation challenging EPA rules is like the appeal of nearly any federal agency's rulemaking, which is treated as a review on the agency record.

When multiple parties challenge the same rule, the separate petitions are consolidated into a single case shortly after the close of the filing period. The parties can file a motion asking the court to consolidate the cases, but usually case consolidation is initiated simply by the court clerk on the basis of the petitions or docketing statements. In some cases, a petitioner may also ask the court at this time to stay the enforcement of the rule pending the litigation. Following these initial filings, nothing happens in court until several months to a year or so later when the court establishes a schedule for briefing and oral argument.

The opening period of litigation in judicial review cases contrasts with civil cases in trial courts. The parties in judicial review litigation are not required to file pleadings such as complaints and answers, staking out opposing positions early in the game. No discovery takes place, so neither interest group nor agency staff members find themselves compelled to answer lawyers' questions under oath or turn their filing cabinets over for scouring by outside paralegals and attorneys.

What does happen after the filing of a petition for judicial review looks a lot like the activity the participants are most used to conducting: ongoing negotiations continue, and new negotiations begin. Interest group and agency staff members consistently emphasize that settlement negotiations are a routine part of judicial review litigation challenging EPA rules.

As an indication of the level of such settlement activity, consider that nearly half of all the petitions for review filed against the EPA in the DC Circuit Court of Appeals between 1979 and 1990 ended with a voluntarily dismissal by the parties—before any oral hearing was held by a judge.[8] This rate may initially seem small compared with the common (but mistaken) belief that 90% of all trial-level cases settle (see Kritzer 1986). In fact, it is notably high when compared with the settlement rate for appellate cases. The settlement rate for EPA rule challenges in the DC Circuit (47%) is nearly twice that for all appeals (25%) and substantially more than the rate for all administrative appeals (28%).[9] Bargaining and settlement appear more dominant in EPA rulemaking cases than in administrative appeals in general. The structure and practice of litigation challenging EPA rules lacks the features of other kinds of litigation that are thought to lead to harm and adversarial posturing.

With so much settlement activity, interest groups sometimes file an action against the EPA just to maintain a seat at the bargaining table. Although interview respondents indicated that this regularly occurs, it does not appear to occur with such frequency as to explain the higher rates of litigation by repeat players over EPA rules. If defensive litigation of this kind by repeat players were the underlying explanation for the pattern of litigation found, we would expect that the groups that participate more often in EPA rulemakings might congregate toward suits brought by other repeat players, so as to maintain their bargaining position. The average number of comments filed by litigants would therefore be expected to rise with the number of parties involved in the litigation. We would also expect that repeat players would be more likely to challenge a rule when an opposing interest group does. Yet the correlation between the average number of comments filed by litigants in each of the rules issued in 1988–90 and the number of parties in litigation over these same rules

[8] Over half the suits filed against the EPA in the courts of appeal are filed in the DC Circuit. For the 1979–90 period, 969 petitions for review were filed in the DC Circuit challenging EPA rules; these petitions were consolidated into 322 distinct cases.

[9] The settlement rates for overall and administrative appeals were obtained from the Administrative Office of the United States Courts' annual *Federal Judicial Workload Statistics* and are based on cases filed from 1981 to 1988. Appeals disposed of through consolidation with other appeals were excluded from the cases reported here. For all appeals, n = 228,186; for administrative appeals during this same period, n = 21,311. The category of administrative appeals includes all appeals of administrative decisions, such as those dealing with social security benefits, and include only a very small portion of rulemaking cases (Schuck & Elliott 1990).

turns out to be virtually nonexistent and in the direction opposite from what might be expected (–0.08). Moreover, the average number of comments filed by litigants in cases where both environmental and industry groups are involved in the case (4.04) turns out to be slightly less than the average in cases without such conflict between these two types of groups (4.46). While defensive responses to settlement activity apparently do not explain the pattern of litigation by repeat players, the fact that bargaining often occurs does make a difference in the way in which the filing of a lawsuit gets perceived by agency staff.

C. Advantages of Administrative Litigation for Interest Group–Agency Cooperation

Litigation over EPA rules is more than just nonobtrusive and dominated by bargaining. This administrative litigation actually holds at least three advantages for interest groups seeking to negotiate cooperatively with the EPA.

First, litigation can allow groups and the agency to escape strict congressional deadlines. Once a rule is made final, the EPA has met the statutory deadline even if it goes back later and rewrites portions of the rule. For example, staff at the EPA's Office of Solid Waste scurried to get a wood-preserving rule written to meet a deadline, but once in litigation they spent two additional years working with the American Wood Preservers Institute to modify portions of the rule to respond to the trade association's concerns.

Second, litigation narrows the number of groups in the negotiation process and changes the dynamics of bargaining (cf. Baumgartner & Jones 1991; Schattschneider 1983). While each rule issued in 1988–90 elicited an average of 45 commenters, only about 5 litigants on average were involved in the actual litigation over each challenged rule. In the wood-preserving rule, the 267 individuals and groups filing comments on the rule narrowed down to three industry organizations in court. Greenpeace and the Environmental Defense Fund were extremely active in that rulemaking but did not enter the litigation. As a result, the positions these environmental groups successfully advanced in the wood-preserving rulemaking were later directly undercut in the litigation process. Of course, with a generally higher litigation rate than other groups, environmental groups certainly do not drop out after the rulemaking process in every instance. Overall, though, a clear winnowing effect occurs.

Finally, litigation offers interest groups and the agency an opportunity to do something they were not permitted to do in the notice-and-comment period: negotiate in secret. Agency rules governing *ex parte* communications no longer apply once a final rule is issued. Interest group and agency staff members can re-

turn to the type of close communication that characterizes the phase of rulemaking that precedes the issuance of a proposed rule. In addition, settlement negotiations between interest group and EPA attorneys hold an added degree of secrecy given their privileged status.

The advantages of litigation for reaching cooperative solutions may or may not be considered socially desirable (cf. Axelrod 1984:17). The winnowing effect described above may well create some systematic biases against certain kinds of groups participating in policy decisions made under the guise of litigation. We know, for example, that individual members of the public file a considerable number of comments in the rulemaking process but are left out of the nonpublic litigation process. The use of litigation to engage in exclusive bargaining over public regulation certainly raises questions about procedural legitimacy. Whatever the answers to such questions, the important implication for disputing theory is simply that judicial review litigation does facilitate cooperative bargaining by the organizations active in EPA rulemaking. Since litigation sometimes facilitates cooperation, it cannot be assumed always to be a form of defection in ongoing relationships. Instead, as one respondent put it,

> I see this litigation as just a continuation and a narrowing of the regulatory process, and I think most of the players do too. . . . Once it's all over at the official stage, you start the second stage and you start it by filing litigation so that you can be at the table and work it out with only those people who are really interested. You've narrowed the universe from the general public down to those who really care, and you can get down to business. Litigation just happens to be the way you do it.

In disputes over EPA rules, an interest group's turn to litigation does not signal a breakdown of a relationship; it is just another means for its continuation.

V. Litigation and Disturbance in Regulatory Bargaining

In seeking to explain why some disputes reach the courts, past research has emphasized the importance of the relationship between disputants. According to what almost seems to be a "golden rule" of sociolegal studies, the more distant or temporary the relationship between disputants, the more likely someone will file a lawsuit when a dispute arises. The empirical findings reported here challenge this view, showing how it has been constructed on acontextual assumptions about the nature of litigation. In the regulatory context, interest groups working closely with EPA file suits more regularly than those with more fleeting involvement in the regulatory process. Relationships by themselves do not explain the coexistence of litigation with ongoing relationships in the regulatory realm.

The puzzling findings reported in this article reveal a need to expand and clarify our understanding of disputing and litigation. The conventional view tends to homogenize both litigation and relationships, without acknowledging how important differences can exist in both the nature of relationships *and* the nature of litigation. To explain why interest group–agency relationships can coexist with repeated litigation, it is necessary to take these differences into account. Focusing on the concept of disturbance shows how these differences matter, bringing together the past discussion of both relationships and litigation.

By *disturbance,* I mean the relative amount of disruption or change created by moving from one mode of relating or disputing to another. The notion of disturbance, for example, seems implicit in the standard sociolegal account of the transformation of disputes (Felstiner et al. 1980–81). Each stage in the transformation process represents a change in a mode of disputing, from informal claiming to meeting with a lawyer to filing suit. As a dispute moves from one stage to the next, changes take place that the parties find undesirable, costly, or unpleasant.

Consider the claimant who first communicates her concerns directly to the person against whom she has a grievance. Communicating her claim in this way presumably involves a minimal change (or disturbance) because such one-to-one communication is a routine part of living. Meeting with a lawyer, however, increases disturbance. It creates changes for the claimant, such as the costs of finding a lawyer she did not previously know. It also alters to a degree the terms of the relationship between the two disputants: a third party is now brought into a previously bilateral relationship. If the claimant proceeds to filing a lawsuit, this creates even further changes. Both disputants now incur new costs in the form of attorney's fees and possibly the inconvenience of giving testimony. With additional third parties (including a judge) involved in the dispute, the mode of relating has become much different from what it was in the original bilateral relationship.

Disturbances often come about because of additional costs that the parties to a dispute must incur. However, the absolute costs created by a new method of resolving a dispute (such as litigation) are less important than relative costs, and costs by no means need be thought of strictly in terms of legal fees. The main importance of costs for creating a disturbance lies in any amount of perceived *increase.*[10] If parties already interact in ways that require them to incur high costs, switching to a method of

[10] This explanation bears some similarity to the "micro-structural" approach to the deterrence of criminal sanctions. Ekland-Olson, Lieb, & Zurcher (1984) emphasized how the impact of the same criminal sanction—e.g., an arrest—may be perceived differently depending on how seriously the sanction threatens an individual's interpersonal relationships.

dispute resolution that has equally high costs will not seem like much of a change. The parties may well wish they could find another alternative with lower costs, but in the absence of a lower-cost alternative they should have little complaint if one of the parties forces them into an equally high-cost method of dispute resolution.

A dispute resolution alternative can be expected to be used more readily by disputants engaged in an ongoing relationship when it creates at most a small change between itself and the existing pattern of the disputants' relationship. When the costs of litigating are relatively high and the costs of relating relatively low, filing a lawsuit will create a large disturbance. This is the situation found commonly among neighbors and certain business partners, where a move to litigation would mark a dramatic change in the existing pattern of relating with one another. The relationships between inspectors and firms in the context of regulatory enforcement may also fit this pattern (cf. Hawkins 1984; Scholz 1984). These private relationships tend to have lower overall costs and formalities than litigation, so persons in such ongoing relationships can be expected to resort to litigation at best only infrequently. It is in these settings that litigation amounts, in game-theoretic terms, to a form of defection because it escalates the other party's costs.

Of course, where there are no established patterns of relating, or no future plans for such ongoing relationships, then disturbance is not an issue. In such cases, no relationships exist to be disturbed. The out-of-town motorists in Ellickson's (1991) study of Shasta County, for example, did not need to consider whether filing a lawsuit would increase the costs of their relationships with the ranchers whose cows strayed onto the road. Disturbance becomes a factor, therefore, only where parties are engaged in ongoing relationships. When disputants are engaged in ongoing relationships that they expect will continue in the future, they can be expected to avoid dispute resolution techniques that would create high levels of disturbance.[11]

A number of interest groups, I have shown, have ongoing relationships with the EPA. These groups nevertheless can sue the agency and maintain their relationships because the filing of a lawsuit does not impose a large disturbance on the agency and its staff. Although much of agency rulemaking involves informal negotiations, especially at its earlier stages, interest group and agency staff members are accustomed during rulemaking to certain costs not found in ordinary business or neighborly relation-

[11] Alternatively, if the parties have no choice over the available method of resolving their dispute, they will use that method in such a way as to minimize the amount of disturbance. A related situation arises in the cooperative relationships that develop between ostensibly opposing lawyers in criminal courts or small towns (Flemming, Nardulli, & Eisenstein 1992; Landon 1985).

ships. Attorneys regularly participate in agency rulemakings. Third parties, ranging from other interest groups to the White House, from other agencies to Congress, also routinely participate. Participants observe formalities like putting *ex parte* communications in writing.

In contrast, the costs of judicial review litigation are relatively low. Unlike the situations of neighbors or small businesses, the EPA need not search for and hire a lawyer. Although litigation can impose additional demands on its own legal staff and lawyers from the Department of Justice, the preexisting establishment of these internal legal services means that the program staff members who write the rules do not have to use their own time or resources to locate and retain legal support. Moreover, the conduct of judicial review litigation does not require the intrusive document searches, depositions, or evidentiary hearings that can accompany other types of litigation.[12] No personal liability is at stake, and in the relatively few cases that reach the courts for decision, the agency is upheld completely as often as it is not (Coglianese 1994). Since judges only get involved close to the time of oral argument, much litigation gets handled without any involvement of third parties. Indeed, litigation can sometimes help protect the agency staff and interest groups from third parties, providing a forum within which only a limited number of groups participate and sometimes helping shield agency officials from oversight by others such as the Office of Management and Budget. Finally, the overall "clinical" nature of judicial review litigation permits interest groups to minimize its formality by not even referring to it as litigation but rather (as they usually do) as a matter of filing "protective petitions."

Absent from judicial review litigation, but not from other types of litigation, is the element of personal accusation. The structure of appellate procedure does not require the filing of pleadings that exchange allegations and stake out adversarial positions. Moreover, rulemaking disputes are largely about public policy, not about judging specific conduct between individuals. Norms about petitioning and influencing government decisions may make litigation over public policy less personal than litigation otherwise can be. The agency staff member quoted in part II.C spoke of judicial review as a "duty" on the part of interest

[12] The nature of judicial review litigation against the EPA undoubtedly contrasts with the impact other litigation may have on other kinds of government agencies. In her narrative account of a welfare hearing, for example, Lucie White (1990:26) notes how welfare agency staff members perceive court hearings as "a hassle and an embarrassment to the county. A hearing mean[s] pulling an eligibility worker and several managers out of work for a few hours, which—given the chronic understaffing of the welfare office—[is] more than a minor inconvenience." Further, hearings inevitably lead the county "to point to the worker as the source of the problem." In White's account, the welfare recipient is aware of the disturbance a hearing causes the agency worker and for that reason is reluctant to go to court.

groups. Judicial review is a recognized check on the agency and an accepted means of clarifying the statutory terms underlying what the agency does.

Judicial review litigation does not itself necessarily amount to an accusation or a personal attack. If done in a certain way it might, but groups communicate with agency staff to let them know that they are just suing over the policy decision, not attacking the character or competence of the agency staff. By speaking of litigation as simply a matter of filing a "protective petition," interest group representatives help keep agency officials from becoming uneasy about their intentions. The euphemism works because the type of litigation employed generates little disturbance to existing relationships. One EPA staff member I interviewed had nothing but the highest praise for a particular trade association that, as it happened, had recently sued over a rule this staff member had developed:

> Of all the trade associations that I have ever dealt with, [they were] probably one of the most effective in terms of looking out for their membership and the ability to inform them, both to inform them and also cooperate with the agency, bend over backwards to help us in any way that we wanted. All we had to do was ask and they would do that. It was literally a pleasure working with those people.

But then again, when probed further, this staff member did not even think of his rule as having been litigated or of the agency having been challenged in court. The filing of a petition for review generates so little disturbance to ongoing relationships that regulatory officials sometimes do not even realize that their agency has been sued.

VI. Conclusion

Litigation over EPA rules defies normal predictions about disputing and relationships because this type of litigation permits bargaining between interest group representatives and agency staff members to continue largely undisturbed. The findings I have reported point to the need, in explaining disputing, to look beyond variation in relationships and to consider variation in litigation as well. Especially in a legal system with party-driven litigation, the social meaning and practice of litigation can vary considerably. The costs and formalities of judicial review litigation in appellate courts are much less pronounced than trial litigation in other settings. In the regulatory process, relationships are ordinarily carried out in terms more formal than relationships between neighbors and others. Judicial review litigation in this setting creates few, if any, negatively perceived changes to the relationships between interest groups and agency staff. For participants in the environmental regulatory process, litigation even offers certain

advantages for cooperative behavior. Litigation is not viewed as a last-resort strategy reserved for outsiders, as it is ordinarily thought to be, but rather as a legitimate institutional process for carrying on business as usual.

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Statute

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