

Common Legalism: On the Common Law Origins of American Legal Culture

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More than any other scholar of comparative regulation, Bob Kagan has advanced our understanding of the distinctive features of American regulatory culture and attendant differences between Europe and the United States. In explanation of the greater propensity of Americans to litigate regulatory and other policy disputes, Kagan has highlighted the role of a “set of governmental structures that reflect mistrust of concentrated power” in America (Kagan (2001:15)). In contrast with other economically advanced countries, the United States divides political power among the various branches of government and between federal, state and municipal authorities. As a result of this fragmented structure, judges and courts have come to occupy in the United States a role parallel to that assumed by central bureaucracies elsewhere. The result has been a legal culture marked by weak hierarchical controls and strong party influence within the legal process or, in Kagan’s term, “adversarial legalism.”

The antithetical model, “bureaucratic legalism,” is typified by centralized hierarchical structures and judicial control over evidence gathering and decisionmaking. Kagan (2001: 11) likens the latter model to Max Weber’s ideal-typical conception of bureaucratic authority, and points to German and French courts as close approximates of the model. But unlike Weber, Kagan stops short of linking bureaucratic legalism with continental systems of justice. In this he also departs from Mirjan Damaska (1986) for whom differences between the continental and Anglo-American legal traditions overlap with reactive and activist conceptions of state government and attendant hierarchical and coordinate organizational structures. While building on Damaska’s typology, Kagan appears to decouple the connection between American reactive government and coordinate authority on the one hand and Anglo-American law on the other. Instead he points to “the political liberalism that animated the American Revolution and constitutional founding” as the fountainhead of divided government in America, and by implication, adversarial legalism (2001:41).

In his search for the American roots of adversarial legalism, Kagan stresses the trans-Atlantic divide over the civil-law/common-law split. In this, his approach fits with the relatively minor role that differences in legal tradition have tended to play in comparative studies of regulatory policy. This pattern deviates substantially from the sustained attention to the relationship between common law ideology and American regulatory practices in 19th century jurisprudence and regulatory politics (Morag-Levine 2007). Americans of that time disagreed sharply over the legitimacy of following continental administrative models. But given the prominence the topic received in 19th century writings the relevance of the common law tradition to differences between the United States and continental Europe as they existed at the time would have struck most 19th century Americans as self-evident. In the interim this division has largely receded from view for reasons that are mostly outside the scope of this paper.

Where comparative studies of regulatory culture and national policy styles are concerned, skepticism regarding the common law’s explanatory power gained strength from the existence of evident and important differences between England and the United States. Beginning with Tocquville, American legal institutions were said to differ from

those of Europe as a whole, England included.¹ Late twentieth century comparisons between British and American legal and regulatory practices reinforced this observation. Relative to the United States, relations between business and government regulators in England were shown to be more consensual (Vogel 1986:24). P.S. Atiyah and Robert Summers (1987:1) have gone as far as to conclude that notwithstanding superficial similarities the “legal style, legal culture, and, more generally, the *visions* of law which prevail in the two countries” are profoundly different. The explanation they offer, similarly to Kagan’s, highlights the contrast between the high level of trust that English political institutions accord each other on the one hand, and the extreme distrust at the heart of American law and politics (Atiyah and Summers 1987:40)

The view of political distrust as a home-grown product of the American Revolution and colonial American history is deeply etched in prominent accounts of the American polity. Seymour Martin Lipset (1994:39) summarized the argument in an effort to identify the roots of American exceptionalism: “Fighting against a centralized monarchical state, the founding fathers distrusted a strong unified government...The chronic antagonism to the state derived from the American Revolution has been institutionalized in the unique division of powers that distinguishes the United States from parliamentary regimes, where parliament, or more realistically the cabinet, has relatively unchecked power, much like that held by an absolute monarch.” England appears in this account as the antithesis to American constitutionalism, with the American Revolution marking a sharp break from English political traditions.

A very different picture suggestive of far greater continuity between English political ideas and those that spawned the American Revolution appears in Bernard Baylin (1967, 1992) and Gordon Wood’s (1969) seminal accounts. Both historians highlight the degree to which the colonists conceived of their grievances against England in reference to historic common law liberties. The guarantee that these liberties provided against the corruption and abuse of political power were seen as the reason why England escaped the type of despotism that could be found elsewhere in the world. For the colonists, England’s perceived failure to live up to its own constitutional ideals justified the Revolution. They launched that revolution on behalf of, rather than in departure from, English political values. In this they relied, in large measure, on the writings of radical Whig writers who decried the growth of the English bureaucracy during the 18th and invoked the ancient constitution and 17th-century liberal writers in trenchant critiques of contemporary English politics (Wood 1969:14-15). What was in England an oppositional ideology largely at odds with political practice became in this fashion a mainstream tenet of American political culture. Roscoe Pound (1921:42) commented on this phenomenon when he wrote: “it is not an accident that common-law principles, as they were fashioned in the age of Coke, have attained their highest and most complete

¹ As Lipset wrote in this connection “Tocqueville looked at the United States through the eyes of someone who knew other cultures well, particularly that of his native country, but also to some considerable degree Great Britain” (1996:18).

logical development in America, and that in this respect we are and long have been more thoroughly a common-law country than England herself.”

The common law has long existed in England in tension with countervailing continental influences. Notably, in their account of the divergence between English and American legal theories at the end of the 18th century, Atiyah and Summers (1987:225) put particular emphasis on Bentham’s influence on English legal thought at the time and the fit between Benthamite preference for statutory law with “the newly established role of Parliament in the British political system.” Bentham was among the most prominent of a long line of English reformers who were deeply critical of the common law and molded their proposals on continental models. Their influence likely accounts for England’s subsequent divergence from the United States, but this divergence should not lead us to discount the importance of differences in legal tradition where both intra-European and Euro-American legal cultural distinctions are concerned.

Both in England and the United States the common law defined an ideological alternative to the type of administrative models associated with the civil law-based regimes of continental Europe. The civil law model relied on centralized, agency-based, state administration aimed at the implementation of regulatory standards through expert legislators and bureaucrats. The common law model fundamentally distrusted bureaucratic administration, and as a consequence, identified courts as the proper locus for administrative governance. The influence of the common law model in England may have declined over time relative to its import in the United States. But the search for the origins of American legal culture leads us back to England, nonetheless.

With this goal in mind, the paper draws on key works in English legal history in support of three interrelated arguments. The first traces the path by which early centralization in England gave rise to weaker political institutions than those which were later to emerge in France and elsewhere on the continent. In turn, these institutions entrenched a political ideology that made distrust of concentrated political power into the cornerstone of English constitutionalism. The paper next turns to the role of these principles in the writings of leading opponents of centralized administrative governance in 19th century England. In conclusion the paper touches on the importance of attending to differences in legal traditions for clarification of the institutional roots of contemporary differences between American and European legal cultures and the prospects for trans-Atlantic convergence in this respect.

II. Paradoxes of Early Development and the Institutionalization of Distrust

In a book he titled *De Laudibus Legum Angliae (Praises of the Laws of England)* and written during the 1460s, Sir John Fortescue, who earlier served as Chief Justice of the King's Bench under Henry IV, set out to stem the penetration of civil law influences into English law (Lockwood 1997). The book which proceeds through a fictional dialogue between a young prince and a chancellor who instructs the future king in the study of the law, is devoted to the proposition that the legal "customs of the English are not only good but the best" (Lockwood 1997:27). In justification Fortescue pointed to both procedural and substantive differences between the two systems of law as explanation for why the common law offered the benefits of greater liberty and prosperity. On the procedural side, the common law was distinguished by its reliance on juries, while the civil law admitted proof by witnesses and resorted to torture to obtain confessions. Substantively, the two systems diverged in the scope of authority that rulers possessed. Whereas the civil law accepted and celebrated the Justinian maxim "What pleases the prince has the force of law," English law rejected this maxim and as a consequence denied rulers the authority to change the law (Lockwood 1997:48). As a consequence, Fortescue went on to argue, English subjects were protected from the interventionist economic policies which the French monarchy began to pursue around that time. Invoking the French royal monopoly over salt as an example, Fortescue said that in France, "the king does not suffer anyone of his realm to eat salt, unless he buys it from the king himself at a price fixed by his pleasure alone" (Lockwood 1997: 50). "In the realm of England," Fortescue wrote, no one is "hindered from providing himself with salt or any goods whatever, at his own pleasure and of any vendor...Nor can the king there, by himself or by his ministers, impose tallages, subsidies, or any other burdens whatever on his subjects, nor change their laws, nor make new ones, without the concession or assent of his whole realm expressed in his parliament" (Lockwood 1997: 52).

The view of distrust of concentrated political power as the distinguishing characteristic of English political principles was well developed by the end of the 15th century, as Fortescue's writings attest. Equally evident is the perceived threat to these principles during Fortescue's time. The danger to which Fortescue alluded in an exchange between the prince and the chancellor was revealed in the desire of some English monarchs to emulate the civilian practices of their continental counterparts (Lockwood 1997:48-49). Fortescue ascribed this impetus to the intrinsic affinity between these monarchs' absolutist aspirations and the civil law (Lockwood 1997:48). For centuries to come, efforts to impede the penetration of civil law institutions into England would invoke similar constructions of the civil law as an inherently despotic political instrument. The discussion below will offer some key examples to illustrate. But first it seems important to briefly touch on the primary historical explanations behind the rise of distinct legal ideologies in England and on the continent.

Historians who have addressed this question have tended to converge on differences in the timing of centralization efforts in England and the continent. England became a unified national monarchy centuries before the establishment of centralized

royal regimes elsewhere in Europe. As a consequence, the circumstances that the Norman rulers encountered differed in key respects from those under which later centralizing efforts took place. Armed with fewer material resources and arriving in advance of Roman-law-inspired models for political reform, England's founding monarchs built their regimes on existing feudal institutions, paradoxically entrenching in the process a weaker and more diffused political structure than later centralizers were able to put in place (Dawson, 1960; Van Caenegem, 1987).

The challenge of ruling over a large territory with limited manpower led English kings to delegate judicial and administrative authority to lay professionals and existing local institutions. Most important in this connection was Henry II's decision in 1166 to adopt local juries of knights or ordinary freemen as a primary substitute to modes of proof based on older techniques such as ordeals or trials by battle (Van Caenegem 1973:71). The alternative of judicial interrogation of witnesses of the type continental legal systems would come to adopt was only in early stages of development and would have required, in any event, a larger cadre of trained legal personnel than was available in England at the time. In similar fashion the desire to lighten the workload of the king's judges encouraged reliance on lay "judges of the peace" whose offices came to combine both adjudicatory and criminal enforcement functions. As in France, English monarchs sought by the end of the 15th century to implement national economic policies and to bring local powers under their control. But whereas in France the Crown was able to forge a cadre of professional bureaucrats whose task was to implement royal policy and whose primary allegiance was to the king, in England administrative authority remained at the hands of unpaid and frequently unmotivated justices of the peace (Neff 1940:10). The absence of a reliable civil service led the crown to provide private citizens with financial incentives to act as "common informers" who under both Queen Elizabeth I and James I served as "a chief instrument for the enforcement of economic legislation and the indirect taxation of the kingdom" (Beresford, 1957). What began as a necessary adaptation to the demands of early centralization created in time a normative attachment to what came to be understood as local institutions of self government (Dawson 1960:134). This attachment accounts for the resilience of these institutions even after the English monarchy developed the requisite administrative capacity.

In addition to their limited material resources, early English monarchs were disadvantaged by the absence of institutional blueprints applicable to the novel administrative challenges which they faced. The situation was different for later continental rulers for whom the newly rediscovered Justinian Digest and the flourishing of Roman law studies in European universities after the 12th century presented an applicable legal model (Van Caenegem 1987:104). Influenced by these developments, English kings began to introduce during the 14th and 15th centuries new courts and procedures that followed Roman law examples in their deployment of inquisitorial trial procedures (Van Caenegem:1987). But by this point they faced formidable opposition from common law theorists who beginning with Fortescue and continuing with Sir Edward Coke made common law procedure into a cornerstone of English constitutionalism.

Coke cited Fortescue in support of the proposition that the “King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament.”² At issue were two prerogative proclamations that James I promulgated which prohibited the construction of new buildings in London and the processing of wheat starch. Voiding these proclamations, Coke and his colleagues on the King’s Bench described the king’s prerogative as limited to the remediation of dangers “which it will be too late to prevent afterwards.” In other words, the king could appropriately act where there existed a threat to life or property, but prerogative authority could not legitimately be deployed for purposes of land use or economic planning, as the proclamations in question sought to do. Absolutism proceeded from the belief that monarchs possessed both the right and the duty to guide and shape economic and social development for the advancement of the state. The royal prerogative served within this framework as an instrument of social and economic change and was supported as such by peasants and others whose interests were insufficiently protected by existing local institutions. Roscoe Pound pointed out in this connection to the extent to which during the 17th century the royal prerogative benefited from the support of progressive social forces who resented the common lawyers’ obstruction of what many in England of the time viewed as benevolent social policies (Pound 1921 :63). Whereas absolutism embodied a newfound belief in rational planning and the active pursuit of social improvements through public policy, “common law theory reasserted the medieval idea that law is not something made either by king, Parliament, or judges, but rather is the expression of a deeper reality which is merely discovered and publicly declared by them” (Postema 1986:4).

Here then we can already discern the link between common law ideology and the “reactive state” (Damaska:1986). The central trait distinguishing reactive conceptions of the state from their activist counterpart is the absence of collective policy goals of any kind. Eschewing independent objectives of its own, the reactive state limits its task to the provision of a neutral framework for the pursuit of private interests. Conflict resolution rather than policy implementation is its *raison d’être*. Damaska’s work has greatly expanded our understanding of the correlation between reactive philosophies of this type and distinctly adversarial legal procedures and policy paradigms. Differences between Anglo-American and continental procedure follow within this account from deep-seated divisions over the role of the state. The causal link runs from distrust in the state’s benevolence and capacity to the creation of litigant-controlled legal processes and bottom up regulatory paradigms. As the above discussion suggests, however, the line of causation between political ideology and legal procedure may have been reciprocal, rather than unidirectional. The early entrenchment of local institutions in England appears to have itself instilled suspicion towards the activist state within influential segments of English society. For purposes of the current discussion the causal direction is, however, less important than the creation in England of a distinct regulatory tradition fusing a reactive political ideology with a set of distinct institutional practices. This ideological tradition existed in England in tension with continental-inspired reforms of various stripes and for that reason was best evident in the texts of those who wrote in opposition to the penetration of continental influences. The following section examines

² *Proclamations*, 12 Reports 74.

the arguments advanced by two such 19th-century writers, and argues for the existence of significant overlap between what these writers considered to be core common law principles and the characteristics distinguishing American adversarial legalism today.

III. Common Law Challenges to the Administrative Governance in 19th century England

This section focuses on the place of common law principles in the oppositional writings of two English legal theorists. The first of these two theorists, A.V. Dicey, requires little introduction. The second, much less familiar, is Joshua Toulmin Smith, a barrister and prolific author who during the mid 19th century led a radical anti-centralization movement in opposition to that era's parliamentary reforms. Though both relied on common law principles for their argument their critiques differed from each other to a substantial extent. At the heart of Smith's argument was an understanding of local government based in judicial processes of administration as the bedrock of English constitutionalism. Whereas Smith was fundamentally suspicious of Parliament and its centralizing agenda, Dicey emphasized and celebrated Parliamentary sovereignty. Dicey's concern was with the conflict between continental-styled administrative law and the rule of law which he understood to require the subordination of agency decisions to judicial review by ordinary courts. Common to both perspectives was a deep-seated suspicion of administrative interventions and a reliance on judicial mechanisms based in common law principles as a primary line of defense.

In the wake of the Parliamentary reforms of the 1830s England embarked on a period of extraordinary governmental growth. Factory legislation, poor laws, educational reforms and new police initiatives were just some of the newly minted interventions during that time. It was against this backdrop that Toulmin Smith launched an anti-centralization campaign directed at what he described as the blatant violation of common law principles of self government. English liberty itself was under attack from "a foreign centralized system of police," Toulmin Smith wrote in a book he published in 1851 under the title *Local Self-Government and Centralization* (Toulmin Smith 1851:204). The 1848 Public Health Act and the National Board of Health which Edwin Chadwick headed until 1854 drew particularly sharp criticism from Toulmin Smith. In delegating enforcement powers to local boards of health, he argued, the Act preempted judicial forms of common law regulation under nuisance law and instead fastened "a horde of functionaries upon the land" (Toulmin Smith 1851: 207). Nuisance law held a constitutional status in Toulmin Smith's eyes for reasons important for our understanding of the connection between common law principles and key element of contemporary adversarial legalism: litigant activism (Kagan 2001:9).

For Smith, nuisance acquired the status of a constitutional principle because it conformed to a bedrock principle of the English Constitution: "*All Law must spring from the people and be administered by the people.*" (Toulmin Smith 1851:21, emphasis in the original) As he explained elsewhere "*Common Law is that Law which SPRINGS immediately from the Folk and People themselves, and which is also ADMINISTERED*

immediately by the Folk and People themselves” (Toulmin Smith 1851:112 emphasis in the original). Nuisance law sprang from the people because it relied on citizens to file lawsuits rather than on proactive enforcement by professional bureaucrats. And nuisance law was administered by the people because it granted decision-making authority to juries, in contrast with the enforcement powers that the Public Health Act granted “boards and commissions” along the continental model. Local government, for Smith, meant more than simple local control over decision-making authority in matters of local concern. Rather, it entailed a particular method—judicial rather than bureaucratic—of regulatory administration.

Whereas Toulmin Smith would likely have found the contemporary United States far too bureaucratic for his tastes, he would probably concur that the particular elements said to distinguish American regulatory style bear significant resemblance to those he singled out as key common law principles. Particularly pertinent in this regard is the prominent role of litigants, rather than judges and bureaucrats, in the “assertion of claims, the search for controlling legal arguments, and the gathering and submission of evidence” (Kagan 2001:9). Self government for Smith required direct citizen participation in all spheres of regulation in contrast with rule by professional bureaucrats. “The difference between free institutions and despotic governments” Smith wrote, “is simply the difference between men taking care of their own affairs, and submitting to have their affairs taken care of, for them, by others.” And it was because bureaucracy took over the administrative function of courts that bureaucratic institutions and “individual despotism” showed “no difference in principle” (Toulmin Smith 1851: 28-29).

The connection between court-based self government and liberty on the one hand and bureaucracy and despotism on the other followed for Toulmin Smith from the evidentiary burdens that the common law imposed as a precondition for regulatory intervention. The common law, Smith wrote, “throws it upon those who allege any particular thing or course of proceeding to be inconsistent with the health of any neighbourhood, or its welfare in any respect, to bring forward the proof, before the people themselves, that it is as alleged” (Toulmin Smith 1851:112) This serves as a check against those who, under the guise of protecting the public welfare, seek to “gain some interested object, or to enforce some crude individual notions.” (Toulmin Smith 1851:112). Because it fails to impose a similarly rigorous screening, centralization finds favor, Smith argued, “in the eyes of interested schemers” (Toulmin Smith 1851:112).

In addition to its capacity to illuminate the common law origins of the American emphasis on litigant activism, Toulmin Smith’s work points to the connection between contemporary American decentralization and common law. As Kagan (2001:15) notes, “in comparison with most other economically advanced democracies, the national government in the United States shares more power with states and municipalities.” Federalism offers an incomplete explanation for this fragmentation, particularly where the place of municipal government is concerned. Instead it seems localism was earlier on understood to exist as an independent common law principle. An Austrian law professor by the name of Josef Redlich commented on this phenomenon in the introduction to his 1903 book *Local Government in England*: “It has for many centuries been the most

characteristic feature of public authority in England that all, or nearly all, the functions of home government, for the preservation of order, the protection of citizens, and the promotion of common interests, are functions of local government pure and simple” (Redlich 1903: xxiv). Unlike Toulmin Smith, Redlich viewed England’s 19th-century social and economic reforms with significant sympathy. His goal was to defend the legitimacy of the new democratic institutions by establishing their derivation from and consistency with older organs of self-government. For present purposes what matters however is his understanding of English history in reference to an “antithesis between a *central* function of the State and a local activity of citizens prescribed and ruled by laws (Redlich and Hirst,1903:xxiv), the origins of which Redlich attributed to the contrast early on in English history “between a powerful unifying monarchy, with the whole force of the executive behind it, and a strong local feeling which clung to what remained of a territorial organization” (Redlich 1903:11).

Similar interest in the historical roots of English local government led Sidney and Beatrice Webb to publish in 1906 a monumental study tracing *English Local Government from the Revolution to the Municipal Corporation Act* (Webb and Webb:1906). Explaining the motivation behind the study the Webbs wrote in the introduction to book: “There is a great deal of the eighteenth century still surviving in the Local Government of the twentieth; and those who are familiar with its working--whether in England or in the United States--will, we believe, find warning, suggestion, and encouragement from an intimate acquaintance with the story of the past” (Webb and Webb 1906:vii).

If the significance of localism in English constitutional thought has since largely receded from view, that is likely due in part to Dicey’s immense influence. Dicey devoted his *Introduction to the Study of the Constitution* (1885) to the proposition that English constitutionalism could be reduced to two guiding principles that together characterized the political institutions of England since the Norman Conquest. The first of these was “the omnipotence or undisputed supremacy throughout the whole country of the central government” (Dicey 1885:171). In this lay the key distinction between England and the United States. England was a “Unitarian” system of government under one sovereign parliament whereas America epitomized federalist principles (Dicey 1885:142). Dicey equated American federalism not only with a division between state and federal authority but with a tendency “to limit on every side the action of government and to split up the strength of the state among co-ordinate and independent authorities (Dicey 1885:128). Two interrelated political attributes characterized America as a result. One was government that was by necessity and design weak (Dicey 1885:157). The other was pervasive legalism derivative of the propensity of courts to fill in the vacuum created by the absence of a central sovereign authority. The “predominance of the judiciary” in America and a general “spirit of legality” among its people both followed for Dicey from the fragmentation of political sovereignty in that country (Dicey 1885:160).

Federalism aside, it was the similarity between English and American legal principles that impressed Dicey more. As he wrote “in every other respect the institutions of the English people on each side the Atlantic rest upon the same notions of

law, of justice, and of the relation between the rights of individual and the rights of the government, or the state” (Dicey 1885:128). Most importantly it was their shared commitment to the “rule of law” that bound the two countries together and set their legal systems apart from those of continental Europe. In frequently quoted language he described the meaning of the rule of law in England in the following terms: “...when we speak of the “rule of law” as a characteristic of our country, [we mean] not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals” (Dicey 1885:177). English constitutionalism consequently required the subordination of administrative decisions to review by regular courts and in this fundamentally departed from the continental practice under which administrative bodies were subject to specially created tribunals and a distinct body of law. In this key respect there existed no difference between England and the United States (Dicey 1885:180, 213). As he wrote, “The fact that the most arbitrary powers of the English executive must always be exercised under Act of Parliament places the government, even when armed with the widest authority, under the supervision, so to speak, of the Courts” (Dicey 1885:339).

The contrast that Dicey drew between England and French administrative practices was accurate only in part. In practice there existed in England during the late 19th century multiple examples of administrative adjudication independent of ordinary courts (Craig 1990:26). Where the search for the origins of American adversarial legalism is concerned, however, the descriptive accuracy validity of Dicey’s account of administrative adjudication in England of his time is not particularly important. Rather it is his understanding of judicial review of administrative decisions as a key common law principle that matters for our purpose. Decades later, Roscoe Pound echoed Dicey when, against the backdrop of unprecedented growth in federal and state administrative power during World War I, he warned against “the tendency to commit everything to boards and commissions which proceed extrajudicially” and violate in the process “common law postulates” (Pound 1921:7). Most important of these were the principles of judicial precedent, trial by jury, and “the doctrine of the supremacy of law” (Pound 1921:65).

These ideas were central to Pound’s leadership in the wake of the New Deal of the ABA campaign for the guarantee of judicial review of administrative action under the Administrative Procedure Act. On the other side of the fence, James Landis blamed Dicey for instilling in Americans a misguided suspicion in the administrative process and an attendant attachment to judicial review:

Droit administratif, being the system of law and courts that dealt with the claims of the individual against government, to the English mind bespoke bureaucracy. The term administrative law had thus the same emphasis. From bureaucracy to autocracy to dictatorship is a simple transition. And that transition has frequently been made in the literature of the administrative process. That literature abounds with fulmination. It treats the administrative process as if it were an antonym of that supposedly immemorial and sacred right of every Englishman, the legal palladium of “the rule of law” (Landis 1938:4).

Landis's statement above underscores the degree to which the New Deal controversy surrounding administrative judicial review was framed in reference to the choice between competing continental and common law-based paradigms. The unparalleled frequency of judicial review of administration in the U.S. at the end of the twentieth century (Kagan 2001:7) speaks to the common law's ascendance in this fight.

IV. Legal Traditions and the Study of Regulatory Culture

A shared legal tradition in no way necessitates a legal-cultural convergence, as England and the U.S. amply illustrate. The novelty in the approach suggested here lies in the use of institutional ideology rather than aggregate political or legal culture as the pertinent unit of analysis. A focus on the latter has led to the marginalization of legal tradition as a causal factor in studies of national legal styles and comparative politics more generally, since many current national legal cultures are blends of multiple legal traditions. In highlighting the role of institutions in shaping political preferences historical institutionalists have challenged the predominantly behaviorist suppositions of modern political science (Whittington 2000). An enhanced understanding of the origins of cross-national differences across a range of spheres is among the payoffs of this approach.

The common law has not disappeared from English legal culture even as it was diluted by other influences. Differences between English and continental policy paradigms have repeatedly been noted in the literature, especially in reference to tensions within the European Union. Notable in this connection is the existence of distinct approaches to the setting of pollution control standards. Whereas in England interventions have tended to be more reactive, tailored to local circumstances, and dependent on scientific proof, the continental approach has emphasized reliance on uniform, technology-based standards (Ball and Bell, 1997:99; Weale et al., 2000:157). Elsewhere I have argued that the distinction between these standards can be traced to the respective influence of common law and civil law regulatory paradigms (Morag-Levine 2003). In a recent article Phillip Booth (2007) has advanced a similar line of argument regarding the origins of differences between English and continental land-use planning practices. These and other examples point towards the continued significance of tensions between the common law and civil law traditions in contemporary intra-European divisions over regulatory style and policy.

At the same time differences in the relative balance between common law and civil influence can help explain the development of a distinctively adversarial regulatory culture in the United States. The reasons behind the common law's greater resilience in America are yet to be fully explored, but the presence of a written constitution and the fragmentation of political power that this constitution entrenched have likely played an important role in this respect. The potential for growing convergence between American and European legal culture and institutions has drawn significant attention with the globalization of business and the rise of the European Union. Departing from the prediction of some scholars, Kagan (2007) has pointed to the "tenacity of European

national legal cultures” in support of the argument that that core differences between American and European legal cultures are likely to remain in place for a significant time to come. This conclusion is strengthened if the prospects for convergence are viewed against the backdrop of close to a millennium-long competition between common and civil law principles.

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