Adversarial Legalism and The Regulatory State

Protect us, O Government, from harm! Protect us, surrounded as we are by the side effects of dynamic capitalist economies and modern technologies. For we dwell in fear that we and our children will ingest or inhale invisible toxins. Agricultural chemicals, mechanized logging, industrial pollutants, and massive construction projects threaten our remaining forests, marshes, and streams. We are vulnerable to dangerous machines and products, deceitful promoters, discriminatory treatment, and all kinds of human error. In the name of human decency, O Government, protect us from harm!

Versions of this fervent prayer are voiced every month in legislative hearing rooms, television programs, and the newsletters of public interest advocacy organizations. In democracies governments take those prayers seriously. They don’t answer every prayer, of course, but every year they commission studies to analyze risks and they enact additional regulatory obligations into law. Governmental inspectors fan out across the community, a white-collar police force enforcing regulations designed to prevent a wide range of harms: workplace injuries, environmental pollution, food-borne disease, substandard care in nursing homes, and inadequate maintenance of airliners and school buses. Regulatory officials in office buildings evaluate permit applications for factory expansions, new construction projects, new pharmaceutical products, and new stock issues. All in all, the cumulative growth of the regulatory state has wrought one of the most far-reaching changes in modern legal systems, proactively inserting law into every corner of society, compelling constructive transformations in business and governmental practices, significantly reducing many risks and forms of injustice.

Despite much political rhetoric about “over-regulation,” few politicians push hard to eliminate (as opposed to fine-tune) protective regulation programs of the kind mentioned in the preceding paragraph. Most regulatory programs are widely regarded, by political conservatives as well as liberals, as essential correctives for serious market failures – that is, hazards and injustices that are inadequately controlled by market incentives and liability law (Singer, 2005). Yet for several reasons, regulation remains a focus of political conflict. The first reason is that regulation never fully answers the prayer for protection. “Under-regulation” is inevitable. An
ever-changing economy constantly generates new unregulated hazards, new openings for heedless, greedy, or incompetent behavior. new economic pressures that tempt some businesses to take risky short-cuts. Regulatory officials are not omnipresent; they cannot detect, correct, or punish all violations. But when serious harms slip through the gaps or around the edges of existing regulatory programs, charges and investigations occur, and the regulatory system is decried as corrupt or tragically inadequate.

Second, regulation stimulates political conflict because the mandated regulatory requirements often impose significant costs on regulated entities. Some regulatory restrictions threaten the market share and earnings of individual regulated firms and sometimes of whole segments of an industry. That can stimulate organized political efforts to roll back certain regulations and to block the promulgation of new ones.

A third reason for conflict is that regulations have an inherent tendency to be overinclusive. Regulations that mandate precautionary measures often are stimulated by, and designed to prevent, harmful practices by unscrupulous or negligent business firms. Although such firms usually are only a small minority of companies, regulations, designed to be even-handed, usually apply not only to those “bad apples” but to all firms in an industry, including the “good apples,” the generally responsible firms.” For those good apples, those across-the-board regulatory requirements often seem unnecessary, costly to comply with, and hence unreasonable (Bardach & Kagan, 1982: Ch. 3). To use a familiar analogy: millions of law abiding, well-intentioned people endure inconvenient security screenings designed to catch or deter a tiny number of terrorists or madmen. The constant chafing of perceived “regulatory unreasonableness,” stemming from having to comply with a multitude of such prophylactic regulations on different subjects, makes many business-people critical of the bureaucratic regulatory state, resistant to its expansion, and eager to see it cut back. That dynamic, moreover, is exacerbated by America’s distinctive “regulatory style.”

American bodies of regulatory law do not differ greatly from those of other economically advanced democracies in terms of the kinds of social problems addressed or the substantive thrust of regulatory standards. On some subjects, American regulations are more demanding, on others less stringent (most prominently, concerning reduction of carbon emissions) (Swedlow et al, 2009; Wiener, 2007). But in terms of regulatory style, the United States is clearly different. American forms of regulatory law, its processes for making regulatory policy, and its methods of
enforcing regulatory rules tend to be more legalistic and more reliant on adversarial legalism. This sometimes makes American regulation more effective than regulation in other economically advanced democracies. Sometimes it does not. But it almost always makes American regulation, viewed in comparative perspective, more costly, more inefficient, and more inflexible. One consequence is that regulation in the United States, viewed in cross-national comparison, more often evokes hostility, undermining the support from and cooperation by regulated entities that are essential if the public’s regulatory prayers are to be answered.

Adversarial Legalism in Action: PREMCO’s Regulatory Experience

Between 1995 and 1998 I directed a research program that conducted ten detailed case studies of multinational corporations that have similar business operations in the United States and in Europe, Canada, or Japan. Each company studied interacts repeatedly with different national regulatory regimes with respect to the same technologies and regulatory issues. By “holding the regulated entity constant” (or as close as one might expect to come to that condition), the research highlighted the differences in national legal regimes as they actually operate. For example, Kazumasu Aoki and John Cioffi, authors of one of the case studies, compared the Japanese and American regulatory regimes for industrial wastes by studying the regulatory experience of “PREMCO” (a pseudonym), a Japanese multinational corporation that manufactures precision metal parts, with facilities in many countries. PREMCO operates similar factories in the US and Japan, generating similar manufacturing wastes—solvents, oily water, and contaminated metal particles (Aoki and Cioffi, 2000). Some of those wastes are classified as hazardous; if disposed of improperly they can badly contaminate soil, waterways, or underground aquifers, endangering ecosystems and human health. After years of uncontrolled industrial waste disposal, sloppy management of hazardous waste storage sites, “midnight dumping” by unscrupulous waste disposal services, and revelations of serious harm to many people, both the United States and Japan enacted legislation that mandated rigorous waste storage and disposal methods.

It appears that PREMCO strives to be an environmentally responsible corporation. The company won EPA recognition for developing a method to phase out the use of chlorofluorocarbons and trichloroethylene two years before the deadline established by the Montreal Protocol (designed to protect the earth’s ozone layer). PREMCO also instituted an aggressive corporation-wide environmental auditing and waste reduction program, certified under the International Standards Organization’s important ISO 14000 series. Aoki and Cioffi
found that in its U.S. and Japanese factories, PREMCO had instituted similar shopfloor controls on the collection and storage of wastes, as well as controls on their shipment and disposal. The two governmental regimes’ regulatory styles differed sharply, however. According to Aoki and Cioffi (2000: 34):

Viewed through the lenses of PREMCO’s comparative experience, American environmental regulations are more detailed and prescriptive, and American enforcement processes, in contrast with Japan’s, emphasize the legalistic interpretation of formal regulations and the imposition of sanctions to modify economic behavior. In contrast to Japanese waste management regulation, the complex American regulatory scheme poses more difficulties in compliance, imposes substantial additional economic costs on regulated entities, and engenders antagonism and defensiveness on the part of firm personnel.

The Japanese mode of environmental regulation is far more cooperative and non-adversarial. “Administrative guidance” (gyōsei shidō) reduces the Japanese regulatory system’s reliance on formal legal rules, sanction-based enforcement, and litigious relations. In addition, the Japanese regulatory framework tends to emphasize (1) “performance standards” rather than specific, mandatory methods of waste control, and (2) informal regulatory initiatives formulated and implemented jointly by industry associations and government ministries and agencies. In comparison with the United States, corporate antagonism towards regulators in Japan is extremely low, as the system appears to facilitate corporate acceptance of regulatory norms. Shopfloor environmental practices as implemented in PREMCO’s Japanese plant are equal or superior to those imposed on the U.S. factories by prescriptive American regulations.

To illustrate this contrast Aoki and Cioffi recount the experience of AMERCO—PREMCO’s U.S. subsidiary—with the environmental regulatory agency in an eastern American state in which three AMERCO factories are located. The federal Resource Conservation and Recovery Act (RCRA) authorized the U.S. Environmental Protection Agency (EPA) to turn over the administration of the mandated waste control program to state governments, so long as the state adopts each provision of RCRA, plus implementing regulations and procedures that are at least as stringent as the federal program. The federal statute and rules, moreover, are extraordinarily detailed and prescriptive. The regional EPA office monitors state RCRA enforcement regarding the number of violations found and penalties imposed.

Comprehension as well as compliance is a primary challenge under RCRA. A U.S. Court of Appeals opinion described the effort to comprehend RCRA a “mind-numbing journey” (American Mining Congress v. EPA, 1987). The facilities managers at two AMERCO plants
estimated that they spend approximately 15 to 20 percent of their time on RCRA issues (Aoki and Cioffi, 2000). One prescriptive provision, for example, is “the twelve-hour rule,” which provides that hazardous wastes must be moved from shopfloor collection containers to a satellite or a main storage area once every shift or every twelve hours. The state agency has classified waste oil as a hazardous waste under RCRA, which brings most of AMERCO’s production processes within the ambit of RCRA regulations, including the twelve-hour rule.

In October 1992 state RCRA inspectors visited AMERCO Plant A, a facility that was scheduled to close two weeks later. The inspectors issued a citation to the plant manager for a number of violations, including failures to properly collect, label, and store waste oil under the twelve-hour rule and other state RCRA provisions. AMERCO’s current management officials insisted to Aoki and Cioffi that these violations did not result in any environmental contamination, or even in any significant environmental risks, and none was alleged by the regulators. Plant A’s manager promised the inspector, “We’ll go ahead and fix these problems, but we’re not going to send you documentation that we have fixed the problem… since in two weeks this plant is not going to even exist” (Id at 40-41). The regulators, write Aoki and Cioffi, “perceived this response as evidence that AMERCO was indifferent or resistant to environmental regulation.” That perception was colored by an earlier conflict involving AMERCO’s Plant B. PREMCO had bought Plant B in 1985, soon after it had been placed on EPA’s “Superfund” list of badly contaminated chemical disposal sites. Years before, between 1960 and 1967, sloppy disposal or leakage from Plant B, had caused extensive contamination of soil and a municipal water supply well. By the mid-1990s, AMERCO had been obligated to spend $14 million on cleanup and related fees, with more to come. But adversarial negotiations over the details of the cleanup plan, during which PREMCO’s Washington lawyers had employed “aggressive negotiation and litigating tactics,” had been interpreted by state regulators evidence of “corporate hostility to environmental obligations” (Id at 36-37)

In April 1993 state regulatory officials launched simultaneous RCRA inspections of AMERCO Plants B and C (located in different cities) and cited them for numerous violations similar to those found in the 1992 inspection at Plant A. Once again, according to company officials and AMERCO’s outside counsel (a former state environmental agency attorney), the vast majority of these violations posed no significant risk to the environment and none had caused any environmental contamination.

At that time, each of the three AMERCO factories regarded itself as autonomous in production, management, and regulatory affairs. But to the regulators, the failure of Plants B and
C to respond to the warning provided by the Plant A inspection was symptomatic either of persistently haphazard waste management practices or of outright defiance. Consequently, for each violation of the twelve-hour rule, regulators cited the company not merely for violating the rule but for violating labeling, sealing, and storage requirements for hazardous wastes. Thus a single violation immediately mushroomed into four or five violations; two-thirds of the approximately 150 citations issued following the 1993 inspections were derived from violations of the twelve-hour rule. Subsequently, AMERCO submitted two status reports and additional correspondence confirming rectification of all violations, and in March 1994 the agency issued a notice of compliance to both plants. Nevertheless, two months later the agency sent AMERCO a legal notice demanding $495,000 in fines for violations found during the inspections at all three plants.

The company and its attorneys, outraged by the punitive response to its efforts to remedy the violations, argued that the regulators had grossly inflated the environmental risk factor and thus the size of the fine. Aoki and Cioffi’s review of the litigation file convinced them that the company managers’ position was justified. Negotiations between AMERCO and the government took six months and cost the company over $50,000 in attorneys’ fees—far more than the cost of remediying the original violations themselves. The government ultimately settled for approximately $200,000—$100,000 in fines, a $10,000 donation to a local environmental group, and a credit of $92,500 in return for $185,000 in capital expenditures for new pollution controls which addressed issues that had not constituted violations and required the company to undertake waste reduction measures not mandated by RCRA.

AMERCO also hired a new environmental manager with responsibility for coordinating environmental compliance across all plants. But the bitterness between AMERCO and the agency reportedly persisted into the late 1990s when Aoki and Cioffi interviewed company officials, and shopfloor supervisors still regarded any possible governmental RCRA inspection with trepidation. And in the late 1990s a statewide political backlash, led to the total repeal of the regulation that classified machine-lubricating waste oil as a hazardous waste under RCRA -- a change that reduced the risk of overregulation but increased the risk of underregulation.

PREMCO-JAPAN’s regulatory experience could hardly be more different. Rather than employing detailed, prescriptive legal rules, Japanese environmental statutes articulate broad regulatory goals. They are implemented through informal “administrative guidance” and custom-tailored agreements between individual firms and the prefects or municipal governments that enforce the national laws (Wallace, 1995; Young, 1984). Regulators view extensive consultation with regulated industry trade associations and with individual facilities as the most important
means of formulating and achieving policy goals. Japanese law and administrative guidance, rather than prescribing the means of achieving regulatory goals—such as the U.S. twelve-hour rule—simply require industries, in Aoki and Cioffi’s paraphrased translation, “to employ any necessary measures to prevent [hazardous wastes and ordinary wastes] from scattering, flowing away, seeping into the ground, or emitting an offensive odor.” The sole prescriptive rule requires factories to enclose waste storage areas, post signs identifying them as such, and store wastes in sealed containers to prevent evaporation or exposure to high temperatures.

When violations of these waste storage provisions are found, Japanese law requires regulators to issue an “improvement order” containing no financial penalties. Only if an improvement order is ignored or if harm to human health occurs are officials authorized to seek legal sanctions—i.e., criminal penalties. But resort to formal enforcement mechanisms is discouraged and extremely rare. Thus, in the municipality in which PREMCO’s Japanese plant is located, regulators told Aoki and Cioffi that formal sanctions have never been imposed for violation of storage standards and, in contrast with AMERCO’s experience, regulators inspecting the Japanese plant have never formally found a violation of waste management regulations—although that might reflect the pervasive reluctance of Japanese environmental regulators to resort to formal legal sanctions (Kitamura, 2000). Japanese regulators instead focus on monitoring the firm’s waste manifests and on waste reduction as their primary regulatory goal.

Japanese environmental law requires companies and individual facilities to appoint a senior plant official as the factory’s “pollution control supervisor” and in addition to appoint a “pollution control manager.” These officials are then legally responsible for compliance with, and violations of, environmental regulations and orders. Here too the emphasis is on institutionalizing responsibility for overall environmental outcomes rather than for complying with specific legal rules. According to Aoki and Cioffi (2000: 46):

In contrast with AMERCO, PREMCO has taken advantage of the opportunities afforded by the performance-based character of the Japanese waste storage standards to diffuse environmental knowledge, training, and responsibility throughout the firm, including to shopfloor workers and supervisors. Performance-based regulation also allows greater flexibility in compliance efforts. Perhaps as a consequence, PREMCO’s Japanese managers display none of the negative attitudes towards environmental regulation and regulators detected among AMERCO’s managers.
The American Regulatory Style

The PREMCO case, like the other case studies in the research project from which it emerged, replicates the findings of a substantial body of comparative sociolegal studies, covering different regulatory programs, concerning the distinctiveness of the American style of social regulation. Of course, there are a great number of regulatory programs in the United States at all levels of government, with variation in regulatory style. While some regulatory statutes and implementing rule books, like RCRA’s, are highly prescriptive, setting out regulatory obligations in excruciating detail, others grant implementing agencies considerable discretion to balance regulatory goals and economic considerations, depending on the particular circumstances. Some American regulatory agencies, like ticket-issuing highway patrolmen, have a legalistic enforcement style, automatically imposing fines on detected rule violations, even those that pose no immediate risk of harm, but many other agencies employ a more flexible enforcement style. (Kagan, 1993). Many state environmental agencies are much less likely than the U.S. EPA to resort to formal legal penalties against or to sue serious violators (Institute for Policy Integrity, 2017) – although that sometimes is because the agency is understaffed or less than fully politically independent. Different regional and different state offices charged with implementing the same law have been found to employ different enforcement styles (Shover et al., 1984; Scholz and Wei, 1986). Repeatedly, politicians and agency chiefs announce plans for making regulation more cooperative (Fiorino, 1996; Michael, 1996; Freeman, 1997).

Nevertheless, as in the Aoki and Cioffi study, whenever researchers have carefully compared specific regulatory regimes in the United States with their counterparts in other economically advanced democracies, the American regulatory regime has been found to entail a number of distinctive features. First, American regulatory statutes and regulations generally are more legalistic—that is, more detailed, prescriptive, and complex (yet confusing and difficult to comply with). Second, American regulatory regimes more often (even if not always) enforce the law legalistically: they are more likely to issue formal legal sanctions when they encounter rule violations, and their legal penalties tend to be much more severe. Third, relationships between regulators and regulated entities in the United States are much more often adversarial; legal contestation of regulatory rules and decisions, in administrative appeal boards or in courts, is far more common, both by regulated entities and by citizen advocates of stricter regulation. American regulatory statutes, including but not limited to civil rights laws and anti-trust laws, are far more likely than similar laws in other countries to authorize and provide incentives for private enforcement suits against violators. Fourth, regulatory rules and methods in the United States more often are enmeshed in political controversy and conflict, as rival interests and
politicians battle over regulatory appointments and funding, and strive to lock their policy preferences into statutory amendments or revised regulatory rules.

The European Union, in order to implement its growing body of business regulations, has had to rely on member state governments. Thus like the U.S. federal government, the EU in recent decades has tended to promulgate more detailed rules, to demand more formal procedures, and to encourage tougher sanctions for violators. Daniel Kelemen (2011) has labeled this regulatory style “Eurolegalism,” a cousin of American adversarial legalism. Empirical studies in several regulatory policy areas indicate that the EU has thereby injected a dose of legalism into previously cooperation-oriented national enforcement styles (National Academies of Sciences, 2017, Ch 3); Bastings et al, 2017); Bignami, 2011). But nevertheless, those studies reaffirm the proposition that Europe remains a goodly distance from the American regulatory style, which remains distinctive – more adversarial, less collaborative, and more reliant on litigation.

The Form of the Laws

Law professor Edward Rubin, aware that the U.S. Federal Reserve Board’s authorizing statutes and regulations governing bank safety and soundness fill numerous three-inch-thick binders, was astonished to learn that Germany’s comparable statute and the Bundesbank’s implementing regulations are bound in a pamphlet that is less than 100 pages in length. Part of the explanation, Rubin learned, is that German bank regulatory officials are career employees, subjected to much more extensive training than their American counterparts, and are trusted to make programmatically sensible judgments without constraint by immensely detailed legal rules (Rubin, 1997).

German environmental regulations are implemented by state (lander) and municipal officials, and are perhaps the most detailed of any nation’s save the United States. Still, they are much less prescriptive and constraining than American rules. Moreover, the purpose of detail in German regulations is different, according to Daniel Kelemen (1998). The prescriptiveness of American statutes and regulations reflects politicians’ and interest groups’ desire to control regulatory agencies that they do not fully trust; the rules are designed to prevent the agency’s “capture” by regulated entities or, on the other hand, by regulatory zealots, and to facilitate judicial review that will check unwarranted administrative decisions. In Germany, in contrast, the detail of federal environmental regulations is designed to provide guidance to the state and local officials who are responsible for implementing federal law, and to shield regulatory administrators from judicial interference. Moreover, the detailed German air pollution
regulations have the legal character of “administrative guidance,” not binding law; hence administrators can (and often do) lawfully depart from them in individual permitting decisions, based on their duty to adjust regulatory requirements to particular circumstances and economic conditions.6

Comparisons of U.S. environmental statutes and regulations with those of Sweden (Lundqvist, 1980), Great Britain (Vogel, 1986, Cooter & Ginsburg, 1996) and Canada (Grabén & Bieber, 2017) have also noted the far greater legal formality, complexity and prescriptiveness of the American laws. 7 Unique to the United States, for example, is Congress’s tendency to stipulate firm deadlines by which a regulatory agency must promulgate implementing regulations and achieve specific regulatory goals; because agencies often cannot meet those deadlines and goals, they are sued by environmental groups demanding compliance (Melnick, 1992a).

Prescriptive, deadline-laden statutes, moreover, lead to prescriptive, deadline-laden regulations,8 and at the level of individual regulated enterprises, to permits, remediation plans, checklists for inspectors, and reporting requirements that far exceed in specificity those imposed by other countries (Axelrad, 2000; Dwyer, Brooks & Marco, 2000).

The complexity of American statutes also is exacerbated, Peter Schuck (2014: 281-294) has noted, by Congress’s tendency to enact statutes that assign implementation responsibilities to multiple, cross-checking federal agencies, or to divide it between federal and state agencies – which greatly complicates compliance for regulated entities. In the realm of civil rights law, Shep Melnick (2018b: 34-35) writes:

In its investigations of complaints [to the U.S. Department of Education’s Office for Civil Rights] under the federal Individuals with Disabilities Education Act, OCR expects schools to follow the 320 pages of regulations promulgated by its Department’s Office of Special Education and Rehabilitative Services. Federal contractors must follow the guidelines established by the Office for Contract Compliance (OFCC) in the Department of Labor. OFCC’s Federal Contract Compliance Manual runs over 700 pages. The [Equal Employment Opportunity Commission’s] rules run to almost 270 pages [of fine print] in the Code of Federal Regulations (CFR)…. The rules established by Department of Justice’s Civil Rights Division are even longer—slightly more than 360 pages in the CFR. [The Department of Housing and Urban Development’s] fair housing rules are a bit shorter, just over 200 pages. These figures do not include those agency guidelines, interpretations, compliance manuals, technical assistance documents, memoranda of understanding, and resolution agreements that are the daily fare of regulation. The bottom line is that modern civil rights state has produced an intricate web of rules that apply to
almost all businesses, educational institutions, government units, and non-profits in the country.

The Regulatory Policymaking Process

Many governments seek to manage the political struggle over regulatory standards by entrusting regulatory decisions to technocratic bureaucracies, largely shielded from political and legal interference. Other governments create “corporatist” forums in which representatives of the regulated industry and of proreregulation advocacy groups, along with relevant scientific and regulatory experts, bargain toward consensus in formulating regulatory standards. In the United States, in contrast, there is much less trust in agency expertise and political neutrality, and understandably so: the leaders and top echelon of regulatory agencies are politically appointed. Often, they are not specialists drawn from the regulatory bureaucracy. In Republican administrations, they often are former executives, lawyers or lobbyists for regulated entities. In Democratic administrations, they often are drawn from pro-regulation advocacy organizations. And hence regulatory agencies are the foci of partisan political struggles over regulatory policy. Reformers, on the other hand, have sought to subject those political struggles to the constraints of legal rationality, and with some success. The American administrative process for making regulatory policy thus is distinctive in its legal formality, its openness to interest group participation, its adversarial quality, and its subjection to judicial review.

Specifically, American statutes and court decisions insist that regulatory agencies must publish draft regulations, invite comments by affected parties, and conduct hearings in which advocacy groups, business organizations, and other interests may present their critiques and demands. Private consultation between regulators and regulated firms is legally proscribed in many circumstances and politically dangerous in many more. Administrative law compels regulatory policymakers to spell out the scientific, technological, and economic evidence they think will justify the standard chosen. Major regulations often are challenged in court, where judges scrutinize the fairness of the agency’s rulemaking procedures, its interpretation of the relevant statutory language, and the quality of its response to arguments submitted by industry and advocacy organizations. The complex requirements of administrative law, however, slow down the regulatory policymaking process, sometimes delaying the issuance of badly-needed new rules (Mendeloff, 1987; Mashaw & Harfst, 1987). The fate of new rules is often determined by whether the court that reviews them has a majority of Republican or Democratic judicial
appointees (Cross & Tiller, 1998). But that complex requirements of administrative law, as shown by Steven Croley’s (2008) detailed case studies, have a valuable function. They push agencies to conduct reasoned, evidence-backed policy analyses. In that and other ways, they reduce the capacity of members of Congress, lobbyists, and lawyers representing regulated business interests to pressure regulatory agency policymakers to water down demonstrably valuable proposed regulations, and more difficult for incoming presidential administrations to simply repeal regulations they don’t like.

In Great Britain, in contrast, the regulatory policymaking process is far less formal and less open to legal contestation. As indicated by David Vogel’s (1986) comparative study of environmental policy, regulatory officials in the U.K issue nonbinding administrative guidelines stating presumptive emission limits and control technologies. They do so after private discussions among staff members, selected technical representatives of affected companies and trade associations, and “responsible” environmental groups. Judicial review of agency decisions is infrequent. Lawyers, therefore, do not play a significant role in the rulemaking process. The same contrasts emerge from Rose-Ackerman’s (1995) comparison of German and American environmental policymaking; from Badaracco’s (1985) detailed comparative account of occupational health regulation in the United States, France, Germany, England, and Japan; and from Brickman, Jasanoff, and Ilgen’s (1985) analysis of how Germany, France, the United Kingdom, and the United States regulate potential chemical carcinogens in pesticides, food additives, and workplaces.

In the European nations Brickman et al. (1985: 305) studied, “the absence of legislative-executive competition,” together with the traditions of governance by professional, apolitical public agencies and by corporatist bodies, have reduced “pressure for rigorous procedural and judicial controls on the bureaucracy.” In consequence, “A confidential process of consultation and accommodation permits government officials to mediate among conflicting private interests. As a result, regulators are able to make the necessary trade-offs and compromises without presenting reasoned public justifications or drawing open political fire.” In contrast, American regulatory agency policymakers implement statutes under the critical eye of other governmental institutions and . . . warring private interests, each advancing interpretations of law, science, and economics consistent with its narrower objectives. Unable to strike bargains in private, American regulatory agencies are forced to seek refuge in “objectivity,” adopting formal methodologies for
rationalizing every action. . . . [The courts’] searching review . . . has forced administrators toward greater formality and rigor in building the evidence to support their decisions. (Id at 304)

Precisely the same contrast is illustrated in the above-mentioned comparative analysis by Joseph Badaracco (1985: 120-21) and in a comparison of rulemaking by the US and the EU by Peter Strauss (2006).

Implementation and Enforcement

The large, punitive fine imposed on PREMCO for only moderately serious, quickly remedied regulatory violations is far from unusual (Adler, 1998: 40, 41), and it contrasts with the regulatory enforcement styles of other economically advanced democracies (Kagan, 2000). On the other hand, it is not entirely representative of American regulatory enforcement. During the administration of President Ronald Reagan, the Occupational Safety and Health Administration’s propensity to impose fines declined significantly (Scholz & Wei, 1986), as did the proportion of OSHA fines contested by employers (Kniesner & Leeth, 1991). Some American agencies, as noted earlier, consistently pursue a flexible or even an accommodative enforcement style, emphasizing remedial orders more than punishment (Kagan, 1993). Some American regulatory regimes employ a “soft touch” strategy, requiring individual regulated entities to make and enforce their own intra-firm standards and procedures for reducing hazards in ways tailored to their particular operations. Some American agencies are too lenient: reports regularly surface of cases in which regulatory officials declined or failed to punish obvious and significant regulatory violations (Barstow, 2003; Lifsher, 1998).

Nevertheless, in many American agencies, regulatory officials are at risk of criticism, from elected politicians or their own superiors, for not citing or punishing regulatory violations – as well as for being too legalistic. Agencies often seek to demonstrate their diligence by highlighting the number of prosecutions brought and fines. As noted in the PREMCO case, the federal EPA systematically audits state environmental agencies’ records with respect to failure to seek legal sanctions against violators; EPA reports that criticize failures to prosecute often make newspaper headlines (Fialka, 1998: 40; Adler, 1998: 40). Therefore, notwithstanding variation among American agencies, numerous cross-national studies of particular regulatory programs have found regulatory implementation in the United States to be more legalistic and deterrence-oriented than in other economically advanced democracies, where enforcement officials who encounter shortcomings among regulated entities more consistently employ a

When John Braithwaite and colleagues (1993) compared nursing home regulation in the United States, England, Japan, and Australia, they found that enforcement in the United States was more legalistic and punishment-oriented. For most violations American state nursing home regulators accept the filing of a satisfactory plan of correction, but formal legal enforcement—administrative fines, suspensions of new admissions, and license revocations—is far from infrequent, and far more common than in the other countries. Each journalistic report of substandard care triggers demands for harsher penalties. Thus nursing home regulation in the United States, Braithwaite concludes, is “tougher than nursing home regulation in the rest of the world, and much tougher than most other domains of business regulation” (id. at 25–27). But Braithwaite also was struck by the “culture of distrust” generated by the legalistic approach to regulation. Writing in 1993, Braithwaite observed that federal training of state inspectors “emphasized the need for inspectors to be in control during [end-of-inspection] exit conferences, not to be distracted by questions raised by nursing home staff, [and] to stick to the facts of the deficiencies that require a written plan of correction”—a posture that would be shocking to nursing home regulators in Australia or England (id. at 36). In consequence, Braithwaite pointed out (id. at 48):

Inspectors in the United States spend most of their time alone in a room poring over resident charts, whereas English and Australian inspectors spend most of their time out in the nursing home observing care and talking to staff, residents, and visitors about care. The theory of the recent [1990 federal statutory] reforms was that the inspection process would become more resident-centered and less document-centered. But our research team’s observation is of no significant change because the new element of resident interviews has been balanced by extra documents for inspectors to check and extra pieces of paper for them to fill out.

This kind of impersonal, “by the book” regulatory style has been noted in other sociolegal studies (Bardach and Kagan, 1982; Axelrad, 2000).

Another striking feature of American regulatory style is the relatively severity of the legal sanctions it imposes for serious violations of many of its regulatory laws. No other nation authorizes and imposes such weighty criminal penalties for violations of regulatory laws. In 1988 Congress increased criminal fines for insider trading to $1,000,000 for individuals and
$2,500,000 for entities, and doubled the maximum prison term for violations of any securities law provision from five to ten years (Pitt & Shapiro, 1990: 238). In the late 1980s and early 1990s Congress upgraded criminal offenses in most environmental laws from misdemeanors to felonies, thereby increasing the maximum potential prison sentences. Under both federal and California law, courts can impose a criminal fine of up to $1,000,000 on a corporation for violations of water pollution law that “knowingly endanger another person”; for such violations individuals can be fined up to $250,000 and sentenced to prison for up to fifteen years.11

Of course, the vast majority of regulatory violations – including those detected and cited by enforcement officials -- do not lead to criminal prosecutions and penalties. That is largely because most regulatory rules require precautionary preventive measures, so that most violations (like AMERCO’s violation of the twelve hour rule), while often increasing the risk of harm, do not result in actual harm; the usual regulatory response is an administrative citation and order requiring remedial action. Secondly, even when serious harm does occur, it often is difficult for prosecutors to pin down individual responsibility and prove criminal intent (see the “knowingly endanger” standard in the preceding paragraph) in a large corporation with complex decision processes and sophisticated legal defense teams. Despite intense political pressures to punish those responsible for the disastrous 2008 Wall Street meltdown and ensuing deep recession, even able and dedicated prosecutors, hampered by restrictive court rulings, were unable to win criminal convictions and imprison any top executives of the financial institutions that fraudulently sold, bundled, and mislabeled the millions of high risk home loans, bonds and derivatives (Eisinger, 2017: xviii). For serious violations, therefore, prosecutors and regulatory agencies, therefore, are more inclined to bring criminal charges or civil lawsuits against the corporation as a whole and settle for large money penalties (Ibid; Garrett, 2014; Firestone, 2003; Uhlmann, 2014)12

Nevertheless, the risk of criminal prosecution for regulatory violations is very salient for regulated entities in the US. In the 1995–1997 period, after Congress increased EPA’s funding for criminal investigators (Blabolil et al., 1997), prosecutions for environmental violations more often were brought against individual corporate officers, rather than corporate entities, and more than a third of those convicted were sentenced to prison (Blabolil et al., 1997; Kagan and Lochner, 1998). A study of 700 prosecutions for violations of federal environmental laws between 2005 and 2010 found that virtually all stemmed from repeat violations, deceptive conduct, outright defiance, or significant harm to the environment or public health (Uhlmann,
A survey of American corporate environmental managers in 2004 found that they estimated, on average, a 70% probability that a serious environmental law violation by their company would be prosecuted and punished, and most overestimated the severity of such punishments (Thornton et al, 2005).

American law also provides for much heavier civil penalties for regulatory offenses than does the law of other countries. The federal Clean Air Act and the Toxic Substances Control Act authorize civil penalties of up to $25,000 per day for ongoing violations. The EPA can also impose administrative penalties equal to the financial “benefit” the violator gained by not making the required abatement. Several federal environmental statutes require violators to pay for the damages to natural resources caused by unauthorized pollution (Privatera, 1992: 3–6). In 1989 the Exxon Valdez (with third mate Robert Kagan at the wheel) went aground in Prince William Sound, Alaska, spilling eleven million gallons of oil in the wildlife-rich waters (Davidson, 1990). Exxon Corporation, after spending $2 billion on cleanup efforts, pled guilty to criminal charges and was fined $125 million, based on damages to the environment. In addition, the state of Alaska and the federal government each brought civil actions against Exxon for natural resource damages, and Exxon settled those suits for almost $1 billion (Washington Post, 1991: A14; Verhovek, 1999). Exxon also was sued for damages by scores of plaintiffs’ lawyers who signed up thousands of fishermen, Indian tribes, and other private parties allegedly injured by the spill, and a federal court jury handed down a $5 billion punitive damages award. These figures seem almost quaintly small when compared to the over $20 billion in combined criminal fines, civil damage claims, and natural resource damages assessed two decades later against British Petroleum in the wake of the giant oil spill from its Deepwater Horizon well in the Gulf of Mexico in 2010. Volkswagen’s combined criminal and civil penalties for intentionally rigging their diesel cars to pass government emission tests, while in practice emitting illegal levels of harmful particulate matter—resulted in over $4.3 billion in criminal and civil penalties, plus more in civil case settlements with cheated customers (Vlasic, 2017)

Exxon’s, BP’s and Volkswagen’s simultaneous exposure to criminal prosecution, governmental civil penalties, and private lawsuits for damages for the same violations highlights another distinctive feature of American regulatory law: its encouragement of private enforcement of regulatory law. In the 1890 Sherman Antitrust Act, Congress enabled plaintiffs to bring a civil lawsuit against and collect ‘treble damages’ from a company which had harmed them by engaging in prohibited anti-competitive practices. The enhanced damage provision encouraged lawyers to represent such claimants on a contingency fee basis, that is, in return for a
substantial percentage of the damages obtained. Since then, in over 250 statutes, Congress has provided incentives for entrepreneurial lawyers to act as “private attorneys general” (Farhang, 2014, 2010). The incentives also include “one-way fee shifting” provisions whereby successful plaintiffs’ fees must be paid by the defendant – but if plaintiffs lose, they do not have to reimburse the prevailing defendant’s lawyers’ fees. In addition, some statutes, beginning with the 1964 Civil Rights Act, provide that many individual claims can be aggregated into class actions -- remember the Columbia Falls Aluminum case in Chapter 6 -- which vastly multiplies incentives for entrepreneurial plaintiffs’ lawyers and the deterrent threat to regulated companies. These incentives often are combined. The federal Truth-in-Lending Act (1968), for example, gave debtors a cause of action against lenders who violate the statute’s complex disclosure rules; and provided that prevailing plaintiffs would receive a $100 minimum award, regardless of actual losses, plus their attorneys’ fees; and provided that attorneys could bundle thousands of bank customers together in a class action, “raising the specter of enormous damages suits [even] for minor violations of the statute” (Rubin, 1991: 237).

These kinds of statutory incentives -- together with plaintiffs’ strong rights of pretrial discovery and the remarkable volume of reports that American corporations must file (disclosing financial data, industrial emissions, product complaints, chemical inventories, bank lending patterns, and more) -- have made litigation by entrepreneurial lawyers a prominent and often potent means of enforcing American regulatory law in many spheres, from securities laws and civil rights laws to the Clean Water Act. Neither the private class action, the contingency fee, nor other special incentives for private enforcement actions are prominent features of regulatory law in other countries (Greve, 1989b; Coffee, 2015). What Sean Farhang (2010) has labeled “the litigation state” – in which a decentralized, legally-incentivized army of private attorneys is a vital aspect of the regulatory system -- is a uniquely American phenomenon.

All in all, the combination of criminal, civil, and private enforcement results in regulatory penalties in the United States that dwarf those in other countries. Karpoff, Lott, and Rankine (1998: 4), after studying legal responses to 283 environmental violations by publicly traded companies in the 1980–1991 period, wrote, “The mean fine or damage award in our sample is $9.43 million (the median is $600,000), and the average forced compliance or remediation cost is $59.97 million (the median is $8 million).” In recent years, the European Union has imposed extremely high monetary penalties on giant companies for violating EU fair competition law and privacy protection regulations. But overall, multinational corporations view American regulatory
regimes as more threatening than those of any other economically advanced democracy (Kagan, 2000).

Is Adversarial Legalism Necessary?

If adversarial legalism makes American regulation particularly threatening, does it also make American regulation more effective than regulation in other rich democracies? For several reasons, that question, posed in such general terms, is easy to answer. First, the term “regulation” encompasses scores of different kinds of regulatory programs and rules, some very ambitious and demanding, some rather less so. Second, there are no settled metrics for measuring ‘effectiveness,” and whatever metric one chooses, there is inadequate comparative data to enable one to apply it across different countries. Third, both across and within countries, specific regulatory programs’ priorities and levels of ambition shift over time, often rather rapidly (Vogel, 2012). Fourth, regulatory agencies both within and across countries face different task environments. Some police industries with a relatively high prevalence of recalcitrant “bad apple” enterprises, while others face a higher percentage of cooperative firms (Shover et al, 1984). Different agencies cope with different levels of political resistance versus support, and differentially severe funding shortfalls. Fifth, when American regulation succeeds, as it usually does, in reducing risks and harms to a meaningful extent, it often is not clear how much those successes are due to the extra deterrent punch provided by adversarial legalism. In a study of 15 pulp and paper mills in the US and Canada, Neil Gunningham, Dorothy Thornton and I found that all had reduced the harmful chemicals in their effluent to levels below the requirements in their regulatory permits. But in explaining variation in environmental performance across those firms, non-legal factors -- such as social pressures, adverse publicity, and managers’ normative beliefs -- were more important than regulatory agency pressures and enforcement style. (Kagan, et al, 2011; Gunningham et al, 2003).

Yet although social pressures, reputational concerns, and cultural norms of good corporate citizenship play a large role in supporting regulatory compliance, regulation’s deterrent threat clearly does matter. Firms in highly competitive markets – such as pulp and paper manufacturing or trucking -- are unlikely to invest in very costly preventive measures absent legally-binding, regularly-enforced rules that compel those firms’ competitors to make comparable investments (Thornton et al, 2009 ; Gunningham et al, 2003; Vogel, 2005). Lewis-Beck and Alford (1980) found that, after controlling for other factors, increases in regulatory penalties played a major role in sharply reducing the high death rate of underground coal miners
in the United States. The American propensity to supplement government enforcement with incentives for enforcement via private lawsuits also has mattered, at least in some regulatory spheres. For example, some comparative studies indicate that American laws forbidding racial discrimination in employment and workplace sexual harassment, while far from fully rooting out those offenses, have been far more potent than comparable laws in nations that do not foster the private enforcement of public law (Lieberman, 2005; Saguy (2000); Gelb, 1989:206). Conversely, private enforcement (as well as government enforcement) has been relatively weak in implementing the 1968 U.S. Fair Housing Act, contributing to tragically slow progress in combatting racial discrimination in housing markets (Massey & Denton, 1993). 14

On the other hand, some research, such as the above-discussed study of PREMCO by Aoki and Cioffi (2000) and a study of nursing home regulation by John Braithwaite and colleagues (1993), indicate that the legalistic American regulatory style, by discouraging cooperative relationships between regulators and regulated entities, may make regulation in the US less effective than other nations’ regulatory style, at least in some spheres of regulation. Lyle Scruggs (1998; 1999) used national reports to the Organization for Economic Cooperation and Development (OECD) to analyze rates of progress by seventeen economically advanced democracies in reducing pollution during the 1970s and 1980s. Notwithstanding the greater prescriptiveness and deterrent threat of American environmental regulation, Scruggs found that the United States ranked thirteenth of the seventeen nations in reducing air pollution (sulphur dioxide, nitrous oxide), solid wastes (measured by reductions in municipal wastes and proportion of paper and glass recycled), and water pollution (measured by percent of population served by waste water treatment plants, and by reduction in pesticide use per acre of arable land). In terms of rates of progress, the United States trailed Germany (which ranked first) and several countries with decidedly nonlegalistic enforcement styles—the Netherlands (second), Sweden (third), Japan (fourth), and the United Kingdom (eleventh) (id. at 70). The most important correlate of rapid environmental improvement, Scruggs found, was whether the nation had “neo-corporatist” institutions that fostered a more consensual mode of regulation—that is, whether well-organized, comprehensive industry associations were incorporated into the regulatory policymaking and enforcement process. “Pluralist” systems, in which political and economic power is more fragmented, ranked lower—and the United States is surely the most “hyperpluralistic” of all the OECD countries.
According to Allen (1989: 72), from the mid-1970s to the mid-1980s German chemical companies invested twice as much money as their American counterparts in complying with environmental protection measures. Verweij (2001) found that Swiss, German, and French regulatory regimes reduced toxic effluents in the Rhine River more completely than did the comparable American regime for the Great Lakes. Like the PREMCO study, several previously mentioned case studies of multinational corporations (Kagan and Axelrad, 2000) showed that while the corporations experienced more adversarial and legalistic regulation in the United States, the levels of protection that the companies provided in their parallel operations in Germany, Japan, the Netherlands, and the United Kingdom were substantially similar to those achieved in the United States.

Still, one might argue, even if some other countries achieve comparable regulatory outcomes with less legalistic, more cooperative regulatory methods, such methods would not work in the United States. American businesses, some observers have contended, are less deferential to governmental authority than are Japanese and European firms,15 and less enmeshed in strong industry associations of the kind noted by Scruggs in the paragraph above. Indeed, American business interests work hard and make very large campaign contributions to elect political leaders whose regulatory appointees will relax enforcement of existing regulations and block promulgation of new ones. That is what indeed occurred during the administration of George W. Bush (2001-2008) and is currently occurring, even more vigorously, during Donald Trump’s presidency.

Moreover, corporatist political systems that engage in cooperative regulatory policymaking are vulnerable to slipping into overly cooperative patterns. Japan’s collaborative regulatory policymaking, which Aoki and Cioffi describe positively in their PREMCO account, has been marked by significant failures. It received some of the blame for the the terrifying and immensely costly 2011 Fukushima nuclear power plant disaster. The cooperation-seeking Japanese enforcement style, while generally effective vis-à-vis large regulated entities, has been shown by some studies to be far less so vis-à-vis smaller firms, with adverse consequences for worker safety (Wokutch & Vansandt, 2000) and environmental protection (Aoki & Cioffi, 2000:53). Moreover, Milhaupt and Miller (2000) describe how the Japan’s collaborative financial regulatory system failed to attend to the growth of non-bank financial institutions whose high-risk lending practices stimulated a real-estate bubble, whose collapse in 1990 had devastating economic effects – much like the way American financial regulators’ hands-off approach led to the equally devastating Wall Street financial meltdown in 2008.
Perhaps, then, American regulatory policymaking, so open to partisan political influence must be more constrained by administrative law, adversarial legalism, and judicial review. Those processes make the rule-making process more transparent, open to a wide range of information and opinion, and more reliably evidence-based. They make agencies less vulnerable (although not invulnerable) to capture, corruption, or crippling by regulated business interests and their political allies. Similarly, perhaps American regulatory enforcement sometimes must be rather adversarial, legalistic, and deterrence-oriented. Legalistic agency enforcement, some studies indicate, often is necessary in the initial phase of a new regulatory program or regulation; and in regulatory task environments characterized by many small competing firms and high compliance costs (Thornton et al, 2009, Kagan et al, 2013); and for regulatory norms and market niches characterized by by significant levels of recalcitrance (Shover et al, 1984 ). Enforcement via private litigation provides vital added punch for regulatory programs when the relevant government agency’s monitoring capacity is limited – as is often the case due to inadequate budgets. To sharply curtail adversarial legalism in the American regulatory state without somehow replacing it with a more effective and reliable way of assuring cooperation from regulated enterprises almost surely would pave the way to much larger numbers of harmful violations of important, public-protecting regulatory norms.

Nevertheless, it is important to recognize that the benefits provided by adversarial, legalistic regulation in some situations come at a price in others. American adversarial legalism imposes higher costs on regulated businesses, and hence on the economy as a whole, than comparable regulatory approaches in other economically advanced democracies. The next section explores further the nature of those costs.

The Social and Economic Costs of Legalistic Regulation

It is fairly clear that American adversarial legalism, when contrasted with cooperative modes of regulation, generates more legal uncertainty, much higher litigation and lawyering expenses, higher compliance and opportunity costs, and more defensiveness and alienation among regulated enterprises. These costs, by incrementally reducing aggregate economic efficiency, are borne by the society at large as well as by regulated firms.
Unpredictability

In theory, a regulatory regime that emphasizes detailed, strictly enforced legal rules should be more stable and predictable than regimes that emphasize discretionary adjustment of policies to particular circumstances. Paradoxically, however, regulatory compliance officials in multinational enterprises characterize American regulation as more legally uncertain than regulation in Western Europe or Japan. The uncertainty stems from several features of American regulatory systems. Institutional fragmentation results in overlapping, imperfectly coordinated regulation by numerous local, state, and federal agencies, which may be dominated by different political parties with different regulatory policy preferences. Business groups and advocacy organizations battle for regulatory changes in agencies, courts, and legislatures, rendering American regulatory law particularly malleable. The ever-present prospect of legal and political challenge means that regulatory officials in the United States, compared to their counterparts in other countries, typically demand more scientific evidence to support permit applications, requests for variances, and new regulations. Consequently it is often unclear to regulated enterprises when a regulatory decision on a permit application, for example, will be made and whether the evidence and certifications provided will be regarded as legally sufficient.

Consider, for example, the experience of “Q Corp,” a multinational electronic-parts maker with similar factories in California and Japan, subject to parallel water pollution regulations. Aoki, Kagan, and Axelrad (2000: 82) found that

Q USA environmental managers spend much more time than their Q Japan counterparts striving to assimilate and reconcile regulatory requirements that are promulgated—separately and not always consistently—by federal agencies, state agencies, municipal agencies, and courts. Q USA officials spend much more time attending meetings, communicating with regulatory enforcement officials, and going to private workshops aimed at clarifying the law and ascertaining how it applies to particular industrial operations. Q USA officials spend more time communicating with environmental lawyers retained by the company, from whom they seek a second opinion in an effort to reduce the legal uncertainty that they regularly experience.

Even so, legal uncertainty remains, because U.S. regulatory law is often in flux. To mention one example that affected Q USA, in 1987 Congress directed the states to adopt by 1990 numerical ambient water quality objectives for certain toxic pollutants. States were slow to do so, however, partly because of concern that their decisions would be challenged in the courts, either by industry or by environmentalists, for lack of an adequate scientific basis. In 1991 California
promulgated the Inland Surface Water Plan (ISWP), but it omitted objectives for some bodies of water and some pollutants. The EPA then disapproved California’s regulations as incomplete. Meanwhile, local California governments sued the state on the ground that the ISWP rules were too stringent and would compel them to build or renovate water treatment plants at great expense. A California court invalidated the ISWP rules for violating certain procedural requirements in the promulgation process. Back at the federal level, an environmental organization sued the EPA for failing to meet the 1987 law’s deadline, and a federal court ordered EPA itself to issue regulations setting standards for the pollutants, which the agency did in 1992. The impact of the ongoing federal-state jousting on the local water treatment plant to which Q USA’s effluents flow, and hence on Q USA’s in-house treatment obligations, thus took years for the company to figure out (Aoki et al., 2000: 94, note 51).

More generally, a survey of American environmental lawyers (Ruhl et al., 2002) uncovered strong agreement that the sheer number, complexity, and changeability of regulations is the chief cause of noncompliance (far outranking ‘costs of compliance’) and indeed made it virtually impossible to achieve full compliance 100 per cent of the time, even for committed firms.

Lawyering Costs

Officials of PREMCO, the Japan-based metals manufacturing company mentioned earlier, assert that the corporation has spent more money on legal services for its U.S. subsidiary than for its corporate headquarters plus all its other manufacturing plants in Asia and Europe. Officials of several other multinational enterprises in the same research project said that their U.S. subsidiaries consult lawyers more often and longer on a wider range of matters because American law is generally more complex, changeable, and difficult to master; because the legal sanctions for being wrong are generally much higher; because litigation is more common; and because litigation in the United States is vastly more expensive than in other economically advanced democracies (Nielsen, 1999; Ruhlin, 2000; Kagan, 2000). Welles and Engel (2000) found that “Waste Corp.”, a multinational builder and operator of waste disposal facilities (which nobody wants near their backyard), spent a staggering $15 million on legal services in the course of its efforts to obtain approval for a municipal solid waste landfill in California; for over ten years the company had approximately seven lawyers on retainer, busy addressing numerous regulatory agencies, two major administrative appeals, and three extended lawsuits. In Pennsylvania the same company retained seven lawyers (but only
part-time) for the five years it took to get a landfill permit there, a process that entailed two administrative appeals but no lawsuits and “only” $1.45 million in lawyering costs. When Waste Corp. sought to develop a similar landfill in England, by contrast, the company retained two lawyers, part-time, for an eight-year process that also included at least one administrative appeal; its legal costs there were about $137,000. And in the Netherlands, despite having undergone two administrative appeals, the company did not have to retain lawyers at all (since lawyers are not required in administrative appeals) and it spent “less than $50,000” on legal services.

**Accountability Costs**

Viewed in cross-national perspective, American regulatory regimes generally impose more extensive and specific requirements concerning reporting, record-keeping, testing, employee education, certifications, and so on. Besides the costs of complying with substantive regulatory standards, therefore, regulated firms spend more in the United States than they do overseas to prove that they are complying (Dwyer et al., 2000; Kagan, 2000). For example, in the early 1990s “B Corp.” notified regulatory authorities in the United States, England, and the Netherlands that it had discovered that solvents had leaked from deteriorating underground tanks and pipes in its factories in those countries. The American regulators, Lee Axelrad (2000) found, demanded far more comprehensive analysis, more voluminous documentation, and more costly reports than did the European authorities. The documents submitted to American regulators for contaminated sites, said B Corp. regulatory compliance officials, would fill a four-drawer filing cabinet, compared to the less than half of a single file drawer of documentation submitted to regulators in the other countries. And behind each additional ten pages of documentation lay scores of hours that company officers devoted to research, testing, measurement, analysis, and preparation and checking of draft reports.

All in all, B Corp. officials estimated that “extra” studies, submissions, and negotiations with U.S. regulators added $8 to $10 million to the costs of designing the cleanup plan for the two sites in the United States (out of total costs per site of an estimated $22 million), whereas the “extra” regulatory accountability costs for comparable site investigations and cleanup planning in the United Kingdom and the Netherlands were negligible (Axelrad, 2000). Moreover, as of the time Axelrad interviewed B Corp. officials, actual remediation efforts in England and the Netherlands were well under way, but at the American sites action remained on hold while the firm still waited to learn if officials considered the company’s analysis sufficient. In this case, therefore, the additional demands of the U.S. regulatory regime confirmed the maxim that when
pushed too far, accountability (proving one has done the right thing) can displace responsibility (doing the right thing) (Bardach and Kagan, 1982).

Opportunity Costs

Regulatory permitting systems are designed to slow the headlong rush of development and technological change, forcing business firms to look more carefully at potential adverse side effects before they leap. But prior regulatory review may also impose opportunity costs on society. Each month’s further scrutiny of a new, perhaps more benign, pesticide means another month’s delay in supplanting a more harmful pesticide. For most products and processes, however, American regulatory regimes impose longer delays and larger opportunity costs than comparable national regimes in Western Europe. American opponents of new projects generally have more opportunities to challenge regulatory approvals in court than their counterparts in other countries, and litigation, crawling at a deliberate pace, typically results in substantial opportunity costs. The greater prospect of judicial review, moreover, often seems to make American regulatory officials more cautious and legalistic in reviewing proposals than their counterparts abroad. When Ford applied for air pollution permits for new processes in its two German plants, the time from application to approval in Germany took five months and seventeen months, respectively; the same permit applications for Ford’s plants in Minnesota and New Jersey took over four years (Dwyer et al., 2000).

Divisiveness and Defensiveness

One of adversarial legalism’s chief intangible costs is its corrosive effect on business-government relationships and ultimately on regulatory politics. When a regulatory inspector and a regulated enterprise become locked in an adversarial posture, exchange of information and cooperation, so essential to effective regulation, are often reduced (Bardach and Kagan, 1982). Comparing U.S., British, and Australian nursing home regulation, Braithwaite (1993: 17) observed, “American nursing homes have higher fire safety standards than Australian nursing homes, better food and nutrition standards than English nursing homes, . . . better care planning, and more varied activities.” But overall, Braithwaite (id. at 15–16) concluded, quality of care in the United States is worse, primarily because the highly prescriptive and legalistic American enforcement system drives nursing homes toward a defensive, legalistic approach to compliance -- rather than motivating them to do their demanding work more carefully and compassionately.
After sitting in on meetings that included a facility director of nursing, a dietician, and a quality assurance coordinator (a position required by law), Braithwaite (1993: 41) observed, “The question that holds center stage during quality assurance meetings is not, ‘What is the best way to design this program to deliver maximum improvement in quality of care?’ It is, ‘What is it that they [the regulators] want of us here? What is the minimum we have to do to satisfy the requirement of having a quality assurance program?’” Defensiveness is also manifested in a disturbingly high incidence of falsification of medical and other records in order to avoid violations (ibid.).

Similar observations pervade comparative studies of other regulatory programs. Comparing “Q Corp.’s” environmental compliance programs at its factories in the United States and Japan, Aoki, Kagan, and Axelrad (2000) say, “One can think of [environmental managers in the U.S. plant] as playing legal defense instead of playing environmental offense. Q Japan officials have more time to do the latter.” They go on (id. at 83):

Whereas Q Japan environmental officials express dismay that Q USA has actually violated the law on occasion, Q USA officials, while clearly committed to the goals of environmental protection, seem to regard occasional violations of particular regulatory rules as something close to inevitable and as something less than shameful. In the U.S., where legal penalties often are imposed for unintentional violations that do not entail serious harm, the social stigma attached to a regulatory “violation” seems less severe than in Japan, where sanctions are reserved for serious violations.

In Japan, we conclude, the regulatory regime appears to have gathered greater “normative gravity,” partly because Q Japan officials view it as comprehensible, reasonable and predictable. This appears to facilitate the internalization of regulatory norms by operating managers and workers. The fluctuating, polycentric character of the American regime, in contrast, seems to impair the law’s normative gravity (although not its threat) and to make it more difficult for regulatory norms and the idea of perfect compliance to permeate the corporate culture and the planning process.

To be sure, many efforts to institute more cooperative modes of regulation in the United States occur, and many succeed (Rees, 1988; Weber, 1998). But a regulatory system structured by adversarial legalism makes it more difficult to successfully institutionalize informal cooperative methods. And as a number of scholars have found (Brickman et al., 1985: 27; Wallace, 1995: 111), the defensiveness that legalistic enforcement engenders often keeps American regulation from achieving the gains that would flow from cooperation.
Compared to other economically advanced democracies, the United States has been remarkably successful in fostering vibrant financial markets, promoting innovation and entrepreneurial activity, facilitating industrial restructuring, and creating new jobs. However costly American social regulation may be, and however annoying the extra costs generated by adversarial legalism may be, its overall social benefits, as many analyses have shown, massively outweigh those costs. Notwithstanding those costs and annoyances, most American firms willingly comply with most regulations. They are motivated to do so by social pressures, by business managers’ belief in the rule of law, and by their normative agreement with the basic norms of most regulatory programs (Kagan et al, 2013; Gunningham et al, 2003; Vandenberg, 2003). The costs and annoyances of adversarial legalism have not been a major source of relocation of manufacturing or other business operations to other countries (Anderson & Kagan, 2000), a process driven much more by differential labor costs. Indeed, in contrast to the closed-door decisionmaking methods of many other nations, American adversarial legalism provides both domestic and foreign companies greater assurance that they are competing on a relatively level regulatory playing field and that they have legal recourse against official arbitrariness or favoritism. Adversarial legalism, ironically, helps legitimize the American regulatory process because it emphasizes legal accountability, transparency, and rights of public participation.

Nor should we over glamorize the regulatory systems of other economically advanced democracies. It would not be difficult for those knowledgeable about particular regulatory problems to point to instances or entire regulatory arenas in which American regulation is considerably more effective and efficient, or in which other countries’ regulatory regimes are poorly enforced. That said, it does not follow that adversarial and legalistic regulation is optimal for the United States. The United States benefits from the enormous market it offers both American and foreign businesses; they cannot afford to abandon the United States even if its regulatory system is especially litigation prone and legalistic. But those “extra” costs, even if they do not sink a dynamic economy, are often very significant for particular firms and in principle wealth-depleting for the society as a whole.

Even more significant, perhaps, are the social and political costs of adversarial regulation. Through its prescriptiveness, punitiveness, and contribution to formalization of business-government relationships, American adversarial legalism often induces mutual resentment,
defensiveness, and mistrust. It thereby discourages the kind of cooperation that is essential to the full achievement of regulatory goals. Most importantly, it gives regulation a bad name, obliterating attention to its positive achievements, ubiquity, and essentiality in competitive, rapidly-changing modern societies. That negative view of regulation has contributed to – and has been amplified by -- the upsurge of ideological hostility to government regulation led by conservative business activists and Republican politicians during the early 21st Century. As discussed below, their anti-regulation agenda has aimed, for the most part, not at reforming or improving regulation but at repealing or impeding implementation of morally-essential, economically desirable (even if imperfect) regulatory statutes and rules, brushing aside the prayers for regulatory protection that had led to those laws’ enactment. That has compelled me to suggest that the American regulatory state, partly burdened by, partly propelled by adversarial legalism, is preferable to a crippled, dismantled regulatory state.

**Epilogue: The Regulatory State in the Early 21st Century**

Beginning in the 1970s, conservative activists and business organizations created and funded think tanks that published critical analyses of federal regulation. Those analyses sought to be constructive. They often highlighted the extent to which particular regulations imposed costs that probably exceeded their intended benefits, or in which the regulations, as formulated, were not the most cost-effective way to achieve the regulatory objectives. But then moved sharply away from their earlier stance of regulatory cooperation. By the 1980s and ‘90s, both the Republican Party and some major business organizations had adopted a more intense, ideologically-driven opposition to government regulation (Hacker & Pierson 2016). The goal, it seemed, was not to reform regulation but to simply to repeal it or cripple the regulatory state. Comparing the politics of regulation in the United States and in Europe, David Vogel (2012) observed by the early 21st Century, “Each claim about a new risk is “likely to be challenged by a counter-narrative contending that it was misinformed.” (Id at 264). Prominent conservative politicians and television commentators referred to government regulation as “job-killing” and denounced global warming, or the human contribution to it, as a hoax. And as the Republican Party enjoyed increasing electoral success, conservative opponents of the regulatory state gained opportunities to turn their ideas into law.

From 2001 through 2008, during George W. Bush’s presidency, a Republican Congress slowed the growth of the regulatory state, even as new risks became evident. Political
conservatives allied with regulated businesses were appointed to head federal departments and regulatory agencies. During President Barack Obama’s tenure, 2009-2016, Congressional Republicans, often used legislative tactics to block new regulatory legislation, to weaken laws they could not block, and to cut funding for regulatory agencies’ policy research, risk assessment, and compliance-monitoring programs. When regulatory laws, administrative regulations, and executive orders were promulgated, Republican state Attorneys’ General and the US Chamber of Commerce often challenged their legality in court, delaying their implementation. Republican electoral victories also gave conservatives control of a majority of state governments, and hence over state regulatory agencies and their budgets. Since the mid-1990s, according David Vogel’s (2012) analysis, European countries, prodded by the EU government, have replaced the United States as the world’s leader in enacting stringent risk-control regulations. The federal government in the US failed to adopt more stringent new EU regulatory standards concerning, among other things, food safety, chemical safety, control of genetically modified agricultural products, and most significantly, regulations designed to counteract global warming.

Moreover, after the 2016 election, Republicans again won the presidency and retained control of both the House and the Senate. President Donald J. Trump promised to implement a more radical anti-regulation agenda. His strongly anti-regulation appointees to federal government departments, agencies, and commissions moved quickly to repeal existing regulations and policies, to abandon existing prosecutions of regulatory violations, and to purge their organizations of regulatory experts and scientists (Davenport, 2018; Protess & Silver-Greenberg, 2017; Cowley & Silver-Greenberg, 2017; Goodnough & Zarnike, 2017). In many agencies, in Republican states as well as in Washington, there were signs that an energetic, sometimes legalistic enforcement style was being replaced not merely by a less legalistic one but by an undemanding, very accommodative enforcement style (Lipton & Ivory, 2017).

The saying “It is difficult to make predictions, especially about the future,” has been attributed to Niels Bor, Mark Twain, Yogi Berra, and many others. Probably, I have read, it is an old Danish adage. In any case, it suggests why it is difficult to predict to what extent conservative assault on regulation, during the Trump Administration and thereafter, will shred the portrait of the American regulatory state painted in this chapter. Nevertheless, a number of
factors that point to the long-run resilience and continuity of the American regulatory state and of the distinctive American regulatory style, rather than to their disintegration.

First, by 2000, the major laws, institutions, and legal practices that constitute the federal regulatory state had been entrenched for several decades, creating change-resistant “path dependencies.” That is, many businesses, activist organizations, and members of the public who had adapted to, relied on, benefitted from, and adapted to those laws and practices could be expected to – and did – fight hard against efforts to change them. Moreover, as Joseph Singer (2015) wrote, while many Americans in opinion polls affirm the generalization that there is too much regulation, they also express strong approval for most specific regulatory policies and wish they were stronger or better enforced. So by the end of the 1990s, conservative opponents of the regulatory state had already learned a hard political lesson: because of the many veto points in the American policy-making and legislative process, and because of the depth of public support for most major environmental, health and safety, and civil rights policies, it is rarely possible to repeal or substantially weaken important regulatory statutes (Burbank & Farhang, 2017). During the 2000-2018 period, Republican Congressional leaders did not even try to repeal any major regulatory statute, other than the 2009 Obama-era Affordable Health Care Act, or even to amend any, save for the 2010 Dodd-Frank Act, which sought to stabilize the financial services industry.

Scores of regulatory statutes and rules, therefore, remain on the books. Most do not evoke partisan political conflict or opposition from regulated entities, who generally have accepted and adapted to them. Drawing on those statutes and the rich body of administrative law, attorneys general from politically liberal states, as well as a large array of preregulation advocacy organizations, regularly and immediately file lawsuits that challenge the legality of Trump Administration anti-regulatory initiatives. Each day, existing regulatory law triggers complaints of violations and propels the actions of thousands of regulatory inspectors and bureaucrats, state as well as federal. In that important sense, the American regulatory state and the adversarial legal contestation that it generates have remained intact.

The lawsuits by attorneys general from liberal states remind us, too, that in America’s politically fragmented and divided political system, there are many sources of political and legal resistance to the Republicans’ anti-regulation movement. In a 2011 survey, while 84 percent of Republicans asserted there is too much government regulation, only 22 percent of Democrats
thought so (Carrigan & Coglianese, 2012: 3). In politically liberal American states, from California, Oregon and Washington to Maryland, New York and Massachusetts, legislatures and courts continue to make and enforce new law aimed at regulating environmental degradation and greenhouse gas emissions, dangerous technologies and products, workplace discrimination, unfair labor and commercial practices, and other harms. Historically, an American political party that moves toward an ideological extreme, rather than toward the position of the median voters, risks being defeated at the polls sooner or later. The Republicans have managed, for periods of time, to govern as desired by their more ideologically extreme voter and donor base (Hacker & Pierson, 2005). But that strategy could also lead, as it did in the 2008 election, to a Democratic counter-reaction, in which some or many of the conservative changes in regulation may be reversed.

More fundamentally, a basic support for and propellant of the American regulatory state and regulatory style -- the political and legal culture of “total justice” -- while more politically-contested, still seems far from dead. That political culture, as mentioned in Chapter 3, has two elements. The first is the political idea, stemming from the 18th C Enlightenment and the nation’s founding, that the role of government is, as the US Constitution promises, to promote the general welfare. The second element, as Lawrence Friedman (1984) argued in Total Justice, is the technologically and organizationally sophisticated nature of economically advanced modern societies, which makes it evident to the public that government has the capacity to devise and implement laws that will prevent serious harm. Together, those elements are interpreted as imposing on government the obligation to devise and implement regulatory laws to deal with serious, evident problems, holding to blame for failures to do so. Thus in the aftermath of highly publicized disasters like fatal coal mine explosions, petroleum spills, food poisonings, the September 2001 terrorist attack, and the 2008 financial collapse, politically overwhelming demands arise from civil society, demanding government action to prevent a recurrence. Almost uniformly, elected political leaders scramble to respond, proposing new laws, tougher regulations, and/or more aggressive enforcement. ¹⁹

The idea of total justice, as noted in Chapter 3, stimulated and became embedded in the wave of civil rights, environmental, health and safety, and consumer protection laws enacted in the 1960s and 1970s. These ideas are why, as noted above, Republicans have not attempted to repeal or significantly weaken those laws, realizing that to do so would be politically difficult or
even disastrous. Polls suggesting that Republicans respondent agree that there is “too much”
regulation does not mean they think there should be no regulation. Moreover, these ideas impel
a free press to document and analyze the apparent causes of obvious regulatory failures. They
give Democrats principles to invoke in criticizing Republican governments and electoral
opponents who appear unresponsive to such regulatory failures. And failures, as suggested at the
outset of this chapter, are close to inevitable.

In our technologically dynamic, interdependent, highly-competitive economic world,
opportunistic or heedless behavior by some business firms will occur and recur. Tragedies will
ensue. Some will be attributed to regulatory cutbacks by the Trump administration (or
subsequent administrations), some to scandal-triggering revelations about government favoritism
to the responsible regulated enterprise. Public demands for better protections also will ensue.
Over time, therefore, it is likely that government regulation will grow, regardless of the partisan
tides of politics. And in the United States, both the shortcomings and the excesses of regulation
will continue, as in the past, to spur adversarial legalism, both as a mode of making government
more responsive and as a mode of policing regulated enterprises.

Endnotes Chapter 9

1 David Vogel (2012) makes the cases that in recent decades, European risk control regulations,
which earlier had been stringent than their counterparts in the United States, have become more
stringent.
2 This distinctive characteristic of Japanese regulation has been analyzed by scholars in the
United States and Japan. See, for example, Upham (1987); Haley (1986); Young (1984);
Yamanouchi (1974).
3 Aoki and Cioffi (2000) note that the agency’s chief of environmental enforcement later
apologized in private to company officials for what he conceded was unfairly harsh treatment.
Aoki & Cioffi (2000:53) acknowledge that “whereas the informal Japanese regulatory system appears to have been quite effective in the case of sophisticated, well-staffed companies like PREMCO, environmental contamination remains a serious problem in Japan,” at least partly due to ineffective regulation of smaller and financially weak companies.

For example, John Dwyer and colleagues compared Ford Motor Company’s experience with air pollution controls at its German and American assembly plants. German and American regulations, they noted, prescribed similar emissions levels for the pollutants produced during the vehicle painting process, and both required use of the best available control technology. The EPA’s regulations, however, prescribed specific emission levels for each of three different coating processes, while the German regulations called for a single overall emission limit for the plant, which gives manufacturers more flexibility in adjusting production runs and processes, and reduces monitoring and reporting requirements (Dwyer, Brooks, and Marco, 2000). See also Rose-Ackerman (1995).

American regulatory agencies also use “administrative guidance” to flesh out or supplement legally binding regulatory rules. Increasingly, they have used rules labeled “guidance” in order to bypass the slow, formal rule-making process and avoid the risk of judicial review or reversal (Farber, 2014; Melnick, 2018). Research by Nicholas Parillo (2017) has found, however, that front-line American bureaucrats apply the “guidance” rules literally rather than flexibly, so as to reduce the risk of criticism for treating regulated entities inconsistently. And regulated entities often regard the guidance as binding, since that reduces the risk of legal trouble with the agency.

The complexity of American statutes also is exacerbated, Peter Schuck (2014) has noted, by Congress’s tendency to enact statutes that assign implementation responsibilities to multiple, cross-checking federal agencies, or to divide it between federal and state agencies.

In an earlier publication on the density of legal rules (Kagan, 2010: 6), I wrote, “The U.S. water pollution regulations, for example, are 3.6 times as long as the U.S. Clean Water Act (and 4.5 times the length of Japan’s water regulations). The total combined length of U.S. air and water pollution statutes and implementing regulations, according to Cooter and Ginsburg, 19 . 306) are 6.6 times as long as the Japanese statutes and regulations, and 14 times as long as the U.K.’s.”

In 1989, Braithwaite (1993: 23–24) reports, California and Texas imposed 1,800 and 1,700 administrative penalties respectively, although most states imposed fewer than 100. New Jersey suspended admissions on more than 130 occasions, Texas 218 times. In 1989, 53 nursing homes
in the United States had their licences revoked, and 130 were decertified for purposes of receiving vital Medicaid benefits.

10 Among the most prominent exceptions are the federal Occupational Safety and Health Act and the federal Mine Safety Act, in which criminal convictions of individual corporate officials are treated as misdemeanors.


12 In a 2010, according to Daniel Ulmann (2014), who studied federal legal actions for violations of environmental laws, the Justice Department filed 172 civil actions in court, compared to 111 criminal actions. These figures are dwarfed by the 1802 administrative penalty actions filed by the Environmental Protection Administration – actions taken by the agency itself, rather than referring the cases to the Department of Justice for civil actions or prosecutions in court. Similar ratios between administrative penalty actions, civil suits for damages, and criminal prosecutions were found by Jeremy Firestone (2003) in study of EPA enforcement cases, 1990-97.

13 As of April 2015 BP had set aside $42 billion for fines, victim compensation, natural resource damages, and clean-up costs. The Economist (2015b) That included $5.4 billion (as of July 2015) in civil damage awards to adversely affected businesses and individuals; $4 billion in criminal penalties; $5.5 billion in civil damages under the Clean Water Act; $7.1 billion under the National Resource Damage assessment law; and $6 billion in economic damages to state and local governments.

14 Similarly, small employers rarely are subjected to lawsuits by rejected minority job applicants; studies show that they often continue to discriminate against young black males job applicants (Pager, 2007; Pager & Western, 2005).

15 For a discussion of American business culture in this context, see Vogel (1986). According to Daniel Okimoto (1989: 158), government-business relations in Japan are “informal, close, cooperative, flexible, reciprocal, non-litigious, and long-term in orientation,” while in the United States most business-government relations “can be characterized as formal, distant, rigid, suspicious, legalistic, narrow, and short-term oriented.”

16 In some fields, regulations in some European nations impose greater delays and obstacles than do American regulations, often making it harder and slower to open a new business, a large discount store, to grow genetically modified agricultural products, and most significantly, to dismiss redundant employees.
After the 2016 election, Republicans controlled both the legislature and the governor’s office in 24 states. Almost two-thirds of the states had Republican governors, and in almost two-thirds, both houses of the state legislature had Republican majorities. It should be noted, however, that several politically liberal state governments have enacted fairly ambitious regulatory laws aimed at carbon emissions reduction. For a detailed journalistic account of the conservatives’ political and legal efforts to halt governmental efforts to combat emission of greenhouse gases, see Davenport & Lipton, 2017.

Thus in the 2009-2016 period, the Obama Administration pushed important new statutes through Congress or issued dozens of new regulations, designed to control offshore oil drilling in deeper waters, improving food safety standards, increasing reserve requirements and risk management obligations in major financial institutions, regulating home mortgage and other forms of consumer lending, compelling motor vehicle manufacturers to meet tougher fuel economy standards, preventing unfair treatment by private health insurance companies, pushing hospitals and physicians to curtail redundant medical procedures and hospital admissions, reducing carbon emissions from coal-burning electric utility plants, and more. Some of the Obama-era regulations may be successfully repealed by the Trump Administration, but some probably will survive, while others may eventually be reenacted.