

THE AMERICANIZATION OF JAPANESE LAW*

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1. INTRODUCTION

The literature on comparative law and public policy has long portrayed the United States and Japan as having contrasting legal styles. U.S. legal style, which Robert Kagan has labeled as “adversarial legalism,” is characterized by complex rules, formal and adversarial procedures for resolving disputes, costly legal contestation involving many lawyers and frequent judicial intervention in administrative affairs.¹ Japanese legal style, by contrast, has been

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¹ See Robert A. Kagan & Lee Axelrad, *Adversarial Legalism: An International Perspective*, in *COMPARATIVE DISADVANTAGES?: SOCIAL REGULATIONS AND THE GLOBAL ECONOMY* 146 (Pietro S. Nivola ed., 1997) (reviewing comparative studies of United States legal/regulatory style); Robert A. Kagan, *Adversarial Legalism and American Government*, 10 *J. POL’Y ANALYSIS & MGMT* 369, 371 (1991); Robert A. Kagan, *American Lawyers, Legal Culture, and Adversarial Legalism*, in *LEGAL CULTURE & THE LEGAL PROFESSION* 7, 8-11 (Lawrence M. Friedman & Harry N. Scheiber eds., 1996) [hereinafter Kagan, *American Lawyers*] (discussing how the American legal

characterized by informality, opacity, flexibility, cooperation between regulators and the regulated and little involvement of either lawyers or courts.² Some commentators have even gone so far as to question the extent to which Japan enjoys the rule of law at all.³

More generally, scholars of comparative law and comparative public policy have recently started to ask whether the American regulatory or legal style may be spreading to other jurisdictions around the world. These scholars have highlighted a number of mechanisms that may encourage the spread of American legal style, including economic liberalization, the globalization of markets, growing distrust of government bureaucrats, heightened judicial activism, demands for transparency, the globalization of U.S. law firms and the international influence of American legal education.⁴ As in many debates surrounding the impact of globalization

process is characterized). Kagan uses the terms regulatory style and legal style interchangeably when discussing American adversarial legalism. In discussing the same phenomena, others refer to a distinctive American "mode of production of law." See David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 413 (1994).

² See FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN (1987) (examining myths and truths of the Japanese legal system); Robert A. Kagan, *Comparing National Styles of Regulation in Japan and the United States*, 22 LAW & POL'Y 225 (2000); Frank K. Upham, *Privatized Regulation: Japanese Regulatory Style in Comparative and International Perspective*, 20 FORDHAM INT'L L.J. 396 (1996) [hereinafter Upham, *Privatized Regulation*] (discussing how and by whom Japan is governed).

³ See, e.g., JOHN OWEN HALEY, AUTHORITY WITHOUT POWER 143 (1991) ("What makes the role of the bureaucracy distinctive in Japan is neither its influence nor its size. It is instead the conjunction of broad, seemingly limitless authority without, however, even a relatively normal degree of coercive legal powers."); Eric C. Sibbitt, *Regulating Gambling in the Shadow of the Law: Form and Substance in the Regulation of Japan's Pachinko Industry*, 38 HARV. INT'L L.J. 568, 568-86 (1997) (discussing the quasi-legal status of the pachinko industry in Japan). Other scholars have stressed the role of law as "an instrument of the government to govern" rather than "an instrument for citizens to challenge the government or big business to solve disputes among them;" Setsuo Miyazawa, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, 2 ASIAN-PAC. L. & POL'Y J. 118 (2001). See also *id.* (citing Kôji Satô, Jiyûno Hô Chitsujo [Legal Order For Liberty], in 2 Kenpô Gojûnen no Tenbô [2 The Prospect of The Constitutional Law at Its Fiftieth Anniversary], 1, 54-58 (Kôji, Satô et al. eds., 1999) (noting that Japan has had "rule by law," not the "rule of law").

⁴ Some scholars have focused on the spread of American style adversarial legalism. See REGULATORY ENCOUNTERS: MULTINATIONAL CORPORATIONS & AMERICAN ADVERSARIAL LEGALISM (Robert A. Kagan & Lee Axelrad eds., 2000); Lawrence M. Friedman, *Are We a Litigious People?*, in LEGAL CULTURE AND THE LEGAL PROFESSION, *supra* note 1, at 53; Marc Galanter, *Law Abounding: Legalisation Around the North Atlantic*, 55 MOD. L. REV. 1 (1992) [hereinafter Galanter, *Law*

on national policy choices, the emerging debate over the globalization of law pits one group of scholars arguing that globalization severely constrains national policy choices, against another group, arguing that national governments are likely to maintain their distinctive national policies in the face of globalization pressures. Some scholars have argued that legal styles are converging on an American model,⁵ while others have argued that distinct national legal styles are likely to persist.⁶ However, there has been little sustained debate and little systematic empirical research on the issue of legal convergence. Moreover, the existing research remains isolated from broader debates regarding globalization and policy convergence.

This Article offers both theoretical and empirical contributions to the debate regarding the globalization of law. Theoretically, we show why the most common explanations for policy convergence that focus on competitive pressures or policy emulation do not provide a convincing account for the spread of American legal style, and we offer an alternative explanation. We argue that the spread of U.S. legal style results primarily not from economic

Abounding]; Marc Galanter, *The Assault on Civil Justice: The Anti-Lawyer Dimension*, in LEGAL CULTURE & THE LEGAL PROFESSION, *supra* note 1, at 79 [hereinafter Galanter, *The Assault*]; Kagan, *American Lawyers*, *supra* note 1; Robert A. Kagan, *Should Europe Worry About Adversarial Legalism?*, 17 OXFORD J. LEGAL STUD. 165 (1997) [hereinafter Kagan, *Should Europe Worry*]; Kagan & Axelrad, *supra* note 1; Martin Shapiro, *The Globalization of Law*, 1 IND. J. GLOBAL LEGAL STUD. 37 (1993), available at <http://www.law.indiana.edu/glsj/vol1/toc.html>; Wolfgang Wiegand, *Americanization of Law: Reception or Convergence?*, in LEGAL CULTURE AND THE LEGAL PROFESSION 100 [hereinafter Wiegand, *Americanization*]; Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229 (1991) [hereinafter *The Reception*]. Other scholars have focused specifically on the spread of judicial review, which they recognize as a practice most fully developed in the United States. See ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000); THE GLOBAL EXPANSION OF JUDICIAL POWER (Neal C. Tate & Torbjörn Vallinder eds., 1995); Martin Shapiro & Alec Stone, *The New Constitutional Politics of Europe*, 26 COMP. POL. STUD. 397 (1994).

⁵ See Yves Dezalay, *Between the State, Law and the Market: The Social and Professional Stakes in the Construction and Definition of a Regulatory Arena*, in INTERNATIONAL REGULATORY COMPETITION AND COORDINATION: PERSPECTIVES ON ECONOMIC REGULATION IN EUROPE AND THE UNITED STATES 59 (William Bratton et al. eds., 1996); Galanter, *The Assault*, *supra* note 4; Galanter, *Law Abounding*, *supra* note 4; Shapiro, *supra* note 4; Trubek, *supra* note 1; Wiegand, *The Americanization*, *supra* note 4; Wiegand, *The Reception*, *supra* note 4.

⁶ See Kagan, *American Lawyers*, *supra* note 1; Kagan, *Should Europe Worry*, *supra* note 4; Kagan & Axelrad, *supra* note 1; Frans van Waarden, *Persistence of National Policy Styles: A Study of Their Institutional Foundations*, in CONVERGENCE OR DIVERSITY? 333 (Brigitte Unger & Franz van Waarden eds., 1995).

competition between governments or from emulation, but from common responses by governments to similar economic, political and social conditions.⁷ We argue that two factors, economic liberalization and the fragmentation of political authority, are the primary drivers of the spread of American legal style. In addition, we emphasize the role that the spread of U.S. law firms, itself a product of economic liberalization, plays in accelerating the process of Americanization.

Empirically, we conduct a detailed study of the "Americanization" of Japanese legal style, examining general trends as well as more specific developments in two particular areas of regulation: securities and products liability. As noted above, Japan has a well-established legal style that differs dramatically from the American. The roots of Japanese legal style are deeply imbedded in a variety of political and social institutions, and one would expect Japanese legal style to be particularly resistant to Americanization. Thus, our findings concerning Japan are likely to lend insight into the prospects of Americanization in other OECD (Organization for Economic Cooperation and Development) countries. In essence, if Americanization of legal style can happen in such a "tough case" as Japan, this suggests that Americanization in countries with less divergent legal styles is quite plausible.

Measuring the globalization of American law presents numerous challenges. First, the concept of legal style is itself multifaceted, involving the way statutes and regulations are written, interpreted, applied and enforced, the role and use of lawyers to protect client interests and the organization of the legal profession itself. Certain aspects of a country's legal style may be Americanized, while others remain unchanged. Further, while change may become immediately apparent where new laws are promulgated or old ones are amended, changes in practice and the legal infrastructure may take longer to manifest themselves. Second, legal style varies across areas of law within any country. Some areas of law may be thoroughly Americanized, while others may go untouched. Finally, the factors that influence the spread of American legal style may differ in various areas of law, such that no single

⁷ See generally Beth Simmons & Zachary Elkins, *Globalization and Policy Diffusion: Explaining Three Decades of Liberalization*, in GOVERNANCE IN A GLOBAL ECONOMY: POLITICAL AUTHORITY IN TRANSITION (Miles Kahler & David Lake eds.) (forthcoming) (manuscript, on file with author) (making a similar distinction in examining the diffusion of economic liberalization policies).

explanation of legal globalization accounts for the entire phenomenon.

To address these measurement challenges, we supplement our analyses of broad trends in legal style in Japan with detailed comparative case studies of two distinct areas of law: securities law and product liability law. Securities law serves as an “easy case” for our argument. Developments in securities law are likely to be particularly influenced by the profound globalization of financial markets, which is facilitated by economic liberalization. Moreover, the financial services industry is highly internationalized and relies heavily on the legal services of major U.S. transnational law firms.⁸ Economic liberalization and political fragmentation also promote Americanization in the products liability area. However, American law firms are not active in this area in Japan, and absent their catalytic effect, we anticipate less Americanization in this area. While space limitations prevent us from examining other areas of law in as much detail, our discussion of general trends in legal style includes discussion of developments in a number of policy areas.

It may be the case that the globalization of American law is a limited phenomenon, impacting only the most internationalized areas of legal practice and of interest primarily to multinational enterprises. However, we argue that the globalization of American law is having a more profound effect, encouraging a transformation in patterns of interest group representation and policymaking by replacing informal, opaque, consensual processes with formal, transparent and adversarial ones. The normative implications of such a transformation would be highly contested. Some observers would applaud such changes, viewing them as enhancing transparency, openness, accountability, fairness and legal certainty. Others, however, would view such a shift as the advent of costly American-style hyper-legalization and litigation mania. Thus, depending on one’s viewpoint, the globalization of American law either may be seen as a salutary development, or as a form of legal contagion—spreading the “American Disease” of excess lawyers and litigation.⁹

⁸ See Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443 (1989).

⁹ See Richard B. Stewart, *Antidotes for the “American Disease,”* 20 ECOLOGY L.Q. 85 (1993) (discussing regulatory legalism as a distinctly “American Disease”).

The remainder of this Article is divided into four sections. Section 2 details our explanation for the globalization of American law. Section 3 explores the notion of American legal style in more detail and presents brief accounts of American legal style in the areas of securities regulation and products liability law. Section 4 examines the spread of American legal style to Japan, including cases studies of products liability law and securities regulation. Section 5 concludes with a discussion of the applicability of our findings into other areas and of the prospects for continued globalization of American law.

2. EXPLAINING THE GLOBALIZATION OF AMERICAN LAW

The most common explanations of global convergence of national policies do not provide an adequate explanation for the globalization of American legal style. One common explanation for convergence is the "race-to-the-bottom," or competition in laxity.¹⁰ The race-to-the-bottom logic suggests that exit-threats from mobile targets of regulation (e.g., firms) pressure governments to lower their regulatory standards. In other words, competition between jurisdictions to attract and retain mobile targets of regulation leads governments to reduce the stringency of their regulations.

David Vogel has offered a contrasting explanation, arguing that economic liberalization and regulatory competition may lead to a "race-to-the-top," or competition in strictness.¹¹ By this logic, if a jurisdiction with a large market chooses to maintain strict regulatory standards and makes access to its market contingent on meeting those standards, foreign producers who wish to access the market will be pressured to adopt those standards. Once foreign producers adjust to these higher standards, they will be more willing to accept the introduction of these standards in their home jurisdictions. They may even seek the introduction of these standards as a regulatory barrier against competitors, both domestic

¹⁰ See REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES (Daniel Esty & Damien Geradin eds., 2001); Daniel W. Drezner, *Globalization and Policy Convergence*, 3 INT'L STUD. REV. 53 (2001); and Peter Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE J. ON REG. 67 (1996) for reviews of the race-to-the-bottom literature.

¹¹ See DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* (1995).

and foreign, that currently do not meet those standards. Finally, governments of jurisdictions with higher standards may pressure governments of other jurisdictions to raise their standards, in order to prevent them from deriving competitive benefits from their regulatory laxity.¹²

Neither of these forms of regulatory competition provides a sufficient explanation for the globalization of American law. A race-to-the-bottom explanation would require that foreign jurisdictions emulate U.S. style regulations in an effort to make themselves more attractive to mobile targets of regulation. This argument presumes that the United States has lower standards, which is clearly not true in many areas. In securities law¹³ and products liability law, U.S. standards arguably impose higher costs on firms. One would hardly expect foreign jurisdictions to emulate such laws in an effort to compete for mobile targets of regulation. More generally, many critics argue that American legal style is excessively costly, conflictual and slow, and look to Western Europe and Japan for models of more cooperative, informal, inexpensive approaches to law and regulation.¹⁴ Finally, while smaller or weaker jurisdictions may intentionally lower their regulations to attract or retain more mobile offshore tax avoiders, money launderers, or manufacturers exploiting tax environmental or working conditions, advanced industrial economies with significant market power do not generally lower their standards to compete with such threats.¹⁵

¹² See Drezner, *supra* note 10, at 77 (discussing the use of economic coercion as a tool to force others to conform to desired regulatory standards).

¹³ In fact, the New York and London markets have become the largest international securities markets despite having the most comprehensive securities regulation systems in the world. See Manning Gilbert Warren III, *Global Harmonization of Securities Laws: The Achievements of the European Communities*, 31 HARV. INT'L L.J. 185, 189 (1990).

¹⁴ See Charles R. Epp, *Do Lawyers Impair Economic Growth?*, 17 LAW & SOC. INQUIRY 585 (1992) (disputing the theory that large lawyer populations impair economic growth); Galanter, *The Assault*, *supra* note 4 (depicting the current negative view of the U.S. legal system and lawyers as the chief beneficiaries of that system).

¹⁵ The response of advanced industrial economies is generally not to lower their own standards, but to expand the scope of their own laws and apply political and economic pressures on these jurisdictions, either unilaterally or in concert with others states. For example, the OECD's Financial Action Task Force has been actively blacklisting "non-cooperative jurisdictions" when it comes to money laundering and financial crime. See Gareth Porter, *Trade Competition and Pollution*

As for the race-to-the-top argument, non-U.S. firms forced to meet U.S. legal or regulatory requirements stricter than those in their home markets (e.g., disclosure requirements for offering securities) in order to access the U.S. market would probably find it easier to adapt to the adoption of U.S. regulations at home. Because the incremental cost of domestic compliance for firms already complying with U.S. restrictions may be minimal, this dynamic may contribute to the foreign adoption of particular U.S. laws or regulatory standards, for instance in some areas of securities regulation and environmental regulation.¹⁶ However, there are many policy areas, such as products liability, where such domestic implementation would expose firms to additional costs and liabilities and would not generate a race-to-the-top dynamic. Generally race-to-the-top dynamics are likely to be limited to standards concerning traded goods and services (where high standard states can threaten to block market access) and are unlikely to influence more general patterns of regulation and legal practice.¹⁷ Therefore, the race-to-the-top itself cannot explain adequately why a country's regulatory style as a whole would change.

Finally, another set of explanations for policy convergence focuses on policy emulation among nations. These emulation arguments suggest that convergence may occur as governments model their policies after those of salient global leaders or those advocated by international governmental organizations.¹⁸ While emulation of U.S. policies has certainly occurred in some policy areas, emulation arguments do not provide a convincing explanation for the spread of American legal style in a broad sense. First, even in areas where emulation of American policies clearly occurred, the shift toward American legal style was only made possible when changes in the domestic political and economic factors discussed below allowed policymakers in favor of Americanization to overcome opposition to such reforms. Second, while the U.S. laws and legal practices have been viewed as pacesetters in a number of ar-

Standards: "Race to the Bottom" or "Stuck at the Bottom?," 8 J. ENVTL. DEV. 133 (1999); VOGEL, *supra* note 11; Drezner, *supra* note 10.

¹⁶ See VOGEL, *supra* note 11; Beth A. Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, 55 INT'L ORG. 589 (2001).

¹⁷ On limits of race-to-the-top arguments, see Swire, *supra* note 10, at 85.

¹⁸ See MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY (Peter J. Katzenstein ed., 1996); Drezner, *supra* note 10; John W. Meyer et al., *World Society and the Nation-State*, 103 AM. J. SOC. 144 (1997).

eas, governments across the OECD have been eager to avoid adopting American legal style in a general sense. As noted above, U.S. legal style has been viewed both inside and outside the United States as excessively inflexible, adversarial and costly.¹⁹

We maintain that neither race-to-the-bottom nor race-to-the-top regulatory competition between governments, nor policy emulation provide adequate explanations for the spread of American legal style. While race-to-the-top dynamics and emulation have played a role in the adoption of some U.S.-style laws, these dynamics cannot explain the general shift to U.S. legal style across a broad range of policy areas and cannot explain far-reaching changes in legal practice. Rather, we argue that the shift toward U.S. legal style is the product of similar, but primarily uncoordinated responses by governments to analogous economic, political and social developments. Increasing economic liberalization, including the catalytic spread of U.S. law firms to foreign jurisdictions, and political fragmentation have been the primary forces encouraging the spread of U.S. legal style.

2.1. *Economic Liberalization*

Over the past twenty years, a wave of deregulation and trade liberalization has swept across the OECD economies, opening international markets for capital, goods and services and instigating far-reaching domestic reforms, such as privatization of state-owned enterprises and removal of price and entry controls. Examining the causes of this trend is beyond the scope of this Article, and we take economic liberalization as an exogenous force (though we draw particular attention below to explaining the spread of U.S. law firms as an important component of this liberalization) that has impacted national legal and regulatory systems across OECD countries. Liberalization allows new actors, some of them foreign actors, into previously closed markets and allows both new and existing actors to participate in new areas of economic activity where markets were previously non-existent. The introduction of newcomers and outsiders undermines informal systems of regulation based on insider networks and trust. Furthermore, where liberalization allows for the emergence of new markets, governments

¹⁹ Indeed, during the U.S. recession of the early 1990s, many critics contended that the inflexibility, stringency, and litigiousness characteristic of American legal style were to blame for America's lackluster economic performance. See Warren, *supra* note 13.

may not have established regulatory channels to implement their regulatory objectives. When governments find that their closed, informal, and opaque approaches to regulation have become unworkable, they seek other means by which to pursue their regulatory goals. Therefore, liberalization leads to more than simple deregulation; it also creates pressure for re-regulation to enable government to maintain influence over economic actors in a liberalized environment.²⁰ Given the distrust between actors in liberalized markets and the lack of close government/industry ties, new laws and regulatory processes will tend to be more formal, legalistic, and transparent, at the same time creating greater demand for lawyers to protect the interests of their clients through guidance, advocacy and dispute resolution.²¹ Economic liberalization commenced earlier in the United States than in most other OECD economies. As other jurisdictions liberalize, they subject themselves to many of the same economic conditions that stimulated the emergence of a formal, transparent, and adversarial legal style in the United States years earlier.

2.2. American Law Firms

As a result of economic liberalization, the influence of American corporate law firms, particularly their entry into foreign jurisdictions, plays an important role in accelerating the process of Americanization. Opening up markets for legal services introduces a degree of competition to an area of economic activity, which in most jurisdictions is shielded from free competition by the restriction of legal practice to a cartel of licensed professionals. Economic liberalization also stimulates greater transnational activity and, hence, demand for cross-border legal services. When American law firms enter foreign markets to service multinational clients or in search of new clients, they bring with them American lawyers, legal practices, and forms of law firm organization. Their experience with adversarial legalism and their expertise in mega-lawyering techniques, including complex multi-jurisdictional litigation, the drafting of contracts suited to liberalized markets, and

²⁰ MICHAEL MORAN, *THE POLITICS OF THE FINANCIAL SERVICES REVOLUTION* 88-119 (1991); STEVEN K. VOGEL, *FREER MARKETS, MORE RULES: REGULATORY REFORM IN ADVANCED INDUSTRIAL COUNTRIES* 3 (Peter Katzenstein ed., 1996).

²¹ As Kagan notes, this notion parallels Donald Black's thesis that legalization increases as the social distance between parties increases. DONALD BLACK, *THE BEHAVIOR OF LAW* 131 (1976).

lobbying, prove, in a liberalized environment, to be distinct advantages vis-à-vis foreign competitors unfamiliar with this type or scale of practice. Moreover, their size enables them to provide a full range of legal services and an array of legal specialists that smaller local law firms cannot match. The influx of American law firms into foreign legal markets introduces a competitive dynamic that pressures local law firms to reorganize along the lines of American law firms or to join them. Through interaction with the domestic bar, U.S. lawyers provide examples of U.S. solutions to re-regulation and advocate for deregulation/re-regulation along U.S. lines. As the structure and practices of foreign law firms begin to resemble their American counterparts in important respects (most notable are the U.K. firms in the past decade or so),²² the spread of U.S. legal style accelerates.

2.3. Political Fragmentation

Systems of informal regulation depend on political leaders (the principals) delegating extensive discretion to the regulatory bureaucracy and/or to private self-regulatory bodies (the agents). This approach is most likely to be found in political systems where political authority is concentrated in the hands of a small number of like-minded veto players.²³ Where political authority is concentrated, political leaders need not resort to codified, inflexible, legalistic means to control their regulatory bureaucracy and achieve their regulatory aims. Instead, they can establish less formal incentive structures, backed by monitoring mechanisms that encourage the bureaucracy to pursue their goals faithfully.²⁴ If political leaders are unhappy with actions undertaken by the bureaucracy, they can readily reign them in. Moreover, where political author-

²² For example, Clifford Chance, a U.K. firm that merged in January 2000 with Rogers & Wells of the United States, is now the largest law firm in the world, despite being the product of a 1987 merger of two mid-tier law firms that were not part of the elite "Magic Circle" of the United Kingdom's top five firms.

²³ George Tsebelis, *Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism*, 25 BRIT. J. POL. SCI. 289 (1995) (explaining that the degree to which power is concentrated in a political system can best be measured by examining the number of "veto players" (i.e., actors who have the power to veto new legislation) in the system and the political distance between the veto players. As the number of veto players increases and/or political distance between them increases, political fragmentation increases).

²⁴ See J. MARK RAMSEYER & FRANCES MCCALL ROSENBLUTH, JAPAN'S POLITICAL MARKETPLACE 107-19 (1993).

ity is concentrated, courts tend to play a weak role in oversight of the bureaucracy; therefore recourse to judicialization as a means of controlling the bureaucracy would be futile.²⁵

By contrast, as political authority becomes more fragmented, judicialization becomes a more attractive means for political principals to control bureaucratic agents. As the fragmentation of political authority increases (i.e., as the number of veto players increases), assembling the political coalitions necessary to reign in the bureaucracy (i.e., to pass new legislation) becomes more difficult. Recognizing the likelihood of political gridlock and the durability of legislation, lawmakers have an incentive to draft legislation in a manner that will insulate their regulatory policies against potential manipulation by the bureaucracy ("bureaucratic drift") or by political forces that may come to power in the future ("political drift").²⁶ Lawmakers also recognize that the fragmentation of power insulates the judiciary against easy legislative overrides and other forms of political backlash, and that courts may, therefore, be willing to play an active role in challenging executive actions and constraining executive discretion.²⁷ Lawmakers draft statutes that specify in great detail the goals that bureaucratic agencies must achieve, the deadlines they must meet, and the administrative procedures they must follow. They provide for extensive judicial review, assuring that their allies will have access to the courts to hold the executive accountable.²⁸ When lawmakers rely on such a judicialization strategy as a means to control the bureaucracy, they encourage the development of an inflexible, adversarial and litigious

²⁵ See Terry Moe & Michael Caldwell, *The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems*, 150 J. INSTITUTIONAL & THEORETICAL ECON. 171 (1994). On the role of courts in concentrated power systems, see MARTIN M. SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981); John Ferejohn, *Law, Legislation and Positive Political Theory*, in *MODERN POLITICAL ECONOMY: OLD TOPICS, NEW DIRECTIONS* 191 (Jeffrey S. Banks & Eric A. Hanushek eds., 1995); and Robert D. Cooter & Tom Ginsburg, *Comparative Judicial Discretion: An Empirical Test of Economic Models*, 16 INT'L REV. L. & ECON. 295 (1996).

²⁶ MURRAY J. HORN, *THE POLITICAL ECONOMY OF PUBLIC ADMINISTRATION* 14-19 (1995); McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J. L. ECON. & ORG. 180 (1999); Terry M. Moe, *Politics and the Theory of Organization*, 7 J.L. ECON. & ORG. 106, 106-29 (1991).

²⁷ See Ramseyer & Rosenbluth, *supra* note 24, at 142-61.

²⁸ See *supra* note 25; Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

approach to the implementation and enforcement of regulatory policy.

Finally, fragmentation of political authority also encourages adversarial legalism by creating multiple openings through which interest groups can access political power. The existence of multiple access points encourages groups to engage in a form of political forum shopping.²⁹ If one political authority does not accede to their demands, they need not necessarily reach a negotiated compromise; instead, they can readily shift their efforts to another source of political or judicial authority. Thus, the fragmentation of political authority encourages interest groups and other societal actors to engage in complex, multi-pronged lobbying and litigation strategies.

The institutional structure of the U.S. government was explicitly designed to fragment political power. The highly fragmented U.S. system, which combines separation of powers, bicameralism and federalism, has encouraged the development of adversarial legalism. While the degree of fragmentation of power varies considerably across advanced industrial economies, we expect that increases in the degree of political fragmentation encourage shifts from opaque, flexible, informal approaches to regulatory policy to more transparent, inflexible, formal and adversarial approaches, resembling the American model.

Taken together, economic liberalization (including the resulting spread of U.S. law firms) and political fragmentation explain the globalization of American law. While a host of other factors have certainly played a role in some issue areas, we maintain that the confluence of these two factors are primarily responsible for the shift toward U.S. legal style across a range of policy areas.

3. AMERICAN LEGAL STYLE

The United States has a distinctive legal style. While legal style varies across areas of law in the United States, some patterns are common across a wide range of legal fields. Much of the distinctiveness of U.S. legal style³⁰ is well-captured by Kagan's notion of

²⁹ R. Kent Weaver & Bert A. Rockman, *When and How Do Institutions Matter?*, in *DO INSTITUTIONS MATTER? GOVERNMENT CAPABILITIES IN THE UNITED STATES AND ABROAD* 445-61 (R. Kent Weaver & Bert A. Rockman eds., 1993).

³⁰ Other analysts examining similar issues use terms other than "legal style." For instance, Trubek, *supra* note 1, at 413, refer to the distinctive American "mode of production of law."

“adversarial legalism.” According to Kagan, cross-national comparisons reveal that U.S. legal style is characterized by

more complex and detailed bodies of rules; more frequent recourse to formal legal methods of implementing policy and resolving disputes; more adversarial and expensive forms of legal contestation; more punitive legal sanctions (including larger civil damage awards); more frequent judicial review, revision, and delay of administrative decision making; and more malleability and unpredictability.³¹

While Kagan’s characterization captures essential features of American legal style, we emphasize two additional features. First, the broad range of regulatory guidance and advocacy services that law firms provide and the pattern of organization of the American legal services industry are central aspects of American legal style. Second, while critics often focus on excessive litigation as the central feature of American legal style, we find that in many areas of law the promotion of transparency and disclosure plays a more central role than litigation. This promotion of transparency and disclosure is further reinforced by the formal privatization of regulatory enforcement through the creation of enforcement incentives in the form of statutory causes of action and litigation devices such as the class action lawsuit, derivative suits, and liberal discovery rules.

3.1. Organization of U.S. Legal Services Industry and Range of Services.

The organization of the U.S. legal services industry has long differed from that in most other countries. Large corporate law firms first emerged in the United States at the turn of the twentieth Century, first in New York and later in other large cities in the United States, with a few firms maintaining small offices in Europe.³² The pace of growth of large U.S. firms increased dramatically from the 1960s, as firms not only added more lawyers and support staff, but spread their operations to branch offices

³¹ Kagan & Axelrad, *supra* note 1, at 150.

³² MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 4-19 (1991).

across the United States and the world.³³ By contrast, Japanese firms and European firms, with the notable exception of U.K. firms in the past decade, have remained small by American standards. In 2001, of the top 100 international firms in terms of total revenue in the world, eighty-eight were U.S.-based. The remainder were from the common law jurisdictions of the United Kingdom, Australia and Canada. Of the top ninety-nine, U.S. firms occupied eighty-three spots in terms of profits per partner and sixty-five in terms of total number of lawyers, with U.K., Australian and Canadian firms occupying the remaining positions.³⁴

Along with expanding their size and geographic scope, American law firms expanded the range of services they provided and developed internal divisions of labor, establishing departments specializing in various areas of law. While their European and Japanese counterparts tended to maintain more distance in their practices from the world of commerce and politics, U.S. firms became intimately involved in both. American corporate law firms began to play a direct and far-reaching role in dealmaking and corporate strategy. American firms also began to provide a wide range of policy advocacy services, representing clients in legislative and administrative fora, as well as in courtrooms and corporate boardrooms. Employing what Galanter calls "mega-lawyering techniques," they advocate for their clients using multi-pronged strategies, preparing drafts of legislation and administrative rules and lobbying for their adoption, negotiating with regulators, and pursuing litigation in multiple fora.³⁵ These strategies have been emulated outside the world of corporate law as well; public-interest law firms, for instance, that provide a similar range of political advocacy services for the causes they serve.³⁶ In short, law firms serve as important general agents of interest representation and advocacy.

³³ For many of the largest U.S. corporate law firms, half their revenues are from foreign clients in the United States or from American or foreign clients overseas, and the percentage is said to be increasing. At least twenty American firms now have ten percent of their lawyers stationed overseas. See Alison Frankel, *Who Is Going Global?*, AM. LAW., Nov. 2001, at 79.

³⁴ See *The Global 100*, AM. LAW., Nov. 2001, at 87.

³⁵ See Galanter, *Law Abounding*, *supra* note 4, at 4-5.

³⁶ *Id.*; GALANTER & PALAY, *supra* note 32, at 18.

3.2. *Emphasis on Transparency Disclosure and Privatization of Incentives for Enforcement*

Finally, an overemphasis on litigation seriously misrepresents the nature of the U.S. legal style. It is the demand for transparency and disclosure, detailed codification, and strict adherence to formal rules and procedures that most distinguishes American legal style. Government regulators certainly prosecute and sue offenders to promote the public good, but the primary demands they place on the regulated involve adherence to detailed, codified, transparent procedures. Moreover, promotion of transparency and disclosure is effectively privatized in a number of areas by creating private economic incentives for enforcement through statutory claims relating to disclosure-related failings. In relationships between businesses, American lawyers tend to produce long, complex contracts designed to cover all contingencies.³⁷ The threat of litigation certainly casts a shadow over much legal work done in the United States, particularly in areas of tort law, but for most of the largest U.S. law firms litigation work is less significant than general corporate work.

3.2.1. *Securities Law*

All modern industrial economies regulate financial markets in order to promote efficient capital allocation, investor protection, market stability and other regulatory goals. Financial markets may be roughly divided into indirect financing (borrowing from banks) and direct financing (raising money through offerings of debt or equity securities), a division that has been reinforced in markets such as the United States and Japan through a regulatory division between banking and the securities business.³⁸ We focus on the

³⁷ See Martin Shapiro, *Globalization of Freedom of Contract*, in THE STATE AND FREEDOM OF CONTRACT 269-98 (Scheiber ed., 1998); Richard C. Breedan, *The Globalization of Law and Business in the 1990s*, 28 WAKE FOREST L. REV. 509, 516 (1993) (describing the American standards of disclosure); Goebel, *supra* note 8, at 449 (depicting Wall Street law firms' contracts as complex, elaborate, and highly protective).

³⁸ In Europe where so-called "universal banking" exists, financial institutions have been permitted to more directly engage in both the securities and banking businesses. This regulatory distinction has been reduced through the watering down and eventual elimination of the Glass-Steagall division in the United States and the loosening of the Article 65 "one-set" regulatory structure in Japan. See James R. Barth et al., *The Repeal of Glass Steagall and the Advent of Broad Banking*, (Office of the Comptroller of the Currency, E&PA Working Paper 2000-5, 2000),

regulation of direct financing, specifically regulation of the public securities markets. As a comprehensive analysis of even only the regulation of the public securities markets is beyond the scope of this paper, we emphasize only the basic approach toward the regulation of the public securities markets.

Federal regulation of securities in the United States began with the enactment of the Securities Act of 1933 (the "33 Act") and the Securities Exchange Act of 1934 (the "34 Act"), which collectively form the basic statutory foundation for the regulation of securities in the United States.³⁹ The hallmarks of U.S. securities regulation are (i) a focus on regulating only the quality of mandatory disclosure of issuers, not the quality of the investments themselves or the range of permissible investments, (ii) a high degree of transparency in the regulatory process itself, and (iii) a strong emphasis on private enforcement, through both self regulatory organizations and antifraud litigation by private parties.

3.2.1.1. *Disclosure*

The 33 and 34 Acts represent somewhat of a middle course between the conflicting philosophical approaches toward the regulation of securities that had been adopted by different U.S. states at the time of its enactment. One approach was *laissez-faire*, requiring no disclosure but providing penal sanctions for committing fraud. At the other end of the spectrum were proponents of the philosophy underlying many state "Blue Sky" laws, which included disclosure requirements and "merit" standards empowering regulators with the discretion to judge which companies passed muster to offer their securities to the public.⁴⁰

available at <http://www.occ.treas.gov/wp2000-5.htm>. In addition, new financial products increasingly blur the distinction in all markets. For example, banks may issue securities in order to make loans, and securities firms may help banks securitize loan portfolios.

³⁹ The 33 and 34 Acts followed a multitude of varying state regulatory regimes, "Blue Sky" laws, and several centuries of legislation in England. See, e.g., LOUIS LOSS & JOEL SELIGMAN, *SECURITIES REGULATION* 3-6 (3d ed. 1998) (describing the disclosure requirements of the 33 and 34 Acts).

⁴⁰ In fact, the original 1933 bills provided for revocation of registration upon an administrative finding (among other standards) that "the enterprise or business of the issuer . . . or the security is not based upon sound principles, and that the revocation is in the interest of the public welfare," or that the issuer "is in any other way dishonest" or "in unsound condition or insolvent." *Id.* at 170. A minority of U.S. state laws have merit regulation systems to varying degrees, though marketplace exemptions under the state law and federal preemption, pursuant to

The middle course ultimately adopted went beyond the *laissez-faire* approach by statutorily mandating comprehensive disclosure but not imposing merit standards. The philosophy behind this approach was well-articulated by Justice Louis Brandeis, who noted, "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."⁴¹ The drafters refused, however, to involve the government in passing judgment upon the merits of any particular investment. As a drafter of the bill, Felix Frankfurter, explained in 1933, "the Federal Securities Act does not place the government's imprimatur upon securities. It is designed merely to secure essential facts for the investor, not to substitute the government's judgment for its own."⁴² U.S. securities regulators are not concerned with the quality of the companies they review; rather, they regulate the quality of the disclosure.

The 33 Act and 34 Act outline the disclosure regime for issuers, including mandatory disclosure for offerings of securities and continuous quarterly, annual, and special event reporting for public issuers. A detailed body of written regulation provides further guidance. The SEC actively takes steps to promote quality disclosure. It reviews registration statements, financial statements and, selectively, other reporting, often making several rounds of comments requiring further disclosures, clarifications, or representations by the issuer or independent professionals such as accountants or underwriters working for an issuer. The SEC also actively takes both formal and informal actions to remedy or discipline disclosure-related failings.

3.2.1.2. *Transparency*

Just as U.S. regulators have focused on the primacy of disclosure by issuers, they have largely "practiced what they preach" by regulating in a manner that is generally quite transparent. In addition to promulgating detailed, written regulation, the process of rulemaking itself is quite public. Newly proposed rules or amendments (and for more complicated or novel rules, "concept releases" articulating a proposed regulatory direction before for-

the National Securities Markets Improvement Act of 1996, have limited their scope for listed companies.

⁴¹ *Id.* at 171 (citing LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT* (1914)).

⁴² CHARLES J. JOHNSON, JR. & JOSEPH McLAUGHLIN, *CORPORATE FINANCE & THE SECURITIES LAWS* 6 (2d ed. 1997).

mulation of a specific rule) are publicly disclosed, and public commentary is invited. The SEC usually receives extensive comment letters from industry, law firms, and public interest groups. It then summarizes the views expressed in the letters, often making changes reflecting some of the comments and explaining the reasoning behind its chosen course of action. This contrasts with regulatory approaches traditionally applied in other jurisdictions, where authorities may consult informally with a limited number of experts or industry participants before enacting a formal or informal rule.

Further, the process of regulatory guidance is relatively transparent. For example, "no-action letters," letters usually drafted by attorneys on behalf of a private party unsure of how to interpret a particular statutory provision or regulation, typically outline a fact scenario, set out the relevant legal and regulatory background, and request that no regulatory or enforcement action be taken if a particular course of action is followed by the requesting party. In responding to a no-action letter request, the SEC may seek further clarification, refuse to confirm that no action would be taken, or state that, based on the facts in the letter, the SEC would not take any action. The letters and SEC responses are published, unless the requesting party withdraws the letter in anticipation of rejection, and are used as guidance by other practitioners confronting similar situations. This contrasts with the practice of other jurisdictions where, if such guidance is provided, it is likely to be informal, oral, and non-public. Moreover, the SEC even publishes the *Manual of Publicly Available Telephone Interpretations*, which documents numerous SEC responses to informal questions posed in telephone consultations with the SEC.

While the SEC uses both private and public administrative guidance⁴³ in enforcement, the SEC actively uses its more transparent formal enforcement powers under the 33 Act and 34 Act to sanction violators with injunctions, monetary fines, and imprisonment. In 1999, for example, the SEC initiated 525 enforcement ac-

⁴³ Although administrative guidance often carries a connotation of administrative coercion behind closed doors, this is not necessarily so. For example, Arthur Levitt, formerly Chairman of the SEC, in his campaign to improve the quality of auditing, applied a tremendous amount of pressure on audit firms through cajoling speechmaking, including his famous "Numbers Game" speech, and the very public threat of stricter regulation. See Chairman Arthur Levitt, The "Numbers Game," Remarks on Securities and Exchange Commission (Sept. 28, 1998) at <http://www.sec.gov/news/speech/speecharchive/1998/spch220.txt>.

tions, obtained orders in SEC judicial and administrative proceedings requiring securities law violators to disgorge illegal profits of approximately \$650 million, ordered civil penalties in SEC proceedings totaling more than \$191 million, and obtained sixty-four indictments or information and sixty-two convictions.⁴⁴

3.2.1.3. *Privatization of Enforcement*

The degree to which securities regulation has been formally privatized is one of the most distinctive characteristics of U.S. securities regulation. While the SEC plays an active role in enforcing disclosure obligations, incentives for enforcement have largely been privatized. The statutes governing securities regulation encourage the privatization of enforcement through (i) self-regulatory organizations and (ii) civil liability. While both self-regulatory organizations and the SEC play important roles in securities regulation, it is the threat of private litigation that creates the most powerful incentive for compliance.

The 34 Act provides for self-regulatory organizations ("SROs"), to which substantial rulemaking and enforcement power is delegated. The SEC oversees SROs with the power to intervene in the rulemaking process or the threat of regulating directly if the SROs rules are deemed inadequate. The SROs most active in regulating securities are the National Association of Securities Dealers ("NASD") and the stock exchanges themselves. Stock markets such as the New York Stock Exchange and the Nasdaq market are authorized by the SEC and subject to regulatory guidance, but the exchanges largely decide their own rules in a competitive environment.

Generally, the threat of potential private litigation drives corporate disclosure more than the threat of enforcement action by the SEC or the rules of SROs. The 33 Act and 34 Act contain a number of provisions for liability, but the most important rules providing redress are Rule 10b-5 under the 34 Act, a general antifraud provision, and Sections 11 and 12(a)(2) of the 33 Act. Recovery can be had under these provisions against underwriters, accountants, directors and officers, lawyers, and other experts named in the registration statement for material misstatements or omissions and other violations.

⁴⁴ 1999 SEC ANN. REP., available at <http://www.sec.gov/pf/annrep99/ar99full.pdf>.

The 33 Act and 34 Act require issuers to have their financial statements audited by independent public accountants, and issuers and underwriters need lawyers to guide them through the regulatory landscape. While such professionals have important incentives to maintain their reputations, it is the background threat of enforcement actions or litigation that ultimately puts teeth behind compliance efforts. While there may be concern of enforcement by the SEC, including criminal sanctions, the much larger threat arises from private actors. Liability provisions such as Rule 10b-5 and Section 11, in conjunction with litigation devices such as the class action lawsuit or shareholders derivative suit, have given rise to an industry of securities plaintiffs' lawyers who profit by uncovering potential disclosure failings. Concern over the perceived excesses of such litigation led Congress to enact reform legislation in 1995; however, private litigation remains a potent tool of enforcement.⁴⁵ In 2000 and 2001, there were 216 and 487 issuers named in securities class action lawsuits, respectively.⁴⁶ The four largest settlement awards range from \$259 million to \$3.527 billion.⁴⁷ Underwriters hire lawyers in part to establish a "due diligence" defense against litigation and to get a clean opinion from them. Accountants' opinions on the quality of the financial statements are statutorily required. Part of the leverage these professionals may exercise in forcing disclosure by reluctant issuers and underwriters is the need to protect against the threat of litigation from investors and plaintiffs' attorneys.

3.2.2. *Products Liability Law*

For many critics, products liability law is the *bête noire* of American legal style, characterized by ambulance-chasing lawyers, frivolous claims, sky-high punitive damage awards and a general threat to the competitiveness of American industry. Critics argue that products liability law has spawned a litigation industry that serves the interests of trial lawyers more than those of injured con-

⁴⁵ Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-47, 109 Stat. 737 (1995).

⁴⁶ Stanford Law School Securities Class Action Clearinghouse, at <http://securities.stanford.edu> (last modified Feb. 11, 2002). The increase in suits in 2001 was due in part to the proliferation of "IPO allocation" lawsuits.

⁴⁷ *Id.*

sumers.⁴⁸ While there is hyperbole in some such images, they do capture distinctive attributes of America's products liability regime. The U.S. system relies heavily on decentralized enforcement by private litigants to identify defective products and to punish their manufacturers and sellers. While a variety of product safety and disclosure standards, enforced by a number of federal regulatory agencies, play an important role in protecting consumers from unsafe products, these controls are backed by the threat of products liability litigation—against which regulatory compliance is generally no defense. The threat of heavy punitive damages is thought to deter manufacturers from marketing dangerous products in the first place. Permissive pre-trial discovery provisions, the availability of contingency fee arrangements and class-actions, the awarding of punitive damages, and the role of juries in determining damages all play central roles in American products liability law. Together, these legal institutions have encouraged an adversarial, litigious, and highly unpredictable approach to products liability.

There is no general federal products liability law in the United States.⁴⁹ Efforts to enact federal statutes governing products liability law have failed, and products liability has remained a matter of state law, generated primarily through the case law of state courts and occasionally through state statutes. While academic projects such as the American Law Institute's ("ALI") Restatement (Second) of Torts, Section 402A, and later, the Restatement (Third) of Torts identify common principles emerging from the common law and legal literature and help to promote the general acceptance of these principles, state laws diverge in important ways. Some states have enacted statutes limiting punitive damages, non-economic damages, joint-and-several liability, and establishing statutes of limitation, while others have not.

⁴⁸ See Mike France, *The Litigation Machine*, BUS. WK., Jan. 29, 2001, at 114 (discussing the power of the plaintiffs bar in tort law and the push for tort reform).

⁴⁹ The only federal products liability laws concern specific products. For instance, the National Childhood Vaccine Injury Act of 1986 establishes special liability rules concerning injuries caused by childhood vaccines. See Thomas Lundmark, *The Restatement (Third) and the European Product Liability Directive*, 5 DETROIT C. L. J. INT'L L. 239, 267-68 (1996). Also, the General Aviation Revitalization Act of 1994 (49 U.S.C. § 40,101) establishes an eighteen year time limit on liability claims.

In the 1960s, strict liability emerged as the dominant doctrine in products liability case law.⁵⁰ The emergence of strict liability eased the burden of proof for injured consumers. Under strict liability, the plaintiff only needs to prove that a “defective” product caused the harm; proof of negligence on the part of the manufacturer is unnecessary. Proponents of strict liability argue that strict liability helps consumers secure justice in the face of otherwise inferior bargaining power, places the burden of harm on parties most able to prevent and spread the cost of the harm (e.g., through insurance or price increases)⁵¹ and, as a result, helps to encourage manufacturers to make safer products.

Most U.S. jurisdictions place liability for harm caused by defective products on all “sellers.” This means that not only manufacturers, but retailers and other middlemen in the chain of distribution of the product can be held liable. Consumers can rely on the principle of joint-and-several liability to seek to recover damages from any of the “sellers” (i.e., manufacturers, distributors, retailers) involved in the chain of supply. Except in states that have adopted relevant statutes of limitation, consumers are free to bring products liability cases years or potentially decades after purchasing a product.⁵²

Central to the practice of products liability law is the notion of a “defective” product. Generally, a product may be defective because it is designed improperly, manufactured improperly, or contains inadequate warnings. American lawyers actively review product warnings (which must also address reasonable misuse) to reduce the risk of a defect through adequate disclosure. While many courts have allowed manufacturers to rely on a state-of-the-art defense, shielding them against liability for “scientifically unknowable risks,” some courts have held that manufacturers may be liable for “scientifically unknowable risks.”⁵³ Products liability claims may also be made on a variety of other grounds including

⁵⁰ The doctrine was included in the RESTATEMENT (SECOND) OF TORTS, § 402(A) (1965). A 1962 California Supreme Court decision, *Greenman v. Yuba Power Prod., Inc.*, 377 P.2d 897 (Cal. 1962), is a particularly important precedent.

⁵¹ See Andrew Spacone, *Strict Liability in the European Union - Not a United States Analog*, 5 ROGER WILLIAMS U. L. REV. 342 (2000).

⁵² The only general exception is for the aerospace sector. *Id.*

⁵³ Under the ALI's Third Restatement, the state-of-the-art defense may be admitted but is not dispositive. Susan H. Easton, Note, *The Path for Japan? An Examination of Product Liability Laws in the United States, the United Kingdom and Japan*, 23 B.C. INT'L & COMP. L. REV. 311, 327 (2000).

negligence, intentional tort, implied warranties of merchantability, and fitness and representation theories.

Perhaps the most distinctive feature of the American products liability regime is the size of damage awards. In addition to winning compensation for material damages (physical harm to person or property), American plaintiffs can make claims for non-material damages, such as psychological pain and suffering and for punitive damages. While some states have enacted statutory limits on damage awards,⁵⁴ most have not, and sympathetic juries continue to award plaintiffs with huge punitive damages aimed at punishing errant companies. In 2000, the median products liability award against businesses was \$1.8 million and there were twenty-seven awards in excess of \$100 million.⁵⁵

When we couple these aspects of U.S. products liability law with other aspects of legal practice, such as the availability of contingency fee arrangements, class actions, extensive pre-trial discovery requirements, and jury trials, a comprehensive picture comes together. Contingency fee arrangements lower costs for litigants (as they are essentially being financed by the plaintiff's attorneys); strict liability lowers the burden of proof, hence increasing the likelihood of payoff; joint-and-several liability allows plaintiffs to focus on the most appealing or "deep-pocketed" targets; liberal pre-trial discovery gives plaintiffs access to potential "smoking guns," increasing the likelihood of success; class actions facilitate cost-sharing; and juries tend to award generous damages. Together such factors explain the robustness of the products liability litigation industry spawned by the U.S. legal system.

4. AMERICANIZATION OF LAW IN JAPAN

4.1. Japanese Legal Style

The current wave of Americanization of Japanese law is not the first instance in which the Japanese legal system has been significantly influenced by the law of a foreign jurisdiction. During the Meiji Era, the Japanese government revolutionized their existing feudal legal system by importing civil, commercial and adminis-

⁵⁴ Lundmark, *supra* note 49, at 260-62.

⁵⁵ *The People v. America Inc.*, *ECONOMIST*, Mar. 24, 2001, at 71.

trative codes modeled on the German and French systems.⁵⁶ During the American occupation following WWII, Japan adopted an American style constitution with an emphasis on individual rights, along with a host of new regulatory laws modeled after American laws. Nevertheless, the Japanese legal style maintained a number of distinctive attributes.

In the post-World War II era, Japan has relied heavily on an informal regulatory style, in which government bureaucrats use informal "administrative guidance" (*gyosei shido*) to steer the affairs of firms and pursue their regulatory goals.⁵⁷ Compliance with this guidance is, in principle, voluntary. In practice, bureaucrats have a number of tools to compel firms to comply to varying degrees. Highly conservative Japanese judges, themselves career bureaucrats of the Ministry of Justice, have facilitated these informal, non-transparent practices by granting government ministries broad discretion.⁵⁸ An informal variety of "privatized regulation"⁵⁹ is another aspect of legal informality in Japan. In many areas, government bureaucrats have allowed relevant industries to informally bargain over regulatory policies, while restricting public involvement. These informal regulatory practices were bolstered by the close ties within the "Iron Triangle," comprised of the Liberal Democratic Party ("LDP"), the bureaucracy and business. The importance for businesses of maintaining relationships with the bureaucracy was such that in a number of industries, elite track employees were assigned the task of cultivating personal relations with government officials in order to access information and seek favors.⁶⁰ Ties between bureaucrats and the industries they regu-

⁵⁶ Percy R. Luney, Jr., *Traditions and Foreign Influences: Systems of Law in China and Japan*, 52 *LAW & CONTEMP. PROBS.* 129, 148-49 (1989). The American legal system was also studied but was rejected.

⁵⁷ See Ken Duck, *Now That the Fog Has Lifted: The Impact of Japan's Administrative Procedures Law on the Regulation of Industry and Market Governance*, 19 *FORDHAM INT'L L. J.* 1686 (1996); Upham, *Privatized Regulation*, *supra* note 2, at 425.

⁵⁸ See, e.g., Setsuo Miyazawa, *Administrative Control of Japanese Judges*, in *LAW AND TECHNOLOGY IN THE PACIFIC COMMUNITY* 263 (Phillip S.C. Lewis ed., 1994) (discussing the administrative mechanisms in Japan); Masaki Abe, *The Internal Control of a Bureaucratic Judiciary: The Case of Japan*, 23 *INT'L J. SOC. L.* 303 (1995) (describing the bureaucratic nature of the Japanese judiciary); ; J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 *J. L. STUD.* 721 (1994); Ramseyer and Rosenbluth, *supra* note 24.

⁵⁹ Upham, *Privatized Regulation*, *supra* note 2.

⁶⁰ In the finance industry, the phrase "MOF-tan" (meaning brokers as intermediaries) was even coined for these employees. See Duck, *supra* note 57.

lated were further enhanced by the practice of *amakudari* ("descent from heaven"), through which retired career bureaucrats were given lucrative senior positions in regulated industries, as well as by extravagant entertaining of bureaucrats by businesses.⁶¹ Politically protected "special corporations," government controlled semi-public corporations heavily subsidized by the government, provide bureaucrats with an additional retirement option. Ties between business and politicians were strengthened by both legitimate donations and bribes, evident in the number of high-level scandals that have come to light in the postwar period.⁶²

Political leaders and bureaucrats have traditionally focused on pleasing their business constituencies at the expense of diffuse interests such as consumer or environmental protection, a focus which has been reinforced by multimember electoral districts that promote catering by politicians to narrow interest groups. Consistent with the interests of most businesses, political leaders have consistently sought to discourage litigation and to channel policy disputes away from courtrooms and into informal, non-transparent bureaucratic settings.⁶³ They have done so through a variety of means. Most notably, the government has discouraged litigation by limiting the number of, and hence access to, lawyers in Japan. Even after years of incremental increases, each year only approximately 1000 students pass the entrance exam for the Supreme Court's Legal Research and Training Institute, which, with the exception of certain law professors, one must attend in order to become a lawyer (*bengoshi*), including judges, public prosecutors, public defenders, and private practitioners.⁶⁴ As of January 1, 2002, there were 18,917 lawyers admitted to practice Japanese law in Ja-

⁶¹ For a description of one of the more notorious bureaucrat entertainment scandals, see *infra* note 107 and accompanying text.

⁶² Major postwar scandals implicating high-level politicians include the 1976 Lockheed Scandal that forced Tanaka Kakuei's removal from office, the 1988 Recruit Scandal that forced Takeshita Noboru's resignation and the 1992 Sagawa Kyubin Scandal that led to the resignation of Kanemaru Shin, one of the LDP's chief postwar power brokers.

⁶³ See John Owen Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 2 (1978); Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923 (1984).

⁶⁴ IVAN P. HALL, *CARTELS OF THE MIND: JAPAN'S INTELLECTUAL CLOSED SHOP* 21 (1998). By comparison, 7000 graduates pass the Bar in the Philippines each year.

pan; less than one lawyer for every 7000 residents.⁶⁵ By comparison, the ratio in the United States in 2000 was approximately one lawyer per 300 residents.⁶⁶ Even if one adds the separate professions of tax attorney (*zeiri-shi*), patent attorney (*benri-shi*), and the paralegal professions in Japan (i.e., judicial scriveners (*shiho shoshi*), and administrative scriveners (*gyōsei shoshi*)), the total number of legal service providers remains extremely low by comparison with the United States.⁶⁷ Access to lawyers has been restricted by the limited number of lawyers and resulting high fees, back-logs on court dockets as a result of inadequate appropriations to fund the judicial system, high court filing fees, the absence of contingency fee arrangements, and procedural rules such as restrictive standing requirements and limited pre-trial discovery. Potential payoffs are also limited as there is no provision for punitive damages in tort law, and judges, rather than juries, determine awards.

Political leaders saw American legal style, and American lawyers, as an explicit threat to the Japanese approach to regulation. Japanese industry feared the emergence of American style litigation, legal expenses and damage awards. Japanese lawyers, often acting under the aegis of the Japanese Federation of Bar Associations (Nichibenren), wished to restrict competition by limiting the number of lawyers party to their domestic monopoly and keeping foreign lawyers out of their captive market. Except during the Oc-

⁶⁵ This number includes five foreign lawyers (*junkai-in*) who were deemed by the Supreme Court of Japan to possess sufficient knowledge of Japanese before the 1955 amendment of the Lawyers Law and sixteen Okinawa lawyers granted lawyers status at the time the United States returned Okinawa to Japan. Japan Federation of Bar Associations, Outline of the Federation, at <http://www.nichibenren.or.jp/english/outline.htm> (last updated Dec. 2001).

⁶⁶ Mike Jacobs, *Squeezed: Missing Skills Stifle Economic Vitality*, THE JOURNAL (American Chamber of Commerce in Japan), Sept. 12, 2000 (citing data from the Japanese Ministry of Justice). See also Kathryn Tolbert, *Japan Altering Legal System to Produce More Lawyers; Tradition of Consensus Inadequate for Business Needs*, WASH. POST, Sept. 3, 2000, at A26 (citing a figure of one lawyer for every 400 residents in the United States).

⁶⁷ Dan Fenno Henderson, *The Role of Lawyers in Japan*, in JAPAN: ECONOMIC SUCCESS & LEGAL SYSTEM 27, 30-40 (Harald Baum ed., 1996). There were 35,381 *gyōsei shoshi* as of February 28, 2001. Telephone interview with Japan Federation of Gyoseishoshi Lawyers Associations (Mar. 27, 2002). There were 65,782 *zeiri-shi* as of February 15, 2001. See Japan Federation of Certified Public Tax Accountant's Associations Website, at <http://www.nichizeiren.or.jp/03map/map.asp>. As of April 1, 2001, there were 17,075 *shiho shoshi*. See Japan Federation of Shihoshoshi Lawyer's Associations Website at <http://www.shiho-shoshi.or.jp/data/zenkoku.htm>. As of November 30, 2001, there were 4819 *benri-shi*. See Japan Patent Attorneys Association Website at <http://www.jpaa.or.jp/list/memlist.html>.

cupation, and with the minor exception of a tiny class of foreign lawyers grandfathered at that time, foreign lawyers were entirely excluded from the Japanese legal services market until 1986.⁶⁸

4.2. *Americanization in Japan*

In the 1990s, Japanese legal style has been Americanized in a number of significant respects and across a number of policy areas. The two factors we identify above in Section 2, economic liberalization, including the entry of American law firms, and the fragmentation of public authority, have played central roles in encouraging the Americanization of Japanese law. As a result, Japanese legal style across a wide range of policy areas has started to involve more transparency, disclosure, codification of administrative procedures, adversarial legal contestation, and reliance on the services of larger law firms. We will explore the causal mechanisms behind these shifts in detail in the case studies that follow, but we begin with an overview of more general trends.

4.2.1. *Political Fragmentation*

The watershed in terms of political fragmentation came in June 1993 with the election of the first non-Liberal Democratic Party government of the post-war era and the subsequent reform of the electoral system in 1994, brought on by the collapse of stock and land-price bubbles, the ensuing prolonged recession, repeated corruption scandals, and a split in the LDP. In the 1993 election, the LDP was ousted from government after nearly forty years of uninterrupted dominance and was replaced by a coalition government headed by Prime Minister Hosokawa. The new coalition government took power having made a commitment to reforming Japan's electoral system within one year. They made good on that promise and introduced a new electoral system based on a combination of single member districts and proportional representation to replace the existing single non-transferable vote, multi-member district system.⁶⁹

⁶⁸ Hall, *supra* note 64, at 24.

⁶⁹ See GERALD L. CURTIS, *THE LOGIC OF JAPANESE POLITICS 137-70* (1999) (describing Japan's electoral reform); TAKAYUKI SAKAMOTO, *BUILDING POLICY LEGITIMACY IN JAPAN 99-133* (1999) (discussing the change in the Japanese election system from a multi-member district system to one that combines single-member districts and proportional representation).

The LDP's 1993 loss and the subsequent electoral reform encouraged a shift in Japanese legal style in two ways. First, the end of LDP dominance increased the degree of political uncertainty in Japanese politics. Before 1993, LDP leaders, who could reasonably expect their party to maintain control indefinitely, controlled the bureaucracy through a variety of informal incentive structures backed by ongoing monitoring.⁷⁰ LDP leaders had no incentive to establish formal, codified administrative procedures and to invite judicial review. After the LDP's 1993 defeat and the 1994 electoral reform, however, leaders of the LDP and those of other parties were faced with great uncertainty regarding future electoral outcomes. The opposition parties who suddenly found themselves in a position of power had a great incentive to codify administrative procedures and invite judicial review in order to increase the accountability and transparency of the bureaucracy that had for so long been tightly linked to the LDP. Even LDP leaders had an incentive to formalize and judicialize mechanisms of bureaucratic control, as its existing informal mechanisms were no longer viable in light of the new electoral uncertainty. The electoral reform had a second effect on the incentives of politicians that encouraged a shift in legal style. While Japan's traditional single non-transferable vote ("SNTV") multi-member district system encouraged politicians to cater to narrow interest groups such as business constituencies, the new electoral system gives politicians greater incentives to appeal to large portions of the electorate with policies favoring diffuse public interests.⁷¹ As a result, political leaders have an incentive to open up the regulatory process to previously largely excluded diffuse public interest groups such as consumers and environmentalists.

The coalition seized on its newfound power immediately to push for a reform of the administrative procedures that would increase the accountability and transparency of the bureaucracy that for so long had been controlled by the LDP. The Administrative Procedures Law ("APL"), enacted in November of 1993, contained a host of measures aimed at codifying existing administrative pro-

⁷⁰ RAMSEYER & ROSENBLUTH, *supra* note 24, at 142-60.

⁷¹ Frances Rosenbluth & Michael Thies, *The Electoral Foundations of Japan's Financial Politics: The Case of the Jusen 22-23* (unpublished manuscript), (on file with author), available at <http://www.yale.edu/leitner/pdf/1999-02.pdf> (last visited Nov. 26, 2001).

cedures and increasing transparency.⁷² The APL established formal procedures governing the use of administrative guidance and codified the procedures for licensing and permitting activities. The APL also included procedures for hearings and requires that bureaucrats "give reasons" for their decisions. These and other aspects of the law follow the approach taken by the U.S. Administrative Procedures Act. In response to the APL, individual ministries have established their own formalized administrative procedures, in line with APL requirements. Firms have also shown more willingness to challenge administrative guidance.⁷³

The wave of reform did not end with the fall of Hosokawa, but persisted through the shifting coalition governments of the mid-1990s and through the LDP's return to power as the overwhelmingly largest partner in a coalition government following the 1996 election. The enactment of the Disclosure of Information Act (or Law Concerning Access to Information Held by Administrative Organs) in 1999 was an example of this continuing trend. Proponents of government accountability had pushed for a freedom of information law modeled on the U.S. Freedom of Information Act ("FOIA") for over twenty years, but the LDP had consistently blocked such proposals at the national level.⁷⁴ In 1998, the Hashimoto government presented an information disclosure bill to the Diet as part of a series of reforms intended to increase the transparency and accountability of the bureaucracy.⁷⁵ Finally, the Disclosure of Information Act was adopted in May 1999 and took effect in 2001. The law allows individuals to request government information and establishes institutions and administrative and judicial procedures to hear appeals in cases where the government denies information requests. The promulgation of the law marked a major change in regulatory philosophy toward transparency and accountability in government.⁷⁶

⁷² Duck, *supra* note 57, at 1729-40.

⁷³ *Id.* at 1745.

⁷⁴ See Sonni Efron, *Right-to-Know Law Changing Shape of Japan*, L.A. TIMES, May 11, 1999, at A1 (describing the passing of the new law); *Measures needed to make information disclosure work*, ASAHI NEWS SERVICE, May 10, 1999, available at Lexis Academic Universe, World News Library.

⁷⁵ Lawrence Repeta & Jody Chafee, *Japanese Government Information: New Rules for Access*, JAPAN INFORMATION ACCESS PROJECT, SPECIAL REPORT (June 1998), available at <http://www.jiaponline.org/specialreports/joho.html> (last visited Mar. 18, 2002).

⁷⁶ *Id.*

The passage of the Nonprofit Organization (“NPO”) Law of 1998 further oriented Japan toward a more transparent regulatory environment and facilitated the emergence of a larger number of NGOs capable of influencing public policy.⁷⁷ Traditionally, non-profit organizations in Japan could acquire and maintain legal status through the explicit permission of the competent bureaucratic authority. Without legal status, groups could not enter contracts (i.e., for renting facilities) and generally had difficulty gaining recognition and legitimacy. Bureaucrats were given almost unlimited discretion in making decisions over the authorization of nonprofit organizations. Many groups were denied legal standing, while those that won it were subject to ongoing supervision and the threat that their status might be revoked if they strayed from the preferences of the bureaucracy. The tight restrictions on non-profit organizations were part of the LDP’s effort to keep outsiders from interfering with the closed, informal decision making processes that went on within the Iron Triangle.

Pressured by its coalition partners, the SDP and Sakigake, the LDP agreed to a law that decreases bureaucratic control over NPOs. The new NPO Law permits groups to gain legal status without bureaucratic screening and to maintain status without administrative guidance, enhancing the status, independence and potential influence of NPOs pursuing diverse political agencies. The new NPO Law has already significantly increased the number of NPOs.

4.2.2. *Economic Liberalization and the Growing Presence of U.S. Law Firms.*

Japan underwent a massive liberalization of its economy from the early 1980s through the 1990s. Between 1980 and 1996, the government of Japan entered into forty-five major trade agreements with the United States alone.⁷⁸ As discussed in the case studies in the following sections, economic liberalization led to the introduction of new entrants into a previously sheltered economy and the need for re-regulation in a liberalized environment.

Among the many areas of economic activity liberalized from the mid 1980s onward, perhaps the most significant for the Ameri-

⁷⁷ See Robert Pekkanen, *Japan’s New Politics: The Case of the NPO Law*, 26 J. JAPANESE STUD. 111 (2000).

⁷⁸ AMERICAN CHAMBER OF COMMERCE IN JAPAN, MAKING TRADE TALKS WORK 12 (1997).

canizing of the practice of law has been the liberalization of the legal system itself. The partial opening of the Japanese legal market to foreign lawyers in 1986, periodic reduction of restrictions on practice by foreign legal professionals through the rest of the 1990s, and the growing presence of law firms in Japan have encouraged a further Americanization of legal practice. In the early 1980s, as Tokyo emerged as a world business and financial center, American law firms sought to enter the Japanese market. After several years of active negotiations on access to the Japanese legal market between 1982 and 1986, the Japanese government relented, in part to pressures from the U.S. government to open its legal services industry to American law firms, with the Foreign Lawyers Special Act of 1986.⁷⁹ While the Foreign Lawyers Special Act constituted a watershed, it severely restricted the activities of foreign lawyers in a number of ways. Foreign lawyers operating in Japan could advise only on issues of their home country's law; they were prohibited from advising clients on Japanese law or on matters of third country law. More significantly, foreign law firms could not employ Japanese lawyers, could not form partnerships with Japanese lawyers, and were restricted in the ability to use their firm name in the Japanese market. Consistent with their design, these restrictions stunted the growth of foreign firms in Japan and limited their ability to serve both foreign and Japanese clients.⁸⁰

American law firms in Japan and the U.S. government continued to lobby heavily for loosening restrictions on foreign law firms in Japan with further liberalizing reforms of the law being undertaken in 1994, 1996, and 1998.⁸¹ Today, foreign lawyers are allowed to advise clients on matters of third country law, but are still restricted from advising on Japanese law. Foreign law firms are still prohibited from hiring Japanese lawyers in Japan, but foreign law firms can form "specified joint enterprises" (*tokutei kyodo jigyo*) with Japanese firms through which Japanese lawyers of the venture may advise on Japanese law. Though the restrictions are bur-

⁷⁹ Gaikoku bengoshi ni yoru hōristsu jimu no toriatsukai ni kansuru tokubetsu sochi-hō [Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers], Law No. 66 of 1986, available at <http://www.jcaa.or.jp/e/arbitration-e/kaiketu-e/special.html> (last visited Feb. 20, 2002).

⁸⁰ See Todd M. McHenry, *When is a Reform not a Reform? The Ongoing Effort to Provide International Legal Services in Japan*, THE JOURNAL (American Chamber of Commerce in Japan), May 1998. The restrictions also stunted the internationalization of Japanese firms.

⁸¹ See Hall, *supra* note 64, at 25-29; Henderson, *supra* note 67, at 66-67.

densome, the success of several of these arrangements and the extremely high demand for legal services in recent years in Japan has led to the adoption of this structure by a number of U.S. and U.K. firms with practices in Japan.

Though the prohibitions on foreign firms directly hiring Japanese lawyers and on full mergers with Japanese firms have inhibited the growth of foreign and domestic firms, the presence of U.S. law firms in the Japanese market has begun to force restructuring of the legal profession in Japan along American lines. The number of American firms and lawyers working for American firms has grown steadily since the mid-1980s. While the growth rate in U.S. lawyers in Japan has been similar to that in Europe over this period, the number and size of American firms in Japan has remained comparatively small in absolute terms.⁸² As of May 11, 2001, there were only 159 registered foreign lawyers (*gaiben*), mostly American, in the world's second largest economy, though the actual number of foreign lawyers is several times this as most foreign lawyers working in Japan are not formally registered as *gaiben*. As recently as 1997, there were only eighty-six *gaiben*. However, their influence in corporate legal matters is disproportionate to their numbers, because, as a prominent senior partner at one U.S. firm in Japan asserts, "The only institutions capable of handling large, multi-jurisdictional and sophisticated transactional work are the major international law firms."⁸³

Japanese corporate law firms have traditionally been tiny relative to their American counterparts, but have expanded rapidly in recent years. The largest firm in Japan now has approximately 150 lawyers, while five years ago the largest firm was approximately fifty lawyers. By comparison, the Tokyo branch offices of Baker & McKenzie and White & Case, including the lawyers in their joint venture counterparts, have approximately seventy and sixty lawyers, respectively, and provide a wide range of foreign and Japanese legal services. Japanese firms catering to multinational or domestic clients have had to reorganize to compete. Firm sizes have increased as economic liberalization and domestic restructuring have required large teams of lawyers to perform work such

⁸² Based on data compiled from "The NLJ 250" published annually in the NATIONAL LAW JOURNAL and from "The AmLaw 100" published annually in THE AMERICAN LAWYER.

⁸³ Mike Jacobs, *Squeezed: Missing Skills Stifle Economic Vitality*, THE JOURNAL, Sept. 2000, at 12.

as due diligence for mergers and acquisitions and asset securitization. Legal practice in Japan has also become increasingly specialized. Although small when measured against the absolute scale of recent European mergers, recent mergers among major Japanese firms and the formation of "specified joint venture arrangements" with foreign firms have sent shockwaves through the tiny and insular corporate legal community in Tokyo.⁸⁴ Between 1985 and 1998, there was a doubling of the number of firms employing more than ten lawyers in Tokyo and a quadrupling of the same in Osaka.⁸⁵ Geographic expansion within Japan remains prohibited by bar association rules restricting a firm to one office in Japan.

As various reforms aimed at increasing transparency and bureaucratic accountability have increased the need for lawyers in Japan, the government has been undertaking reforms to increase the number of legal professionals. The Supreme Court Legal Research Institute has already begun offering two intakes a year, shortened the training period from two years to a year and a half, and increased the number of would-be lawyers that complete its training course annually from 500 to 600 in 1991 to 1000 in 2000. The final report of the government-sponsored Judicial Reform Council, issued in June 2001, calls for the establishment of American style post-graduate law schools by 2004 and for tripling the number of students who qualify for the bar annually. Moreover, the report calls for measures to facilitate pre-trial discovery and to facilitate citizen access to legal services by shortening trials and lowering the

⁸⁴ Nagashima & Ohno, Japan's largest firm, and Tsunematsu, Yanase & Sekine, an old and prominent Japanese firm, merged in January 2001 to become the country's largest law firm with approximately 150 lawyers. The venerable Aoki firm merged with the Tokyo operations of Baker & McKenzie, which operates as a Japanese firm in Japan, in April 2001. Recently, Mori Sogo, one of Japan's largest firms, and Hamada & Matsumoto, perhaps the most respected specialized capital markets firm, agreed to merge their current total of 134 lawyers by 2003. A number of prominent and less prominent lawyers have also left their domestic firms to pursue opportunities at the major U.S. and U.K. firms. For example, Simmons & Simmons announced in 2001 the formation of a specified joint-enterprise with TMI Associates, a forty-four lawyer M&A and intellectual property practice. Allen & Overy and Freshfields Brukhaus Deringer have also set up joint ventures. See, e.g., *Simmons & Simmons Tokyo JV May Spark Fusionsfieber, Japanese Style*, INT'L FIN. L. REV., Nov. 2001 at 6.

⁸⁵ ASIA PAC. LEGAL 500 (2000).

cost of litigation.⁸⁶ The Koizumi government has endorsed the plan and pledged to follow its recommendations.

4.2.3. *Securities Regulation in Japan*

Changes in the way securities markets are regulated, once perhaps the most salient example of administrative guidance and iron triangle politics, reveal further Americanization. Although operating under a similar basic statutory framework, traditionally, securities regulation in Japan has differed markedly from that in the United States. First, the regulatory regime has focused on attempting to reduce risk through the careful licensing of new entrants and restricting the range of permissible investment products.⁸⁷ This focus has resulted in public disclosure of information useful to investors that is more limited in scope and is less timely than in the United States. Second, securities regulation by the Ministry of Finance ("MOF") has been marked by notorious opacity rather than transparency in practice, little resort to formal rules and procedures, and a reliance on the use of "administrative guidance" to achieve regulatory objectives. Finally, privatization of incentives for enforcement has been, on the whole, less comprehensive than in the United States. While much of this traditional approach persists, political fragmentation and economic liberalization have pushed Japan away from this traditional framework toward one more similar in philosophy to U.S. practice.

4.2.3.1. *Favoring "Merit" Regulation over Disclosure*

Japan emerged from the Allied Occupation of Japan with a statutory infrastructure for the regulation of securities similar to the United States. The Securities and Exchange Law of 1948 ("SEL") foisted on Japan by the Supreme Commander for the Allied Powers ("SCAP"), was patterned after the 33 Act and the 34 Act of the United States and became the statutory cornerstone of the Japanese securities regulatory regime. An independent Japanese SEC was created with investigative regulatory powers, and civil liability was instituted for including misleading and false

⁸⁶ See *Judicial Reform Panel Calls for More Lawyers, Jury System, Faster Trials*, JAPAN TIMES, May 22, 2001, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20010522a5.htm> (last visited Aug. 8, 2001); *Reforms Sought to Increase Number of Attorneys*, NIKKEI WKLY, Oct. 30, 2000, at 6.

⁸⁷ See, e.g., Yukihiko Endo, *Historical Development of the Japanese Financial System*, in JAPANESE FINANCIAL MARKETS 3, 4-13 (1996).

statements in the registration statement. Unlike the U.S. SEC, the independent Japanese SEC did not initially emerge as a watchdog of disclosure. In fact, it disbanded as soon as the Peace Treaty was signed in 1951, and its powers transferred to the Finance Management Bureau of MOF. In an economy where bank-led financing would dominate for decades, securities regulation was not deemed important enough to even merit Bureau level status within the MOF until 1965 when the Securities Bureau was created. Enforcing quality public disclosure did not become a regulatory priority within the MOF.⁸⁸ Given the narrow definition of "security" in Japan, regulators focused more attention on which industry, banking or securities, would be permitted to handle new financial products than on investor protection.⁸⁹

The inattention to promoting quality disclosure by Japanese regulators led to markets plagued by lax and fraudulent disclosure and numerous scandals. For example, following a famous securities fraud involving Sanyo Specialty Steel Co. Ltd., the MOF investigated reports of over 1000 companies, and revealed that approximately ten percent of these companies had made false or misleading statements and that 210 certified public accountants had submitted false audit reports.⁹⁰

Instead of adopting the U.S. approach of forcing disclosure, the MOF amended the SEL and regulated securities in order to restrict the number of market participants and control the types of investments investors could make. In 1965, for example, the U.S.-style broker dealer registration system (in which a securities firm meeting the minimum formal requirements simply announces its commencement of business) was thrown out and replaced with a licensing system that gave MOF licensing power over securities firms, helping give rise to the so-called "convoy system" (*gosô sendan hōshiki*) that virtually precluded the entry of new participants

⁸⁸ It is perhaps no accident that, to this day, Japanized versions of English words for concepts such as "disclosure," "transparency," "accountability," and "insider trading" are used in lieu of original Japanese words, possibly suggesting the "foreignness" of these concepts.

⁸⁹ See Hideki Kanda, *Developments in Japanese Securities Regulations: An Overview*, 29 INT'L LAW. 599 (1995). For an excellent overview of the role of MOF in "managing" the securities markets, see Curtis J. Milhaupt, *Managing the Market: the Ministry of Finance and Securities Regulation in Japan*, 30 STAN. J. INT'L L. 423 (1994).

⁹⁰ JONATHAN ISAACS & TAKASHI EJIRI, *JAPANESE SECURITIES MARKETS* 156 (1990). See also I. Kawamoto & Y. Ohtake, *Securities and Exchange Law – Market, System and Enterprises in the Transmitting Era*, NIHON KEIZAI J., 1987, at 24.

(and guaranteed the continuing survival of existing ones) into the broker-dealer business and other financial markets for decades.⁹¹

Organizations such as the Tokyo Stock Exchange (“TSE”) and the Japan Association of Securities Dealers (“JASD”) that engage in self-regulation (*jishu kisei*) subject to MOF guidance have also traditionally emphasized merit regulation rather than disclosure.⁹² In order to list on an exchange in Japan, an issuer must furnish the exchange officials with an extremely detailed application comprised of two parts. Part I (commonly referred to as *ichi no bu*), the much smaller of the two, essentially forms the registration statement (*yuka shoken todokesho*) which is publicly filed with the MOF and, with some modification, becomes the statutory prospectus (*mokuromisho*) distributed to investors. The generally more voluminous Part II (commonly referred to as *ni no bu*) is available only to the relevant exchange. The exchange actively reviews both Part I and Part II, and conducts an extensive investigation of the company over a long period of time, including interviews with employees. The exchanges do not generally force additional disclosure, but instead focus on judging whether the issuer is “qualified” to list on the exchange. Stock exchanges can order listed companies to provide immediate disclosure of information to investors, but in the past this was a rare event.⁹³ In addition, unlike the more proactive role of the SEC in forcing substantive improvements in disclosure practices, the MOF’s role in reviewing the registration statement is typically limited to ensuring formalistic compliance with form requirements.

4.2.3.2. *Bureaucratic Informalism – Regulation in the Shadow of the Law*

Just as the MOF traditionally has not been demanding of the disclosures it requires of issuers, it has not been demanding of transparency in its own activities. While the MOF has long issued ordinances and drafted Cabinet Orders for approval by the Cabi-

⁹¹ For a description of the convoy system and compartmentalization of financial markets, see Eric C. Sibbitt, *A Brave New World for M&A of Financial Institutions in Japan*, 19 U. PA. J. INT’L ECON. L. 965 (1998).

⁹² For a comparison of the New York Stock Exchange and Tokyo Stock Exchange and the comparative environments in which they operated as of 1990, see Jonathan Macey & Hideki Kanda, *The Stock Exchanges As a Firm; The Emergence of Close Substitutes for the New York and Tokyo Stock Exchanges*, 75 CORNELL L. REV. 1007 (1990).

⁹³ ISAACS & TAKAHASHI, *supra* note 90, at 146.

net, the crucial issue of interpretation has been largely oral and informal. These actions often took the form of a personal visit to the MOF or a telephone call, to which nothing was public and everything was generally unwritten. Even where written guidance of some kind was provided, this guidance mainly took the form of administrative directives known as *tsutatsu* or administrative instructions known as *jimu-renraku* rather than formal ordinances. Formal legal procedures have almost never been invoked by the MOF, its injunctive power has seldom been used, and there are few claims raised by private litigants against MOF actions. Most enforcement actions and policy initiatives have been performed informally often in consultation with what were the "Big Four" securities firms (Nomura, Daiwa, Nikko and Yamaichi) through the use of administrative guidance.⁹⁴ Almost no cases challenging any MOF interpretation of, or regulatory action under, the SEL exist.⁹⁵

4.2.3.3. *Limited Privatization of Enforcement*

In stark contrast to the United States, private incentives for compliance with the securities laws have been limited. The threat of private litigation has played virtually no role in encouraging compliance with securities regulatory principles or enforcing disclosure in Japan.⁹⁶ Claims by aggrieved investors under the SEL are virtually unheard of. Even under a broader corporate law claim, between 1950 and 1990, shareholders filed fewer than twenty derivative suits in Japan.⁹⁷ In fact, the threat was so minimal that directors and officers insurance, a standard insurance product in the United States, was not introduced into Japan until

⁹⁴ The "Big Four" is now more like the "Big Two-and-a-Half" with the bankruptcy of Yamaichi and integrated activities of Nikko Securities and Salomon Smith Barney.

⁹⁵ See Christopher P. Wells & Haruko Yamamori, *Securities & Banking Law*, in JAPAN BUSINESS LAW GUIDE 65-160 (CCH International). This may in part be because the major securities firms have had an ex ante informal role in shaping the rules.

⁹⁶ However, public exposure of something scandalous in the mass media subjects executives to the disciplining force of public shame, sometimes forcing them to make public apologies, resign or reduce their salaries.

⁹⁷ Mark D. West, *The Pricing of Shareholder Derivative Actions in Japan and the United States*, 88 NW. U. L. REV. 1436, 1438 (1994). Moreover, traditionally these suits were limited to disputes for private companies, not relating to publicly listed ones. See also Kenji Utsumi, *The Business Judgment Rule and Shareholder Derivative Suits in Japan: A Comparison with Those in the United States*, 14 N.Y. INT'L L. REV. 129 (2001).

1990, and even then only for risks of exposure to lawsuits overseas. Director's and officer's insurance for threats arising in Japan was not sold until 1994. Although commentators have expressed numerous views on the reasons behind the lack of litigation in Japan generally, including a cultural aversion to overt and formal conflict, the fact is that such litigation was all but impossible because of (i) limited statutory causes of action and (ii) a general legal infrastructure that made it time-consuming, expensive, and difficult to for plaintiffs prevail.⁹⁸

In fact, prior to 1989, there was little incentive for "insiders" to refrain from using non-public information to their advantage, as Japan effectively lacked an insider trading regime.⁹⁹ Not unlike the United States and United Kingdom in earlier times, trading, particularly by corporations, based on inside information was a common practice.

The extreme shortage of lawyers forms an institutional barrier to privatizing enforcement in Japan. Although there are no available statistics, there are probably only a few hundred lawyers dealing primarily with securities law matters in all of Japan. Moreover, the activities of foreign legal professionals have also been tightly restricted. The limitation on the number of lawyers has profound implications for securities regulation in Japan. First, there are smaller potential classes of public prosecutors and fee-seeking private plaintiffs lawyers to seek out securities disclosure-related problems, and a smaller class of judges to handle cases. As a result, the threat felt by companies is limited. Second, in part because of the difficulty and cost of securing a lawyer as well as the reduced threat of litigation, lawyers are less involved in the securities registration process. For example, companies and underwriters rather than lawyers usually draft the prime disclosure docu-

⁹⁸ The lack of juries in Japan may also contribute to the difficulty of prevailing in Japan as "the deference . . . [United States] courts show their juries increases their willingness to let implausible claims go to trial. Freed from that concern, Japanese judges apparently dismiss nuisance suits far earlier and more frequently." J. MARK RAMSEYER, *VERTICAL INTEGRATION IN JAPAN: SPECULATIONS FROM TAX LAW AND CIVIL PROCEDURE* 3.2 (Inst. for Monetary and Econ. Studies, Bank of Japan, Discussion Paper No. 97-E-6, 1997).

⁹⁹ Although the SEL had a general fraud provision in Article 58 of the law, it was never applied to insider trading. See OKAMURA & TAKESHITA, *LAWS & REGULATIONS RELATING TO INSIDER TRADING IN JAPAN* (1989). Only employees of securities firms were banned from trading on inside information, pursuant to a 1965 ministerial ordinance issued pursuant to the MOF's licensing power under the SEL, though the level of enforcement is certainly questionable.

ments for domestic offerings by Japanese companies and underwriters in domestic offerings conduct much of their due diligence investigations using in-house staff. With fewer securities professionals, the ability of the Bar to contribute to the robustness of the legal reform process is also limited.

4.2.3.4. *Americanization of Securities Regulation*

Political fragmentation and economic liberalization have pushed Japan away from its traditional framework toward one more similar in philosophy to U.S. practice. The forces of economic liberalization helped fragment the regulation of the securities sector in a number of ways. First, U.S. government demands that Japan open up its financial sector introduced an outside force to the "financial iron triangle" comprised of the MOF, the LDP, and the finance industry that could not be easily ignored. Continued U.S. *gaiatsu* ("foreign pressure") led to the February 13, 1995 Measures by the Government of Japan and the Government of the United States Regarding Financial Services. Included among the basic objectives of the agreement were removal of barriers to market access, both formal and informal, for competitive foreign financial firms, broadening the range of permitted instruments in the domestic securities and simplifying and increasing the transparency of regulations governing cross-border capital transactions. Japan also committed itself to making financial regulation fully transparent, providing for foreign participation in financial advisory groups, assuring that administrative guidance is voluntary and given in writing if requested, and that licensing and approval of financial activities is in accordance with published standards.

Second, the gradual success of U.S. firms in the Japanese securities markets turned them into a major domestic forces that demanded regulatory attention. Following the first steps toward internationalization of Japan's securities markets and the liberalization of restrictions on foreign market entrants in the 1970s,¹⁰⁰ foreign financial institutions steadily increased their pres-

¹⁰⁰ In 1971, the enactment of the Law on Foreign Securities Firms enabled foreign securities firms to legally operate in Japan, while the removal of the ban on investments in foreign securities by the investing public opened the public securities market to them. Foreign issuers started to participate in the Japanese financial markets with the first samurai bond issuance (a yen-denominated bond by a foreign issuer) in 1971, and the opening of a Foreign Section of the TSE followed by a few listings by foreign firms in 1973.

ence in the Japanese market as restrictions on their activities were reduced.¹⁰¹ Whereas securities regulation often took the form of informal consultation between the MOF and the Big Four, half of the Big Four became tightly integrated with foreign financial firms. Merrill Lynch picked up the retail brokerage assets of the bankrupt Yamaichi Securities, while Salomon Smith Barney entered into a strategic joint venture with Nikko Securities, then rumoured to be in less than sound condition. As foreign investment banks grew in power and domestic ones waned or collapsed, it became inevitable that U.S. firms would have a greater impact on financial service practices. These firms wielded clout not only through the American government (it is noteworthy that Robert Rubin, former Secretary of the Treasury and a former chairman of Goldman Sachs, signed the 1995 Financial Services Agreement with Japan on behalf of the United States government), but also as powers with domestic political influence—foreign investment banks now employ thousands in their Japanese branches, including many from Japan's elite, and play a critical role in access to international capital.

Third, economic liberalization helped reveal the shaky status of many firms on the verge of collapse that had been shored up by Japan's regulators. Failings of the regulatory system began to manifest themselves with the collapse of the Bubble Economy in 1989, and the emergence of scandals implicating bureaucrats, politicians and the securities industry. The collapse of the Bubble Economy weakened the unshakable faith in the Japanese bureaucracy as the enlightened stewards of the Japanese economic "miracle," while the economic fallout from the collapse gave rise to popular dissenting voices from businesses and individuals alike. Businesses complained about the inferior level of know-how at Japanese financial institutions and the poor quality of the services provided in relation to the costs incurred. Individuals, on the other hand, saw the rapid appreciation in personal assets, particularly land, halt and became increasingly fearful of the status of their pension funds. Almost all taxpayers, both corporate and individual, opposed taxpayer-funded bailouts of the country's heavily indebted home-mortgage lenders (*jusen*).¹⁰²

¹⁰¹ For example, foreign firms were allowed to become members of the TSE, and the Foreign Exchange Control and Foreign Trade Law was amended to make foreign securities transactions "free in principle" rather than "prohibited in principle," though a prior notification requirement persisted until further amendment in 1991.

¹⁰² Polls indicated that over ninety percent of the public opposed such use.

The revelation of massive amounts of non-performing loans on the books of financial institutions only discredited the bureaucracy further. Numerous scandals have discredited the MOF further with public anger often tipping the balance in the passage of reforms oriented at curtailing the power of the bureaucracy and reorient the regulatory style. A number of securities-related reforms were undertaken from the late 1980s onward, with the most ambitious plan being the Big Bang, modeled after the Big Bang in the United Kingdom and announced by Hashimoto, in 1996, as aimed at making Japan's markets free, fair, and global.¹⁰³

4.2.3.5. *Promoting Disclosure*

With financial regulators evidently no longer capable of making most of the decisions themselves, particularly with the increasing internationalization, complexity, and diversification of investors in the Japanese financial markets, it became essential to empower a broader range of market participants with the information necessary to make their own decisions. In response, Japan has adopted an approach that increasingly emphasizes the quality and scope of disclosure in order to meet the needs of a more liberal economic environment. In 1988, reporting of transactions by officers and ten percent shareholders became mandatory, and in 1989, trading on non-public information (and hence encouraging the timely disclosure of that information) was made clearly a criminal offense.¹⁰⁴ In 1990, disclosure of shareholdings by five percent shareholders was required. In 1992, the SEL was amended to provide disclosure and antifraud rules in connection with repurchase by a company of its own shares. The Japanese Generally Accepted Accounting Principles ("GAAP"), known for their "flexibility," continued to grow closer to U.S. GAAP with recent changes including consolidated reporting, mark-to-market accounting and changes in valuation of pensions.

Exchanges such as the TSE have also become more active in forcing issuers, through informal discussion, to make timely dis-

¹⁰³ The reforms included deregulation of brokerage commissions, an end to foreign exchange controls, enhanced competition among banks, insurers and securities firms, freedom to offer new financial products, and increased transparency in accounting and reporting standards.

¹⁰⁴ Criminal sanctions were effectively introduced for the first time, with up to six months imprisonment and fines of up to ¥500,000. Law No. 75 of 1988, amending the SEL.

closure to investors. In 1999, the TSE undertook a number of initiatives to lower restrictions on listing criteria and rules for both its First and Second Sections, and introduced stricter requirements for timely disclosure, in addition to establishing the Mothers market to attract and fund U.S. style high-growth venture businesses. The Mothers market adopted a more U.S. approach, lowering listing standards (in fact lower than Nasdaq Japan or Nasdaq in the United States), promised a faster approval process, and required greater disclosure than is required on other sections of the Tokyo Stock Exchange. Quarterly reporting was required (as in the United States) rather than the typical semi-annual financial reporting of Japanese companies. The TSE even became more aggressive than the SEC in encouraging issuers to make earnings projections. The Japanese market has also seen similar U.S. style regulations being promulgated by the Jasdaq OTC market, as well as by Nasdaq Japan, a joint venture between Nasdaq and the Osaka Securities Exchange.

4.2.3.6. *Increasing Transparency in Regulation*

The same forces leading to the Administrative Procedures Act and the Freedom of Information Act have been pushing MOF toward SEC-style transparency. In 1992, provisions were instituted to replace the administrative circular notices issued by regulators with formal orders and regulations based on specific statutory provisions. In May 1998, MOF announced that it would end the practice of sending individual order and injunction notices to financial institutions and switch to open publication of ordinances clearly showing requirements for authorization. In June 1998, MOF abolished 382 of 400 *tsutatsu* and 234 of 243 *jimu-renraku* under review, and elevated some of them to the level of formal ministerial ordinances or notices in the *Official Gazette (Kanpo)*.¹⁰⁵ The previous practice was criticized as arbitrary and lacking transparency. In fiscal 2001, the Japanese government was to fully implement a system in which its ministries and agencies would publicize their interpretations of the law at the request of companies and individuals. It has slowly begun to reply to such requests. The Japanese government introduced the use of no-action letters,

¹⁰⁵ See Marine & Fire Insurance Association of Japan, *The Total Review of Administrative Directives and Instructions Related to Financial Institutions (Including Insurance Companies)*, at http://www.sonpo.or.jp/english/eng_4912 (last modified Feb. 2, 2002).

though the thirty-day period has been criticized by many as being too short, as well as a public comment period for new laws and regulations. The increasing use of formal enforcement powers, as discussed above, also reflects a more formal approach.

This increased openness is backed by a willingness to prosecute those that continue to operate under the principles of old. In January 1998, public prosecutors, for the first time in fifty years, entered the MOF to arrest a MOF official. The official was charged with leaking the dates, times and locations of MOF bank inspections, in what became notorious in Japan for the "*no pan shabu shabu*" scandal which became notorious in virtually every household in Japan.¹⁰⁶ In a symbolic move, prime minister Hashimoto appointed the new vice-minister himself without consulting the bureaucracy, ignoring the long-standing practice of consulting MOF bureaucrats. Ironically, the evidence eventually implicating two ministry officials came about as the result of greater powers allocated to prosecutors to go after financial racketeers known as *sokaiya* (literally "shareholder meetings specialists") as a result of a reform of the commercial code aimed at improving corporate governance.

The financial scandals involving major securities houses that came to light in 1991 (primarily involving loss compensation) led to 1992 amendments establishing the Securities and Exchange Surveillance Commission ("SESC") to serve as a watchdog of the securities industry. Though the SESC was designed to be more independent than other bureaus of the MOF, it initially remained under MOF control. However, in 1998, after further scandals and mounting pressure from opposition parties, the Hashimoto government dealt the MOF a major blow by transferring control of the SESC to a new independent regulatory body, the Financial Supervisory Agency ("FSA"). The SESC is an independent watchdog for the securities market, akin to an SEC but with fewer powers and less than ten percent of the staff.¹⁰⁷ In addition to monitoring the day-to-day trading activities of the securities companies, the SESC investigates illegal securities trading, brings charges against viola-

¹⁰⁶ "No pan shabu shabu" is a Chinese-style hot-pot restaurant where the women remove their panties for a tip, adding additional color to the corruption scandal. The fallout would result in three suicides, the resignation of the finance minister, and the firing of two of his civil vice-ministers. See, e.g., Andrew Horvat, *MOF Fried in "No Pan Shabu Shabu,"* EUROMONEY, Mar. 1998 (commenting on the impact the "shabu shabu" scandal had on Japan's Ministry of Finance).

¹⁰⁷ See Ryu Osumi & Takeshi Ando, *Securities Agencies Vow to Cooperate,* NIKKEI WKLY., Dec. 18, 2000.

tors of the SEL to the attention of public prosecutors and recommends administrative disciplinary action or policy measures to the FSA. Furthermore, the revamped SESC is more active than its MOF predecessor in the use of its formal enforcement powers. In 1999, it lodged seven accusations with the public prosecutors office (including three cases of submitting securities reports with false information, two cases of employing deceptive devices in the sale of securities, one case of insider trading and one case of market manipulation) as well as thirty-seven recommendations to the Financial Recovery Commission and the Financial Reconstruction Commission (which were merged in January 2001) for disciplinary administrative actions against securities companies and directors or employees of securities companies for breaches of the SEL.

4.2.3.7. *Privatization of Enforcement*

Reforms have also been undertaken to improve the ability of individuals to take matters into their own hands, rather than relying solely on the bureaucracy to protect their interests. When criminal sanctions were introduced for insider trading in 1989, in part a response to four widely publicized cases of insider trading in 1987,¹⁰⁸ companies and shareholders were given the power to sue for profits when an officer or ten percent shareholder of the company profits from the sale and purchase within a six month period of the company's securities.¹⁰⁹ Officers and ten percent shareholders were also required to file reports with MOF when trading in a company's shares, helping to make the public aware of changes in control. In May 1992, the insider trading regulations, which had previously been limited to securities traded on an exchange, were extended to cover insiders of OTC companies. As of 1996, there had been four convictions and by the end of 2000, a total of thirteen recommendations for prosecution by the SESC.

The commercial code was also revised in 1993 to make derivative suits (*kabunushi daihyo soso*) easier and less costly and to increase damage amounts to include reasonable costs beyond litiga-

¹⁰⁸ The most important of these was the Tateho Chemical Case in which insiders at Tateho and Tateho's bankers dumped large amounts of Tateho stock on the market in advance of the announcement of Tateho's bankruptcy. On the Recruit affair, see Tomoko Akashi, Note, *Regulation of Insider Trading in Japan*, 89 COLUM. L. REV. 1296 (1989).

¹⁰⁹ Art. 189 of Shōkentōrihiki Hō [Securities and Exchange Law], Law No. 25 of 1948. If the company does not sue within sixty days, then a shareholder may.

tion and attorney costs.¹¹⁰ Strictly speaking, derivative suits are not a securities law based claim, but are often used by shareholders to address corporate misbehavior. Following the amendments, the number of derivative suits has increased,¹¹¹ the amount of claims has become bigger, the number of suits against public companies has climbed, and the purchase of directors and officers insurance has become more popular. Reforms to the Japanese Civil Procedure code in 1996 were aimed at improving the efficient and fair resolution of claims in the court system, though the extent of the reforms was tempered by the fear of unleashing U.S. levels of litigation to Japan.¹¹² Perhaps an indication of changes to come, though not related to the offering of securities, in September 2000, the Osaka District Court ordered the executives of Daiwa Bank to pay \$775 million in damages for losses incurred by its New York branch, the largest award in a shareholder compensation suit by a factor of seventy.¹¹³ The Osaka ruling was the first decision in a shareholder lawsuit in Japan to hold directors responsible for failing to manage risks. More generally, the number of shareholder lawsuits filed annually in Japan has more than tripled since 1993, when the government lowered the filing fees for shareholder lawsuits.¹¹⁴

¹¹⁰ Prior to 1993, a claimant suing for one billion yen would owe an upfront stamp tax of ¥3,117,600, with many courts further requiring the posting of security for expenses. After the amendment the cost was lowered to ¥8,200. West, *infra* note 139, at 1436-66.

¹¹¹ Only thirty-one cases had been filed between 1950 and 1993. See Miyazawa, *supra* note 3 (citing Masaru Hayakawa, *Shareholders in Japan*, in JAPAN: ECONOMIC SUCCESS & LEGAL SYSTEM 247-48) (Harold Baum ed., 1996) (discussing the increase in derivative suits)). As of 1994, eighty-four cases were pending and as of 2000, 206 cases were pending. Norio Henmi, *Kôporêto gabanansu ni kansuru shoho-tokureihô kaiseian no pointo* [Key issues on the amendments to the commercial code and the exemptive law relating to corporate governance], JUNKAN KEIRIJÔHÔ, Oct. 20, 2001, at 26.

¹¹² See Yasuhei Taniguchi, *The 1996 Code of Civil Procedure in Japan – A Procedure for the Coming Century?*, 45 AM. J. COMP. L. 767 (1997) (discussing the possibility of increased U.S. litigation in Japan).

¹¹³ See, e.g., *Business execs stung by court order*, NIKKEI WKLY., Sept. 25, 2000, available at LEXIS, News Group File; Bill Spindle & Peter Landers, *Japanese Court Sets Restitution in Daiwa Suit*, ASIAN WALL ST. J., Sept. 21, 2000, available at 2000 WL-WSJA 23749218 (discussing how the Osaka District Court ordered a payment of ¥775 million in damages).

¹¹⁴ Chester Dawson, *At Long Last, Law Suits*, BUS. WK., Feb. 5, 2001, at 25 (noting the increase in lawsuits despite a desire by law officials to curtail lawsuits). See also George F. Parker, Note, *The Regulation of Insider Trading in Japan*:

Securities regulation is converging on an American approach, emphasizing transparency in regulation, democratizing information access through promoting disclosure¹¹⁵ and creating greater opportunities for individuals to exercise legal rights independently of the bureaucracy. Nevertheless, it is far easier and less time-consuming to amend the substance of a statute than to increase a country's institutional legal capacity. The practice in Japan remains distant from the United States, though it is clearly converging. It will take time for increases in the number of lawyers to begin to have a significant influence on the legal system. The dearth of such professionals may be the largest bottleneck and put an upward limit on the pace of convergence toward a U.S. style system of securities regulation.

4.2.4. *Products Liability Law in Japan*

Prior to 1994, Japanese law placed a number of formidable statutory barriers in the way of would be products liability plaintiffs. These barriers were so substantial that between 1945 and 1990 only 150 products liability cases were decided in Japan.¹¹⁶ Most consumers brought products liability cases under negligence-based tort law, requiring consumers to prove negligence on the part of manufacturers.¹¹⁷ However, severe restrictions on pre-trial

Introducing a Private Right of Action, 73 WASH. U. L.Q. 1399 (1995) (discussing the increase in lawsuits in Japan).

¹¹⁵ In addition to democratizing information access, recent reforms to the commercial code facilitate the democratization of shareholding through facilitating the use of stock options and elimination of minimum par values of stock. For example, the previous minimum par value per share of ¥50,000 (\$375 on March 25, 2001) discouraged the issuance of shares at per share prices more accessible to individual investors wishing to build diversified portfolios and made holding shares less attractive as the ability to sell in small lots was limited. Stock option plans are now explicitly permitted, but previously the first stock option plans in Japan required approval by the Ministry of International Trade and Industry or evading stock option plans entirely through the issuance of bonds with detachable warrants, where the warrants were detached from the warrants and the debt paid back almost immediately.

¹¹⁶ Hiroshi Sarumida, *Comparative Institutional Analysis of Product Safety Systems in the United States and Japan: Alternative Approaches to Create Incentives for Product Safety*, 29 CORNELL INT'L L.J. 79, 82 (1996) ("[O]nly 150 product liability cases were decided between 1945 and 1990 in all of Japan.").

¹¹⁷ Consumers could also bring products liability cases based on breach of contract. However, the legal hurdles and the potential pay-offs under contract law were so unbalanced that very few plaintiffs used that legal basis. On the traditional approach to products liability law in Japan, see Jason F. Cohen, *The Japanese Product Liability Law: Sending a Pro-Consumer Tsunami through Japan's Corporate*

discovery typically made it almost impossible for plaintiffs in products liability cases to prove negligence on the part of manufacturers.¹¹⁸

In addition to these specific obstacles, the general deterrents to litigation mentioned above also affected products liability law. High attorney's fees, high court filing fees, the duration of trials and the absence of punitive damage awards and contingency fee arrangements all discouraged injured consumers from bringing suits.¹¹⁹ Moreover, with the exception of a few highly publicized mass torts, judges generally sided with manufacturers in products liability cases.¹²⁰ With high costs, a paucity of lawyers willing to take on products liability cases, and little chance of victory in the courtroom, it is not surprising that there was so little products liability litigation in Japan prior to 1995.

While lawyers, litigation and courts played little role in promoting product safety in Japan, the issue was not ignored. Rather, in line with general patterns of policy making in Japan, the bureaucracy played a dominant role in the regulation of product safety. The government promoted product safety with strict product safety standards, often in the form of precise design standards. In addition to setting standards, the government established alternative routes for consumers to secure compensation for damages caused by faulty products. The government established a variety of voluntary public insurance schemes¹²¹ and mandatory industry-wide compensation trust funds.¹²² These programs sought to bring risk sharing (between government and industry) and predictability to the area of products liability. Consumers who bring complaints to these funds face a lower burden of proof and enjoy a higher probability of gaining compensation than they would in the court-

and Judicial Worlds, 21 *FORDHAM INT'L L.J.* 108, 133-37 (1997); Easton, *supra* note 53, at 320, 321; Andrew Marcuse, *Why Japan's New Products Liability Law Isn't*, 5 *PACIFIC RIM L. & POL'Y J.* 365, 370-71 (1996); Phil Rothenberg, *Japan's New Product Liability Law: Achieving Modest Success*, 31 *LAW & POL'Y IN INT'L BUS.* 453, 455-72 (2000).

¹¹⁸ Marcuse, *supra* note 117, at 389.

¹¹⁹ *Id.* at 395.

¹²⁰ Cohen, *supra* note 117, at 128, 132.

¹²¹ For instance, the 1973 Consumer Daily Life Appliances Safety Law established a voluntary standard setting, testing and labeling scheme, coupled with a compensation fund to cover claims made involving products which had been approved under the scheme. See Marcuse, *supra* note 117, at 377.

¹²² Manufacturers pay premiums to these funds in proportion to their market share in the relevant industry. See Cohen, *supra* note 117, at 143-44.

room; however, the compensation amounts are determined by fixed schedules and are lower than the awards plaintiffs might win in court. These schemes help channel disputes away from the judicial arena and toward the arena of informal bureaucratic control.¹²³

4.2.5. *The New Product Liability Law*

On July 1, 1994, the Japanese Diet enacted the Product Liability Law (*seizobutsu seikinin ho*) (the New PL Law) that dramatically altered the products liability regime in Japan.¹²⁴ The idea of adopting a products liability law based on strict liability had been debated twenty years before the Diet finally enacted the Product Liability Act. However, Japanese government and business leaders consistently opposed the adoption of such legislation, arguing that it would encourage frivolous litigation and maintaining that the government's strict product standards provided consumers with adequate protection.¹²⁵

Finally, in 1993, pressures created by economic liberalization and political fragmentation converged to spark the passage of the New PL Law. Economic liberalization promoted the adoption of the New PL Law in two ways. First, the wave of deregulation that swept over Japan decreased the ability of the bureaucracy to protect consumers through strict product regulations. This led to a growing recognition by the government leaders that more privatized approaches to consumer protection, such as products liability law, would be necessary to protect consumers. Second, as the liberalization of trade opened Japanese markets, foreign firms and their governments complained that Japan's rigid product safety standards, which substituted for products liability law, constituted non-tariff barriers to trade.¹²⁶

¹²³ Marcuse, *supra* note 117, at 378.

¹²⁴ For a detailed English language review of the law, see Thomas Leo Madden, *An Explanation of Japan's Product Liability Law*, 5 PAC. RIM L. & POL'Y J. 299 (1996).

¹²⁵ Cohen, *supra* note 117, at 133, 144-48; Takahashi Fumitoshi, *Japan's Product Liability Law: Issues and Implications*, 22 J. JAPANESE STUD. 105, 105-07 (1996).

¹²⁶ Cohen, *supra* note 117, at 148-54. The spread of American law firms as a result of economic liberalization has had less impact in the products liability area. Certainly, Japan's exporting manufacturers have been exposed to U.S. products liability law and litigation as they have, of necessity, relied upon U.S. legal counsel to guide, protect, and litigate for them under the products liability regimes in the United States. However, American law firms in Japan concentrate on securities law, mergers and acquisitions, joint venture work, intellectual property, and other aspects of corporate law, not products liability law or litigation. Plaintiffs

Political fragmentation, in the form of the election of the first non-LDP government finally tipped the balance. Just as Hosokawa and his coalition allies quickly moved to reform the Administrative Procedures Law, they also moved quickly to reform products liability law. Consumer groups, who saw the LDP as unresponsive to their concerns, had been important backers of the Hosokawa coalition. Within months, the new coalition introduced a products liability bill that was later adopted and went into force at the start of 1994.¹²⁷

The New PL Law has "Americanized" Japanese products liability law in important respects. Most importantly, Article 3 of the New PL Law introduces the notion of strict liability into Japanese law.¹²⁸ As in American products liability law, manufacturers are liable for damages caused by their defective products, regardless of fault. Article 2(3) expands the definition of manufacturer to include any party involved in the process of manufacturing or importing a product.¹²⁹ However, other aspects of the New PL Law maintain the status quo of Japanese products liability law and were disappointments for consumer activists. For instance, the definition of defect under the New PL Law in Article 2(2) will allow courts to continue to apportion fault based on their analysis of comparative negligence.¹³⁰ Article 4 provides exemptions from liability under the law for component manufacturers and, more generally, for "developmental risks."¹³¹ Article 5 provides for time limitations on claims.¹³² The New PL Law is silent on the issue of the burden of proof necessary for establishing causation, and it includes no special provisions regarding pre-trial discovery for products liability suits. Finally, Article 6 provides that where it is silent on an issue, such as damage awards or joint-and-several li-

attorneys concentrating in products liability and personal injury have no presence whatsoever in Japan (though they remain eager, of course, to sue these manufactures and their affiliates in the United States). While American law firms have helped stimulate reform of the legal profession in Japan more generally and may in the future stimulate the emergence of a U.S. style plaintiffs' bar, these reforms have yet to give rise to a significant increase in the number of domestically trained plaintiffs lawyers.

¹²⁷ *Id.* at 153-54.

¹²⁸ Madden, *supra* note 124, at 314-18.

¹²⁹ *Id.* at 303, 312-14.

¹³⁰ *Id.* at 308-11.

¹³¹ *Id.* at 319-21. See also Easton, *supra* note 53 (suggesting the same).

¹³² Madden, *supra* note 124, at 323-25.

ability, existing tort and contract provisions of the Civil Code shall apply.¹³³

It is still too early to assess the impact of the New PL Law; however, we can examine some initial evidence concerning the impact of the law on consumer and business behavior. As for consumers, while the New PL Law has not stimulated a flood of litigation, it has stimulated a dramatic increase in public interest in products liability and has led to an increase in the number of products liability suits filed.¹³⁴ Debates surrounding the New PL Law attracted extensive media attention and books on products liability became the best selling law books in Japanese history.¹³⁵ Among the cases brought thus far under the New PL Law are ones involving a defective tea container, a defective condom, E. coli bacteria in school lunches, defective boat equipment, computer error, and a defective jelly.¹³⁶ Plaintiffs have made claims for medical expenses, lost earnings, mental suffering, and wrongful death.¹³⁷ The first case decided under the New PL Law found McDonald's guilty for selling defective orange juice to a Japanese woman. A Nagoya court ruled in favor of the plaintiff, despite the fact that the exact defect in the orange juice was never discovered. The court regarded the fact that the woman had vomited blood shortly after drinking the orange juice as sufficient evidence to conclude the juice had been defective.¹³⁸ Another prominent, pending case involves litigation against a Japanese subsidiary of Philip Morris and Japan Tobacco.¹³⁹

Many Japanese manufacturers have reacted to the New PL Law by improving product safety and taking other steps to forestall products liability suits. Manufacturers in sectors including toys, food, electronics, alcoholic beverages, and automobiles have im-

¹³³ *Id.* at 325-27.

¹³⁴ Luke Nottage, *The Present and Future of Product Liability Dispute Resolution in Japan*, 27 WM. MITCHELL L. REV. 215, 216-17 (2000); Rothenberg, *supra* note 117, at 505-07.

¹³⁵ Cohen, *supra* note 117, at 178; Rothenberg, *supra* note 117, at 506.

¹³⁶ For a summary of cases filed under the PL law, see Luke Nottage, *Reported Case Filings under the PL Law*, at <http://www.law.kyushu-u.ac.jp/~luke/pllawcases.html> (last updated May 8, 2001).

¹³⁷ *Id.*

¹³⁸ Rothenberg, *supra* note 117, at 489-90. The court's approach may be analogized to the doctrine of *res ipsa loquitur* ("the thing speaks for itself") as applied to prove causation in negligence cases in the United States.

¹³⁹ *Id.* at 488-89.

proved their product instructions and safety warnings in reaction to the enactment of the New PL Law, including employing lawyers to review such warnings.¹⁴⁰ After the adoption of the New PL Law, purchases of products liability insurance coverage by Japanese manufacturers increased dramatically.¹⁴¹ A number of recent settlements indicate that manufacturers are settling products liability claims they would have previously dismissed, because of the lowered burden of proof necessary under the New PL Law's strict liability provisions.¹⁴² Finally, weary of being burdened with the liability for defective products, Japanese retailers are demanding more detailed contracts with manufacturers and consumers.¹⁴³ Where written contracts between manufacturers and retailers were either vague or non-existent in the past, in the wake of the New PL Law retailers are increasingly demanding that manufacturers sign contracts assuming liability for products liability claims.¹⁴⁴ Similarly, some retailers have begun requesting that consumers sign waivers, protecting them against products liability claims.¹⁴⁵

While products liability law in Japan still differs in important respects from American products liability law, the former has certainly converged on the latter. Provisions of the New PL Law and the reactions of producers and consumers parallel central aspects of American products liability law. Above all, the adoption of strict liability brings the Japanese law closer in line with American law. Increased concern on the part of manufacturers regarding product labeling, liability insurance and the attention to liability concerns in commercial contracts all reflect American practices. Finally, increased consumer interest in products liability and increased filings of complaints certainly suggest a move toward a more litigious approach to regulating product safety.

¹⁴⁰ Rothenberg, *supra* note 117, at 496-501; Cohen, *supra* note 117, at 164-66. In fact, as a summer associate at a Japanese law firm around the time of the implementation of the PL Law, one of the authors was charged with reviewing a Japanese safety warning for Japanese consumers from an "American" perspective.

¹⁴¹ Rothenberg, *supra* note 117, at 502-03. See also Jathon Sapsford, *Japanese Firms Brace for First Laws on Consumer Rights, and Insurers Gain*, WALL ST. J., Mar. 8, 1994, at A13 (explaining that prior to the passage of the law, corporate orders for insurance coverage were rising).

¹⁴² Cohen, *supra* note 117, at 162-63; Rothenberg, *supra* note 117, at 503-05.

¹⁴³ Cohen, *supra* note 117, at 169-72.

¹⁴⁴ *Id.* at 171.

¹⁴⁵ *Id.* at 172.

5. CONCLUSION

Japanese legal style is becoming Americanized in important respects. Economic liberalization in the 1990s coupled with increasing political competition has led to significant changes in regulatory style. In areas ranging from administrative procedures, to the regulation of non-profit organizations, to securities regulation, to products liability, reforms have aimed to decrease bureaucratic discretion, promote disclosure, increase transparency in regulation, and arm individuals with a greater ability to exercise legal rights.

Economic liberalization has opened the Japanese economy to new entrants, both foreign and domestic, and reduced bureaucratic involvement in the economy. As the economy liberalized, it became clear that the traditional approach to regulation was lacking in many ways. Liberalization created pressure to re-regulate in a manner more suited to a liberalized environment, and encouraged policymakers to rethink their approach to regulating such diverse areas of law as financial services and products liability. As part of economic liberalization, the legal profession itself was also gradually liberalized. The entry and increasing size of these law firms has provided American models for regulation in a liberalized environment as well as posed a direct competitive threat to the Japanese legal establishment, helping to spark the restructuring of the Japanese legal profession itself.

Economic liberalization alone, however, is only part of the explanation. Without the fragmentation of the Japanese political landscape, particularly evident in the increasing political competition following the weakening of the LDP, Americanization would be limited primarily to areas of the economy most impacted by deregulation. The fragmentation of the Japanese political landscape has helped give voice to a more diverse group of interests, forcing politicians to pay attention to diffuse interests such as consumer or investor protection.

The convergence of political fragmentation and economic liberalization has led to significant changes in regulatory style along American lines. In essence, Japan is in the process of replacing the waning power of bureaucrats to regulate Japanese affairs in informal consultation with a business and political elite. In its place, the legal landscape is being gradually but fundamentally altered to empower a broader range of interests beyond this elite to play a greater role in determining their own affairs. As we have seen, power has been shifted from bureaucrats and businesses to con-

sumers through the provision of strict liability, from corporate insiders to shareholders through the creation of a cause of action for insider trading, and from entrenched management to shareholders through facilitating the use of derivative suit.

The phenomenon is evident in other areas as well. For example, until 2000, the Japanese Fair Trade Commission had the exclusive authority to enforce the Antimonopoly Act and private parties have been unable to seek court injunctions to prevent violations of the Antimonopoly Act. An amendment in 2000 allowed private parties injured by violation of the Antimonopoly Act to directly seek court orders to prevent illegal conduct under the Act.¹⁴⁶ Empowering individuals to exercise such rights is being realized through reform of the judicial system itself to facilitate litigation and increases in the number of legal professionals through which those rights may be exercised.¹⁴⁷

The hoarding of information within closed, personal networks within the bureaucracy (*jimmyaku*) and those with close access to it is also being reduced, through the emphasis of transparency and disclosure. Strict liability encourages detailed warnings; a regulatory shift toward disclosure is extending the range and quality of financial information from corporate insiders to the investing public. Also, government secrets are being made available to the public through the Freedom of Information Act and other measures such as the Administrative Procedures Act. As a result, investors, consumers, and citizens have access to information previously only available to a business, political, and bureaucratic elite. More generally, the discretionary power of the bureaucracy has been circumscribed through the NPO Act, reorganization of the bureaucracy, and, at least hortatively, the Public Ethics Act.

This Americanization, however, should not be overemphasized. Japanese style securities regulation, litigation, and corporate governance are undoubtedly much more like the United States than fifteen years ago, but substantial differences remain. Litigation has increased, but not to anywhere near the "adversarial legalism" of the United States. Statutory changes create incentives for behavioral changes, but where constraints on institutional ca-

¹⁴⁶ In addition, the amendment extended strict liability to trade associations (*jigyosha dantai*) for compensation for damages resulting from illegal acts.

¹⁴⁷ On the politics of judicial reform, see Setsuo Miyazawa, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, 2 *ASIAN-PAC. L. & POL'Y J.* 89 (2001), at <http://www.Hawaii.edu/aplpi>.

capacity exist, fundamental change in practice will take time to more clearly manifest itself. Most notably, the pace of Americanization is limited by access to lawyers, and it will take many years before increases in the number of legal professionals result in a sufficient number of experienced lawyers that a broader range of interests can avail themselves of formal legal representation.¹⁴⁸ With the forces of economic liberalization and political fragmentation in Japan being too powerful to ignore, however, the Americanization of the Japanese legal system will only continue.

¹⁴⁸ In the interim, it may be that, as some observers have suggested, Japan, particularly in the business area, will increasingly rely on U.S. professionals to fill the gap on institutional inadequacies. The practice of accounting in Japan has already gone this way, while the legal market is showing signs of the same.

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