

ADVERSARIAL LEGALISM: TAMED OR STILL WILD?

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If one takes a long enough view, particular social problems seem to diminish in intensity. From satellite height, the pollution near the mouth of a river is but a blemish on the vastness of the ocean, and one may even take comfort that the stain is somewhat paler than it was a few decades ago, when raw sewage was discharged into the estuary. In *Taming Adversarial Legalism*,¹ Christopher Busch, David Kirp, and Daniel Schoenholz (“BKS”) look back, as if from a great height, on the costs and delays which adversarial legalism imposed on the Port of Oakland in the late 1980s and early 1990s. What matters most, their article implies, is that it all worked out in the end. Adversarial legalism subsided. The harbor eventually was dredged. The policy community learned lessons and took measures that may reduce the amount of legal conflict concerning port expansion in the future. BKS conclude that we need not worry overmuch about the costs, delays, and policy distortions that flow from adversarial legalism in general. In the long run, they argue, the legal pushing and hauling that is characteristic of the American system for implementing public policy generates new political solutions and is more responsive than the hypothetical corporatist system to which I referred in my 1991 article, *Adversarial Legalism and American Government*.²

BKS’s *Taming Adversarial Legalism* is an engrossing case study of how legal deadlocks are often broken. A complex, pluralistic political system provides multiple channels through which complaints can be made, new alliances formed, political leaders moved to action, and

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1. Christopher Busch et al., *Taming Adversarial Legalism: The Port of Oakland’s Dredging Saga Revisited*, 2 NYU J. LEGIS. & PUB. POL’Y 179 (1999) [hereinafter BKS].

2. Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. POL’Y ANALYSIS & MGMT. 369 (1991) [hereinafter Kagan, *Adversarial Legalism and American Government*]. A somewhat revised version of the article is published in THE NEW POLITICS OF PUBLIC POLICY 88 (Marc K. Landy & Martin A. Levin eds., 1995).

creative solutions developed. BKS remind us of the extraordinary resilience of the American political system.

At the same time, BKS address a fundamental issue about the American propensity to transform political conflicts into formal legal contestation. This propensity, as I argued in my 1991 article, has both good and bad effects. As I suggested, it is important not only to celebrate adversarial legalism's shining victories but also to look closely at its shadows—costliness, cumbersomeness, and unpredictability—that are often a source of injustice and inefficiency.³ But BKS, based on their update of the Oakland Harbor story, suggest that adversarial legalism's costs are neither great nor enduring, and that it contributes to a healthy policy-making system. In particular, they argue, no significant change is needed in the laws and institutional arrangements that promote adversarial legalism.⁴ I believe that their analysis glosses over the costs that adversarial legalism imposed on the Oakland community too lightly, fails to deal adequately with the causes and consequences of those adverse effects, and overestimates the extent to which adversarial legalism has been “tamed,” both in seaport dredging and in other areas of American public policy.

Part I of this essay will take yet another sweep through Oakland Harbor, indicating where I believe BKS's account is misleading or insufficiently probing. Part II will review their critique of my discussion of institutional alternatives to adversarial legalism. Since BKS misstate or misinterpret several aspects of my 1991 article, I must at several points try to set the record straight.

I

ADVERSARIAL LEGALISM AND OAKLAND HARBOR

A. *What is “Adversarial Legalism”?*

My starting point in *Adversarial Legalism and American Government* was a review of an accumulating body of studies that compare how the United States and other economically advanced democracies deal with particular social problems. These studies examined one social problem after another: crime control and criminal prosecution,⁵

3. See Kagan, *Adversarial Legalism and American Government*, *supra* note 2, at 370.

4. See BKS, *supra* note 1, at 206.

5. See FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* (1986); John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979).

compensating injured people,⁶ regulation of pollution and chemicals,⁷ ensuring equal educational opportunities,⁸ deterring malpractice by physicians,⁹ selecting labor union representatives,¹⁰ holding corporate managers accountable,¹¹ regulating workplace safety,¹² cleaning up toxic waste sites,¹³ and more. The results of all of these studies showed that the U.S. system for implementing public policies and resolving related disputes generally entails: (1) more complex, prescriptive legal rules; (2) more formal, adversarial procedures for resolving policy or scientific disputes; (3) more costly forms of legal contestation; (4) stronger, more punitive legal sanctions; (5) more frequent judicial review of, and intervention in, administrative decisions and processes; (6) more political controversy concerning legal rules and institutions; (7) more politically fragmented, less closely coordinated decision-making systems; and (8) more legal uncertainty and malleability.¹⁴

I used the term "adversarial legalism" to encapsulate at least some of the above-referenced legal propensities. Adversarial legalism can be distinguished, along one dimension, from non-legalistic modes of policy implementation and dispute resolution, such as those that rely on *expert* or *political* judgment (the latter would include bargain-

6. See Gary T. Schwartz, *Product Liability and Medical Malpractice in Comparative Context*, in THE LIABILITY MAZE 28, 29 (Peter Huber & Robert Litan eds., 1991); Tako Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 LAW & SOC'Y REV. 651 (1990).

7. See RONALD BRICKMAN ET AL., CONTROLLING CHEMICALS: THE POLITICS OF REGULATION IN EUROPE AND THE UNITED STATES 314 (1985); DAVID VOGEL, NATIONAL STYLES OF REGULATION: ENVIRONMENTAL POLICY IN GREAT BRITAIN AND THE UNITED STATES 146 (1986); see also 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).

8. See DAVID L. KIRP, DOING GOOD BY DOING LITTLE: RACE AND SCHOOLING IN BRITAIN (1979); David L. Kirp, *Professionalization as a Policy Choice*, 34 WORLD POL. 137 (1982).

9. See Lois Quam et al., *Medical Malpractice in Perspective*, 294 BRIT. MED. J. 1529, 1597 (1987).

10. See Derek C. Bok, *Reflections on the Distinctive Character of American Labor Law*, 84 HARV. L. REV. 1394, 1449 (1971).

11. See JONATHAN P. CHARKHAM, KEEPING GOOD COMPANY: A STUDY OF CORPORATE GOVERNANCE IN FIVE COUNTRIES (1994).

12. See JOHN BRAITHWAITE, TO PUNISH OR PERSUADE: ENFORCEMENT OF COAL MINE SAFETY (1985); STEVEN KELMAN, REGULATING AMERICA, REGULATING SWEDEN: A COMPARATIVE STUDY OF OCCUPATIONAL SAFETY AND HEALTH POLICY (1981).

13. See Thomas W. Church & Robert T. Nakamura, *Beyond Superfund: Hazardous Waste Cleanup in Europe and the United States*, 7 GEO. INT'L ENVTL. L. REV. 15, 56 (1994).

14. See Kagan, *Adversarial Legalism and American Government*, *supra* note 2, at 372.

ing among government officials and interest group representatives in corporatist bodies).¹⁵ Secondly, adversarial legalism can be distinguished from formal legal methods that are more hierarchically organized and operated, which I labeled *bureaucratic legalism*. Most European legal systems can be viewed as examples of bureaucratic legalism. They emphasize hierarchical, bureaucratic recruitment and supervision of legal decision makers, a smaller role for aggressive legal advocacy than in the U.S. legal system, judicial domination (rather than lawyer domination) of the adjudicative process, and a restricted role for judicial policy making.¹⁶ In contrast to these more hierarchical modes of policy implementation and dispute resolution, adversarial legalism emphasizes:

- * formal legal contestation—competing interests and disputants readily invoke legal rights, duties, and procedural requirements, backed by recourse to formal law enforcement, strong legal penalties, litigation, and/or judicial review;
- * litigant activism—formal legal contestation of a particular kind: the assertion of claims and the gathering and submission of evidence is dominated not by judges or governmental officials, but by disputing parties or interests, acting primarily through lawyers;
- * fragmented authority—multiple centers of decision-making authority in which hierarchical control is relatively weak.

As a consequence of these defining features, adversarial legalism also entails two further characteristics noted in the comparative studies:

- * costliness—litigant-controlled, adversarial legal decision making tends to be particularly complex, protracted and costly; and
- * legal uncertainty—both the fragmentation of political and legal authority and the pervasiveness of adversarial advocacy render official legal norms and decisions relatively malleable and variable.

In a policy area structured by adversarial legalism, full-scale legal contestation may not always occur. Its high costs and uncertainties impel most disputants to negotiate a formal plea bargain or settlement, and even the threat of litigation will often induce a government body or private firm to take steps to avoid legal trouble. Thus, it is useful to regard adversarial legalism as encompassing both (1) a set of legal structures, institutions, and rules that facilitate adversarial

15. *See id.* at 372-74.

16. *See id.* at 374.

legal contestation, and (2) the day-to-day practice of adversarial legal contestation, which varies in frequency.¹⁷

Although one would not learn it from reading BKS, I pointed out in my 1991 article that American adversarial legalism has many virtues:

Adversarial legalism encourages and facilitates the articulation of new justice-claims and ideas. Ready recourse to a politically responsive judiciary enables dissenters to attack the official dogma of government officials, corporate toxicologists, medical experts, highway planners, and penologists. Repeatedly, adversarial legalism has enabled political underdogs to demand just rights from the government, first and foremost in the case of the civil rights movement, but also in the quest for more equitable electoral districts, more humane conditions in prisons and mental institutions, and more compassionate welfare administration.¹⁸

On the other hand, I argued, adversarial legalism is a double-edged sword that sometimes produces just and socially valuable outcomes and other times produces unjust and socially harmful results:

An equal opportunity weapon, it can be invoked by the misguided, the mendacious, and the malevolent as well as by the mistreated. Its processes enable contending parties to use the extraordinary costs and delays of adversarial litigation in a purely tactical way, to extort unjustified concessions from the other side.¹⁹

After emphasizing (1) the Janus-faced quality of adversarial legalism, and (2) the studies showing that other economically advanced nations address their social problems with less legal (and less costly) conflict than the U.S., I suggested a particular line of inquiry: What legal and institutional changes might retain adversarial legalism's political responsiveness while curtailing its costly and often unjust excesses? My stated purpose in recounting the Oakland Harbor dredging story was to contribute to such an inquiry. Analyzing that story, I thought, would not only illustrate some of the negative aspects of adversarial legalism but would also illuminate the *causes* of those negative impacts, and stimulate thought about alternative ways of ensuring accountability.

17. See Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 L. & SOC. INQUIRY 1, 6 (1994).

18. Kagan, *Adversarial Legalism and American Government*, *supra* note 2, at 375.

19. *Id.*

B. *Trying to Dredge Oakland's Harbor*

BKS provide a brief sketch of the Oakland dredging saga and refer to the punishing costs of the extended legal and regulatory process. But by portraying the story as having a happy ending, they omit some of its more disturbing aspects. To fully understand and evaluate adversarial legalism, however, it is important to take a hard look at those disturbing features.²⁰

The Port of Oakland ("Port"), in San Francisco Bay, is one of America's leading container ports, and is one of the pioneers in developing intermodal cargo-handling technologies.²¹ Thus, it has been a vital participant in a transportation revolution that has dramatically increased the efficiency and reliability of trans-oceanic, trans-continental cargo movements (a key element in a more globalized economy). In the fast-paced, more competitive world of intermodal transport, ports must compete for business. Hence, Port of Oakland officials, as BKS point out, formulated plans well ahead of time to dredge ship channels to accommodate larger, deeper-draft container-ships.²² Failure to deepen the harbor on time would have been a very serious matter for the Port and the various communities that depend on the steady flow of containerized cargo.

20. My account of the Oakland dredging story, and of the relevant law, is drawn from my articles: *Adversarial Legalism and American Government*, *supra* note 2; *The Dredging Dilemma: Economic Development and Environmental Protection in Oakland Harbor*, 19 *COASTAL MGMT.* 313 (1991) [hereinafter Kagan, *The Dredging Dilemma*]; and *Dredging Oakland Harbor: Implications for Ocean Governance*, 23 *OCEAN & COASTAL MGMT.* 49 (1994) [hereinafter Kagan, *Dredging Oakland Harbor*]. These articles draw on the documentary record, contemporary accounts in *Pacific Shipper* (a weekly trade magazine), and on scores of interviews I conducted with shipping company officials, EPA and Army Corps of Engineers officials, representatives of California environmental agencies, representatives of environmental advocacy organizations, and Port of Oakland officials. For developments since 1993, I have relied primarily on the account in BKS.

21. "Intermodal cargo handling" refers to a complex of technological developments in shipping, whereby cargo is loaded into uniformly sized, locked forty foot long containers. The containers are then moved, under a single bill of lading, from one mode of transportation to another—e.g., truck to seaport storage yard to trans-oceanic ship to receiving port to train to rail yard to truck to customer's loading dock. The intermodal revolution, beginning in the early 1970s, included the development of special containerships, cranes, and trains, and was abetted by the development of electronic data interchange ("EDI") systems that simplify the tracking of containers and cargo. For an account of the enormous savings made possible by the intermodal revolution and an analysis of the political and legal developments that facilitated it, see ROBERT A. KAGAN, *PATTERNS OF PORT DEVELOPMENT: GOVERNMENT, INTERMODAL TRANSPORTATION, AND INNOVATION IN THE UNITED STATES, CHINA, AND HONG KONG* (1990).

22. See BKS, *supra* note 1, at 182.

In 1987, Congress finally appropriated funds for the long-planned harbor-deepening project.²³ Yet, for the ensuing *five years*, legal disputes over where dredged harbor sands should be dumped kept the dredging equipment idle. Beginning in 1988, larger ships could not call at Oakland except at high tide.²⁴ Shipping lines gradually curtailed their use of the Port, which started losing money.²⁵ Meanwhile, regulatory officials, Port personnel, scientists, and lawyers debated the adequacy of sediment samples and the reliability of environmental impact models, arguing first in one regulatory forum or court, then in another.²⁶ A partial dredging operation, dubbed “Phase I,” finally was permitted in late 1992.²⁷ It was not until 1995, *eight years* after congressional funding was provided, that the harbor was dredged to the planned depth, enabling modern containerships to visit the Port fully loaded.²⁸

The extraordinary delays in the Oakland Harbor dredging project stemmed from the design of the legal institutions that regulated the dredging process and from characteristics of the governing laws themselves. As in many areas of public policy in the U.S., there was plenty of law, but no legal clarity or finality. Year after year, the dense, complicated body of laws and regulations generated only legal uncertainty. In the course of its efforts to win legal approval for dredging and disposal, the Port was legally obliged to seek approvals, *inter alia*, from the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, the San Francisco Bay Conservation and Development Commission, the California Coastal Zone Management Commission, two California Regional Water Boards, the state Lands Commission, the California Department of Fish and Game, two county water districts, and the National Oceanic and Atmospheric Administration—each of which was guided by a different statute and could be challenged in court for failing to apply that statute properly.²⁹

The result of this fragmented regulatory structure was legal irresolution. When one government agency found a dredging disposal site legally acceptable, another would disagree, invoking a separate regu-

23. See Kagan, *The Dredging Dilemma*, *supra* note 20, at 319.

24. See *id.* at 322.

25. See Kagan, *Dredging Oakland Harbor*, *supra* note 20, at 53.

26. See Kagan, *The Dredging Dilemma*, *supra* note 20, at 320-24.

27. See Kagan, *Dredging Oakland Harbor*, *supra* note 20, at 53.

28. See BKS, *supra* note 1, at 183, 195.

29. See BKS, *supra* note 1, at 207 n.177, where they list fourteen different agency permits or formal approvals that the Port and/or the Corps of Engineers were legally required to obtain.

latory statute. For example, after the Port convened a conference that included all major agencies, environmental groups, and the Pacific Coast Federation of Fishermen, the participants agreed upon a sediment disposal site in the ocean, a few miles off the Pacific coast.³⁰ In a regime of adversarial legalism, however, agreements are always vulnerable to challenge. The Half Moon Bay Fishermen's Association brought suit in federal court, challenging the environmental impact statement that had endorsed the ocean site.³¹ That court decided the plan was acceptable. But in an institutionally fragmented regime, legal finality is elusive. The Half Moon Bay fishermen then filed suit in a state court.³² This time a judge blocked the ocean disposal, holding that the California Coastal Commission (which previously had declined to comment on grounds that the matter was not within its purview)³³ had not made findings on how the plan might affect coastal resources.³⁴

Instead, Port officials determined to transport the dredged sediments to the Sacramento River Delta, where local officials wanted to reinforce levees.³⁵ It took almost a full year before the regional Water Quality Control Board approved *that* plan.³⁶ It then took another full year before a court rejected a downstream water district's lawsuit challenging the Delta disposal plan.³⁷ By that time, the Port had concluded that the conditions placed on the Delta disposal plan had made it prohibitively costly (\$21 per cubic yard, compared to \$2 to \$4.50 per cubic yard for sites in San Francisco Bay or the ocean),³⁸ so Port officials again sought permission to use a San Francisco Bay site to dump the sediments from a "Phase I" partial harbor deepening.³⁹ Final regulatory approval of that plan took another two years.⁴⁰ It took three more years to gain regulatory approval for disposal of sediments from the full "Phase II" dredging plan.⁴¹

30. *See id.* at 183.

31. *See* Kagan, *The Dredging Dilemma*, *supra* note 20, at 322.

32. *See id.*

33. *See id.* at 337 n.26.

34. *See id.* at 322.

35. *See id.* at 322-23.

36. *See id.* at 323.

37. The Central Valley Regional Water Quality Board, the state water board, and the superior court all had concluded that the sediments could be used to reinforce levees without serious risk to water quality. *See id.* at 338 n.35.

38. *See* Kagan, *Dredging Oakland Harbor*, *supra* note 20, at 52, 62.

39. *See id.* at 52.

40. *See id.* at 53.

41. *See* BKS, *supra* note 1, at 192-95.

It is important to emphasize that throughout this cascade of procedures, no agency or court ever found that the dredging and disposal plans actually posed significant environmental hazards. From a relatively early date, the Port's dredging plans stipulated that seriously contaminated parts of the dredged material would be segregated, taken to a special upland or aquatic site, buried, and sealed.⁴² Moreover, all major participants agreed that the Port was a vital facility and that it was very desirable to deepen the harbor.⁴³ But the law did not empower any single agency or any court to authoritatively designate an environmentally acceptable, economically sensible disposal alternative. The delaying decisions and lawsuits were based wholly on arguments that uncertainty remained about *possible* environmental impacts, that more research was required, that already compendious environmental impact statements should have been improved, or that further regulatory approvals should have been sought. In late 1992, when California regulatory agencies approved a Phase I partial dredging operation, they authorized the Port to dump the mud in San Francisco Bay near Alcatraz Island⁴⁴—precisely the location the first plan and environmental impact analysis had proposed five years earlier. In the interim, the additional sampling, testing, lawyering, and impact analysis costs incurred by the Port and the Corps of Engineers reached an amount equal to \$8 a cubic yard of dredged Phase I sediment—about triple the cost of the actual dredging, barging, and disposal operation.⁴⁵

C. *The Costs of Adversarial Legalism*

What are we to make of stories like the Oakland Harbor saga? We cannot dismiss them as aberrant. In 1989, a researcher found 123 reported cases in the federal courts alone concerning dredging and dis-

42. See Kagan, *Dredging Oakland Harbor*, *supra* note 20, at 53.

43. There was little doubt that deepening Oakland's harbor would be economically desirable, both for the region, where port activity is a vital source of economic sustenance, and for the nation as a whole, which profits from more efficient infrastructure and lower transport costs. See U.S. ARMY CORPS OF ENGINEERS, DESIGN MEMORANDUM AND ENVIRONMENTAL ASSESSMENT, FINAL OAKLAND INNER HARBOR 38-FOOT SEPARABLE ELEMENT OF THE OAKLAND HARBOR NAVIGATION IMPROVEMENT PROJECT (1992) [hereinafter CORPS MEMORANDUM]. If Oakland should become incapable of handling the most modern vessels, the only major ports on the entire West Coast would be in Los Angeles and in Puget Sound, reducing the competition that enhances flexibility, efficiency, and reliability. See Kagan, *Dredging Oakland Harbor*, *supra* note 20, at 51-52.

44. See BKS, *supra* note 1, at 192.

45. See CORPS MEMORANDUM, *supra* note 43.

posal issues.⁴⁶ In the subsequent decade, according to a Lexis search, there were 108 reported court cases that dealt with “dredging and environmental impact.” A 1985 National Research Council report sharply criticized the regulatory and judicial processes that govern the dredging process as “complex, cumbersome, unpredictable, and fragmented,”⁴⁷ adversely affecting modernization of the nation’s shipping system. The mere threat of lengthy litigation, as the report noted, often compelled ports to agree to extremely costly “mitigation” measures, simply to avoid further delays:

Objectors do not necessarily have to win in the courts If the courts provide a vehicle for substantial delay and that delay is costly to the proposers of the project, the threat of going to court becomes a powerful negotiating tool in the hand of objectors Few things struck the committee with more force than the frequency with which participants in the dredging decision making system either identified the courts as vehicles for slowing down the process or mentioned concerns about possible court action.⁴⁸

While BKS focus only on dredging, my primary point in the 1991 article was that the kind of adversarial legalism seen in the Oakland case can be seen as emblematic of all manner of regulatory disputes in the U.S., where lawsuits and multi-agency reviews often cause massive delays or costly project redesigns in the construction of waste disposal sites,⁴⁹ highways,⁵⁰ factories,⁵¹ and housing develop-

46. See Scott T. McCreary, *Resolving Science-Intensive Public Policy Disputes: Lessons From the New York Bight Initiative*, at 43 (1989) (unpublished Ph.D. dissertation, M.I.T.) (on file with *New York University Journal of Legislation and Public Policy*).

47. MARINE BD., NAT’L RESEARCH COUNCIL, *DREDGING COASTAL PORTS: AN ASSESSMENT OF THE ISSUES* 77 (1985).

48. *Id.* at 89-90. The Council report further stated:

In sum, the availability of the courts reinforces a widely noted characteristic of the regulatory decision making process in the United States. That is, that opponents and objectors deal with a system where the processes are weighted in their favor. Simply stated, for anything to happen in this regulatory decision making system, all significant participants have to be in agreement at least to the point of not organizing in opposition. Alternatively, to keep things from happening, only one significant participant has to be vigorously opposed.

Id. at 90.

49. See, e.g., MICHAEL O’HARE ET AL., *FACILITY SITING AND PUBLIC OPPOSITION* 49 (1983) (discussing how opponents to waste disposal sites use threat of litigation to delay projects or force adoption of environmental protection standards more stringent than those imposed by law).

50. See Robert Detlefsen, *Government Consent Decrees and the Paradox of “Consent”*: A Critical Case Study, 18 JUST. SYS. J. 13, 16-17 (1995) (describing process undertaken before Century Freeway could be built in Los Angeles).

ments.⁵² Sometimes, to be sure, such legal challenges force highly desirable design changes, or actions that mitigate serious environmental impacts. Sometimes, particularly when affected communities are poor and ill-represented, legal challenges that ought to be made are not.⁵³ But often the Oakland Harbor pattern recurs. The legal process itself, by virtue of its complexity, uncertainty, fragmentation, and characteristic difficulty in reaching closure, becomes a mechanism not merely for expressing political voice, but also for extracting ad hoc policy changes and side payments. As in the Oakland Harbor case, the process often compels project proponents to accept extremely expensive project modifications, not because of a definitive, rationally justified legal or policy decision, but simply to avoid longer legal delays.⁵⁴

This sometimes extortionate pattern reflects a basic logic: when legal transaction costs (including the opportunity costs that flow from legal delay) are very large, the parties who are under the greatest time pressure often feel compelled to give up legal rights or defenses. As BKS quite correctly insist, one should not neglect the social benefits that flow from adversarial legalism when it works well. But neither should one, as BKS seem inclined to do, neglect the social and economic costs that often flow from the same legal arrangements and processes.

D. *Overcoming Mudlock—Why Did It Take So Long?*

BKS remind us that the Oakland deadlock did not last forever. Political pressures, including exhortations by a President seeking votes in California in 1992, eventually yielded funds for further studies and a compromise plan that resulted in implementation of the harbor dredging plan in 1995.⁵⁵ Therefore, BKS suggest, adversarial legalism is not an insuperable obstacle to good policy decisions; rather, it

51. See generally Lis Harris, *Banana Kelly's Toughest Fight*, THE NEW YORKER, July 24, 1995, at 32 (illustrating legal obstacles plaguing proposed paper mill in the South Bronx).

52. See Bernard J. Frieden, *The New Social Regulation Comes to Suburbia*, THE PUBLIC INTEREST, Spring 1979, at 15 (assessing effects of increased powers of regulatory officials in area of housing).

53. See Sheila Foster, *Justice From the Ground Up: Distributive Inequities, Grass-roots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 787 (1998) (noting that although waste facilities are disproportionately located in poor communities, only three federal suits alleging discrimination have ever been filed).

54. See Kagan, *The Dredging Dilemma*, *supra* note 20, at 327-28. See also case studies in sources cited *supra* notes 50-53.

55. See BKS, *supra* note 1, at 188-89, 191-95.

often stimulates a fuller political dialogue, negotiation, policy learning, and more “widely accepted and substantively sensible results.”⁵⁶ I do not contest that generalization; indeed, I concluded *Adversarial Legalism and American Government* by stating:

Deadlock sometimes generates institutional changes, designed to make progress on particular problems. Learning from the Port of Oakland’s experience, Port of Los Angeles officials work to build a multi-agency, multi-city political forum in which to negotiate port expansion plans. To avoid the delays of litigation, regulatory agencies constantly try new ways of forging consensus on particular regulatory standards and methods of implementation.⁵⁷

However, adversarial legalism is an extraordinarily costly and erratic way of generating political responsiveness and policy learning. To praise adversarial legalism for generating negotiations that seek to ward off litigation is something like praising World War II for stimulating creation of the United Nations. Less hyperbolically, to dismiss the costs of adversarial legalism because it sometimes, eventually, produces constructive solutions neglects the lesson of the cross-national comparative studies mentioned earlier. There are other, less costly and less erratic ways of soliciting participation, achieving responsiveness, and generating agreement.

Rotterdam, Europe’s largest seaport, must deal with far larger volumes of far more seriously contaminated dredged material. The Netherlands, like the United States, adheres to the London Dumping Convention (preventing ocean disposal of toxics).⁵⁸ Moreover, there is a strong “green movement” that pushes officials to comply with national environmental laws, like those in the United States, that call for detailed impact analyses and detailed mitigation plans.⁵⁹ Land use in Holland is regulated much more tightly than in the United States. As in the United States, a pluralistic structure assures both local and environmental interests a voice in decisions about disposal of dredged materials.⁶⁰ Few would dispute the assertion that the Port of Rotterdam has dealt with its massive dredging and disposal problems in an environmentally responsible manner. It has, however, done so far more expeditiously than the Port of Oakland, and without resource-draining, dispiriting adversarial litigation.⁶¹ The Rotterdam experi-

56. *Id.* at 181.

57. Kagan, *Adversarial Legalism and American Government*, *supra* note 2, at 399.

58. *See* Kagan, *The Dredging Dilemma*, *supra* note 20, at 331.

59. *See id.*

60. *See id.*

61. *See* Kenneth Hanf & Cor Smits, Maintenance Dredging in the Port of Rotterdam: Trading Off Environmental Quality and Economic Development (June 26-29,

ence suggests that the deadlock in Oakland was not inherent in the task. The deadlock stemmed from a particular institutional structure, characterized by fragmented authority, complex and constrictive legal rules, wide access to litigation, and a high risk of judicial reversal of administrative decisions.

In BKS's account of the Oakland Harbor case, democratic politics and cooperative planning put an end to adversarial legalism. Legal disputes and the delays caused by the regulatory structure, BKS argue, had a positive function: they pushed the problem onto the political agenda, forcing government agencies, environmental groups, and the Port of Oakland to devise new solutions.⁶² The politicians, to use the words of President Clinton, told the regulatory agencies "to get on with it."⁶³ The relevant agencies and interest groups got together and forged a creative and satisfactory compromise.⁶⁴ From a distanced perspective, that is a comforting story, in which adversarial legalism actually precipitates broader democratic solutions and more informed expert judgment. But if the camera zooms in more closely, the story looks less rosy.

The positive view of adversarial legalism's role in generating a solution can be maintained only if one sidesteps the question of why it took so long for the politicians and experts to reach consensus, and only if one turns a blind eye to the costs of both the process and the outcome. For the five years that preceded President Clinton's 1993 exhortation, democratic politics and expert judgment were hamstrung by adversarial legalism. Local and state politicians were unable to accelerate the slowly grinding wheels of the legal and regulatory processes, even as costs and complaints mounted. Agencies, experts, and interest groups which sought to forge compromises found their plans delayed by court challenges brought by organizations that were not interested in compromise. Shipping lines using Oakland sustained millions of dollars of extra operating costs.⁶⁵ Delays experienced by ships attempting to reach port rippled across the country, disrupting

1991) (paper presented at the joint meeting of the Law and Society Association and the Research Committee on the Sociology of Law of the International Sociological Association, University of Amsterdam) (on file with *New York University Journal of Legislation and Public Policy*). The Port of Rotterdam barges some fourteen million cubic yards of sediment each year to a specially constructed containment area at the edge of the North Sea. See Kagan, *The Dredging Dilemma*, *supra* note 20, at 331.

62. See BKS, *supra* note 1, at 191-95.

63. See *id.* at 195.

64. See *id.*

65. See CORPS MEMORANDUM, *supra* note 43; Kagan, *The Dredging Dilemma*, *supra* note 20, at 337 n.34.

the schedules of containertrains and factories in the Midwest waiting for deliveries.⁶⁶ Oakland's loss of business to competing ports pushed the Port into the red, which in turn cut off a significant source of funding for city services.⁶⁷ Employment in local warehousing, stevedoring, trucking, ship-supply, and other port-related businesses was adversely affected.⁶⁸ A major shipping company (as BKS point out) scrapped plans to expand its terminals in Oakland, a blow from which the city has not recovered.⁶⁹

The Mayor of Oakland, the Governor of California, and the local congressional delegation, as well as the Port of Oakland and the Corps of Engineers (the lead agency for permitting dredging and disposal operations) could do very little about these mounting costs. BKS say that President Clinton's July 1993 speech "provided the catalyst needed to bring the dredging project to fruition," so that "the remaining hurdles were quickly cleared."⁷⁰ The catalyst, however, worked rather slowly, and the hurdling was really not very quick. It took almost two more years, according to BKS's account, before large-scale dredging began. Overall, it took many years for political representatives and professional experts to forge a solution because they were hedged out by a regulatory system organized around the ideals of adversarial legalism. These ideals include close constraint of administrative discretion by law, adversarial "checking" of expert judgment, and ready access to judicial review. In this model of governance, regulatory officials should not be free to use their own professional or political judgment in the decision-making process, and should not respond to the demands of elected political officials. Rather, their decisions should be guided by legally prescribed analytical and procedural standards, and should be reviewed by courts to make sure they follow the law.

In the dredging process, for example, the U.S. Army Corps of Engineers is given statutory authority to issue a dredging and disposal permit after concluding that a project passes both a cost-benefit and an environmental impact analysis.⁷¹ The Corps' authority to actually issue a permit, however, is subjected to numerous additional checks. An array of environmental agencies must first certify that the dredging plan is consistent with the environmental values and legal standards

66. See Kagan, *Dredging Oakland Harbor*, *supra* note 20, at 53.

67. See Kagan, *The Dredging Dilemma*, *supra* note 20, at 325.

68. See Kagan, *Dredging Oakland Harbor*, *supra* note 20, at 53.

69. See BKS, *supra* note 1, at 194.

70. *Id.* at 195.

71. See Kagan, *Adversarial Legalism and American Government*, *supra* note 2, at 380.

embodied in statutes enforced by those agencies.⁷² As in the adversarial model of the trial, this complex regulatory process presumes that the best solution will emerge from the adversarial clash of numerous agencies, each acting as an advocate for a particular set of environmental values. Furthermore, in the ethos of adversarial legalism, the judgment of *those* agencies must not go unchecked; hence, each agency's findings concerning a dredging plan can be challenged in court by organizations such as the Half Moon Bay Fishermen's Association and environmental advocacy groups.

Embedded in the governing laws, too, is the demand that regulatory agencies must base their decisions on scientifically validated estimates of all potential environmental and social consequences. For example, to approve an ocean disposal site for dredged material under section 102 of the Marine Protection, Research and Sanctuaries Act, the EPA, according to its regulations, must determine (and be prepared to defend in court):

(A) The need for the proposed dumping; (B) The effect of such dumping on human health and welfare, including economic, esthetic and recreational values; (C) The effect of such dumping on fisheries resources, plankton, fish, shellfish, wildlife, shore lines and beaches; (D) The effect of such dumping on marine ecosystems, particularly with respect to (i) the transfer, concentration and dispersion of such material and its byproducts through biological, physical and chemical processes, (ii) potential changes in marine ecosystem diversity, productivity, and stability, and (iii) species and community population dynamics; (E) The persistence and permanence of the effects of the dumping; (F) The effect of dumping particular volumes and concentrations of such materials; (G) Appropriate locations and methods of disposal or recycling . . . ; (H) The effect on alternate uses of oceans, such as scientific study, fishing, and other living resource exploitation, and nonliving resource exploitation.⁷³

All of these considerations, of course, are precisely what comprehensively rational, environmentally-sensitive decision making would require. But statutorily mandated comprehensive rationality takes a great deal of time and money. Limitations of time, funding, and data often impel agency analysts to make do with educated estimates or imperfect measures. Potential objectors, therefore, often can find some flaws in the agency's analysis, and the agency can never be fully sure that its analysis will pass muster if challenged in court. For the

72. *See id.* at 380-81.

73. Kagan, *The Dredging Dilemma*, *supra* note 20, at 318.

months or years the agency needs to make its analysis scientifically adequate and legally defensible, the regulatory process remains immune from political pressures—and hence, in the Oakland Harbor case, from political responsiveness as well.

For example, after the first ocean disposal plan was blocked by the Half Moon Bay Fishermen's suit in 1988, the EPA, having been stung by lawsuits challenging its approval of ocean disposal sites in both Northern and Southern California, said it could not approve a new site until it had funding for an extensive mapping of the ocean floor.⁷⁴ Such a mapping required an additional multi-million dollar congressional appropriation.⁷⁵ It took until late 1994 or early 1995 for EPA to get funding, complete the research and analysis, and approve a new site.⁷⁶ The Corps of Engineers operated under similar legal constraints. Until Congress changed the law in 1996, as noted by BKS, the Corps was obliged to reject more distant and costly disposal options, such as wetlands creation in the Delta, because it was legally required to select the least expensive environmentally acceptable method.⁷⁷

E. Assessing the Solution

In the Oakland Harbor story, as shown by BKS, legally induced paralysis finally ended because of a fortuitous confluence of political trends and because the costs imposed on the Port community by adversarial legalism eventually became too salient to ignore. But even the final division of the dredging spoils, which BKS seem to view as a triumph of democratic politics and the deliberations of the multi-agency, public-private Long Term Management Strategy ("LTMS") planning process, reflects the way in which adversarial legalism shapes outcomes.

Aside from the harbor floor sediments that were deemed too contaminated for aquatic disposal, the material dredged in 1995 was taken to two sites. Some four million cubic yards were barged fifty miles out to sea, to a very deep site beyond the edge of the Continental Shelf. This long series of barge trips, through busy shipping lanes, boosted the cost to \$7-\$9 per cubic yard, or some \$30 million—twice what it would have cost to use the much closer ocean site originally

74. See Kagan, *Dredging Oakland Harbor*, *supra* note 20, at 52-55.

75. See *id.* at 55.

76. See *id.* at 62-63.

77. See BKS, *supra* note 1, at 201-02.

approved by the EPA.⁷⁸ Still more expensive, however, was the use of approximately 2.8 million cubic yards to recreate a tidal wetland at the Sonoma Baylands in the lower Sacramento River Delta. Early estimates of the wetlands creation option were that it would cost at least \$15 per cubic yard, almost double the cost of deep ocean disposal.⁷⁹ But BKS indicate that the total cost of the Sonoma Baylands disposal operation was much less—about \$20 million. The reason, according to a Port of Oakland official, is that after the wetlands option was agreed to, redesign of the methods and some preliminary work by the Corps of Engineers (paid for through a separate budget line) reduced the actual costs to almost the same per-cubic-yard level as the deep water ocean site.⁸⁰

BKS describe the wetland creation project as a creative, positive use of the Oakland Harbor mud, and so it was. This solution, however, did not simply reflect a cooperatively reached consensus around a self-evidently good idea. In 1992, the Port of Oakland, desperate to achieve even partial harbor deepening, was compelled by legal pressure to support that kind of solution. Environmental advocacy groups had “swallow[ed] their objections” (as BKS put it)⁸¹ to disposal of Phase I dredged material near Alcatraz—one could just as well say, “agreed not to sue to hold it up”—in return for the Port’s agreement to lend its political support to those groups’ environmental agenda, including use of dredged material for wetlands creation.⁸² Moreover, the Corps of Engineers was legally prohibited from issuing a permit for the Sonoma Baylands project because federal law, in an understandable effort to limit federal expenditures, had long required the Corps to choose “least cost” environmentally acceptable disposal plans.⁸³ BKS

78. See Kagan, *The Dredging Dilemma*, *supra* note 20, at 323; CORPS MEMORANDUM, *supra* note 43, at App. D; Telephone Interview with James McGrath, Environmental Manager, Port of Oakland (August 31, 1998) [hereinafter Telephone Interview].

79. See CORPS MEMORANDUM, *supra* note 43, at App. D.

80. Telephone Interview, *supra* note 78.

81. BKS, *supra* note 1, at 192.

82. Telephone Interview, *supra* note 78.

83. BKS assert that these legal restrictions were not the “real motivation” for the Corps of Engineers’ reluctance to approve the wetlands creation project. See BKS, *supra* note 1, at 193. But if that were the only obstacle, it would hardly seem necessary to obtain a special congressional law and legislative appropriations (as opposed to mere political pressure from the White House and Congress) to get the Corps to approve the project.

It may be true, of course, that the Corps had traditionally been skeptical of wetlands creation projects. On the other hand, wetlands creation projects have a spotty track record. See Margaret Seluk Race, *Critique of Present Wetlands Mitigation Policies in the United States Based on Analysis of Past Restoration Projects in San Fran-*

tell us that it took a special congressional enactment to enable the Corps to approve it,⁸⁴ plus a special \$15 million appropriation, plus a further \$5 million appropriation by the State of California.⁸⁵

While BKS portray the wetlands project as an example of overcoming adversarial legalism, one might legitimately wonder why legislators in Washington and Sacramento, during a time of crushing deficits and budgetary stringency, were so eager to appropriate millions of dollars for this particular environmental project. Perhaps the environmental benefits of the wetlands project could be valued as substantially greater than the \$20 million appropriation, so that it was a good deal for the public. But as in the case of agreements by other seaports to pay for expensive wetlands projects located far from the ports themselves,⁸⁶ the appropriations for Sonoma Baylands might also be viewed as a side-payment to environmental advocacy groups, designed to buy their acquiescence to other segments of the disposal plan.⁸⁷ Their acquiescence had to be “bought” in this perspective because the structures of adversarial legalism still empowered any interested organization, by filing a lawsuit, to delay action for yet another indeterminate period of time. BKS suggest that the political atmosphere had changed by 1993 or so, making it less likely that environmental groups or agencies would go to court.⁸⁸ But their political leverage came from the fact that they *could* do so, and the special bills and appropriations from Washington and Sacramento suggest that those measures were viewed as the price of legal peace and breaking the mudlock.

From this perspective, adversarial legalism did not simply fade away as political attitudes changed. Rather, it *maintained* the deadlock for years and gave environmental advocates the legal bargaining

cisco Bay, 9 ENVTL. MGMT. 71 (1985). A Corps of Engineers marine biologist once told me, “We’re often spending \$1 for environmental protection and getting about 15 cents worth of environmental benefits.” Kagan, *The Dredging Dilemma*, *supra* note 20, at 328. Since some major wetlands creation projects emerged from settlements of actual or threatened lawsuits to halt harbor dredging projects, *see id.*, the marine biologist’s statement is not implausible.

84. *See* BKS, *supra* note 1, at 202 n.143.

85. *See id.* at 193-94.

86. *See* Kagan, *The Dredging Dilemma*, *supra* note 20, at 327, for accounts of such measures paid for by the Port of Tacoma, the Port of Los Angeles, and the Port of Long Beach.

87. Notwithstanding all the additional EPA research and years of discussion in the LTMS forum, some environmental advocates were suspicious of ocean disposal, partly because the proposed deep-water site bordered a National Marine Sanctuary. *See* Kagan, *Dredging Oakland Harbor*, *supra* note 20, at 56-57; Kagan, *The Dredging Dilemma*, *supra* note 20, at 337 n.31.

88. *See* BKS, *supra* note 1, at 192-93.

power that drove the settlement. Here, as elsewhere, the importance of adversarial legalism lies not merely in the incidence of formal legal contestation but in the way its costly and unpredictable processes skew power relationships, incentives, and policy decisions. BKS seem to miss this point. For example, they note that in 1996 the Port Authority of New York and New Jersey reached an agreement ending a dispute that had halted a dredging project for three years (although they fail to add that during that time, some docks silted up, prompting larger ships to call at Halifax instead).⁸⁹ The Port, BKS continue, finally agreed to forego ocean disposal in favor of using the sediments, after being treated, for road construction (although they do not say at what additional cost). BKS use this example to “demonstrate[] that adversarial legalism can be tamed.”⁹⁰ In the same breath, however, they tell us that the quid pro quo was that “[e]nvironmental groups pledged, in the short term, not to sue to halt the dumping of dredged material.”⁹¹ Yet, dredging had already been held up for three years largely because the threat of such a suit pushed the relevant agencies into a posture of scientific hypercaution and legal defensiveness. Thus, adversarial legalism shaped both the costly delay and the costly settlement.

Adversarial legalism’s capacity to produce delay and deadlock, BKS argue, can be overcome by parties “willing to convert rights-based claims—which admit of no compromise, and which necessarily yield losers as well as winners—into chips for political bargaining.”⁹² Yet what if the will is not there? Even if objectors A, B, and C are ready to bargain, the Half Moon Bay Fishermen, or their unyielding counterparts in other disputes, may not. More fundamentally, in situations in which the filing of a lawsuit can impose long delays and enormous opportunity costs on a project, the “chips for political bargaining,” hewed from the block of adversarial legalism, are large enough to crush many a project developer. They shift power dramatically to objecting interests, which can wield the right to litigate to exact policy changes that the objectors could not obtain through normal political processes or through the presentation of arguments and data in regulatory forums.

The shift in political power engendered by adversarial legalism can be used either to advance or to harm the public interest. Sometimes, to restate an earlier point, threats to litigate (and hence to im-

89. *See id.* at 199.

90. *Id.*

91. *Id.*

92. *Id.* at 198.

pose costly delays) are exercised responsibly and result in socially optimal policy changes. Perhaps that could be said of the special appropriations to fund the Sonoma Bay wetland project,⁹³ which turned out to cost less than originally anticipated. On the other hand, the circumstances under which such negotiations occur—I think of the gunman on Jack Benny's radio show who demanded of the stingy comedian, "Your money or your life"—suggest that the outcomes just as often may be less than socially optimal.

II

CORPORATISM, ADVERSARIAL LEGALISM, AND POINTS BETWEEN

In *Adversarial Legalism and American Government*, after discussing the Oakland Harbor story, I offered an analysis of adversarial legalism's causes. I emphasized the confluence of two contradictory political factors: (1) heightened political demands for government to wield *more power*—to control risk, to protect the environment, to combat discrimination, and to prevent injustice; and (2) a fragmented governmental structure and a political culture that *distrusts governmental power*, and hence seeks to make any increases in governmental power legally controllable. The result is a more activist government, armed with tough regulatory powers, but within which administrative discretion is subjected to tight legal constraints exerted by other governmental units, by courts, and by lawsuits brought by a broad range of political and economic interests.⁹⁴ It was in that context, attempting to highlight the distinctive features of American adversarial legalism, that I sketched an alternative, quasi-corporatist model for making regulatory decisions. I called this alternative model "administratively final multi-factor balancing," contrasting it with a system, as in the Oakland case, that instructed the Corps of Engineers to base dredging permit decisions on a wide range of economic and environmental factors, but made its decision anything but final. Instead, as noted above, its discretion was subjected to vetoes by an array of other agencies, each closely restricted by detailed laws, and by private organizations and local governments empowered to use the courts for the same purpose.

93. See *id.* at 202 n.143.

94. See Kagan, *Adversarial Legalism and American Government*, *supra* note 2, at 394-98; see also Robert A. Kagan, *The Political Construction of American Adversarial Legalism*, in *COURTS AND THE POLITICAL PROCESS* (A. Ranney ed., 1996).

A. *Thinking About Alternative Decision Structures*

In the alternative model, the pluralistic values reflected in the U.S. dredging decision-making system are pursued by incorporating diverse voices into the decision structures of a single estuarine planning agency. Such an agency's abilities to encourage cooperation and build consensus also would be enhanced by according its decisions a higher level of finality than the lead agency was granted in the Oakland Harbor story. My inspiration for this model was Joseph Badaracco's comparison of regulatory policy making concerning a single carcinogenic substance, vinyl chloride, in the U.S., Japan, France, Germany, and Great Britain.⁹⁵ The other countries, Badaracco showed, ended up imposing similar protections as the U.S. agency, but without the adversarial legalism, conflict, and defensiveness that characterized the American process. The other countries' policy-making bodies were not subjected to the repeated appeals that often delay implementation of new environmental and safety regulations in the U.S.,⁹⁶ and they enjoyed more cooperative relations with regulated firms than often occurs in legalistic American enforcement systems.⁹⁷

In each of the other countries, Badaracco shows, the lead government agency had final authority to balance competing considerations and make a definitive decision. It was not constrained by highly detailed regulatory statutes and its decisions were rarely reversed by courts. Affected interest groups (industry, labor, environmentalists, etc.) played a strong participatory role. Through a variety of corporatist mechanisms (e.g., permanent representation on key committees), a stable consortium of interest group representatives consulted regularly with government officials on a range of issues. Interaction was more informal than in the comparable American policy-making process, Badaracco observed. Lawyers were not to be seen. Because interest group representatives interacted repeatedly and could not expect to overturn the agency's decision in court or in another administrative or political forum, they had strong incentives to avoid the adversarial position-taking and defensive science characteristic of the American pro-

95. See JOSEPH L. BADARACCO, JR., *LOADING THE DICE: A FIVE-COUNTRY STUDY OF VINYL CHLORIDE REGULATION* 2-3 (1985).

96. See JOHN M. MENDELOFF, *THE DILEMMA OF TOXIC SUBSTANCE REGULATION* 115, 200-01 (1988); John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOLOGICAL L.Q.* 233, 236 (1990); Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 *YALE J. ON REG.* 257, 262-63 (1987).

97. See EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* 79, 112, 118, 313 (1982).

cess. Lacking courts or other fora to which to turn, they simply had to try to persuade each other to reach agreement.

The analogy for American dredging disputes, I suggested in *Adversarial Legalism and American Government*, would be a regional port planning agency, whose governing board might include representatives of environmental interests.⁹⁸ The agency also would establish regularized ways of convening representatives of shipping interests, environmental agencies, conservation groups, the fishing industry, and so forth.⁹⁹ The agency, I suggested, would attempt to build consensus around dredging and mitigation plans.¹⁰⁰ A single governing statute (rather than the multiplicity of extremely detailed statutes that regulated various aspects of the Oakland Harbor story) would give its decisions a high degree of finality, sharply reducing the unpredictable risk of judicial reversal. This, in turn, would strengthen the agency's ability to forge consensus. Similarly, I noted, repeated interaction among interest groups across a range of issues, if Badaracco's observations about the European corporatist regulatory bodies are any guide, would encourage some political log-rolling, discourage participants from taking unreasonable positions, and build mutual trust.¹⁰¹

Although BKS treated my discussion of this model as a concrete policy proposal, or something close to it, I did not intend it as such. Indeed, I was quick to say that such a scheme

is not politically or legally feasible in the United States. Our tradition mistrusts governmental authority. American practice is to disperse governmental power . . . ; to subject administrative bodies to legal regulation . . . ; and to guarantee citizens substantive and procedural rights with which to challenge the bureaucrats in court. That is precisely my point: The legal traditions and structural features of American government create the conditions under which adversarial legalism can flourish . . . in a wide array of policy domains.¹⁰²

98. See Kagan, *Adversarial Legalism and American Government*, *supra* note 2, at 387.

99. See *id.*

100. See *id.*

101. See *id.* at 398. I note that BKS also take a positive view of the "political horse-trading" that can flow from putting several issues on the table at the same time, see BKS, *supra* note 1, at 206, although they counterpose that to my supposed preference for "government by experts."

102. Kagan, *Adversarial Legalism and American Government*, *supra* note 2, at 389. In *The Dredging Dilemma*, I added:

Moreover, even corporatist-style regulatory cooperation . . . works only when there is a reasonable amount of consensus on governmental ends, when disagreements are mostly about means or matters of degree. One can imagine that happening with respect to port development in Japan,

I also pointed out that “[c]orporatist policymaking structures have their own deficiencies, of course. They lack some of the valuable features of the American system—contestability of expert opinion and official plans, openness to a wide array of opinions and interests, sensitivity to individual rights.”¹⁰³

Far from proposing “radical institutional surgery,” as BKS characterize my discussion,¹⁰⁴ I employed a sharply contrasting model as a heuristic device to illuminate the problematic features of the American system and to suggest that incremental steps toward more cooperative, less legalistic modes of decision making might be possible and worth considering. Inasmuch as BKS also endorse some incremental steps toward diminishing the fragmentation of regulatory authority,¹⁰⁵ it seems they agree (although they cast these steps as dissents from my position).

Aside from misconstruing my purpose in discussing corporatist models (which makes much of the latter part of BKS’s article, while interesting and sensible, somewhat beside the point),¹⁰⁶ BKS at times seem to misunderstand the corporatist idea and hence misstate my value preferences. For example, in criticizing “the proposed super-agency,” they refer to “Kagan’s preference for centralized decision making” over politics¹⁰⁷ and assert that participation is treated by Kagan “as an impediment to expert decision making.”¹⁰⁸ To the contrary, I juxtaposed the corporatist model to adversarial legalism precisely because the former suggests that there are alternative ways of combining interest group representation and bureaucratic expertise—ways that emphasize political rather than legal accountability. Corporatist systems seek to temper technocratic expertise by guaranteeing a place at the table for representatives of affected interests (not

Hong Kong, and The Netherlands—nations deeply dependent on foreign trade. . . . But that kind of consensus is more elusive in the huge, economically inward-looking United States

Kagan, *The Dredging Dilemma*, *supra* note 20, at 332.

103. Kagan, *Adversarial Legalism and American Government*, *supra* note 2, at 398.

104. BKS, *supra* note 1, at 204.

105. *See id.* at 202-03 (consolidating permitting authority for dredging, coordinating all agencies’ permit reviews, and discussing stable interagency dredging policy teams, and multi-stakeholder Local Planning Groups).

106. Since I clearly indicated that I thought the corporatist model was not politically feasible in the United States, *see* Kagan, *Adversarial Legalism and American Government*, *supra* note 2, at 389, 398, it is puzzling why BKS spend a paragraph giving reasons why it is politically infeasible in the United States, *see* BKS, *supra* note 1, at 205-06—reasons virtually identical to the reasons I spell out at length.

107. *Id.* at 208.

108. *Id.* 211. They also assert that in terms of building trust in government, “Kagan has little use for politicians or participatory politics.” *Id.* at 210.

merely those who are organized to threaten lawsuits) and by encouraging deliberation and bargaining among those interests and between those interests and technical experts. While the corporatist model may have its own weaknesses,¹⁰⁹ it has the virtue of avoiding the cumbersome and potentially extortive formal processes of American-style litigation.

As for my alleged preference for expertise over politics, one of my major criticisms of the Oakland Harbor process was that for several long years adversarial legalism squelched democratic politics. The tortuous procedural and analytical steps mandated by law made it impossible for agencies to respond to the input of local elected officials who were concerned about the mounting social and economic harms to the Port community. Indeed, it was adversarial legalism that gave a central role to a cadre of experts—the scientists and consultants who prepared gigantic environmental impact statements, along with the lawyers who prepared and filed the legal briefs and regulatory submissions. Thus, contrary to BKS's assertion, it is precisely my preference for a greater emphasis on political accountability, rather than accountability through litigation, that led me to suggest alternatives to adversarial legalism.

B. *Has Adversarial Legalism Been Tamed?*

Interestingly, one of the reforms lauded by BKS is the recent creation of national and regional "Dredging Teams" and particularly Local Planning Groups ("LPGs"), which include "all potential stakeholders involved in the management of dredged materials,"¹¹⁰ such as ports, environmental groups, state economic, resource or regulatory agencies, and the public. Over time, they argue, repeated interaction in working on long-term dredging plans may build trust and thus discourage dissenters from becoming obstructionists. The LPGs bear a striking resemblance to the corporatist model I outlined, both in structure and in their aspirations for a more cooperative policy-making system. There are some significant differences, however, which lead me to be somewhat less sanguine than BKS about the taming of adversarial legalism in the dredging arena.

First, the LPGs, like the multi-agency, public-private LTMS forum praised by BKS, foster participatory deliberation, but have no legal authority. They cannot decide and impose such decisions on interests that never participated in the process, or that felt their interests

109. *See supra* text accompanying notes 102-03.

110. BKS, *supra* note 1, at 202.

were poorly represented or ignored (like the Half Moon Bay Fishermen). It is probably true, as BKS argue, that participation *tends* to build trust and deter participants from exiting the process and seeking their goals through litigation. But without true authority or legal finality, withdrawal from the process and litigation remain an ever-present possibility, and incentives to compromise are weakened. Thus, although the LTMS process was initiated as early as 1989,¹¹¹ a final dredging plan was not approved for another five or six years, while adverse economic impacts grew even more severe and, in terms of action, were essentially ignored.¹¹²

Second, the LPGs and their proposals remain subject to the same web of governing statutes and the same array of regulatory agency reviews that caused the long deadlock in the Oakland Harbor case. In 1995, BKS report, the Secretary of the U.S. Department of Transportation said that dredging projects are “submerged in conflicting missions and mandates . . . and a pyramid of federal rules and regulations, plus state and local government laws which make it a miracle every time a port dredging project is brought to fruition.”¹¹³ That has not changed.¹¹⁴ In contrast to the corporatist model of governance, decision-making authority in the U.S. remains highly fragmented; each of the many agencies and governmental units whose approval of a final plan is legally required is obliged to adhere to the often detailed legal and analytical standards in its governing statute. One would expect, therefore, that the agencies that participate in the LPG planning process will often find their hands legally tied when compromises are proposed. In approving ocean disposal sites, the EPA will still have to make the detailed analysis and findings mentioned above,¹¹⁵ and objectors to any ocean site it approves can stop the dredging for some time by challenging those analyses and findings in court. The same

111. BKS date the LTMS program from 1990, *see id.* at 198, but descriptions of its composition and operations were common in 1989. *See, e.g.,* Carlo J. Salzano, *Ports Put Through Ecological Hoops in Quest for Economic Survival*, TRAFFIC WORLD, Aug. 14, 1989, at 8.

112. In 1990, when the LTMS was striving to come up with a consensual solution, the Bay Conservation and Development Commission took the position that it would find no LTMS plan acceptable until an elaborate San Francisco Bay sediment flow model had been developed and verified, which presumably would take years. *See* Kagan, *The Dredging Dilemma*, *supra* note 20, at 338 n.43.

113. BKS, *supra* note 1, at 204 (citation omitted).

114. The only significant statutory change mentioned by BKS in their account of the post-Oakland-fiasco policy changes is a 1996 amendment to the Water Resources Development Act that authorizes the Corps of Engineers to approve the use of dredged material for wetlands creation and other environmental restoration projects. *See* BKS, *supra* note 1, at 201-02.

115. *See supra* note 73 and accompanying text.

incentives for legal defensiveness apply to other agency-participants in the deliberations as well.

I do not mean to suggest that the LPGs and the national and regional Dredging Teams mentioned by BKS are not a good idea. I do suggest, however, that they lack the legal authority and discretion to tame adversarial legalism, even if they may be able to keep it at bay when the political and technical conditions for consensus-building are favorable. But adversarial legalism remains an ever-present possibility because of the character of the statutes and legal traditions that institutionalize it as a mode of political struggle.

I am less optimistic than BKS about taming adversarial legalism because of the enduring aspects of the political system and legal culture that produce and perpetually reproduce it. As I wrote in *Adversarial Legalism and American Government*,

[B]ecause authority in Congress remains fragmented and government remains politically divided, legislation becomes more, not less, prolix and procedurally complex. Individual Senators and House Subcommittee chairs more often add hastily drafted last-minute amendments, further reducing statutory coherence. Fearful that statutory standards will be eroded by Republican administrators or judges, liberal legislators add amendments articulating more exalted rights and heavier regulatory penalties, while conservatives add amendments enabling regulated entities to raise technical defenses. Law ends up resembling elaborately constructed arms control treaties between mutually suspicious nations, laden with convoluted but substantively unclear provisions that one side or another can invoke in court to challenge administrative decisions it dislikes. Like multisubject omnibus appropriations acts, impenetrable tax law provisions, and the 400 page Clear Air Act of 1990, statutes become longer and more opaque, and hence more likely to generate uncertainty and litigation.¹¹⁶

Although BKS speak of an attitudinal sea-change and a new, more cooperative attitude toward solving dredging issues,¹¹⁷ they do not mention any statutory changes that consolidate decision-making authority. Nor do they mention amendments which would reduce the detailed analytic, procedural, and substantive demands embedded in the web of problem-specific statutes that undergirded the deadlock. Their silence in that regard is not surprising. In a fragmented governmental system penetrable by interest groups, each agency's core political constituency stands ready and able to battle against any

116. Kagan, *Adversarial Legalism and American Government*, *supra* note 2, at 397.

117. See BKS, *supra* note 1, at 196-98.

diminution of the agency's authority and against any decrease in the statutory detail that enables advocacy groups to successfully challenge agency decisions in court.¹¹⁸ Furthermore, members of Congress, still smarting from the politically bruising 1995 battles over Republican environmental reform measures, are reluctant to open up any major environmental statute for revision. Any idea of curtailing judicial review or shielding agency decisions from lawsuits is quickly squelched by a political culture built around distrust of bureaucrats and by a legal elite that values the right to seek redress in court.¹¹⁹

It is almost always worthwhile to construct alternative dispute resolution bodies such as the Local Planning Groups mentioned by BKS because, sometimes, they work. Although the LPGs have not been in existence long, BKS believe a consensus on foregoing legal conflict in dredging issues currently exists. I have no basis on which to dispute that perception, and I certainly hope it is correct. But I note that this is not the first time such non-authoritative estuary planning bodies have been created.¹²⁰ I note, too, that elaborate plans to substitute dialogue for litigation often have failed to prevent a resurgence of adversarial legalism when passionate interest groups are involved, as in the cases of off-shore oil exploration leasing,¹²¹ and forestry planning in the Pacific Northwest.¹²² The LPGs, I fear, can quickly be pushed aside, or will capitulate to unreasonably costly environmental demands, whenever strong conflicts emerge, as they inevitably will, and some participants threaten litigation.

CONCLUSION

At the level of principle, I think there is less of a gulf between BKS and me than their article would lead one to believe. We agree, I

118. See generally Terry M. Moe, *The Politics of the Bureaucratic State*, in *CAN THE GOVERNMENT GOVERN?* 267 (J. Chubb & P. Peterson eds., 1989).

119. See Kagan, *Do Lawyers Cause Adversarial Legalism?*, *supra* note 17, at 9.

120. The search for comprehensive, politically pluralistic regional planning of dredging and related issues has a substantial history. The Corps of Engineers' LTMS project and the LPG bodies described by BKS were preceded by the federally-funded National Estuary Program, which also created public-private fora in which affected interests and agencies could review data, foster research, and negotiate standards and plans balancing commercial, recreational, and environmental values. See Kai N. Lee, *The Columbia River Basin: Experimenting with Sustainability*, *ENVIRONMENT*, July/August 1989, at 6.

121. See Charles Lester, *Contemporary Federalism and New Regimes of Ocean Governance: Lessons from the Case of Outer Continental Shelf Oil Development*, 23 *OCEAN & COASTAL MGMT.* 7 (1994).

122. See Victor Sher, *Ancient Forests, Spotted Owls, and the Demise of Federal Environmental Law*, 20 *ENVTL. L. REP.* 10 (1990); Michael Axline, *Forest Health and the Politics of Expediency*, 26 *ENVTL. L.* 613 (1996).

think, that American adversarial legalism sometimes serves the public interest and justice, but that sometimes it does just the opposite. We agree that for many years, adversarial legalism made the Oakland Harbor story, to use BKS's words, "part tragedy and part farce."¹²³ We agree, I think, that cooperative and politically-negotiated solutions usually—although not always—are preferable to extended and costly legal battles unless matters of high principle are involved. We agree that it is important to retain or devise mechanisms that guarantee some forms of public participation in many bureaucratic decision systems. Finally, we agree that it would be desirable to seek incremental legal and institutional reforms that might temper the excesses of jurisdictional fragmentation and adversarial legalism of the kind that produced the long Oakland Harbor deadlock.

I also appreciate BKS's nicely articulated "policy pentacle"—the notion that many policy arenas would profit from a mix or "balance" of five decision-making frameworks: judicially enforceable legal rights, professional expertise, bureaucratic regularity, political leadership and bargaining, and market pressures.¹²⁴ I am troubled, however, by the lack of any criteria for determining whether the right balance has been struck, especially because I suspect we disagree, both in the seaport dredging arena and in general, about whether the American policy implementation system is currently out of balance, tilting too strongly toward adversarial legalism.

As I have attempted to show at some length, BKS's *Taming Adversarial Legalism* tends to downplay the severity and unjustifiability of the long deadlock in Oakland, as well as the extent to which the ongoing threat of further litigation by objectors blocked any solution until their acquiescence could be won by special multi-million dollar legislative appropriations for environmental measures that had nothing to do with harms engendered by the dredging. While we agree that adversarial legalism sometimes has positive effects, BKS do not seem to fully share my concerns, as documented at substantial length in *Adversarial Legalism and American Government*, about the exorbitant transaction costs, extortive pressures, alienating effects, and governmental paralysis that adversarial legalism unleashes in a wide range of policy spheres.

Finally, I am less optimistic than BKS that balance has been fully restored in the seaport dredging policy area. They think adversarial legalism has been tamed. I think it is still wild, lurking in the wet-

123. BKS, *supra* note 1, at 180.

124. *See id.* at 211-13.

lands (dare I say “swamps”?) until someone gets angry and wants to bring it to the surface. Adversarial legalism remains at large because there has been no change in the root causes of the long Oakland Harbor deadlock. These causes include jurisdictional fragmentation of authority, a dense web of highly detailed and analytically demanding environmental statutes, and ready access to a rather unpredictable court system—all of which make it harder to bring about and bestow legal finality on negotiated compromise plans. The same is true of many other areas of public policy in the United States. Thus, while BKS provide an instructive and interesting account of the resolution of one particular legal deadlock, their article does not persuade me to retract what I said in my earlier article: “Adversarial legalism . . . [is] a barely latent, easily triggered potentiality in virtually all contemporary American political and legal institutions.”¹²⁵ I hope BKS don’t sue me.

125. Kagan, *Adversarial Legalism and American Government*, *supra* note 2, at 375.