The Globalization of American Law

R. Daniel Kelemen and Eric C. Sibbit

Abstract A substantial body of research suggests that the United States has a distinctive legal style characterized by detailed rules, extensive transparency requirements, adversarial procedures for dispute resolution, costly legal contestation involving many lawyers, and frequent judicial intervention in administrative affairs. Recently, scholars of comparative law and public policy have asked whether this American legal style is spreading around the world. Some scholars have argued that legal styles are converging on an American model, while others have argued that distinctive national legal styles will persist. This article addresses this emerging debate. We argue that American legal style is spreading to other jurisdictions. However, we depart from predominant explanations, which attribute convergence to international regulatory competition or emulation. Instead, we argue that economic liberalization and political fragmentation have undermined traditional approaches to regulation and have generated functional pressures and political incentives to shift toward American legal style.

A substantial body of research on comparative public policy and law suggests that the U.S. approach to making and implementing regulatory policies is distinctive.¹ This distinctive American legal style, which Robert Kagan has labeled adversarial legalism,² manifests itself in detailed, prescriptive rules, substantial transparency and disclosure requirements, formal and adversarial procedures for resolving disputes, costly legal contestation involving many lawyers, and frequent judicial intervention in administrative affairs. By contrast, the approaches to law and regulation that predominate in other advanced industrialized democracies are more

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informal, cooperative, and opaque, and rely less on the involvement of lawyers and courts. Recently, scholars of comparative law and public policy have started to ask whether the American legal style may be spreading around the world. Some scholars have argued that legal styles are converging on an American model, while others have argued that distinctive national legal styles are likely to persist. However, there has been little systematic empirical research on the issue of convergence in legal style. Moreover, the existing research remains isolated from broader debates in the international and comparative political economy literature regarding globalization and policy convergence.

In this article, we hope to advance the debate regarding the globalization of law and to link it to broader debates on globalization and policy convergence. Existing studies of the globalization of law have identified a host of factors that may encourage the spread of American legal style, including economic liberalization, the globalization of markets, growing distrust of government bureaucrats, heightened judicial activism, the globalization of U.S. law firms, and the international influence of American legal education. This literature offers a comprehensive picture of the trend, but one which is far from parsimonious and which fails to specify the relative significance of various causal factors. The broader political science literature on globalization and policy convergence does offer more parsimonious theories based on regulatory competition and emulation; however, as we will argue below, these theories do not provide a convincing explanation for the convergence of legal style.

Rather, we argue that the shift toward American legal style is better explained by the confluence of two largely domestic factors: economic liberalization and political fragmentation. Increases in economic liberalization and political fragmentation have undermined traditional, opaque, informal approaches to regulation and have generated functional pressures and political incentives to shift toward a more formal, transparent, adversarial legal style, similar to that found in the United States. Economic liberalization has also had an important corollary; it has unleashed a new set of transnational actors—U.S. law firms, which have played a

6. Some scholars have focused on the spread of American-style adversarial legalism (see note 3) while others focus specifically on the spread of American-style judicial review. See Shapiro and Stone 1994; Stone Sweet 2000; Tate and Vallinder 1995. On judicial globalization more generally, see Slaughter 2000.
7. We take economic liberalization and political fragmentation as exogenous, and for our purposes they can be viewed as domestic processes, though we recognize that they may stem in part from international pressures.
8. In this respect, our argument fits Simmons and Elkins’s 2001 category of explanations for convergence based on similar but uncoordinated responses to common domestic political and economic conditions.
significant catalytic role in the process of Americanization in some policy areas by bringing American approaches to law and regulation to foreign jurisdictions.

We focus on the recent spread of American legal style across advanced industrialized democracies.9 We assess our argument using case studies of legal developments in the European Union (EU) and Japan, examining both changes in substantive law and in patterns of legal practice. EU member-states and Japan have well-established legal styles that differ considerably from the American style. Focusing on the EU and Japan allows us to assess whether these alternative legal styles are being supplanted by American legal style. The variation in legal style across areas of law within any polity poses a challenge to any attempt to generalize about overall trends in legal style. To address this challenge, we supplement our analyses of general trends in legal style in the EU and Japan with detailed comparative case studies of two policy areas, securities law and products liability law, which provide for variation on our independent variables and which may serve to demonstrate the wide scope of the spread of American legal style.

It may be the case that the globalization of American law is a limited phenomenon, affecting only the most internationalized areas of regulation and legal practice. 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, cooperative processes with formal, transparent, and adversarial ones. Some observers would applaud such Americanization as enhancing transparency, accountability, and legal certainty. Others, however, would view such a shift as the regrettable spread of an “American Disease” of excess lawyers and litigation.

The remainder of this article is divided into four sections. The first section explores the notion of American legal style in more detail, considers alternative arguments that might explain the spread of American legal style, and details our own explanation. The second section examines the spread of American legal style to the EU, including case studies of products liability law and securities regulation. The third section examines the same issues in Japan. The final section concludes.

Explaining the Globalization of American Law

American Legal Style

Legal style is a complex, multifaceted concept, for which the existing literature on comparative law and regulation offers no widely shared definition. Our working

9. Previous waves of globalization of law include the spread of Roman law across Europe—see Wiegand 1991—and the spread of European legal models to Asia and Africa in the colonial era—see Mommsen and De Moor 1992. The current globalization of American law also affects some developing countries, but this process falls beyond the empirical scope of this article.
definition of American legal style focuses on the two most fundamental distinguishing characteristics of American law: the emphasis on enforcing legal norms through (1) transparency and (2) broad empowerment of private actors to assert legal rights. The central role of transparency manifests itself throughout American law and legal practice in the prevalence of highly detailed, transparent legal rules and regulatory procedures, extensive disclosure requirements, and the active use of formal implementation and enforcement proceedings by regulators. Transparency regulates by deterring actions that are unlikely to withstand public scrutiny and by arming a wide array of actors with otherwise unavailable information. In addition to transparency provisions, a variety of other aspects of the American legal system empower private actors to assert their rights through adversarial legal contestation. A multitude of statutes and vast body of case law establish causes of action and enforceable rights for private parties, while liberal discovery rules, lax standing (locus standi) requirements, class action lawsuits, contingency fee arrangements, and an abundance of lawyers facilitate the exercise of those rights. This pattern of law and legal practice encourages a central role for lawyers in advising clients on meeting disclosure requirements, in advocating clients' policy interests in the course of regulatory proceedings, and in representing clients in legal contestation.

These two characteristics of American legal style clearly manifest themselves in the areas of securities regulation and products liability law. The hallmarks of U.S. securities regulation reflect the broader patterns of American legal style. First, U.S. securities regulation focuses on regulating the quality of mandatory disclosure by issuers through strict disclosure requirements, not on regulating the quality of investments. In addition, the regulatory process itself is highly transparent. The U.S. Securities and Exchange Commission (SEC) publicly discloses newly proposed rules, invites public commentary, "gives reasons" for its responses, and often publishes correspondence with private parties and even responses to questions posed in telephone consultations. The SEC actively uses its transparent, formal enforcement powers to sanction violators with injunctions, fines, and imprisonment. This transparency is reinforced by its broad empowerment of investors to sue for inadequate disclosure. Liability provisions in the Securities Act of 1933 and the Securities Exchange Act of 1934, in conjunction with litigation techniques such as class action lawsuits, empower an industry of securities plaintiffs' lawyers to profit by uncovering disclosure failings and market manipulation. For most market participants, the threat of costly private litigation is a far more powerful incentive for compliance than SEC action. The Sarbanes-Oxley reforms of 2002— instituted in response to recent corporate scandals— heighten the emphasis on transparency and private enforcement, requiring more extensive and prompt disclosure.

Products liability law also reflects many of the central attributes of American legal style. The U.S. product liability regime relies heavily on the threat of litiga-

tion by private parties to identify defective products and to punish their manufacturers and sellers. Strict liability, which emerged as the dominant doctrine in the 1960s, relieved injured consumers of the burden of proving negligence on the part of the manufacturer, requiring instead that they simply prove a "defective product" had caused them harm. By lowering the bar for product liability suits, strict liability increases incentives for manufacturers and sellers to reduce their litigation risks through the proper design and manufacture of products. The inclusion of "inadequate warning" in the definition of "defect" encourages transparency in the form of detailed disclosure of potential risks in product warnings. A number of other aspects of American legal practice encourage plaintiffs to pursue product liability claims: contingency fee arrangements lower costs for litigants; lengthy statutes of limitations preserve claims until adequate information can be uncovered; joint-and-several liability allows plaintiffs to focus on the most accessible or "deep-pocketed" sellers (that is, manufacturers, distributors, and retailers); liberal pretrial discovery gives plaintiffs access to potential "smoking guns"; class actions create economies of scale; and allowance of psychological pain and suffering and punitive damages, as well as the award of damages by juries (which tend to be more generous than judges), all increase potential payouts. Together, such factors explain the robustness of the product liability litigation industry spawned by the U.S. legal system.

Explaining the Spread of American Legal Style

The most common explanations for policy convergence 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. The race-to-the-bottom logic suggests that competition between jurisdictions to attract and retain mobile targets of regulation (that is, firms) 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. By this logic, if a jurisdiction with a large market chooses to adopt 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 and may even actively support them as a way of disadvantaging competitors that would have more difficulty adjusting to the new standards. Finally, regulatory competition of either variety

11. Generally, a product may be defective because of improper design or manufacture, or inadequate warnings.
may be coupled with political coercion by powerful states. For instance, governments of states with high standards may pressure governments of states with lax standards to raise their standards to prevent them from deriving competitive benefits from their regulatory laxity.14

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 law and products liability law, U.S. standards arguably impose higher costs on firms. More generally, many critics argue that American legal style is excessively costly, conflictual, and slow, and such critics have often looked to Western Europe and Japan for models of more cooperative, informal, and inexpensive approaches to law and regulation.15 One would hardly expect foreign jurisdictions to emulate U.S. legal style in an effort to compete for mobile targets of regulation.

As for the race-to-the-top argument, non-U.S. firms forced to meet U.S. legal or regulatory requirements that are stricter than those in their home markets (for example, automobile emissions standards) in order to access the U.S. market might encourage the adoption of U.S. regulations at home. This dynamic may explain foreign adoption of particular U.S. laws or regulatory standards.16 However, there are many policy areas, such as strict product liability, in which free trade and economic competition 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.17 The race-to-the-top cannot adequately explain why a country's approach to the enforcement of legal norms as a whole would change.

Finally, another set of explanations for policy convergence focuses on policy emulation among nations. Rooted in sociological institutionalism, 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 These arguments do not provide a convincing explanation for the spread of American legal style. Certainly, U.S. policies serve as a salient reference point for many governments, and emulation of U.S. policies has occurred in some policy areas; however, governments throughout the Organization for Economic Cooperation and Development (OECD) have been eager to avoid adopting American legal style in a broader sense. Indeed, during the U.S. recession of the early 1990s, many critics inside and outside the United States con-

tended that the inflexibility, stringency, and litigiousness characteristic of American legal style were to blame for America's lackluster economic performance. 19

We maintain that neither 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. 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 has been driven primarily by increasing economic liberalization and political fragmentation. The spread of U.S. law firms to foreign jurisdictions, itself a product of economic liberalization, has served as a catalyst accelerating the process.

Economic Liberalization. During the past twenty years, a wave of deregulation and trade liberalization has swept across OECD economies, opening international markets for capital, goods, and services. We take economic liberalization as an exogenous force that has affected national legal and regulatory systems across OECD countries. Liberalization allows new actors, both foreign and domestic, into previously closed markets and allows both new and existing actors to participate in new areas of economic activity where markets were previously nonexistent. The resulting increase in the number and diversity of participants undermines informal systems of regulation based on closed insider networks and trust. Furthermore, new markets may not have established regulatory channels to implement regulatory objectives effectively. 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 governments to enforce norms in a liberalized environment. 20 Given the distrust between actors in liberalized markets, as well as the lack of close government-industry ties, new laws and regulatory processes will tend to be more formal, legalistic, and transparent. 21 These forces create greater demand for lawyers to protect the interests of their clients through guidance, advocacy, and dispute resolution. 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 U.S. years ago.

Political Fragmentation. Systems of informal regulation are most likely to be found in political systems in which political authority is concentrated in the hands

of a small number of likeminded veto players. Where political authority is concentrated, political leaders (the principals) need not resort to codified, legalistic means to control their regulatory bureaucracy or private self-regulatory bodies (the agents) and achieve their regulatory aims. Instead, political leaders can establish less formal incentive structures, backed by monitoring mechanisms that encourage the bureaucracy to pursue their goals faithfully. If political leaders are unhappy with actions taken by members of the bureaucracy, they can readily rein them in. Moreover, where political authority 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.

By contrast, as political authority becomes more fragmented, judicialization becomes a more attractive means by which political principals can control bureaucratic agents. As fragmentation increases (that is, as the number of veto players increases), assembling the political coalitions necessary to rein in the bureaucracy (for example, 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 policies against potential manipulation by the bureaucracy (bureaucratic drift) or by political forces that may come to power later (political drift). 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 constraining bureaucratic discretion. 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. Lawmakers provide for private causes of action, assuring that their allies will have access to the courts to hold the executive accountable. When lawmakers rely on such a judicialization strategy as a means of controlling the bureaucracy, they encourage the development of an inflexible, adversarial, and litigious 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 political and legal forum-shopping and multipronged lobbying and litigation strategies. In a fragmented system, if one political authority does not accede to a group's demands, the group need not necessarily reach a negotiated compromise; instead, it can shift its efforts to another source of political or judicial authority.

The highly fragmented U.S. system, which institutionally combines separation-of-powers, bicameralism, and federalism, has encouraged the development of adversarial legalism. While the degree of fragmentation of power varies considerably across EU member-states and Japan, we expect that increases in the degree of political fragmentation in these polities will encourage a shift from opaque, informal regulatory policy approaches to more transparent, formal, and adversarial approaches resembling the American model.

American Law Firms. The entry of American corporate law firms into foreign jurisdictions plays an important role in accelerating the process of Americanization. As part of economic liberalization, governments are pressured to open up their markets for legal services. Economic liberalization also stimulates greater demand for cross-border legal services. When American law firms enter foreign markets, they bring with them American legal practices and forms of organization. Their experience with adversarial legalism and their expertise in mega-lawyering techniques, including multijurisdictional litigation, lobbying, and the drafting of detailed contracts suited to liberalized markets, give them a number of advantages vis-à-vis their foreign competitors. Moreover, the size and worldwide presence of American firms enable them to provide a range of legal services 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 firms. As the structures and practices of foreign law firms begin to resemble their American counterparts in important respects, the spread of American legal style accelerates. While economic liberalization and political fragmentation are the primary underlying causes of Americanization, the spread of American law firms is a vital catalyst that hastens the spread of American legal practices.

Americanization of Law in the EU

Legal Style in Europe

Despite the diversity of European legal styles, a number of common attributes distinguish European from American legal styles. While lawyers and courts in Europe have played a vital role in protecting individual rights, they have played a much weaker role than their U.S. counterparts in the development and implementation of regulatory policy. In many European states, interest group representatives and government bureaucrats have developed and implemented regulatory

policies in concert. In some states (particularly Austria, Sweden, and Germany), corporatist patterns of interest intermediation have predominated. In France, elite government technocrats have traditionally dominated regulatory policymaking. In the United Kingdom (UK) a pattern of cooperative, "chummy" relationships between regulators and regulated entities has prevailed. Traditionally, these systems of regulation relied on closed policymaking networks and delegated wide discretion to regulators to pursue informal means of achieving regulatory objectives. Regulators, regulated industries, and other network insiders resolved conflicts informally, without resorting to judicial processes. The courtroom door rarely served as a significant opening for outsiders to challenge policy. Law firms in Europe played a limited role in business affairs and in the regulatory process. Law firms tended to be small, and they focused on litigation, playing little role as intermediaries between business and government or as advisors on general business affairs. Law firms did not engage extensively in the mega-lawyering techniques associated with large American law firms, such as multijurisdictional litigation strategies, lobbying and other nonjudicial forms of advocacy.

Americanization in the EU

The three factors we highlight above have converged to incite dramatic shifts in European legal and regulatory style since the mid-1980s. First, the economic liberalization that has come with the construction of the EU's internal market has run head-on into the informal, cooperative systems of regulation prevalent in most EU member-states. In a host of areas ranging from telecommunications to competition to environmental policy, deregulation and the opening of markets have undermined established systems of regulation at the national level and led to calls for re-regulation at the EU level. However, given the diversity of players in these liberalized markets, the style of regulation that has developed at the EU level does not resemble the informal, corporatist patterns of regulation that were common in many member-states. With its growing emphasis on openness and transparency in regulatory processes and judicialized enforcement, policymaking in Brussels looks more like that in Washington, D.C., than that in Berlin or Paris.

Second, the transfer of regulatory authority to the EU level has led to an increasing fragmentation of political authority, along both vertical and horizontal dimensions. Authority in many policy areas is divided vertically between the EU and member-state governments, and authority is divided horizontally at the EU level between the Council of Ministers, the European Commission, and the Euro-

32. For a review of comparative studies, see Kagan and Axelrad 1997.
33. See Lehmann and Schmitter 1982; Goldthorpe 1984; and Kitschelt et al. 1999.
34. Hayward 1982.
35. See Vogel 1986; Vogel 1996.
pean Parliament. Public distrust of distant, potentially unaccountable Eurocrats in Brussels, coupled with member-states’ distrust of one another’s opaque regulatory practices, has led to increased demands for transparency and public participation in EU regulatory processes. 38 This fragmentation of power and distrust has encouraged the production of detailed laws with strict goals, deadlines, and procedural requirements, 39 and has encouraged an adversarial, judicialized approach to enforcement. 40 Member-states often favor detailed directives and regulations that facilitate Commission and European Court of Justice (ECJ) enforcement actions against noncompliant states. 41 The European Parliament favors this approach, as it prefers to limit member-state discretion in implementation and to encourage the Commission or private parties to take enforcement actions against laggard member-states. 42 The fragmentation of power also insulates the ECJ against legislative overrides and political backlash, and has emboldened the ECJ to take a strict stance in enforcing EU law against noncompliant member-states. 43 The combination of action-forcing statutes and judicial assertiveness has encouraged the Commission to pursue enforcement litigation against noncompliant member-states. Also, EU treaties, secondary legislation, and expansive ECJ interpretations have created a number of legally enforceable individual rights, which private parties regularly invoke in litigation against member-state governments via the EU’s preliminary ruling procedure. 44

Finally, the influx of American law firms to the European market has played a powerful role in transforming legal practice in the EU. During the 1960s and 1970s, a number of American firms followed their multinational clients abroad and established offices in Europe, primarily in London, Paris, and Brussels. This trend accelerated dramatically from the mid-1980s, as American law firms anticipated that the EC’s single market initiative would create opportunities for lucrative legal, lobbying, and advocacy work in which they might possess an advantage relative to European firms. 45

Table 1 and Figures 1 and 2 show the dramatic increase in the presence of American law firms in Europe. Between 1985 and 1999 the number of offices of American law firms in Western Europe more than doubled, from forty-three to ninety-nine. The total number of lawyers employed by American firms in Western Europe increased nearly six-fold in the same period, from 394 to 2,236. Though these figures demonstrate a marked expansion of American law firms, they greatly underestimate the impact of American firms in three respects. First, much of the

### TABLE 1. U.S. law firm offices and lawyers overseas

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<td>Paris</td>
<td>101</td>
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<td>Frankfurt</td>
<td>20</td>
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<tr>
<td>Other Western Europe</td>
<td>93</td>
<td>7</td>
<td>180</td>
<td>11</td>
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<td>Total</td>
<td>394</td>
<td>43</td>
<td>698</td>
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<td>Asia</td>
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<td>Japan (Tokyo)</td>
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<td>Hong Kong</td>
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<td>Other Asia</td>
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<td>Total</td>
<td>168</td>
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<td>Other</td>
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<td>Total overseas</td>
<td>803</td>
<td>80</td>
<td>1,539</td>
<td>124</td>
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Source: This table has been compiled from "The NLJ 250" published annually in the National Law Journal and "The AmLaw 100" published annually in American Lawyer.

Legal work done for clients in the EU is handled in the American firms' home offices in the United States. Second, this data ignores the activities of American accounting firms, which in some countries—such as France—are authorized to provide legal services and have emerged as major competitors to European firms.46 Third, and most importantly, this data fails to account for the wholesale reorganization of the legal profession in Europe that American firms have helped to spark. American firms had the size, forms of organization, and sets of skills necessary to provide a wide range of services that appealed to corporate clients. American firms had specialized experience in legal fields such as mergers and acquisitions and securities regulation that became vital in the increasingly liberalized market.47 Faced with pressure from these formidable competitors, European firms have adopted many of the legal techniques used by American firms and have tried to match their size and forms of organization through expansions, mergers, and the forma-

tion of global alliances that have reshaped the legal services industry.\textsuperscript{48} In the areas of corporate law in which American firms have had the greatest impact, regulated industries now have access to large law firms equipped to engage in the mega-lawyering techniques that have long been central to American legal style.

Securities Law in the EU

Before the 1980s, securities exchanges in Europe relied on flexible, informal self-regulation based largely on trust between repeat market players. While the degree of government regulation of securities markets varied across EU member-states, in all cases exchanges were granted considerable autonomy. Most member-states had few disclosure requirements for the issuance or trading of securities. In the mid-1980s, seven of the then-twelve member-states did not require firms to publish a prospectus when issuing a security, nine of the member-states did not impose criminal penalties for insider trading, and none of them had an autonomous, national securities regulatory agency. European securities markets were also shielded from private litigation, as informal, self-regulatory approaches limited private causes of action that might have empowered shareholders to sue securities firms or listed companies for malfeasance and fraud.

Since the early 1980s, the EU has transformed its regulatory regime for securities, and its efforts have intensified with a series of initiatives during the past five years. Economic liberalization, political fragmentation, and the activities of American law firms are all acting to reshape the EU's emerging regulatory regime along American lines. The contours of the new approach to securities regulation reflect the hallmarks of U.S. securities regulation identified above: detailed law focusing on disclosure, transparent regulatory processes, and an adversarial, judicialized approach to enforcement with an increased emphasis on private enforcement.

The liberalization of European financial markets simultaneously undermined existing national systems of securities regulation and created pressures for new forms of EU-level regulation. Liberalization accelerated rapidly beginning in the mid-1980s as some national governments started lifting restrictions on cross-border capital movements. The EU quickly stepped in to promote financial market liberalization as part of its single market program, and adopted a series of directives culminating in a 1988 directive calling for the complete liberalization of capital movements by 1990. Cross-border activity increased dramatically in the 1990s as investors, firms, and financial service providers sought opportunities outside their home markets. Not only did the number and diversity of players in securities markets increase, but new trading platforms were also established. Finally, the introduction of the Euro radically accelerated the process of market integration.

From the outset, this market liberalization was coupled with an effort spearheaded by the European Commission to re-regulate at the EU level. The Commission recognized that the informal, opaque regulatory practices common in most member-states were incompatible with a truly Europeanized securities market. If

49. See Karmel 1999, 30; Vogel 1996, 94–98.
existing regulatory schemes persisted, they would discriminate against outsiders and prevent the establishment of a single market for financial services. If member-states unilaterally adopted more transparent, codified regulatory requirements, divergence between these national requirements would continue to fragment the market.\textsuperscript{53} Therefore, the Commission proposed a series of directives establishing minimum EU standards for (1) public offerings and listings, (2) trading activities, and (3) financial intermediaries.\textsuperscript{54} These directives introduced stringent disclosure requirements and demands for transparency in regulatory processes similar to those found in American securities law.

Despite the establishment of these minimal standards, regulatory barriers continued to fragment national markets in important respects. In the run up to the launch of the Euro, the member-states called on the Commission to table an action plan to improve the single market in financial services. The 1999 Financial Services Action Plan set out a schedule for the adoption of forty-two new measures to make the single market in financial services a reality by 2005.\textsuperscript{55} The EU has already completed most of the Action Plan's measures, and the Internal Market Directorate General has issued a series of new proposals aimed at enhancing market transparency.\textsuperscript{56} In 2000, the Council also convened a "Committee of Wise Men"—headed by Alexandre Lamfalussy—to propose institutional reforms to improve the securities regulatory process. Following the Lamfalussy report's suggestions, the EU established a pair of regulatory committees. The European Securities Committee (ESC) was given the power to issue implementing measures on the basis of EU legislation, and some observers view it as an embryonic SEC.\textsuperscript{57} The Committee of European Securities Regulators (CESR), which brings together representatives of national securities regulators, was charged with advising the ESC and with improving coordination amongst national securities regulators.\textsuperscript{58}

The politics surrounding the establishment of the new securities committees and the adoption of the most recent securities directives illustrate how political fragmentation is influencing the EU's emerging regulatory regime. First, the European Parliament has applied its legislative power to demand that the new securities committees be structured in a transparent, democratically accountable manner.\textsuperscript{59} The Parliament blocked the establishment of the ESC until it secured the assurance that it would be fully informed of upcoming ESC decisions in time to make its views heard. Second, the Parliament has proposed hundreds of amendments to securities directives, attempting to constrain bureaucratic discretion and to force

\textsuperscript{53} Warren 1994, 186.
\textsuperscript{54} See Lanno 2001; Karmel 1999.
\textsuperscript{55} Commission 1999a.
\textsuperscript{56} Commission 2002a.
\textsuperscript{57} Lanno 2002, 13.
\textsuperscript{58} The CESR replaced the Forum of European Securities Commissions (FESCO), a weaker cooperative body established by national regulatory authorities in 1997 without any formal EU mandate.
regulators to protect consumer interests. The Lamfalussy Report had called for the adoption of broad "framework directives" that would leave detailed implementing measures to expert Committees.\(^6^0\) Nevertheless, as a result of the Parliament's efforts to constrain executive discretion, the EU's most recent securities directives, such as the draft prospectus and market abuse directives, continue to be extremely detailed. Finally, political fragmentation is also leading the EU to take a stricter, more judicialized approach to enforcement. In response to the implementation failures of some member-states throughout the 1990s, the Parliament, the Council, and the Commission have endorsed the Lamfalussy Report's call for the Commission to strengthen enforcement by bringing more cases before the ECJ via the infringement procedure.

Beyond the increases in centralized enforcement by the Commission, there are clear signs of increased efforts by private parties (that is, shareholders) to take legal action to enforce securities regulations. U.S. institutional investors in Europe have begun employing their shareholder activism techniques, including litigation.\(^6^1\) Shareholder activism groups have emerged in a number of EU member-states, including France and Germany.\(^6^2\) In the UK, recent corporate collapses have triggered an unprecedented wave of shareholder class action lawsuits.\(^6^3\) In France, minority shareholders successfully brought suit to block Schneider Electric's takeover of Legend in May 2001. In Germany, where shareholder lawsuits have been nearly unheard of, shareholder groups such as the Association for the Protection of Small Shareholders (Die Schutzgemeinschaft der Kleinaktionäre) and hundreds of individual shareholders have filed suits against companies whom they accuse of issuing misleading performance information.\(^6^4\) Moreover, reforms passed in the 2002 Fourth Financial Market Promotion Act (4. Finanzmarktförderungsgesetz)—including the establishment of a legal basis for investors to claim compensation for losses suffered because of late, omitted, or false disclosure, and the extension of the statute of limitations for prospectus liability—will encourage litigation.

American law firms active in European securities markets have accelerated the Americanization of securities regulation in the EU. American law firms are active players in European securities markets, advising clients in many of Europe's largest initial public offerings, mergers, and acquisitions. In many areas, these firms have shifted legal practice in a more American direction than that required by the content of EU directives and regulations. The Americanization of legal practice is evident in the most common type of international offerings: those that include offers of unregistered securities to institutional investors outside of the issuer's home jurisdiction pursuant to a "professionals exemption." In such transactions,

\(^6^0\) Lanno 2002, 11–12.
\(^6^1\) Kissane 1997.
\(^6^3\) Financial Times, 15 October 2001, 22.
European institutional investors now prefer U.S.-style disclosure documents when making large purchases of equity securities offered by European issuers.\textsuperscript{65} This preference reflects, at least in part, the fact that U.S.-trained lawyers—brought in for many of the deals by U.S. investment banks or European firms—have over time aligned the standard of disclosure with U.S. transactions for comparable deals. Finally, some prominent American firms have even played a role in shaping the substance of new regulations in Europe including, for example, Germany’s Neuer Markt’s latest regulations for IPO prospectuses, which brought the Neuer Markt closer to U.S. standards.\textsuperscript{66}

\textit{Products Liability Law in the EU}

Traditionally, plaintiffs in EU member-states could make product liability claims under general principles of civil law, such as breach of contract or tort. Tort claims generally required proof of negligence or intentionality. Presumption of negligence and reversal of burden of proof were available in some jurisdictions, but no systems were based primarily on strict liability.\textsuperscript{67} A variety of legal rules and institutions created impediments to, and decreased the potential payoffs of, products liability litigation. Impediments common to most member-states included limited discovery procedures and the absence of contingency fee arrangements and class actions. The expected benefits of product liability litigation were dampened by the fact that damage awards remained low (in part because judges, rather than juries, determined awards), punitive damages were nearly nonexistent, and many of the costs associated with medical treatment and missed work were covered by national medical and social welfare systems. Also, many member-states imposed a “loser pays” system. As a result of these factors, product liability litigation was uncommon.

Beginning with the adoption of the Product Liability Directive in 1985, the EU has moved the substance of EU products liability law much closer to that found in the United States. However, despite the adoption of much of the substance of American products liability law, the practice of products liability law in the EU has not yet been Americanized. Product liability litigation remains rare, class actions are unavailable in most member-states, and the massive damage awards common in the United States are altogether absent. Economic liberalization and political fragmentation in the EU have encouraged the introduction of central aspects of American products liability law into European law; however, American law firms remain absent from this area of law in the EU and have therefore played no role in stimulating Americanization of legal practice. Moreover, a variety of legal rules and

\textsuperscript{65} Jackson and Pan 2001.
\textsuperscript{66} Financial Times, 30 August 2001, 27.
\textsuperscript{67} Spacone 2000.
institutions that increase costs and decrease potential rewards continue to discourage product liability litigation in the EU.

In the wake of the thalidomide tragedy of the early 1960s, national governments across the EU dramatically increased their efforts to protect consumers from unsafe products. These efforts coincided with the ongoing liberalization of trade in the common market. National product safety standards and product liability regimes threatened to undermine the common market by creating regulatory barriers to trade. To protect the common market, the European Commission had a strong incentive to promote harmonization of product safety regulations and products liability law at the European level. Moreover, the Commission was sensitive to critiques that the EU served the interests of big business, and it was eager to adopt policies in areas—such as consumer protection and environmental protection—that were of great concern to European citizens. The Commission viewed products liability law as a means to protect consumers in an increasingly open market, and was eager to claim the political credit for doing so. Given the EU's small budget and staff, using product liability law to protect consumers had the advantage of not requiring the establishment of a vast regulatory bureaucracy. Instead, consumers could be legally empowered to protect their own interests in court.

In 1976, the Commission proposed a directive establishing strict liability for defective products. After being blocked by some member-states for a decade, a compromise was reached and the Council adopted the Product Liability directive in 1985. The directive reflected many legal concepts of U.S. products liability law, including the doctrines of strict liability and joint-and-several liability, as well as expansive definitions of liable parties and the notion of a "defect." However, the Directive also sought to avoid the perceived excesses of the U.S. system. To satisfy those member-states concerned about the negative impact of the directive on European manufacturers, the directive included a mandatory time limit on claims and optional provisions concerning damage ceilings, the developmental risks defense, and liability for primary, unprocessed agricultural products. The directive left questions of nonmaterial damages, such as psychological pain and suffering, and punitive damages entirely to the member-states.

Debate over the directive subsided after its passage but resurfaced in the wake of the "mad cow" crisis concerning the safety of beef products. Initially, the EU adopted an amendment to the directive mandating strict liability for damages caused by primary agricultural products. The European Parliament then pressed for a substantial revision of the directive with the aim of strengthening consumer protection. The Commission responded by issuing a Green Paper outlining a series

69. Stapleton 2002, 1231.
73. Opinion of 5.11.98 (O.J. C 359 of 23.11.98).
of measures that might enhance consumer protection.74 Many of these revisions drew on concepts developed in the U.S. case law on products liability, such as rules on discovery, market share liability, reporting requirements, nonmaterial damages, and class action suits. However, after reviewing the comments on its Green Paper, the Commission concluded that in light of the uncertainty concerning the impact of the directive, it would be inappropriate to amend it as yet.75

While the dearth of systematic, comparative data makes it difficult to assess the impact of the directive, it is evident that the introduction of strict liability under the directive has not yet stimulated the torrent of litigation, the high costs and the unpredictability associated with the American system.76 The European Consumers' Organisation (BEUC) reports that it has not observed an increase in smaller product liability claims, that it is unaware of any major multiparty actions or large damage awards to consumers under the directive, and that there are still few reported cases based on new standards established by the directive.77 In the insurance sector, which handles most claims for manufacturers, no European-wide statistics exist on the claims made or compensation paid in product liability cases.78 Although it is quite possible that the directive has led to an increase in claims leading to out-of-court settlements, these settlements remain confidential.

While economic liberalization and political fragmentation encouraged the Americanization of the substance of EU products liability law, patterns of legal practice across the EU have resisted such change. The institutional impediments and financial disincentives outlined above continue to discourage product liability litigation. Moreover, as of yet American law firms have made no inroads into European legal services markets in the area of products liability, and thus have played no role in stimulating a shift in legal practice. In 2002, the Commission proposed a directive that aimed to improve access to justice by strengthening legal aid across the EU for both individuals and public interest organizations, and that also called for the adoption of a "loser pays" system with exceptions for weaker parties in areas such as consumer protection law.79 If adopted, such reforms promise to increase incentives for aggrieved consumers to pursue products liability litigation.

The combination of economic liberalization, political fragmentation, and the influx of American law firms has stimulated a considerable Americanization of legal style in the EU across a wide range of issue areas. Economic liberalization has undermined national systems of regulation, and the political fragmentation built into the EU's institutional structure has encouraged the development of a regulatory style that emphasizes transparency, detailed codification of rules and proce-

76. Hodges 2000, 184.
77. BEUC 2000.
dures, and judicial enforcement more than did traditional national styles of regulation in EU member-states. Competition from American and British law firms has stimulated a wave of reorganization and consolidation among continental European firms, which are increasingly adopting the structures and practices developed by corporate law firms in the United States decades ago. A major reorientation of securities regulation has taken place since the mid-1980s, emphasizing disclosure and transparency. The substance of products liability law has moved in an American direction as well. However, changes in the practice of products liability law remain minimal, because the existence of alternative compensation mechanisms, restrictions on class actions and punitive damage awards, and the absence of American law firms in this field continue to limit the emergence of the more litigious aspects of an American-style product liability regime.

Neither regulatory competition nor policy emulation provides adequate explanations for these developments. Only in the area of securities regulation can one make a plausible argument that regulatory competition has played a significant role in encouraging Americanization, and even in this area, concerns regarding competition with American securities markets have been secondary to purely 'domestic' (European) motivations for reform. More generally, EU policymakers do not emphasize transparency, draft detailed directives, or rely on judicialized enforcement in an effort to emulate American legal style or in an effort to improve the competitiveness of European industries. Quite to the contrary, many aspects of American legal style are viewed as costly pathologies, and many critics contend that the EU's formal, judicialized approach to regulation is hindering the performance of European industry. The Americanization of EU legal style results not from emulation or competition, but is rather the product of the agency problems facing the EU's multiple political principals and the diversity of players in the markets that the EU seeks to regulate.

Americanization of Law in Japan

Japanese Legal Style

Postwar Japan has relied heavily on an informal regulatory style, in which government bureaucrats use informal, flexible "administrative guidance" to steer the affairs of firms and pursue their regulatory goals. Compliance with this guidance is, in principle, voluntary. In practice, bureaucrats have a number of tools with which to compel firms to comply. Japanese courts have facilitated these informal, opaque practices by granting government ministries broad discretion.

83. See Ramseyer and Rosenbluth 1993; Ramseyer 1994.
litical leaders and bureaucrats have traditionally focused on pleasing their business constituencies at the expense of diffuse interests such as consumer or environmental protection. In many areas, government bureaucrats have allowed relevant industries to 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.

Political leaders have consistently sought to discourage litigation and to channel policy disputes away from courtrooms and into informal, nontransparent bureaucratic settings. Most notably, the government has discouraged litigation by limiting the number of lawyers in Japan. Until recent reforms, only approximately 700 students per year passed the entrance exam for the Supreme Court's Legal Research and Training Institute, which one must attend to become a lawyer (bengoshi). Foreign lawyers were excluded almost entirely from practicing law in Japan until 1986. As of 1 January 2002, there were 18,917 lawyers admitted to practice Japanese law in Japan; less than one lawyer for every 7,000 residents. Even if one adds the variety of other paralegal professions in Japan, the total number of legal service providers remains extremely low compared to the United States, where there is one lawyer for every 290 residents. Access to courts has also been limited by backlogs on court dockets resulting from inadequate funding of the judicial system, high filing fees, the absence of contingency fee arrangements, and procedural rules such as restrictive standing requirements and limited pretrial discovery. Potential payoffs are also limited, as there is no provision for punitive damages in tort law and judges, rather than juries, determine awards.

Americanization in Japan

In the 1990s, the confluence of pressures created by economic liberalization and political fragmentation led to a significant Americanization of Japanese legal style across a number of policy areas. Since the early 1980s, Japan has undertaken a massive economic liberalization across a wide range of economic sectors. This liberalization has introduced new players, both foreign and domestic, into previously sheltered markets. The increasing diversity of players undermined traditional Japanese approaches to regulation based on close ties between insiders in the Iron Triangle. Foreign firms did not fit within these frameworks and, backed by their home governments, demanded regulatory clarity, "level playing fields," and the removal of "unfair trade barriers." Domestic players who stood to benefit from liberalization regularly invoked this foreign pressure (gaiatsu) as a justifica-

84. Upahm 1996.
tion for the reforms they sought. To achieve their policy objectives in the context of markets with an increased number and diversity of participants, Japanese regulators were pressured to adopt approaches that emphasized increased transparency and increased judicialization of dispute resolution.

While economic liberalization by itself provided a vital impetus for reform, it was only after economic liberalization combined with a marked increase in political fragmentation that Japanese legal style moved dramatically in an American direction. The watershed in terms of political fragmentation came in 1993 with the election of the first non-LDP government of the postwar era and the subsequent reform of the electoral system in 1994. In 1993, the LDP was ousted from government after nearly forty years of uninterrupted dominance and was replaced by a coalition government headed by Prime Minister Morihiro Hosokawa. The new coalition government took power having made a commitment to reforming Japan’s electoral system within one year. They quickly replaced the existing single nontransferable vote, multimember district electoral system with a new system based on a combination of 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. 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. 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 power had a great incentive to codify administrative procedures and invite judicial review 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 the LDP’s 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 electoral system had encouraged LDP politicians to target specific, narrow business constituencies, the new electoral system gave politicians greater incentives to appeal to large portions of the electorate with policies favoring diffuse public interests. As a result, politicians had an incentive to open up regulatory processes to previously excluded interest groups such as consumers and environmentalists.

89. See Curtis 1999, 137–70; Sakamoto 1999, 99–133.
90. Ramseyer and Rosenbluth 1993.
The Hosokawa coalition seized on its newfound power to increase the accountability and transparency of the bureaucracy. The 1993 Administrative Procedures Law (APL) aimed to codify administrative procedures and increase transparency. The APL introduced formal procedures for administrative guidance, licensing and permitting, and public hearings, and also established the requirement 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.

The wave of reform did not end with the fall of Hosokawa, but persisted through the shifting LDP-led coalition governments of the mid-1990s and through the LDP's return to power following the 1996 election. In 1998, the government of Prime Minister Ryutaro Hashimoto presented a Disclosure of Information Act to the Japanese Diet as part of a series of reforms intended to increase the transparency and accountability of the bureaucracy. Proponents of government accountability had pushed for a freedom of information law modeled on the U.S. 1976 Freedom of Information Act for more than twenty years, but the LDP had consistently blocked such proposals. The Disclosure of Information Act, which was adopted in May 1999, allows individuals to request government information and establishes administrative and judicial procedures to hear appeals in cases where the government denies requests.

Changes in the regulation of nonprofit organizations provide another example of the trend toward Americanization. Traditionally, nonprofit organizations in Japan could acquire and maintain legal status only with the explicit permission of the competent bureaucratic authority. Many groups were denied legal standing, while those that won it were subject to ongoing supervision. The tight restrictions on nonprofit organizations helped the LDP to keep outsiders from interfering with the closed, informal decision-making processes that went on within the Iron Triangle. In 1998, pressured by its coalition partners—the Social Democratic Party (SDP) and Sakigake—the LDP agreed to a Nonprofit Organization (NPO) Law that permits groups to gain legal status without bureaucratic screening and to maintain status without administrative guidance.

Economic liberalization also allowed American law firms to enter the Japanese market, and these firms soon played a catalytic role in the Americanization of Japanese legal style. In the early 1980s, as Tokyo emerged as a world financial center, American law firms sought to enter the Japanese market. The Foreign Lawyers Special Act of 1986 opened the Japanese legal services market to foreign firms, subject to numerous restrictions. Subsequent reforms over the course of the 1990s eased some of these restrictions, but foreign law firms are still prohibited from

hiring Japanese lawyers or from formally merging with Japanese firms. Despite these barriers, the number of American firms and lawyers has grown steadily since the mid-1980s. (See Table 1 and Figures 1 and 2.) American law firms play the leading role in advising on global equity offerings, and are actively involved in securitization, mergers and acquisitions, and a wide range of other activities. Though Japanese corporate law firms remain small relative to their American counterparts, they have been growing substantially, particularly through mergers and the formation of numerous "specified joint venture arrangements" (tokutei kyodo jigyō) with foreign firms.

As various reforms aimed at increasing transparency and bureaucratic accountability and empowering private actors to exercise legal rights have increased the need for lawyers in Japan, the government has undertaken reforms to increase the number of legal professionals. During the past decade, the Supreme Court Legal Research Institute has nearly doubled the number of would-be lawyers that complete its training course each year. In June 2001, the Cabinet-appointed Judicial Reform Council issued a report calling for a complete overhaul of the nation's legal system, including the establishment of American-style law schools, tripling the number of students who qualify for the bar annually, and a variety of measures that would lower litigation costs and facilitate citizens' access to legal services. The government of Prime Minister Junichiro Koizumi endorsed the plan in 2001 and pledged to follow its recommendations.

**Securities Regulation in Japan**

Although Japan emerged from the Allied occupation after World War II with a statutory infrastructure for securities regulation similar to that of the United States, securities regulation in Japan has differed markedly from that in the United States. First, the regulatory regime has focused not on disclosure but on "merit" standards, reducing risk by limiting new entrants, and restricting the range of permissible investment products. Second, securities regulation by the Ministry of Finance (MOF) has been marked by opacity and infrequent resorting to formal rules and procedures. Finally, privatization of enforcement has been limited in comparison to the United States.

The U.S. effort during its postwar occupation to institute an American-style regulatory regime for securities in Japan largely failed. The 1948 Securities and Exchange Law (SEL) foisted on Japan was patterned after the U.S. regulatory regime and provided for an independent Japanese securities and exchange commission, as well as civil liability for misleading and false registration statements. However,

the Japanese commission was disbanded as soon as the Peace Treaty was signed in 1951, and its powers transferred to the Finance Management Bureau of the MOF. Instead of adopting the U.S. approach focusing on disclosure, the MOF amended the SEL and regulated securities to restrict the number of players and control the types of investments investors could make. Organizations such as the Tokyo Stock Exchange and the Japan Association of Securities Dealers—which engage in self-regulation (jishu kisei) subject to MOF guidance—also emphasized merit regulation rather than disclosure.\textsuperscript{100}

The MOF’s regulatory practices were notoriously opaque.\textsuperscript{101} The interpretation and application of the SEL to particular cases was largely oral and informal, often taking the form of a personal visit or telephone conversations between the MOF and issuers, with no public scrutiny or written record. Even where written guidance of some kind was called for, this mainly took the form of administrative directives (tsutatsu) or administrative instructions (jimu-renraku). Most MOF enforcement actions and policy initiatives were performed informally—often in consultation with what were then the “Big Four” domestic securities firms.

The threat of private litigation played virtually no role in encouraging compliance with securities regulation in Japan. Between 1950 and 1990, shareholders filed fewer than twenty derivative suits in Japan.\textsuperscript{102} Before 1989, there was little incentive for “insiders” to refrain from using nonpublic information to their advantage, as Japan effectively lacked an insider trading regime.\textsuperscript{103}

Since the mid-1980s, Japan has shifted toward an American approach to securities regulation emphasizing disclosure by issuers, transparency of regulators, and enforcement by private parties. This shift has been spurred on by a combination of the factors we identify above. The increasing diversity of players (particularly foreign ones) active in Japan’s securities markets, which has accompanied the liberalization of Japanese financial markets since the mid-1980s, rendered the MOF’s informal, opaque style of regulation increasingly untenable. Throughout the 1980s and 1990s, the U.S. government pressured Japan to open its securities markets to U.S. firms and to increase the transparency of its regulatory processes. While pressure from the U.S. government played a role in prying open the sheltered Japanese securities markets, it was ultimately the general increase in investors and financial service providers active in Japanese markets that undermined Japan’s traditional approach to securities regulation.\textsuperscript{104} American investment banks and other powerful new players had little incentive to submit to the MOF’s informal pressures in the increasingly liberalized market, and individual Japanese investors lost confidence in securities markets as revelations of MOF corruption surfaced. With MOF officials unable to regulate markets through their traditional approach, gov-

\textsuperscript{100} Milhaupt 1994.
\textsuperscript{101} Vogel 1996, 170.
\textsuperscript{102} West 1994, 1438; 2001, 351.
\textsuperscript{103} Okamura and Takeshita 1989.
\textsuperscript{104} Sobel 1994, 97–98, 106–110.
ernments in the late 1980s and 1990s undertook a number of securities-related regulatory reforms, the most ambitious of which was the "Big Bang" reform announced by Hashimoto in 1996 and modeled after the Big Bang financial market reform in the UK.

The pressure for a fundamental reorientation of Japan's approach to securities regulation finally became overwhelming after the ongoing impact of economic liberalization was coupled with the impact of political fragmentation in the mid-1990s. The political fragmentation that occurred after 1993 encouraged the Japanese government both to increase the transparency of the MOF's regulatory practices and to promote decentralized enforcement by shareholders. The MOF had been under pressure to delegate much of the regulation of the securities industry to an independent agency since financial scandals involving securities houses had come to light in 1991. Initially, the MOF was able to resist such pressure, and it maintained control over the new Securities and Exchange Surveillance Commission (SESC) that was established in 1992 in response to the scandals. However, in 1998, after another set of high-profile scandals, opposition parties pressured the Hashimoto government into transferring control of the SESC to an independent body, the Financial Supervisory Agency.\(^{105}\) The revamped SESC has already become more active than its MOF predecessor in using its formal enforcement powers, including recommendation of disciplinary action to public prosecutors.\(^{106}\)

The regulatory process has also become more transparent. 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. Today, regulatory proposals are widely publicized for comment, and in 2001 the government instituted a system in which ministries and agencies publicize their interpretations of the law at the request of companies and individuals.\(^{107}\)

Along with greater focus on disclosure and transparency in regulation, the government has promoted enforcement by private actors. In 1993, the Commercial Code was amended to make derivative suits easier and less costly, and damage amounts were increased.\(^{108}\) Following the amendments, the number of derivative suits and the amounts claimed have increased.\(^{109}\) The purchase of directors and officers insurance, which was not even sold in Japan before 1994, has become standard for public companies. More generally, the number of shareholder lawsuits filed annually in Japan has more than tripled since 1993, when the govern-

ment lowered the filing fees for shareholder lawsuits. Nevertheless, the level of litigation continues to be limited by the dearth of lawyers in Japan. As noted above, in recent years the Japanese government has doubled the number of new lawyers graduating each year and is considering further reforms to lower litigation costs and facilitate access to legal services. However, it will take time for increases in the number of lawyers to begin to have a significant influence on the legal system and for changes in the practice of securities law to, in effect, "catch up" with the changes in substantive law.

Products Liability Law in Japan

Until recently, a number of statutory barriers discouraged potential product liability plaintiffs in Japan, so much so that between 1945 and 1990 only 150 product liability cases were decided in Japan. The few consumers who did bring product liability cases did so under negligence-based tort law, which required that they prove negligence on the part of manufacturers. Severe restrictions on pretrial discovery, however, typically made it impossible for plaintiffs to prove negligence. In addition to these specific obstacles, the general deterrents to litigation mentioned above, such as a limited number of lawyers, high attorney's fees, high court filing fees, the duration of trials, the absence of punitive damage awards and contingency fee arrangements, and the lack of class actions, all discouraged injured consumers from bringing suits. Moreover, with the exception of a few highly publicized mass torts, judges generally sided with manufacturers in product liability cases. Instead of relying on lawyers, litigation, and courts, the Japanese approach to product safety relied on the bureaucracy issuing precise design standards and establishing nonjudicial routes for injured consumers to secure compensation. The government established a variety of public insurance schemes and industry-wide compensation trust funds, which helped channel disputes toward the arena of informal bureaucratic control.

The idea of adopting a products liability law based on strict liability had been debated since the early 1970s, but government and business leaders consistently opposed the idea, arguing that it would encourage frivolous litigation and maintaining that the government's strict product standards provided consumers with adequate protection. Finally, in 1993 pressures created by economic liberalization and political fragmentation converged to spark the passage of a product liability law. Economic liberalization promoted the adoption of the law in two ways.

111. Sarumida 1996.
First, the wave of deregulation that swept over Japan weakened the ability of the bureaucracy to protect consumers through strict product regulations. This led the government to recognize that privatized approaches to consumer protection, such as products liability law, might be necessary to protect consumers. Second, as trade liberalization opened Japanese markets, foreign firms and their governments complained that Japan's rigid product safety standards, which substituted for products liability law, constituted nontariff barriers to trade.¹¹⁷

The political fragmentation that came with the election of the first non-LDP government since the 1940s finally tipped the balance. Consumer groups, who had long felt neglected by the LDP, had been important backers of the Hosokawa coalition. Shortly after taking office, the new coalition pushed through a new Product Liability (PL) Law, which went into effect at the start of 1994.¹¹⁸ Similar to the EU's product liability directive, Japan's new PL law introduced central aspects of American products liability law while attempting to avoid some of the excesses of the U.S. system. Most importantly, the law introduced the notion of strict liability and expanded the definition of manufacturer to include any party involved in the manufacturing process. To the disappointment of some consumer activists, however, the new PL law's definition of "defect" allows courts to continue to apportion fault based on comparative negligence, is silent on the issue of the burden of proof, and includes no special provisions regarding pretrial discovery or damage awards.

It remains too early for a definitive assessment of the impact of the new PL law; however, initial evidence suggests that it may usher in profound changes. While the new PL law has not stimulated a flood of litigation or huge settlement amounts, it has stimulated a dramatic increase in public interest in product liability, as evidenced by the unprecedented sales of books on products liability law, and has already led to a marked increase in the number of product liability suits.¹¹⁹ The new PL law has also stimulated changes in business practices. Manufacturers are including more detailed warnings and instructions with products, seeking legal review of these disclosures, and buying product liability insurance.¹²⁰ A number of recent settlements indicate that because of the lowered burden of proof under the new PL law's strict liability provisions, manufacturers are now settling claims they would have previously dismissed.¹²¹ Finally, weary of being burdened with the liability for defective products, Japanese retailers are demanding more detailed contracts with manufacturers and consumers and increasingly demanding liability waivers.¹²²

¹¹⁷. Ibid., 148–54.
¹¹⁸. Ibid.
¹¹⁹. See Nottage 2000, 217; Rothenberg 2000, 489–90, 506.
¹²². Ibid., 169–71.
While economic liberalization and political fragmentation both played important roles in stimulating the reform of Japanese products liability law, American lawyers have played only a marginal role. The U.S. law firms with a presence in Japan primarily represent corporate entities, whereas products liability claims are typically brought in the name of injured individuals. Accordingly, the influence of American law firms on Japanese legal style has been limited mostly to advocating for general reforms in the legal profession, such as increases in the number of lawyers.

In Japan, economic liberalization coupled with the increasing political fragmentation following the weakening of the LDP monopoly and reform of the electoral system in the early 1990s has led to significant changes in regulatory style. In areas ranging from administrative procedures, to the regulation of nonprofit organizations, to securities regulation and product liability, reforms have decreased bureaucratic discretion and increased transparency. Reforms are also gradually increasing the ability of Japanese citizens to assert their rights in court. These changes have gone further in securities regulation—where economic liberalization has had a stronger impact and where American law firms have stimulated shifts in legal practice—than in products liability. In both areas, the development of American legal style continues to be stunted by the dearth of lawyers; however, major reforms are underway aimed at increasing the ranks of the legal profession and at facilitating litigation in other ways. The timing and scope of these changes cannot be explained adequately by regulatory competition or policy emulation. Only in the area of securities regulation can one make a powerful argument that adoption of U.S.-style laws was driven by competition with, or emulation of, U.S. securities markets. However, even in this area, the impact of regulatory competition and emulation was only indirect. Advocates of securities reform in Japan were able to strengthen their position by shifting blame for the cost of reform to “foreign pressure,” but the most significant moves toward American legal style came only after political fragmentation disrupted cozy relationships between the LDP, the MOF, and the securities industry, and after American law firms began employing American-style legal practices in Japan.

**Conclusions**

American legal style is going global, but the pace and scope of its expansion varies across countries and issue areas. In both the EU and Japan, the shift toward American legal style is being driven by increasing economic liberalization and political fragmentation. Economic liberalization encouraged the spread of American legal style not because it pressured policymakers to adopt more internationally competitive American practices, but because it undermined traditional, informal, opaque approaches to regulation and pressured governments to resort to more formal, transparent, adversarial, American-style processes. Political fragmentation added a vital set of political incentives for the Americanization of law. Only when
the increasing fragmentation of political institutions created incentives for lawmakers to judicialize policy-implementation and enforcement processes did we observe significant shifts toward American legal style. Finally, economic liberalization unleashed a transnational force—American law firms—which accelerated the globalization of American law in the areas where they were active by spreading their practices and pressuring foreign legal service industries to adopt them.

Despite all of these pressures, neither in Japan nor in the EU has the shift toward American legal style led to the extremes of American-style litigiousness. Entrenched institutional impediments to litigation—such as restrictive rules of standing, the absence of class actions, and limited damage awards—discourage litigation in many areas. Governments in the EU and Japan continue to be eager to avoid the notorious excesses of the American system, and they are well positioned to do so. Nevertheless, the spread of American legal style in both the EU and Japan is substantial and ongoing, and because it is rooted in fundamental changes in political institutions and economic structures, it is unlikely to be reversed.

The political consequences of the globalization of American law will be far-reaching. The shifts in legal style we describe above promise to erode the power of closed networks of political and business elites in shaping policy—by increasing openness and transparency, and by empowering a broader range of political interests to challenge bureaucratic malfeasance and corporate misconduct. But enhanced openness, transparency, and judicial enforcement come at a steep price. The shift to American legal style also promises to increase the role of lawyers and costly, protracted litigation, while undermining traditions of trust and cooperative relationships between stakeholders in policymaking processes—the very attributes of policymaking in Western Europe and Japan that scholars and practitioners have long admired.

References


