The Transatlantic Environmental Conflict Explained: How Disparities in Power Distribution have Precluded Environmental Policy Cooperation

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Introduction

In the 1990s and 2000s, before the economic crisis of 2008 enveloped European capital markets and the attention of world leaders, it was widely perceived that a certain moral and cognitive difference was growing between America and Europe. For Europeans, it was a chance to develop an identity in contrast to a host of unpopular American policies.

As Jurgen Habermas wrote in the September-October 2001 issue of *New Left Review*:

The markedly national orientation of the Bush Administration can be regarded as an opportunity for the EU to define a more distinctive foreign and security policy towards the conflicts in the Middle East and the Balkans, and relations with Russia and China. Differences that are coming more into the open in environmental, military and juridical fields contribute to a soundless strengthening of European identity.

The emergent European identity was characterized not only by distinction from America but by opposition to the American Way. At the height of the transatlantic polemical atmosphere, which coincided with the two administrations of George W. Bush, neo-conservative author Robert Kagan codified the contemporary European and American identities in his well-known work *Of Power and Paradise*. Differences between the two polities are not misunderstandings or chance outcomes, but due to incontrovertible disparities in power and influence, he argued. His message that Americans are from Mars and Europeans from Venus resonated sharply in the run-up to the Iraq War, when some Americans perceived the United States to be the undisputed 'hyperpower' of the world. The tense transatlantic atmosphere of the early 2000s has since relaxed, as American leadership has moved toward multilateralism in both discourse and in action. But the United States’ return to some degree of humility on the international scene has not assuaged all the fears of irremediable difference generated in

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the straits of the early 2000s.

Of the political factors implying moral differences between America and Europe, environment issues have proven a particularly difficult one upon which to find common ground. The US has accumulated a record of disappointments to European hopes of regulating the 'environmental crisis.' For example, it signed without ratifying the Cartagena Protocol on Biological Diversity of 1992 and the Kyoto Protocol of 1997. Under the Bush administration, it became increasingly evident that Americans did not believe in climate change, which stung Europeans in contrast to America's willingness to believe that Iraq was harboring weapons of mass destruction. In 2009, the US Senate rejected the American Clean Energy and Security Act (known as the Waxman-Markey Bill), which would have given rise to greenhouse gas emission regulations parallel to those of Europe. Through both Republican and Democratic administrations, the US has proven unwilling to lead cooperative action on the environment, despite its role as the largest emitter of greenhouse gases until China surpassed it in 2009. Historically, American rejection of federal greenhouse gas regulation has nominally been on the grounds that it would hurt economic growth. The moral implications of this divergence are not difficult to discern: A politically-decisive number of Americans do not care about the environment or by extension those put at risk by climate change due to poverty or geography. As the respected critic of American environmental policy Cass Sunstein writes,

"Americans believe that the most serious risks associate with climate change will occur in the long term and will be faced mostly by people in other nations. [...] It seems clear that while Americans show some and perhaps increasing interest in the problem of climate change, they are not willing to sacrifice a great deal to reduce the associated risks."4

The reverse of the coin implies that Europeans care much more about these moral issues.

However, accusations that America is a rogue environmental state are not confirmed by a

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4 513 Sunstein
comparison of the factual outcomes of American and European environmental policies.

Despite its focus on international environmental leadership, Europe has neither succeeded in resolving the ecological crisis of the present nor in providing significantly better environmental outcomes than America. In fact, by certain metrics, the US is significantly "greener" than Europe. A short comparative review of the facts of ecology is warranted to illustrate that America’s reputation as a polluter and Europe’s reputation as a ‘green’ economy are not deserved. The most polemical issue that attracts the attention of environmentalists is the American rejection of the Kyoto protocol, but a comparison of the projected greenhouse gas emissions of the US and the EU makes it quite clear that Kyoto alone has can do little in the way of ending global warming.

On the graph to the left, Europe’s only significant progress in reducing greenhouse gas output is correlated with the economic downturn of 2008. What is clear here

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is that carbon emissions in Europe have declined slightly from their 1990 levels, but this result is evidently quite far from the reductions necessary to make a meaningful impact on global warming. If the levels of greenhouse gases produced in 1990 were ecologically damaging, those same levels today are no less harmful. In other words, the vaunted Kyoto Protocol is no solution to global warming. Concurring with this reasoning, Hammitt (2011) argues that

“because halting the continuous increase in the greenhouse effect by stabilizing GHG [greenhouse gas] concentrations in the atmosphere will require major reductions in global emissions--by 50% or more--policies that lead to development of massive changes in energy supply and other technologies may be much more beneficial than policies to reduce current emissions.”

Stabilization of greenhouse gas emissions is a start to reducing global warming, but it is not an end in itself. Furthermore, it is questionable whether or not the Kyoto Protocol will truly make a difference in the long run in comparison to the rate of change in American carbon emissions.

In the US, greenhouse gas emissions measured in equivalent units have stood at a moderate 6.7% increase in 2009 versus 1990 levels, and projections cast doubt on their future increases. The

![Figure 2](https://example.com/figure2.png)

Figure 4. U.S. energy-related carbon dioxide emissions, 1990-2035 (billion metric tons)

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2012 Energy Information Agency report projects that US emissions will not return to 2005 levels until 2027 without additional federal intervention. The graph of the projected growth of US carbon dioxide emissions from the report is presented above. The projected feeble growth of these emissions is due to "growing use of renewable technologies and fuels, improved energy efficiency, slower growth in demand for electricity, and the growing substitution of natural gas for coal in power production".

The data projected in the graph "assumes that current laws and regulations affecting the energy sector remain unchanged throughout the projection (including the implication that laws which include sunset dates do, in fact, become ineffective at the time of those sunset dates)." It is thus an ecologically pessimistic extrapolation, from a political perspective, since it does not assume that any major federal initiatives will decrease carbon emissions. Of course, extrapolations can only be trusted to a limited extent. Nevertheless, the factual point that US greenhouse gas emissions have risen only moderately while EU greenhouse gas emissions have not significantly fallen from their 1990 levels remains unchallenged.

Beyond carbon emissions, there are other metrics of environmental policy outcomes that can be compared from an eco-centric perspective. For example, in terms of energy consumption, European economies may on average be less energy intensive, but European countries are smaller and experience smaller seasonal climatic swings than the US. America’s use of the world’s most precious resource, energy, is on par with the energy intensiveness of colder and larger European nations, as demonstrated in Figure Three.

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Figure 3: America’s economy is more energy intensive than those of many European states, but given its size and seasonal climatic variations, the discrepancy is to be expected.

If we consider another criterion of ecology, related to the contentious issue of food safety, the US bests every European nation with a significant agricultural sector. As Figure Four demonstrates, most European countries use pesticides at a rate several hundred percent higher than American farmers do. Perhaps due to the use of genetically modified crops, which are engineered to be pesticide-resistant, American foods are “practically organic”\textsuperscript{10} by European standards.

\textsuperscript{10} 137 Baldwin
Figure 4: American pesticide use rates are significantly lower than those of any agricultural economies of Europe.

In respect to a highly visible aspect of transatlantic disparity related to environmental protection, American reliance on private transportation gives the impression that Americans are wasteful of resources. Europe does have a well-developed passenger rail network, but for every railway dedicated to the TGV\textsuperscript{11}, one less railway hauls freight goods. Thanks to its developed rail freight industry, the US has fewer freight trucks on the road per capita than any European country.\textsuperscript{12} Figure Five demonstrates the tradeoff between passenger and freight rail that paints a picture of overall transport efficiency parity between Europe and America.

\textsuperscript{11} An acronym for a symbolic European high speed train, the French \textit{Train à Grande Vitesse}

\textsuperscript{12} 127 Baldwin
Figure 5: American goods travel by rail, while European goods are shipped by truck.

To consider one last dimension of ecology for comparison, the advent of the Precautionary Principle is a major development in the legislation of European environmental policy (for a full discussion, see Chapter Seven). The Precautionary Principle states that where the risks of an action or technology are unknown, protective action should be taken despite the uncertainty. Since the Maastricht Treaty, the Precautionary Principle has formed the basis of EU environmental law, and the principle has been invoked far and wide in EU and Member State policy, particularly in the domain of health and safety regulation. Has the Precautionary Principle made the EU less susceptible to risk? A study by Swedlow et al, using a random sample from a database of general risks, find “no difference in relative precaution” in the aggregate.13 Their chart below maps the change in better risk mitigation before and after the

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Precautionary Principle took effect in the EU.

Figure 6: Although Europe has actively legislated in the realm of environmental and health risk management, evidence shows that the America has not fallen behind in better risk management. Rather, the data exhibits “a diverse mixture of patterns and not a very strong overall trend.”

This varied sampling of statistics aimed to break with the preconceptions about European and American environmental policy outcomes. What statistics illustrate logic defends: based on the same model of society as the US—involving a high degree of energy consumption and resource utilization—Europe is constrained to making the same political-economic resource choices as America. In other words, Europe has not solved the structural environmental crisis. As a European observer notes, "No one believes that our current model of development is sustainable." When measured by policy outcomes, the US and Europe appear to ‘care’ to the same extent about the environment. Why, then, does American environmental policy imply moral distance from Europe? The answer to this question lies in the lack of cooperation between the US and Europe in their environmental policies. That the

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14 Swedlow et al 399
US and Europe have been unable to cooperate closely on their common environmental problem has been a frustrating puzzle to both Americans (liberals especially) and Europeans.

The meaning of cooperation employed in this work is policy convergence because this is how environmental cooperation has been popularly understood. Policy convergence refers here to convergence of the means of environmental policy, such as instituting a national recycling program or the regulation of a specific chemical pollutant. However, it does not refer to the ends of environmental regulatory policy, which are to surpass the structural environmental problem with minimal costs and negative externalities. Hajer (1995) traces the origins of the understanding of the structural nature of the environmental crisis to the 1970 report *Limits to Growth* by the Club of Rome, which was a groundbreaking international bestseller. The structural nature of the environmental problem entails that the current trends in resource consumption and anthropogenic ecosystem change are paradoxically unsustainable in the long term yet essential for the model of society employed in Europe and the US. In other words, economic activity in the West is dependent on consumption of resources and energy at a rate that is unsustainable given the capabilities of current technology. To maintain long-term economic growth, economies must change their patterns of resource consumption, either through changes in consumer habits or technological developments. No single, economically viable technological solution has yet been found to resolve the crisis, and some pessimistic voices doubt that a solution will be found in the near future.

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environment for the duration of the technological search. It is presumed in this thesis that the ends of environmental policy are universally shared.

Previous attempts to resolve the puzzle of transatlantic non-cooperation on the means of environmental policy have been only partial and short on theory. Some answers have focused on the American preference to avoid foreign “entanglements” (to use the words of George Washington\(^\text{18}\)) as an explanation for American reluctance to sign international environmental treaties. The neoconservative answer that America's degree of relative power precludes the necessity to fight problems in a multilateral fashion does not seem to apply to environmental issues. Relative power cannot provide solutions to the structural environmental crisis. Others isolate the Republican Party or the currently active conservative faction in politics as a factor that has tipped the balance away from environmental action since the Reagan era. Although this may be true as a matter of partisanship, such facile logic does not offer any hints as to why the environment is a partisan matter in the US, which is an aspect unique to the country\(^\text{19}\). Finally, another common explanation is that pervasive lobbying has prevented legislation to tackle environmental problems. However, it would be naïve to assume that neo-corporatist Europe has seen either less business presence in national governmental corridors or fewer lobbyists in Brussels than roam the halls of Washington, D.C.\(^\text{20}\) To find a meaningful explanation, one must look deeper than the immediate concerns of media reports.

This thesis will improve upon and systematize these partial explanations with an argument that provides the basis for understanding the differences between American and


\(^{19}\) Florence Faucher, interview by author, February 2, 2012

\(^{20}\) A growing literature is investigating European lobbying (e.g. Christine Mahoney, Brussels vs. The Beltway, Georgetown University Press, 2008.)
European environmental regulation. The argument will first take a sociological historical perspective to explain how each polity reacted to the sudden recognition of the environmental crisis in the 1960s and 1970s. From this original political reaction, Europe and America divided regulatory and legal power in ways that gave rise to highly divergent environmental politics. Then, an institutional historical argument will show how the differences in the repartition of those powers have been strengthened over time, precluding environmental policy convergence. This framework will be applied to the two issues emblematic of the transatlantic discord, climate change and the Precautionary Principle.

In the first chapter, three deeply held values about the role of government, the role of business, and the culture of justice in each polity will be shown to have shaped the powers and governance structures available for the regulation of business activity. The first waves of environmental laws in the 1960s and 1970s were formed by these values, and their implementation created a social division of legal powers that has been highly resistant to change. The average American wields an incredible degree of environmental enforcement and punitive power compared to the average European, which has resulted in two very different environmental law, regulatory, and political systems. From their regulatory values, Europe and the US devised very different environmental regulatory systems; it was not until the idea of transatlantic political convergence that the differences were highlighted.

In the second, third, and fourth chapters, the systems resulting from those three values will be compared in order to show that European and American ways of environmental protection are so fundamentally different that they are nearly incompatible. Taking the view that culture and politics reciprocally shape each other, I argue that the repartition of environmental policymaking power (including enforcement) in the 1960s and 1970s was both based on and created very different bases of socially legitimate
environmental protection. The American and European ways of environmental protection can be derived from the effects of their environmental laws and their resistance to fundamental change over the past forty years. In short, adversarial US environmental policy was originally structured to resolve the problem of industrial polluters whereas consensual European policy framed ecology as a problem of society as a whole. The resultant repetition of policymaking power, elitist in Europe and plebeian in America, has given rise to two legal-regulatory systems with very little opportunity for productive interaction. The differences can be observed at the empirical level. For example, in Europe, polluters have historically 'walked free' or nearly so from environmental damages by comparative standards. Meanwhile, in the US, environmental advocates have tended to be so legally threatening that development projects the private and public level are constantly delayed by requests for more environmental impact assessments. These two chapters illustrate the resistance of the current power distribution to change. Since it is only through a similar distribution of policymaking power that the US and Europe could cooperate meaningfully on environmental issues, the prospects for future cooperation are slim.

In the fifth and sixth chapters, two puzzles of the transatlantic environmental non-cooperation will be directly addressed. First, a case study on global warming will show why it became a partisan issue dominated by conservative think tanks, fossil fuel corporations, and conservative voters in the US. This situation will be compared to that of Europe, which saw no comparable organized resistance to the idea of regulating greenhouse gases. The differences reveal the extent to which the different framing of the environmental crisis by policy has precluded opportunities for transatlantic cooperation on global warming. The

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The following chapter will address the advent of the Precautionary Principle in Europe primarily as a function of the culture of justice held in a policy. The principle, which Europeans consider a hallmark of societal responsibility, has been scorned in the US as a gateway to protectionism or obscurantism (anti-technological attitudes). The differences in respect to the Precautionary Principle are predicated on specific cultural and legal doctrinal differences between nations that make the Precautionary Principle unworkable, if not unthinkable, in the US. What this analysis can tell us beyond explaining the current situation in environmental politics of Europe and the US is the prospects for future governmental action and cooperation on the environment. European policies are likely to avoid public participation and American policies are likely to remain encumbered by the intervention of the public. In the conclusion, ways to ameliorate the environmental conflicts internal to each polity and to ameliorate the transatlantic environmental conflict will be addressed.

The Components of Regulation:

This paper proposes that three separate values combine to shape environmental regulation: 1) Attitudes towards the role of business, 2) attitudes toward the role of government, 3) and the culture of justice held by a polity. Discrepancies in public opinion on the environment will be explained later as endogenously related to these three variables. The definitions of these values are not overly strict, but they each contain several salient characteristics. Attitudes towards business refers to the role businesses are expected to play in a society as well as the amount of power businesses are allowed to accumulate. Anti-trust legislation and movements to support independent producers are examples of the cultural limits of business power in a society. Attitudes towards government similarly indicate the degree of power a government is allowed to hold in a society. While all sovereign governments necessarily retain the monopoly on legitimate violence, governmental
institutions can be designed to limit the autonomy of elected leaders and bureaux. The checks and balances of the American Constitution and the Principle of Subsidiarity of the Treaty of Maastricht are manifestations of these attitudes. Finally, the cultural attitude towards justice refers to the severity with which a society expects a punishment to be rendered for a given crime. Since the degree of severity in a legal system cannot be assessed without comparison, this aspect is best divined through inter-polity comparison of courtroom outcomes. The public is not particularly cognizant of any of these attitudes; they cannot be ascertained through polls. Rather, they must be constructed through the historical analysis. (This is why they are sometimes referred to as 'traditions'.)

These three values combine to structure all but the specific provisions of environmental regulation. The attitudes towards government dictate from a nation's founding documents the limits of government power, which in turn structure the strategies a government may employ to carry out its regulatory mission. For example, in the EU, the power to penalize environmental offenders is reserved to the Member States. Attitudes toward business indicate the level of influence industry groups can legitimately exert on policymaking, determining what incentives, punishments, and modes of regulation should be used to prevent firms from harming the environment. Importantly, the first two variables in tandem indicate the accepted modes of interaction between business and government. This has a strong effect on how regulation is made. Finally, the culture of justice dictates which enforcement strategies are available to a government to achieve its regulatory mission.

In short, these three attitudes set up a standard national method of problem solving, which is the way a nation approached the environmental crisis based on its past experience. While other traditions may affect how nations 'think about' other problems, it is these three attitudes which structured the prise de conscience (revelation) of environmental problems in the
1960s and 1970s in Europe and the US. The way nations not only solve but define domestic problems is by implementing a policy. Hajer (1995)'s definition of policy explains this notion. Hajer defines policy as "the creation of problems, that is to say, policy-making can be analysed as a set of practices that are meant to process fragmented and contradictory statements to be able to create the sort of problems that institutions can handle and for which solutions can be found. Hence policies are not only devised to solve problems, problems also have to be devised to be able to create policies". In Hajer's framework, problems are not part of an objective reality but are socially and culturally constructed. Taking the view that policy and culture reciprocally create each other, this definition of policy allows the argument that due to the distribution of legal power the ‘environmental problem’ does not mean the same thing in social terms, which is very significant in democratic politics. Europeans do not understand why the environment is a political problem in the US, and this thesis will show exactly why this is the case. Furthermore, it will show why European environmental regulation would be highly problematic from an American viewpoint.

To preview the findings, the environmental laws in Europe and the US will be shown to have different intents and spirits, which were shaped by the perception of the sudden 'ecological crisis' of the 1960s and 1970s through the lenses of each polity's values. In the US, these laws represented a nearly unprecedented expansion of the legal power of citizens and NGOs, which were pitted in an adversarial legal dynamic against industry. The fundamental conflict between environmental and industrial interests has not been resolved in American policy. In the European arena, while industry and environmental interests appear to have been reconciled at the level of discourse (which will be elaborated upon

22 15 Hajer
later), this does not suggest that Europeans have solved the underlying technological problems of a resource and energy-dependent model of economy. Rather, the ecological crisis was politically interpreted as a function of European values, which responded with an elitist allocation of environmental policymaking and regulatory power, leaving environmental interests with no means of influence except by cooperation. It was not European enlightenment that permitted business and ecological interests to 'cooperate' in the policymaking process; the decidedly elitist distribution of regulatory legal power in Europe made ‘cooperation’ the only viable choice for environmental interests. While American citizens hold vast legal powers that Europeans do not, European government and business elites retain broad regulatory abilities that American policymakers do not enjoy. These different regulatory power allotments are significant enough to preclude most attempts at transatlantic cooperation in environmental policy.
Chapter One: Regulatory Values

How does a state allocate power to resolve a novel regulatory problem? This is the question that this chapter will attempt to answer in respect to environmental issues through sociological historical analysis. Since the main elements of environmental regulation are the state, industry, and enforcement, the deeply embedded attitudes towards them on the eve of the ecological revolution of the 1960s and 1970s will be revealed here. The ways each society divided these powers framed the ecological problem differently in social and political terms. To borrow from Samuel Huntington (see p. 27), when Americans ‘thought about’ regulating environmental problems, they thought of labeling offenders to hold accountable, devising methods to hold them accountable without expanding government power, and effectively punishing to deter would-be offenders. In contrast, when Europeans thought of regulating the same issue, they found society as a whole at fault, devised ways to manage the problem with minimal disruption to industry, and worked in part to change habits of individuals instead of solely charging producers with cleaning up the environment. Taking the view that culture and politics reciprocally shape each other, this chapter will show how culture influenced the division of regulatory power by the first modern environmental laws. The legal and political systems created by these laws will then be compared in Chapters Two through Five.

A. Attitudes toward Business

Although only remnants remain of national industries in Europe today, such as the British Broadcasting Corporation, Air France, and Statoil of Norway, the European relationship with corporations has taken a vastly different historical manifestation than the American one. The important distinctions between American and European attitudes toward business revolve around the intertwined issues of market power and involvement with
government. In the first case, American business regulations have tended to emphasize competition through the maintenance of countervailing corporate powers within an industry. In other words, Americans loathe monopolies. In Europe, on the other hand, national monopolies have traditionally been part and parcel of maintaining competitive firms in national economies characterized by small domestic markets and powerful international competition. By contrast, American corporate relations with government are characterized by distance and distinction. Nationalization is viewed as a threat in American business politics, and Americans are ill at ease when confronted with corporations deemed too big to fail. Corporate lobbyists in the halls of federal buildings in Washington DC have also come under increased scrutiny in the late twentieth century. It is not for nothing that Justice Louis D. Brandeis wrote that 'sunlight is the best disinfectant.' Meanwhile, in Europe, corporations are invited to policymaking tables in order to directly influence policymaking. Significantly, national ownership of major industries peaked in the 1970s in Europe. The following historical analysis will illustrate how Americans are immutably 'anti-business' in a sense inimical to European business attitudes.

Contrary to the impression lent by the American business dominance of the twentieth century, business power has been regarded in the US with suspicion and hostility since before the American Revolution. This attitude has shaped corporate law since Revolutionary times. Anderson (2010) asserts that "early American colonists arrived in the New World feeling a tremendous sense of distrust for corporate enterprise" which was translated into law in the new colonies. Several of the original American states developed 'anti-charter' laws to prevent the founding of corporations, which were viewed as primarily

aristocratic instruments of control through the concentration of power. These laws eventually ceded to allow corporations that served the public interest. Originally limited to towns and churches, this group of incorporated legal actors came to include banks and merchants when it was recognized that they too could serve a public function. However, anti-corporate attitudes survived up to the eve of the Civil War. A statement from Pennsylvania governor Francis Shunk in 1848 captures the enduring Revolutionary American attitudes toward corporations:

The time was, in other countries, where all the rights of the people were usurped by despotic governments, when a grant by the King to a portion of his subjects, of corporate privileges, to carry on trade, or for municipal purposes, was a partial enfranchisement, and made the means of resuming some of their civil rights. Then and there, corporations had merits, and were cherished by the friends of liberty. But, in this age and country, under our free system, where the people are sovereign, to grant special privileges, is an inversion [sic] of the order of things. It is not to restore, but to take away from the people, their common rights, and give them to a few.

This attitude reverberated after the Civil War as a new era of industry power was met with suspicion and criticism, especially in the wake of severe, industry-related economic crises. It was the banking and railroad failures of the 19th century that helped set a cautious tone towards after the Civil War. Such "sudden and calamitous economic disasters shifted the psyche of the American public' toward an even greater distrust of corporate behemoths in a way that would continue to drive twentieth-century policy and lawmaking decades later."

As a well-known political cartoon from the Gilded Age illustrates, Americans became distrusting of both monopolistic businesses and their comfortable relationships with policymakers.


25 Qtd in 59-60 Maier
26 Qtd in 59-60 Maier
27 1101 Anderson
In the twentieth century, a hostile recognition of the benefits and drawbacks of large corporations gave way to increasingly strict regulation of business practices. Theodore Roosevelt famously led the 'trust busting' anti-monopoly campaign in the first years of the twentieth century, and the New Deal brought with it a legislative reaction to financial malfeasance, the Securities and Exchange Commission. In 1952, the historian John Kenneth Gailbraith wrote that the growth of corporate power, suspected in the early 20th century, and confirmed by statistical measurements in the 1930s, had become inimical to the American liberal. "As the Conservative worried about government power so the Liberal was alarmed over business power" after World War Two. However, the attitude ran deeper than just liberal concern. Gailbraith observes that

"There is nothing in the American tradition of dissent so strong as the suspicion of private business power. It produced the Sherman Act, a nearly unique effort to shape the growth of capitalism, the Wilsonian efforts to extend its effectiveness, the colorful lawsuits of Thurmond Arnold in the late thirties, and the liberal lawyer's undiluted enthusiasm for antitrust enforcement."

The prevalence of such an attitude on the eve of the environmental revolution is highly

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30 Gailbraith.
significant and likely greatly influenced the first modern environmental laws. The American attitude can best be summed up as one reliant on countervailing power:

"As free and fair competition was viewed as the economic embodiment of political freedom and democracy, surrender to the unaccountable economic power of the monopolist would have undermined the ideological foundations of the American state. This does not mean that the American approach to concentration was unquestioningly hostile. Rather, it tended to focus on the need for balance, and on the fostering of a positive pro-competition ethos."

The European attitude towards corporations over the same time period, and through an equal intensity of corporate scandals and corruption, has been markedly different. Despite corporate abuses such as those vividly described by the French muckraker and novelist Emile Zola (e.g. La Curée, published in 1871), the corporation has been welcomed by the European citizen and inextricably linked with governance in Europe. Relations between business and government in Europe have been characterized by a degree of partnership and interdependence unseen in American history. To return to the Pennsylvania governor Shunk, Europe's relationship with the corporation may have originated as ‘grant by the King’ of rights to the bourgeoisie through corporate charters. Moreover, the post-War construction of the European Union, especially from 1954 to the completion of the single market in 1987, has been a history of governments working to expand and enrich the terrain of industry. Apart from the centralized command-style European Coal and Steel Treaty, an often-discomfiting push towards market liberalization has been at the heart of the European project. Rising from the rubble of two world wars, European industry has been the focus of the integration project, to the extent that it would be naïve to believe that European progress could be measured by a rubric ignoring economic growth. At the national level, European business and government have traditionally been much closer than has been seen in the US, except in moments of war or economic crisis. The largest industries, which in the US were

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considered to be powerful "big business", were virtually all state-owned in Europe at the
height of the environmental revolution. Figure Seven shows the extent to which European
industries and governments were intertwined at the height of the environmental revolution.

Figure 7: The major industries of Europe were mainly government-owned until the end of the 20th century. In contrast, nationalization in the US has been reserved as a threat from the government or a
way for government to begrudgingly reconstruct corporations vital to the economy.

European reaction towards 'big business,' or concentrated industry power, has been
muted or lightly positive over in the 19th and 20th centuries. Rather than working to break
down large conglomerates, the European approach fostered cartelization. McGowan (2010)

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32 James Foreman-Peck and Giovanni Federico, European Industrial Policy: The Twentieth-century
Experience (Oxford: Oxford University Press, 1999), pg. 442.
distinguishes two periods of European cartelization. In the first period, from 1871 to 1918, cartels responded to the constraints of small domestic markets and international competition.

"The advent of the cartel much fitted into the realities of rapid industrialization, the freeing of world trade, and the realities of greater international competition. Under these circumstances, cartels were generally deemed not to be so problematic, and in many cases were recognized as almost natural forms of defense to secure the life span of indigenous industries against foreign competition. Social and political concerns about the side effects of cartelization were occasionally vented in public but were never strong enough to challenge the 'positive' aspects of cartel agreements."33

It was at the same period that American trust busters were in their heyday. The second period of cartelization from 1919 to 1945 saw increased regulation of monopolistic behavior in response to the peak of cartels in the 1930s, but the world wars disrupted attempts at (and desire for) regulation. Even so, it is uncertain that de-cartelizing was a European prerogative.

In the British case, the system was not shaped by any mass anti-trust movement, and while restrictive practices were not uncommon in the UK, there was a feeling that this was no particular cause for concern. The tolerant British attitude towards cartels and concentration, particularly in the interwar period, stemmed at least in part from the belief that British industry was generally much more exposed to international competition than the United States, and as such had little need for US-style legislation. Unlike the Americans, British public opinion was not preoccupied with notions of concentrated power."34

In short, monopolistic business was not taken to be a particular problem. It took until the 1990s to fully decartelize Europe from the peak of the 1930s.35 Meanwhile, as private cartels fell, nationalized industry continued to rise. That the European business sector resembles the American one is the result of a recently completed metamorphosis. The corporate ties between government and industry are indicative of entrenched cultural views of this relationship. Casson (1999) provides a useful typology of business-government relations in industrialized nations. In his view, three cultural variables explain the degree of intervention on a scale of one to three in national economies.

35 67 McGowan
Table 14.6. *Three dimensions of culture that explain country-specific differences in the degree of intervention*

<table>
<thead>
<tr>
<th>Country</th>
<th>Organicism (O)</th>
<th>Elitist (E)</th>
<th>Producer (P)</th>
<th>Degree of intervention</th>
</tr>
</thead>
<tbody>
<tr>
<td>Japan</td>
<td>O</td>
<td>E</td>
<td>P/C</td>
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Figure 9: Cultural factors in Europe tend to interventionist industrial policy more than they to in the US.

In the above figure, Casson illustrates three entrenched cultural attitudes which he argues shape the interventionist industrial policies of European nations. The column 'organicism/atomism' refers to the individual's preference for social ownership of industry ('organicism') or private ownership ('atomism'). The 'elitist/democratic' column indicates how political decisions are typically made in the society. The consumer/producer orientation column distinguishes between a view of the industrial system as providing for shopper-consumers (consumer view) and the industrial system as a valuable source of employment (producer view). For the purposes of this thesis, this chart illustrates that at the end of the 20th century, American and European attitudes about the legitimacy of government intervention in the private sector remain highly divergent, despite the end of cartels and most nationalized industry in Europe. Attitudes towards business are one of the three values.

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that set the parameters of regulation in a polity, and they are intricately related with a second value evaluated here, attitudes towards government.

B: Attitudes toward Government

From the outset, the American attitude towards government has been distinctly anti-statist, which again is counter-intuitive, given the legacy of American military dominance in the 20th century. While conservatives may worry more about government power and liberals more about business power in the US, the spectrum of positions on government power in the US is very narrow. Never once has a socialist, communist, or monarchist party been successful in US politics. Seymour Lipset (1996) compares the unified American perspective on government power with the varying perspectives in England:

"It is not difficult to show for example, that the two great political parties in America represent only one English party, the middle-class Liberal party... There are no Tories... and no Labor Party... [T]he new world [was left] to the Whigs and Nonconformists and to those less constructive, less logical, more popular and liberating thinkers who became Radicals in England, and Jeffersonians and then Democrats in America. All Americans are, from the English point of view, Liberals of one sort or another... The liberalism of the eighteenth century was essentially the rebellion... against the monarchical and aristocratic state--against hereditary privilege, against restrictions on bargains. Its spirit was essentially anarchistic--the antithesis of Socialism. It was anti-State."37

This anti-statist attitude is reflected principally in the Constitution, which reserves powers not specifically delegated to the federal government for the States or the People. This tradition has pervaded American institutions, both domestically and internationally. In the development of agencies and government services, there are numerous examples of how these arms of the American government were underdeveloped or grew more slowly than their European counterparts38. For example, education policy in the US is highly decentralized, providing sometimes vastly different curricula for students in different states.

Samuel Huntington identifies a prime example of this tendency in American attitudes

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38 Frank Popper and Deborah Popper, interview by author, February 14, 2012.
towards government. Commenting on American state-building policy, which is a direct reflection of how Americans have built their state at home, Huntington finds the anti-statist tradition runs so deep as to frustrate American state-building efforts abroad:

"When an American thinks about the problem of government-building, he directs himself not to the creation of authority and the accumulation of power, but rather to the limitation of authority and the division of power. Asked to design a government, he comes up with a written constitution, bill of rights, separation of powers, checks and balances, federalism, regular elections, competitive parties—all excellent devices for limiting government. The Lockean American is so fundamentally anti-government that he identifies government with restrictions on government. Confronted with the need to design a political system which will maximize power and authority, he has no ready answer. His general formula is that governments should be based on free and fair elections."\(^{39}\)

Huntington's observations could easily apply to the continual process of government rebuilding and reform that occurs domestically. For the purposes of this thesis, these opinions underline the fact that Americans are unwilling to surrender power to create a strong federal government. Power that has been transferred must, in the same way as market power, be countervailing. It is for this reason that the 'checks and balances' of the American government institutions were devised. In the US, because much power has been reserved to the People, the public has been called upon to enforce the law. Writing in 1968, just before the environmental revolution, Huntington could not foresee the strategic response to the sudden surge in the demand for effective government intervention to limit pollution, nor could he foresee the adversarial legalistic paradigm it would birth. The institutional framework of a weak central state, designed to prevent intervention rather than to effectively regulate, has directly shaped the laws and enforcement mechanisms that resulted from the environmental revolution of the 1970s.

The European case provides two distinct attitudes towards government. In Europe, the state has generally descended from a monarchical tradition, and centralized states have remained a European quality. However, and in sharp contrast, a strong anti-statist reflex has been realized in Europe in regard to the construction of the European Union since the end

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of World War Two. Similarly to the US constitution, the various Treaties of the European Union reserve all powers to the Member States that are not designated as areas of EU competency. As a compromise between intergovernmentalist and supranationalist Member States, the European Union has evolved in a particular circumstance. Unable to collect resources of its own, strategically under-funded by national governments, and without the civil and criminal judicial powers of national governments, the EU is mandated to constrain the actions of sovereign Member States. Furthermore, it must exert regulatory influence on public and private entities within those states, relying on the national legal systems to enforce directives devised in Brussels. This institutional weakness has shaped EU law, which as of recent, is coming to resemble American law for that reason. However, as will be seen, the pro-business impulse in Europe has prevailed over the demand for public regulatory participation in the case of environmental regulation, preventing the onset of a legal system as adversarial as that of the US. Related to legal systems, Europeans and Americans have very different notions of what it means to deter, enforce, and punish lawbreakers.

C. Culture of Justice

Assessing the culture of justice in a country can only be done comparatively, and for observes, transatlantic comparison has been an easy task. For example, The Economist declared in 2010 that

"Justice is harsher in America than in any other rich country. Between 2.3m and 2.4m Americans are behind bars, roughly one in every 100 adults. If those on parole or probation are included, one adult in 31 is under “correctional” supervision. As a proportion of its total population, America incarcerates five times more people than Britain, nine times more than Germany and 12 times more than Japan. The laws simultaneously reflect and create what is comparatively a bloodthirsty culture in terms of criminal justice, and their effect is not limited to deterrence of violent crime.

Punishments for regulatory violations are not exempt from this harshness. The article

continues to observe that

There are over 4,000 federal crimes, and many times that number of regulations that carry criminal penalties. When analysts at the Congressional Research Service tried to count the number of separate offences on the books, they were forced to give up, exhausted. Rules concerning corporate governance or the environment are often impossible to understand, yet breaking them can land you in prison. In many criminal cases, the common-law requirement that a defendant must have a mens rea (i.e., he must or should know that he is doing wrong) has been weakened or erased. In England, the home of the Economist, the tradition of mens rea is strongly embedded in the legal culture, to the extent that it has hindered enforcement of environmental law. (See Chapter 4 for a full discussion.) A prominent neoconservative American voice concurs, stating that "perhaps the most striking feature of American regulatory enforcement is the severity of its legal sanctions, both 'on the books; and in practice. No other nation authorizes or imposes such weighty criminal penalties for violations of regulatory laws" (Kagan 192). Criminal enforcement of environmental law is heavy-handed in the US. Between 2006 and 2010, the EPA obtained 913 criminal convictions, with a mean average of 5.59 months of prison time for each convict. Pecuniary awards for criminal activity have comprised a large part of the EPA’s fines as well. The following chart shows that criminal penalties are highly prevalent in the enforcement of environmental policy in the United States.

41 ibid.
43 Ibid, section F-2.
Figure 10: Criminal penalties (marked in red) have come to usually outweigh civil judicial penalties (marked in blue) and administrative fines (marked in green) in American environmental protection. With such general recognition of the relative harshness of American justice, it is significant that there has been no successful reform of criminal and regulatory law. (In fact there have been public calls for the opposite in respect to ‘white collar crime’ in recent years.) The American culture of justice is dedicated to deterrence based on the credible threat of punishment. How and in what specific ways have European and American cultures of justice, meant to ensure compliance with the law in both societies, evolved so differently?

The main difference between justice cultures for the purposes of comparing environmental regulatory enforcement is that American justice relies on highly public justice as a deterrent against would-be criminals. Whitman (2003) makes a sociological historical argument to explain how this tradition of making a public example of offenders disappeared in Europe. In Europe, there existed in the time of monarchies two types of punishment, high-class and low-class punishment. Low-class punishment was a brutal, humiliating affair,
but high-class punishment left prisoners to a relatively comfortable lifestyle, able to provide their own food and socialize with their companions. Whitman finds that "over the course of the last two centuries, in both Germany and France, and indeed throughout the Continent, the high-status punishments have slowly driven the low-status punishments out. Gradually, over the last two hundred years, Europeans have come to see historically low-status punishments as unacceptable survivals of the inegalitarian status-order of the past"\textsuperscript{44}. European criminal punishment today is characterized by the maintenance of the dignity of the convict over all. Prisoners in France and Germany must be called "Monsieur" or "Herr," guards must knock to enter cells, and uniforms are either banned (in France) or must resemble normal clothes (in Germany). Importantly, "the greater continental concern with dignity in prison is paralleled by a greater continental dislike of public exposure. [...] French and German jurists continue to think of public exposure as a frightening and barbaric thing"\textsuperscript{45}. The treatment of criminals in a broad sense of the term reflects a culture of justice that affects how corporate offenders are viewed as well.

In the American case, no similar drive to preserve the dignity of the condemned is to be found, which Whitman explains with two political reasons. Firstly, as high-class punishment became the norm in continental Europe, Common Law countries and colonies abolished high-class punishment in favor of low-class punishment\textsuperscript{46}. This tradition was concretized in the nineteenth century in the US. The biggest difference between the Continental and American (and British, to a lesser extent) judicial cultures is that Americans "have not learned to think of humiliation and degradation, in the way that Europeans do, as

\textsuperscript{44} James Q. Whitman, Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe (New York: Oxford University Press, 2003), 10.
\textsuperscript{45} 97 ibid.
\textsuperscript{46} 11 ibid.
inegalitarian practices." Secondly, Whitman argues that while in Europe punishment has been both bureaucratized and guarded from pressures of public opinion, "American punishment practices are largely driven by a kind of mass politics that has not succeeded in capturing Western European state practices. We have, as many commentators observe, ‘popular justice,’ and indeed populist justice." A comparative case in point is the arrest of the French IMF chief Dominique Strauss Kahn in New York City in May 2011. The New York Times cited a former French justice minister's reaction to Kahn's televised 'perp walk,' which is a normal feature of American arrests but is banned in France under the presumption of innocence.

“I found that image to be incredibly brutal, violent and cruel,” the former justice minister Elisabeth Guigou told France-Info radio on Monday, referring to widely published photographs of a beleaguered-looking Mr. Strauss-Kahn, handcuffed and led by several New York police officers. “I am happy that we do not have the same judicial system.”

That the IMF chief was powerful and foreign influenced the publicity of the case, but the point remains that the spectacle of American justice is an anomaly in the Western world. Its spirit is not limited to television clips but is deeply embedded into regulatory law. By relying heavily on the spectacle of heavy-handed judicial deterrence of environmental offenses, environmental law is as revanchist as any other branch of American law. The Obama Administration's demonization of British Petroleum in the wake of the Gulf of Mexico oil spill is an outlier in terms of public degradation, but it speaks to the general ethos of retribution that is to be expected in American environmental justice.

Comparisons of regulatory punishments are difficult to establish, but an attempt will be made throughout this work. For the purposes of this work, justice culture is important because it determines which tools can be used to punish environmental offenders and the

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47 ibid.
48 ibid.
severity of those punishments. To leap from the sociological argument centered on
treatment of prisoners to an argument about the nature of regulatory enforcement presents a
methodological challenge. Lacking studies comparing the harshness of regulatory
enforcement, this thesis must initially draw upon the consensus of leading authors. To
surpass this general consensus, the legal reality of environmental law enforcement will be
evaluated and compared throughout this thesis, especially in Chapter Four. De facto
American environmental law enforcement far exceeds the stringency and harshness of
European environmental law enforcement.

How do these regulatory attitudes create actual regulatory systems? These attitudes
determine the criteria for the legitimate repartition of regulatory power within each society.
Regulation can be viewed several ways, each of which has different explanatory power. This
thesis does not challenge the view that law in general is a product of competing interest
group influence, but it presumes that interest groups affect the distribution of spoils to a
much greater extent than the distribution of power. As a general principle of democratic
governance, the repartition of power in a political system must be socially legitimate, not just
sufficient to petitioning actors. It would be more accurate to say that interest groups form
around positions determined by the extant repartition of power. Mahoney and Baumgartner
(2009) observe that “a wide variety of evidence from the US suggests that groups and the
state co-evolve at the national level and with important implications at lower levels of
government as well.” 50 Accordingly, the business and environmental lobbies did not exist in
their contemporary states before the passage of the environmental laws in the 1960s and
1970s; they were formed in reaction to the laws that touched them. Policymakers are thus, to

50Christine Mahoney and Frank Baumgartner, “Converging Perspectives on Interest Group Research in Europe and
America,” Western European Politics 31, no. 6 (2008): 10, accessed March 12, 2012,
an extent, naïve about the future impacts of their legislation. For example, the well-meaning architect of the National Environmental Protection Act of 1969 wrote, “Reconciliation of environmental values and economic interest is a major objective of NEPA”\textsuperscript{51}. The legal-regulatory systems that developed in Europe and in the US are extremely resistant to change (and convergence) due to the repartition of legal power within each system. The different legal realities of each system preclude most opportunities for meaningful environmental cooperation.

The following three chapters will present a detailed analysis of the regulatory systems devised in each polity to respond to the environmental revolution. These systems were shaped by the interaction of the society’s regulatory values with specificities of the post-War moment of the 1960s. The resultant American and European regulatory systems distributed regulatory power in highly divergent ways, creating regulatory legal landscapes that bear little resemblance to each other. The global impulse for environmental protection was legislated into very different legal realities in Europe and the US, which in turn gave very different political meanings to environmental protection. Despite the global nature of some ecological problems, the expectations of American liberals and Europeans for transatlantic policy convergence on environmental issues are generally hopes misplaced.

\textsuperscript{51} Quoted in 81 Manheim.
Chapter Two: The American Environmental Conflict

In this chapter, the American environmental policy landscape will be surveyed and factors precluding transatlantic policy convergence will be outlined. Using the framework developed in this thesis, it will be shown how the regulatory values of the United States were translated at the post-War moment in American history into a uniquely American division of environmental regulatory power between government, businesses, and citizens. The resultant system is characterized by stringent enforcement and a high degree of public participation in policymaking through the courts. As a law enforcement system, American environmental regulation is perhaps frighteningly efficient; however the adversarial legalistic dynamic it created has led to Congressional gridlock on environmental matters. In this way, the distribution of power by the environmental laws of the 1960s and 1970s impedes federal-level overhaul of environmental regulations. Attempts by policymakers to utilize alternate venues of reform have been in general unsuccessful, and American environmental policy remains defined by a prisoner’s dilemma between business and ecological interests. In this highly rigid system, policy change (not to mention convergence with European policy) is extremely difficult to enact.

Europe and the US have approached the environmental crisis by dividing enforcement power differently among societal actors. Each society allowed different tools to be employed to punish and deter environmental offenses, which in turn gave rise to very different political systems in respect to environmental issues. Interpreting environmental problems as the fault of puissant industry, the US government gave powerful legal tools to citizens, creating an adversarial legal dynamic that led to congressional gridlock on environmental issues. The highly polarized atmosphere constrained America’s ability to enact certain environmental regulations, forcing it to enact policy in alternate venues. In
Europe, enforcement power was withheld from the public, and the holders of policymaking and enforcement power have not made any meaningful concessions in that respect. European environmental policymaking has consequently been agile, but its effects have been so light as to beg the question of whether environmental protection means the same thing in Europe as it does in America. It is from the disparity in regulatory power allocation that transatlantic cooperation on environmental matters is often precluded, and it is from the different meanings of environmental protection that the transatlantic dispute arises.

America and Europe have framed their culturally respective ecological problems via their three regulatory values. Because policy creates the ‘problem’ by determining how public demands will be resolved, American ecological policy in effect made industry into the ecological problem. Environmental policy in the US thus required that industry be restrained and strictly regulated for the environmental problem to be solved. It did so by creating blunt, powerful legal tools for citizens to use against industrial offenders. This adversarial legal innovation, also common to other areas of American regulation, has had a particularly damaging and enduring effect in regard to the flexibility of American environmental regulation. Environmental policy in the US been unable to change from this initial framing of opposition between environmental and industrial interests because of the prisoner's dilemma set up by the resultant repartition of regulatory enforcement power.

By arriving at the height of American industrial power, the environmental revolution came at an inopportune moment for industry's future political fate. Today, environmental politics is a highly partisan issue, so it is striking that the environmental laws of the 1960s and 1970s were bipartisan in nature. Both the Clean Air Act and the Clean Water Act won unanimous votes in the Senate.52 These laws were drafted in a context that existed during a

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52 86 Manheim
much briefer window than their framers had imagined. At a time when it was politically acceptable for President Eisenhower to warn Americans of the power of the military-industrial complex, legislators wanted to protect citizens from the abuses of indefatigable American industry. Manheim (2009) explains that contrary to today, industry was seen an unstoppable force in need of constraint:

The enormous dynamism of US industrial performance in World War II—followed by the ability to overcome staggering difficulties to land humans on the moon—lent US industry and technological capability an aura of near invincibility. The perception has had a twofold influence on the framers of the new environmental laws: [The power of industry] reinforced the need for a framework of protections for the environment that would be robust, comprehensive, and not subject to the discretion of enforcement agencies which, it was feared, might “do nothing” to enforce laws when faced with powerful economic interests. The framers felt reassured that the “inexhaustible vitality of the US industrial system” would be able to maintain economic viability in spite of limitations and requirements imposed to protect the health of the environment.

To complete the portrait of the era, it must be remembered that American industry had no competitors in war-ravaged Europe and Asia. Furthermore, industry was perceived as the spoiler of America's pristine wilderness. (It is in this sense that the cultural interpretation of nature has limited explanatory power) As a prime example, Rachel Carson's *Silent Spring* is primarily a tale of industrial actors unjustly spoiling the environment. In an atmosphere of popular and political consensus on the power of American industry, legislators searched to devise a regulatory system that could be effective despite the weakness of the federal government.

The environmental regulatory system that was born would subsequently become one of the most stringent ever implemented. This generation of laws was a novel invention. The laws imposed national standards for emissions and environmental quality and required the open publication of corporate environmental audits. In order to enforce the laws, citizens and non-governmental organizations were given broad legal standing to bring lawsuits to enforce compliance with national standards. The laws represent, in effect, one of the largest expansions of individual legal power in American history. One particular innovation of the

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53 80 Manheim
laws, the Environmental Impact Statement (EIS), became a particularly powerful tool for environmental groups to block developmental action. Kagan comments that these "quixotic, judicially enforceable statutory demands for analytic perfection thus provide sturdy footholds for project opponents and delaying lawsuits. [...] Aware of such stories, agency officials and project planners view litigation as an ever-present threat."

It allowed NGOs to sue a developer on the grounds that he did not provide full certainty that no environmental harm would be done in his project. The effect of these laws was a deluge of lawsuits, which has moreover come to characterize the unique American legal system. It is difficult to tabulate how many lawsuits at all levels of the courts have been filed for environmental reasons, but the following graph illustrates the boom in litigation seen in the United States in the second half of the twentieth century, in large part due to laws that rely on adversarial legal enforcement.

Fig. 4.2 Federal court cases, 1940–2006
Source: Compiled by F. T. Manheim

54 217 Kagan
55 94 Manheim
Figure 11: The litigious American atmosphere is a recent phenomenon, whose origin coincides with the birth of America’s first modern environmental laws. Kagan (2003) characterizes this legal system as predicated upon:

“...reliance on (or at least provision for) litigation to ensure governmental accountability, court-enforceable statutory demands for comprehensive environmental analysis as a precondition to developmental action; and high levels of legal uncertainty. Those three features, in turn, arise from the confluence of two basic factors referred to repeatedly in this book: The distrust and consequent fragmentation of governmental authority in the United States, combined with powerful political demands for governmental action to solve social problems”

This character pervades the American regulatory process. In seemingly innumerable cases, unrepresentative local citizens’ groups have challenged economically beneficial development projects. Well-funded and member-seeking NGOs can sink a project with simply the threat of a lawsuit, and businesses seeking to prevent change to environmental regulations also use lawsuits to prevent regulatory change. Generous standing laws allow "virtually any interested party—including the world's widest array of public interest lawyers, acting as self-appointed 'private attorneys general'—[to] bring lawsuits against alleged violations of public law". The decentralized nature of the US legal system permits low-ranking judges to make highly influential decisions and for litigants to seek different rulings in alternate jurisdictions.

Loaded with the heaviest criminal and civil punitive powers in Western regulation, the US has achieved positive outcomes from its regulation. However, success has come with the price of alienating business in both attitude and sometimes in fact from the US. But it is not just anti-statist attitudes that contribute to the permanence of this adversarial legalistic relationship.

America's deep anti-industry attitude pervades not just American environmental laws' intent but the lawmaking process as well. A public enamored with transparency and suspicious of industry presence in Washington has made the incorporation of industry viewpoints into law unnecessarily onerous. Kagan cites longtime industrial relations scholar

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56 214 Kagan
57 214 ibid.
58 15 ibid.
59 195 ibid.
David Vogel (1986):

“As Vogel observes, rulemaking in the United States reflects a very different method of taking economic considerations into account. In Great Britain business participation 'is both assumed and assured' (Vogel, 1986:170). In the United States consultation between business executives and regulatory officials is politically suspect; participation by business 'must be constantly asserted' and 'the importance given to economic considerations is in large measure dependent upon the lobbying and litigation skills of business.' Economic concerns are addressed through formalized cost-benefit analyses or technical feasibility studies, whose almost inevitable methodological flaws create grounds for appeal to the courts, either by regulated businesses who feel the regulation is too stringent or by pro-regulation advocacy organizations who think it is too lenient”.

Intense suspicion of corporate influence on policy has effectively divorced corporate interests from the public interest in the American policymaking tradition. Consequently, policymaking may suffer from too much ‘sunlight’ today, rather than too little. However, we cannot read this contemporary phenomenon as the inevitable product of a deep-seated American attitude. Along with public attitudes towards global warming, which will be covered in Chapter Three, this contemporary suspicion of business malfeasance in environmental matters is endogenously related to a larger conflict between business and environmental interests, which was set up by the environmental laws of the 1970s. Antipathy may not have been lawmakers' intent, but it has been the result.

Beyond mistrust of business in the halls of the legislature, this mistrust has prevented Congressional delegation of regulatory discretion to the Environmental Protection Agency. Rather than allow the EPA to experiment with flexible guidelines for regulation that would be conducive to industry participation, Congress has insisted on writing its own detailed rules. This pattern of lawmaking has produced incredibly long and detailed legislation, dreaded by all involved except for lobbyists who wish to exploit the finer points of rules.

Anderson comments on the effect of 'hard law' rulemaking:

"Rules serve as external legal safeguards—as intermediaries at the gates of the market to prevent corporate abuses—and therefore function to assuage individual anxieties about prospective abuses. Conversely, soft law principles rely on corporate self-regulation. This trust in corporations to govern themselves is anathema to U.S. historical attitudes and experiences that persist into the twenty-first century: nearly three of every four Americans reported in 2002 that 'business has too much power over too many aspects of American life'”.

60 190 Kagan
61 1104 Anderson
Moreover, Anderson argues that a soft law-based approach without enforceable rules conflicts with two core American values. These values are "(1) a fervent belief that corporations are capable of moral or immoral action, and (2) an impassioned desire to uphold justice, including harsh retributive justice, as a means of securing rightness and fairness." Anderson asserts that the American legal tradition has seen corporations as individuals, implying moral autonomy, whereas the European tradition views corporations as a-moral. Such a charge, combined with a legal system "deeply concerned with the aggressive punishment of convicted wrongdoers," has set the tone of business regulation in the United States. The laws of the environmental revolution have only reinforced the enduring character of this opposition.

The antithetical relationship between business and environmental interests in America has, up to the present, exhibited permanence due to the repartition of power in the laws of the environmental revolution. This expansion of citizens’ legal powers provided fodder for the growth of powerful environmental NGOs that used courtroom success to attract membership. The additional membership and accompanying resources gave these groups heavy political sway in Congress. In turn, businesses redoubled their lobbying efforts, and were met with an atmosphere of public mistrust that increased as a function of industry opposition to environmental protection. Manheim explains how this zero-sum relationship between ecology and industry stultifies reform efforts:

"Any major change toward achieving flexibility and discretion desirable from a scientific and efficiency point of view will potentially weaken a system that gives citizen groups powerful legal levers. Herein lies the dilemma. Why should or would the nation's 10- to 15- million member strong environmental NGOs, the residents of attractive environments, or progressively minded politicians agree to give up existing, formidable power to rely on the uncertain outcome of systems in which politicians or powerful economic/social interests could exercise undue influence? Are there not plenty of examples today of thee risks that could entail?" Locked in a classic prisoner's dilemma, environmental and business interests would both

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62 1106 Anderson
63 1106 ibid.
64 (178 Manheim)
obtain their most preferred outcome—effective environmental protection that imposes low costs—by simultaneously reducing court, lobbying, and political conflict. But, predictably, both sides have been reluctant to do so. Minnesota Mining and Manufacturing (3M)'s "Pollution Prevention Pays" program and the Environmental Defense Fund's Corporate Partners Program are examples of reconciliatory measures which, despite their promise, have not been widely replicated. The locked horns of business and environmental interests have not simply stalled but petrified efforts to reform environmental policy at the congressional level.

Due to the political power dynamic established by the environmental laws of the 1970s, American environmental policy has resisted Congressional reform. To employ Hajer's definition of policy, America has been attempting to resolve the problems of the early 1970s in spite of the fact that today's political, scientific, social, and economic world bears little resemblance to the unique conditions of that moment. Certainly, some policy innovations have come about such as the sulfur dioxide emissions market of the Clean Air Act of 1990. But such success stories do not characterize the American environmental legal landscape. Rather, as Klyza and Souza (2008) describe, Environmental movements from the early 19th century, the turn of the 20th century, and the 1960s-1970s have "embedded conflicting impulses in public policy, and these legacies condition everything about modern environmental policymaking, from the ongoing legislative gridlock to the intense struggles that have played out on the many alternative stages." Over time, the "layering of contradictory policy commitments has yielded an unstable policy terrain that has resisted the visions of new orders from emerging from the greens, conservatives, and next generation reformers." Finally, the use of multiple policymaking access points has contributed to the
"blending" rather than "shaping" of American environmental policy. Institutionalized obedience to 'the lords of yesterday and the lords of a little while ago,' including mining and timber interests which have held on to privileges afforded by frontier America, has been impossible to repeal due to the gridlocked nature of environmental legislation. The remnants of eras past in this craggy legal topos are "as likely to pulverize next generation innovations as [they are] to translate them into new directions in public policy." Even if Congress acts, a new law "enters an institutional labyrinth that renders major decisions contingent at best [due to] continuing challenges in Congress […] the courts [and] the administrative process. […] This goes deeper than the challenges of hyperpluralism, where public authority cannot be exercised without challenge from some aggrieved interest; it goes to the evolution of an institutional system and even a culture that legitimizes contradictory environmental policy claims simultaneously, an intercurrent state." In such an environment, neither conservative nor liberal interests have made significant legislative progress in environmental affairs between 1990 and 2006. Not just contemporary issues such as carbon dioxide, but offshore oil drilling, minerals mining, and federal land management policy are bargaining chips in Congressional environmental politics. Beyond this, every detail of a several hundred-page bill is cause for a battle between environmental and political groups. Attempts at introducing new, principle-guided regulation have failed due to the same constraints.

The extent to which the present analysis has stressed the industry-ecology conflict in the US is slightly hyperbolic when compared to the attitudes of the individuals representing regulatory actors, but it is relatively accurate when applied to the actions of the agents themselves in the policymaking process. In other words, it is well-known that if environmental and business interests could work better together, they would achieve better outcomes. A push towards better regulation through the resolution of this problem started

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65 20 Klyza and Sousa
66 95 ibid
67 95 ibid
under President Bill Clinton with the EPA's Common Sense and Project XL (Excellence in Leadership) programs, which were aimed towards flexible and consensus-based regulation. The programs were only mildly successful and are now shuttered. Klyza and Sousa note that "a fundamental problem with Project XL,' Charles Caldart and Nicholas Ashford observed, 'is that it envisions a kind of regulatory flexibility that has not been granted by Congress.' This led the EPA to behave cautiously and firms—fearing being sued by citizen groups—to approach the expensive process of negotiating a consensus warily. Kagan too finds strong evidence that Congress is overreaching in its environmental regulatory efforts.

"Amendments to [nearly all EPA programs] exhibit the same trend. Each eliminated substantial EPA discretion, imposed more deadlines, and included more prescription. Accountability by detailed law and litigation provides a means of continuing the struggle to constrain power and influence policy. Administrators find themselves without the capacity to set priorities and implement them flexibly." A glance at the most recent large environmental bill defeated by Congress is a case in point. The House-approved version of the failed Waxman-Markey 'carbon market' bill was 1,427 pages in length, covering subjects such as the appropriate illumination options for future outdoor lighting fixtures. That Congress feels it necessary to reserve such a decision for the legislature of the United States of America has led the Economist to opine that "unlike Europeans, whose lives have long been circumscribed by meddling governments and diktats from Brussels, Americans are supposed to be free to choose, for better or for worse. Yet for some time America has been straying from this ideal." In the case of environmental regulation, the power given to citizens groups (and business groups who countersue to prevent change) represents a pendulum that swung too far.

To enact new environmental regulations, the US has increasingly worked to avoid reliance on gridlocked Congress. The Obama administration is making efforts against factors

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68 Klyza and Sousa
69 Kagan
71 Over-Regulated America, The Economist, 3 March 2012
that contribute to global warming to an equal extent but do not involve the politically mired ingredient of carbon dioxide. In February 2012, the US announced the $15 million funding of an initiative to fight methane, soot, and hydrofluorocarbon emissions worldwide. The targeted emissions of the "modest but potentially game changing" program contribute up to 40% of the worldwide greenhouse effect. Meanwhile, the EPA did not believe it had the authority to regulate carbon dioxide until the court case *Massachusetts v. EPA* proved otherwise in 2009. It was the court, not gridlocked Congress, that decided the EPA had the authority to regulate carbon dioxide emissions. Finally, if investments in clean technology mark an effort to surpass the structural environmental crisis, then America leads European nations on that front. The following graph shows that American investment in environmentally friendly technology companies far surpasses that of most European countries, except the smaller economies of Northern Europe.

![Graph showing venture capital investment in clean technology companies](image)

Figure 12: If Americans do not prioritize the environment, it is not evident from investment patterns.

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73 146 Baldwin
One of the most detrimental effects of congressional gridlock in environmental affairs is that the US has been unable to articulate a coherent position on environmental protection, despite its strong environmental protection laws. This point will be especially important in contrast to Europe’s consistent policy position on environmental protection.

In summary, policy gridlock stemming from the way in which Congress decided to distribute environmental regulatory powers in the 1960s and 1970s characterizes environmental politics at the federal level. Environmental policies have resisted reform in many cases due to environmental partisanship, industry lobbying against environmental protection, and unsupportive public opinion on environmental issues, which are all derivatives of the original and enduring distribution of environmental regulatory power in the US. An in-depth analysis of how these issues are all linked will take place in Chapter Five. Politically, environmental protection means something very different than in Europe, where environmental regulation is a more consensual and ‘bipartisan’ process. However, where industry actors are clamoring for more respect and consideration in the American regulatory process, in Europe, citizens and environmental NGOs long for the policymaking powers that Americans enjoy. Path dependence is not only present in American environmental politics. Systematic resistance to a redistribution of power in favor of deliberative policymaking has been remarkably strong in Europe. As will be shown in the next chapter, to ask Europe to emulate American environmental policy—with its broad rights for individuals and strict regulatory enforcement—would present a tough challenge for European society.
Chapter Three: European Environmental Cooperation

If American environmental politics are characterized by gridlock stemming from the nexus of sudden demand for regulation, the apogee of American industry power, and the three American regulatory values identified in this paper, to what extent are European environmental politics the opposite of America's? In fact, they are quite the opposite, but not because Europeans care more about the environment due to moral enlightenment. European environmental protection has not provided meaningfully better ecological outcomes, except for comparatively minute reductions in the output of greenhouse gases, nor has Europe devised an economy vastly less dependent resource and energy consumption. The reason why Europe is supposed to have better environmental policies is because in Europe, environmental policies pose the environmental problematique differently than in the US. To put it journalistically, in Europe business and environmental interests have been seen as working together by necessity because neither can survive in the long run without the other. European environmental discourse has insisted on this positive-sum relationship between industry and ecology to the extent that political scientists have codified Europe's approach as Ecological Modernization Theory. The advent of the environmental revolution during Europe's post-War moment intersected with its three regulatory values to create regulatory laws which pose ecological problems as problems of society as a whole, not as problems of one sector of society. However, as affirmed constantly in this thesis, this has not resulted in 'better' regulation from an ecological point of view. Where American laws are strongest, European laws are at times weak to the point of being questionably effective. Indeed, judging strictly from the punitive and enforcement strength of environmental protection laws, Americans appear to have been seduced by the environment in a way that never occurred to some European nations.
This chapter sets out to assess the advent of European environmental protection and its manifestation at the level of the European Union. The benefits and drawbacks of the European distribution of regulatory power will be analyzed and it will be shown that this regulatory power distribution has proven as resistant to redistribution as its American counterpart. The ‘path dependence’ of EU environmental policy has been systematically reinforced by the EU, which has purposefully excluded environmental issues from a broader push to give European citizens court-enforceable rights to aid enforcement of EU law. This will be explained through an analysis of the direct effect of European environmental law and of the implementation of the Aarhus Convention. From this chapter, it will become apparent that the EU has worked to prevent policy convergence with the US in respect to its practice of environmental law.

A. The Environmental Revolution in Europe

When the Western world was suddenly gripped by ecological consciousness in the 1960s and 1970s, Europe's regulatory values conditioned a different institutional reaction to the ecological crisis from that of the US. As was demonstrated in Chapter Two of this thesis, not only would it have been contrary to European tradition to levy punishing penalties on polluting corporations, but it would have been contrary to national European industrial policies. In Europe, the ecological crisis came at a moment of meteoric rise in standards of living, after a 30-year period of war and depression. Just emerging from the rubble of World War Two and from the American tutelage of the Marshall Plan, European industry was cradled in the arms of national governments. As the height of industry nationalization in Europe coincided with the height of environmentalism, it would have been inimical to national interests to place punitive environmental burdens on major industries. This is especially true with the specter of inter-European competition rising as the European
Communities worked towards the Common Market. Furthermore, since the main polluting industries in European countries were collectively owned, pollution was in fact a problem owned by society too. In this atmosphere, it would have been illogical if not impossible to set up a system of strict, punitive constraint on industry at the national level.

Instead, the three regulatory values and the historical conditions of the postwar moment interacted to establish an elitist repartition of environmental law enforcement power in Europe. As industry was seen as fragile and a fragile provider of rising standards of living during *les trentes glorieuses*\(^\text{74}\) (the period of economic growth of the 1960s and 1970s), and because reborn national industries faced fierce intra-European and US competition, no power was given to European citizens to enforce new environmental laws. Powers of enforcement were reserved for regulators, and those powers were in general limited by the difficulty of integrating environmental regulation with existing systems of punitive law.

Without an adversarial legalistic system of citizen-based enforcement, environmental regulation was immediately less burdensome, less onerous, and less thorny of an issue than in the US. Additionally, without cultural demands to punish entities responsible for polluting pristine wilderness, the integration of environmental law into civil and criminal punishment posed a puzzle to which Europeans had no immediate reply. As will be detailed later in Chapter Five, the idea of punishing a corporation or individual for environmental damage, for which the intent is often impossible to prove, was not compatible with long-standing traditions of civil and criminal justice in European countries. The Treaty of Versailles of 1918\(^\text{75}\) may indeed have been Europe's final flirtation with retributive justice. The important point is that no massive expansion of citizens' rights occurred in the wake of the

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\(^{74}\) literally, ‘the thirty glorious (years)’

\(^{75}\) The Treaty of Versailles, which pinned moral and fiscal responsibility for World War One on Germany, is generally viewed as a major cause of World War Two
environmental revolution. Traditional policymaking routes remained dominant in Europe. The reservation of powers for governments that were intertwined with the largest polluters gave rise to a completely different meaning of environmental politics than in the US.

The European distribution of regulatory and policymaking power permitted the rise of an environmentalism in which industry was not the problem but the solution. This occurred because governments had to respond to citizen demand in legal systems that only gave power to government and industry. With environmentalists unable to assert themselves vis-à-vis established powers, no adversarial, zero-sum relationship between business and environmental interests resulted. Instead, European governments responded to citizen demand by regulating in a consensual fashion with industry. The resultant mode of environmental policymaking and discourse in the EU, theorized as Ecological Modernization (EM) discourse, paints a picture that starkly contrasts with the conflict between business and ecology in the US. Hajer (1995) explains that EM is a ‘greening of industry’ policy that "recognizes the structural character of the environmental problematique but nonetheless assumes that existing political, economic, and social institutions can internalize the care for the environment". While this idea is also prevalent in the US, the legal reality that underpins US environmental protection does not afford America the regulatory harmony implied by EM discourse.

The foundations of EM discourse are highly optimistic and are based upon a collaborative approach to environmental problems that does not politically exist in the United States. Toke (2011) defines EM as "an approach, by business, to environmental protection through technological development, which improves both economic development and environmental protection to be a sum greater than its parts." As he further

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76 25 Hajer
asserts, "it has come to encapsulate EU strategy" (8 Toke 2011). Hajer adds that under EM, environmental problems became calculable and framed as collective action problems, thus becoming management problems. Young (2000) adds that the "pragmatic character of ecological modernization is important, because it made it possible to build consensus and to avoid both damaging political disputes and the alienation of capital. This helped give the discourse wide appeal across different industrial sectors and draw in actors from civil society." The framing of environmental problems in this manner renders their resolution a beneficial process for all segments of society, but as the analysis of policy outcomes illustrated in the Introduction to this work, EM discourse is no panacea. Moreover, it is frequently labeled as ‘greenwashing’ because it pretends that marginal decreases in the rate of resource consumption are as important as decreases in the total amount of resource consumption. Key concepts of this discourse include clean energy, smart growth, and sustainable development. The partnership between ecological and business interests explicit in EM discourse reflects the dual environmental-political mandate of the EU, which in turn is based upon the European repartition of environmental regulatory power. Environmentalists and businesses must ‘work together’ in Europe because environmentalists have no legal avenues to participate in an adversarial fashion.

A key ingredient to maintaining the enthusiasm of European industry for environmental protection is the spread of environmental protection regimes to other countries, protecting European national competitiveness. Keleman (2007) argues that this has been in part the reason why Europe has aggressively pushed for international

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78 26 Hajer
environmental treaties. In respect to the Kyoto Protocol, he argues that “the calculus for European policy-makers was clear: given that voters would in any case demand domestic action on climate change, it was clearly preferable to promote action at an international level that would force the EU’s competitors to undertake costly measures as well”\textsuperscript{80}. This thesis does not take issue with the economic factor in Europe’s international environmental behavior, but this factor is in turn related to the largely tranquil relationship between business and environmental interests in Europe. Where politicians’ concern for industry dictated the terms of regulatory enforcement and policymaking, environmentalism did not become a partisan issue, robbing it of political traction. American business interests have shown little interest in promoting an environmental protection system that reduced their political power and inaugurated an era of legal and political uncertainty. As will be seen in Chapter Six, the (successful) American industry strategy was to fight, rather than spread, climate change regulations.

European environmental law must respond to a dual objective, as mandated by the Treaties. Since the EU only has competency in areas specifically delegated to it, the Treaties are specific. "On the one hand, [environmental policy] is aimed at attaining European environmental objectives (Article 174 EC), but on the other it can be aimed at integration and the establishment and proper functioning of the internal market (Article 95 EC)"\textsuperscript{81}. Revealingly, the European Communities (as they were named at the time of the environmental revolution) would not have been concerned explicitly with environmental issue if it had not been for a European Court of Justice decision that, on its own, gave the Communities the legal basis for environmental protection. Hence Woolley et al. term the


EU’s policy a "purposive approach". European environmental law is based on soft law principles. Article 174(2) EC enumerates six principles of environmental law. These are:

1. High Level of Protection Principle: The EU shall aim for a high level of Environmental protection. This does not imply that the EU must aim for the highest possible level of protection.
2. The Precautionary Principle: Implies that "the EC has the right to establish the level of protection of the environment, human, animal, and plant health that it deems appropriate."
3. The Prevention Principle: Preventative action is preferable to ex-post remediation
4. The Source Principle: Pollution should be remedied at the source, rather than at the 'end of the tailpipe'
5. The Polluter Pays Principle
6. The Safeguard Clause: Member States are permitted to provisionally derogate from, or not participate in, EU measures on non-economic environmental grounds. The safeguard measure is subject to a strictly time-sensitive review.

The EU can use a variety of tools to legislate, including the passing of regulations, directives, and framework directives. Regulations, despite their inflexibility, are essential components of pollution control. The EU imposes most environmental obligations upon member states through directives, which must be transposed to national law within strict time limits. National governments are free to meet the objectives by way of their choosing, unless otherwise specified in the directive. Framework directives are even looser, giving policy direction rather than obligatory goals. These loose policy instruments are increasingly being used in EU environmental regulation.

EU environmental policy has evolved quickly, demonstrating a trend towards flexible, ‘tailor-made’ regulation. Von Homeyer (2009) describes the evolution of EU environmental governance as an example of institutional layering, but one that has not led to gridlock. The table below from his work outlines the evolution of policy direction in EU environmental policy since its first EU-level actions in the 1970s.

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83 35 Jans and Vedder
84 38 Ibid.
Figure 13: The basis of EU environmental policy has shifted from the development of rigid limits in the early years to flexibility and ‘sustainability’ initiatives in recent years. Source: 6 Scott

The character of Europe’s environmental protection has become more flexible and consensual to industry over the past forty years, as the most prominent environmental problems have been cleaned up. The contrast to America's stalled legislative system explains Vogel (2003)'s observation that "over the last fifteen years, the locus of policy innovation with respect to many areas of consumer and environmental regulation has passed from the Unites States to Europe." 66

Scott attributes the changes in environmental governance to perceived economic and ecological conditions, compliance with international agreements, and changes in the EU (enlargement). In respect to the first factor, while acute environmental problems prompted top-down regulation, "globalization and increasing economic competition in the 1990s and beyond contributed to the turn towards more deliberative and flexible environmental governance patterns which aim to integrate economic considerations into environmental policymaking." 67

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67 4 Von Homeyer
true in effect, the evolution of EU environmental law has also served to exacerbate the elitist
distribution of legal power in European environmental regulation. The continuing reduction
in citizens’ legal power vis-à-vis environmental regulation will be explained in the remaining
two sections in this chapter.

B. The Diminishing Direct Effect of EU Environmental Law

While EU environmental lawmaking has not faced gridlock like that of the US, the
character of the laws has taken a turn to the contrary of the general tendency in EU
lawmaking. In general, EU laws have become more court-enforceable in recent years, aiding
the weak EU in applying its directives across divergent national legal systems. Surprisingly, in
the case of environmental directives, the opposite tendency is observed. The evolution of
direct effect in EU environmental law illustrates that the EU has resisted any redistribution
of regulatory power from government and corporate actors to citizens.

Protection of the environment is an explicit goal of the European Union, but the EU
faces two main challenges to making sure the environment is protected. As a supranational
actor, it must ensure that sovereign states have properly transposed and implemented
directives. First, the institutional design of the EU resembles that of the US federal
government in respect to the degree of effective power it holds. Strategically under-funded
by national governments, and bearing only the staff headcount comparable to a mid-sized
European city administration, the EU must rely on other parties to ensure the
implementation of its directives. Second, enforcement of those laws is an ongoing challenge
for the EU. Member States face perversely incentives to hide environmental offenses to
prevent a fine from being levied. Krämer (2002) writes that "it is clear that Member States
take almost all measures to keep investigation reports, surveys, inspection data etc.
confidential and not to send such material to the Commission. Attempts by the EU to give monitoring powers to the European Environmental Agency were successfully defeated by Member States. "At present, the Commission only accidentally obtains reliable information on the local situation in a specific case, and its best source in that respect is individual citizens and environmental organizations" (349 Krämer). The EU’s main weapon against these challenges is the direct effect of its directives, which has been increasingly used in EU law to ensure its proper application.

The direct effect of EU law is the EU’s primary means of ensuring the application of its directives. Directly effective law can be defined as law that does not necessarily give rights to the European citizen but that can be invoked in court. Jans and Vedder argue that litigants can invoke EU provisions "which do not as such confer rights on individuals, but are 'unconditional and sufficiently precise'. Any other view would imply that 'pure' environmental protection provisions could not be relied upon in national courts". Keleman (2011) argues that the direct effect of EU law, which gives legal power directly to citizens, creates an adversarial legalistic dynamic that channels many of the characteristics of American adversarial legalism, which in theory would bring environmental policy convergence between the two polities closer to reality. However, environmental issues contradict this tendency in EU law, as the holders of environmental policymaking power have sought to insulate themselves from calls to redistribute this power in the name of greater public participation.

Kelemen argues that the European Union has begun institute what he calls

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89 171 Jans and Vedder
"Eurolegalism," or a European brand of adversarial legalism. Keleman relates this change in legal structure to two factors. Due to the fragmented power of the EU, the Commission and the European Parliament 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)." Thus, EU executives create rights-based law framed in a manner to allow for enforcement through lawsuits. The immunity of the courts to political backlash then allows the control of bureaus and state governments though "an inflexible, adversarial, and litigious approach to the implementation and enforcement of regulatory policy."91 The rights are conferred through the direct effect of specific provisions in environmental law. While environmental legislation is typically not thought of as framed in the language of rights, Wenneras (2007) finds support for environmental rights in both theory and in case law. Specifically,

"the ECJ has held that environmental rules that protect public health confer rights on individuals, and must be implement in a sufficiently clear and precise manner so that the persons concerned can ascertain the full extent of their rights and rely on them before national courts. […] Since a significant proportion of environmental legislation has a link to human health… it follows that EC environmental law often confers rights on individuals. [These are usually] procedural rights, i.e. the right to rely on unconditional and sufficiently precise provisions in national courts and the corresponding duty of the national judge to make them operational in the domestic legal order."92

Wenneras' findings support Kelemen's claim, but the empirical legal reality does not bear out the theoretical implications of Eurolegalism in the environmental domain.

Direct effect is a more limited tool than the tools of American environmental legal enforcement. Direct effect can only be invoked against member states to incite enforcement of directives, not against private polluters to prompt punishment. (This must be done with national law.) The case law has shown that "direct effect finds all of its raison d'être in allegations that the Member States haven't proceeded to transpose the concerned directive.

91 25 Kelemen 2011
And yet, in environmental matters, the problem, generally, comes not from bad transposition, but from the enforcement itself. The other way in which direct effect could potentially aid enforcement of the law is not effective either in this case. The procedure by which national justices can ask the ECJ how a directive works in their system and then apply their decision does not have much sway in environmental matters "where the problem of execution is more a question of opening [legal] recourses than a correct and uniform interpretation of the law." Beyond the inaptness of direct effect to enforce environmental law, the EU has been actively working to reduce the extent to which direct effect can be applied at all in environmental lawsuits in Europe.

An important part of Kelemen’s argument is that the EU has been increasingly reliant upon Eurolegalism in recent years in many domains of law. However, environmental law has moved in the opposite direction or enforceable rights since the 1980s. Experiments with flexible law, framed as benignly 'innovative,' represent a move away from the enforceability of environmental law because flexible law provides for less specific and therefore less enforceable regulations. Wenneras (2007) finds that decentralized, flexible regulation provides environmental outcomes that are hard to measure and harder to enforce:

"These changes will make compliance with EC environmental law increasingly difficult to monitor and ultimately undermine effective enforcement of EC environmental law. Indications to this effect appeared in the Commission’s first report on the IPPC (Integrated Pollution Prevention and Control) Directive, which failed to assess whether the Member States had correctly implemented the directive. […] The reason is not that Member States have not made a real effort, but rather that they all use very different ways of expressing limits, which they are perfectly allowed to do, since the [IPPC] Directive does not require harmonization of these diverse practices"

It is small wonder that the Commission warned that it might be necessary to introduce Community emission limit values. […] In sum, whilst the recent trend of flexibility and differentiated environmental policy-making may provide cost-efficiency benefits, and in theory tailor-made and thus enhanced environmental protection, it does so at the expense of the direct effect of environmental directives and effective enforcement of EC environmental law. Time will tell whether the end has justified the means" (44 Wenneras).
The march against enforceability of environmental law has been steady and constant. For example, the Sixth EAP does not propose new quantifiable targets or related timetables, "despite the lack of such targets having been identified as a weak point in the Fifth EAP". For a regulator that could not even ascertain if Member States had attained the emissions goals for the fifth EAP, the increased flexibility of the sixth EAP indicates how low a priority the enforcement of environmental law actually is. The idea of public participation in environmental policymaking, which can only be achieved through the delegation of legal powers, is evidently not a prerogative of the EU. An analysis of the failed implementation of the 1998 Aarhus Convention on environmental justice, which aimed to increase public participation in environmental regulation, strengthens this claim.

What we observe from the conflicting impulses embedded in European law, one tending to flexibility and one tending to detailed provisions, is that the former is winning out over the latter in the case of environmental regulation. In EU law, enforceability is antithetical to flexibility. That EU environmental directives have increasingly tended to be flexible rather than detail-oriented speaks to a trend in the distribution of power in European environmental regulation and its resistance to change. The EU’s conservative interpretation of the 1998 Aarhus Convention, which aimed to expand citizens' environmental legal rights, provides a case study in how elitist and pro-industry patterns of decision-making have continued to shape European environmental policy. When considered alongside the Aarhus Convention, the flexibility-oriented 5th and 6th Environmental Action Plans appear to be aimed to defeat any potential effect of the Aarhus Convention by reducing the enforceable provisions of environmental law. The following analysis of the AC shows to what lengths the European Commission, in particular, has gone to reinforce the extant distribution of

95 Woolley et al.
environmental regulatory power in the EU.

C. The Aarhus Convention

In 1998, the Aarhus Convention was signed by the EU and its Member States with the aim of addressing three lacking elements of European environmental law, at both the EU and national levels: Access to information, public participation, and access to justice. These categories form the Convention's three pillars and are by no coincidence the key ingredients to giving citizens influence in environmental policymaking and enforcement. The UN Convention represents the largest effort ever made to coordinate national environmental policies in order to give a legally effective voice to individuals in environmental regulation. Compliance with the Convention would have directly contributed to policy convergence between the US and the EU by modeling the distribution of European environmental regulatory power after the American distribution of those legal powers. The background and intent of the Convention make it all the more surprising that it has been a resounding failure at both the EU level and in many Member States. Widespread reluctance to implement the three pillars illustrates the extent to which the EU and its Member States wish to maintain the current distribution of enforcement power in environmental affairs. Both the EC and the ECJ have worked together to restrict the implementation of all three pillars, leaving only the popularly elected European Parliament to attempt to bring the Convention’s aims to reality. The combination of increased flexibility in environmental law and resistance to the goals of the Aarhus Convention paints a revealingly elitist rigid portrait of the EU. Accordingly, the most restrictive implementation of the Convention has been at the EU level itself, and national level implementations have been

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96 As was noted earlier, the legal power enjoyed by Americans in environmental affairs is based on strict emissions standards, public audits of emissions, broad legal standing to enforce compliance, and tools such as the Environmental Impact Statement, which permit influential public participation via the courts.
uncoordinated and weak, disappointing the hopes of the Convention and preventing US-EU policy convergence.

Ci. Access to Information:

Since the passage of the Aarhus Convention, the EU has made great but labored strides in public access to environmental information. Currently any natural or legal person, not just EU citizens,\(^97\) can request access to environmental information. The progress in removing exceptions with the law in order to comply with Aarhus has been exceedingly slow, which is surprising given the EU’s proficiency at writing regulation. Fourteen years since the signing of the Aarhus convention, the EU is still not in complete compliance. Most of this delay is due to foot-dragging on the part of the Commission, which clearly indicates a lack of interest in improving public access to information.

In 1993, the first environmental information directive was put into effect in the EU\(^98\). The Aarhus Convention was signed in 1998, prompting a directive (EC1049/2001) from the part of the Commission to comply with the Convention. "While the impact of Aarhus on the revised Environmental Information Directive was considerable, Aarhus has essentially no impact on the EU’s general access to documents rules"\(^99\). A subsequent EC proposal for a directive to expand public access to environmental information in 2000 was a terrible legislative product, despite the two years the Commission took to work on it. The proposal represented purposeful bureaucratic impeding of Aarhus’s aims. Hallo (2011) comments, "The need to strengthen the deplorable weaknesses of the Commissions proposal so consumed the European Parliament’s attention that the specific Aarhus repairs

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\(^98\) 58 ibid.

\(^99\) 63 ibid.
could not be made\textsuperscript{100}. The EP managed to fix up the proposal, but did not have the time to add reforms required by the Aarhus Convention. Nine years later, the adoption of directive EC1367/2006 helped bring the EU into compliance with the Aarhus Convention, but left nine major exceptions inconsistent with Aarhus\textsuperscript{101}. A revision of EC1049/2001 received its first reading in the European Parliament in December 2011, thirteen years after the signing of the Aarhus Convention\textsuperscript{102}. The portrait painted by the reluctance of the technocratic EC and the attempts of the democratically elected EP to resuscitate the directive shows the conflict between public pressure for increased legal power and centralized resistance.

Cii. Public Participation:

Legislation following the Aarhus Convention has changed little in terms of the participation of the public in environmental decision-making. Before the treaty, the EU had been working to formalize interest group participation at its own level\textsuperscript{103}, and many environmental directives already technically incorporated public input to an extent that precluded their revision under the Aarhus Convention\textsuperscript{104}. In the Aarhus directive authored by the EC, interest group participation was considered to be reactive, rather than forming a policy input\textsuperscript{105}. In effect, the Aarhus Convention "gave parties a voice but not a vote"\textsuperscript{106} at the EU level. While the Commission welcomes input from any 'citizen, enterprise, or association,' as far as the Commission is concerned, the Aarhus regulation stipulates that it

\textsuperscript{100} 63 ibid.
\textsuperscript{101} 63 ibid.
\textsuperscript{104} 155 ibid.
\textsuperscript{105} 156 ibid.
\textsuperscript{106} 160 ibid.
should provide for public participation at the preparatory stage of its proposals”\textsuperscript{107}, rather than at the decision stage. No new decision-making power was given to citizens at the EU level. Differences between national and EU-level standards and mechanisms of participation and enforcement have resulted from varying applications of the Aarhus Convention. One main reason for this difference is that the EU does not see that article six of the Convention, which outlines eleven steps to allow public participation, as applicable to itself. Member states are not exempt from the article, which requires reasonable timeframes “for the public to prepare and participate effectively during the environmental decision-making” as well as the identification of the public concerned to facilitate their entry into discussions. The EU claims instead to abide by articles seven and eight, which vaguely require "appropriate practical and/or other provisions" and impose a reasonable timeline for participation, the publishing of draft rules, and an opportunity for public comments\textsuperscript{108}. In short, the EU has maintained an elitist decision-making path after Aarhus, rather than committing to an increase in public participation.

Ciii. Access to Justice:

A major problem that the EU has acknowledged and attempted to rectify with the Aarhus Convention of 1998 is "access to justice" in environmental matters. Restrictive standing laws have historically refused locus standi (legal standing) to individuals and to NGOs in the event that they wish to challenge EU directives on environmental grounds. Regulation 1367/2006, adopted to expand standing to those concerned individuals or groups and conform with the Aarhus Convention, is seriously and uncharacteristically flawed, argue Jans and Vedder. In regards to the review of directives prompted by litigation, which

\textsuperscript{107} 161 ibid.

represents the most effective tactic to influence policy available to environmental NGOs, judicial guidelines are blurry. Narrating the legislative process of Regulation 1367/2006, the Jans and Vedder comment that the Commission has worked to confound the essential task of identifying whether or not violations of environmental regulations have been committed:

"So the Commission's proposal raised the pertinent question of what are the legal standards in order to assess if the institutions have breached environmental law or not and how intense this review should be? Surprisingly, the already lamentable text of the Commission's proposal was even worsened. In the regulation any reference to a standard of review is omitted!" [The effect is a] "carte blanche to disregard any request" 109

The inclusion of such strong language to in a formal textbook of EU environmental law is a statement in itself. Moreover, for the leaders of what strives to be the global benchmark in environmentalist governance to work against the basic enforcement principles of environmental law casts serious doubt on the efficacy of ecological modernization policymaking. As the Commission worked to withhold the legal tools necessary for citizen-based enforcement of environmental law, it simultaneously attempted to withhold standing rights from groups interested in challenging environmental directives. In relation to which NGOS qualify as 'interested parties seeking judicial review of acts of the European institutions breaching environmental principles,' the guidelines of the regulation which was passed to comply with the Aarhus Convention did not offer any clarification or expansion of rights.

" The problem with that was of course that this provision still requires that the applicant must be 'direct and individually concerned by the decision.' And what did the European legislature do in the final text of the regulation? It replaced 'in accordance with Article 230 (4) EC Treaty' with 'in accordance with the relevant provisions of the EC Treaty.' However, the problem does not disappear by not addressing the problem. So the question still remains: how can one secondary EC legislation broaden the scope of Article 230(4) EC Treaty?" 110

The uncharacteristically poor quality of this regulation, especially for a bureaucracy that prides itself on the caliber of its bureaucrats, provides strong evidence that the EU has attempted to maximize its net gain from the Aarhus Convention. By signing a treaty that

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109 217 Jans and Vedder
110 218 ibid.
sounds good and may improve citizen access to litigation at the national level, the EU promotes the enforcement of its own environmental policy. Meanwhile, at the EU level, the rules on standing have remained just as murky as before, which serves to maintain a low litigation rate against the Commission.

A case study from Bethell (2009) highlights the European Court of Justice’s restrictive interpretation of the Aarhus Convention, which has resulted in continued repudiation of groups wishing to challenge EC environmental directives:

It was also argued in Região Autónoma dos Açores v Council of the European Union [2008] that a new approach to standing was required because of the Aarhus Convention. However, this argument fell on ‘deaf ears’. The ECJ relied on Article 9(3) which, while granting a right to access, makes it conditional to ‘where [the applicants] meet the criteria, if any, laid down in its national law’. As such the case noted that there is access to the ECJ providing the conditions of “direct and individual concern” test are met. The court also expressly stated that for this to change Member States would have to amend the Treaty. However, they seem unwilling to do so with Article 264 of the Lisbon Treaty simply reiterating the ‘direct and individual concern’ test.”

The ECJ and the Commission have worked in tandem to jealously guard the right to challenge directives, repudiating groups that wish to require more stringency in environmental protection. The Commission’s lawmaking process may be consensual to powerful groups when drafting a directive but the idea of public or citizen group participation is far from reality. Persuading national governments to allow for more environmental litigation while not implementing the same reforms seems to be the key to a more accessible neo-corporatist lawmaking system. This leads Jacob (2007), a former avocat général at the ECJ, to estimate that "the European system presenting the most restrictive approach on the question of direct and individual concern is the Community system itself”

Cognizant of the American adversarial legalism in environmental regulation, the EU has been in no rush to expand citizens’ legal powers in that respect, despite constant affirmations to the contrary. In effect, the EU prioritizes business input over citizen input,

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112 2 Jacob
and it maintains a balance of power to reflect that reality.

In summary, the Aarhus Convention failed to redistribute environmental regulatory power at the EU level. The strong refusal of the EC and ECJ to Americanize, in effect, EU environmental regulations is in itself an act against the convergence of American and European environmental policies. From a comparative perspective, while the developments in European environmental regulation have permitted efficient lawmaking, the resultant laws would be unacceptable to American environmentalists. The political nature of the environmental problem is clearly not shared between the US and the EU. The next chapter will give a concrete illustration of the differing societal expectations for environmental justice, which were shaped by the repartition of legal tools by environmental laws in each nation and by the national culture of justice. This chapter will compare the legal power citizens have in European nations and in the US, showing the empirical differences of divergent legal power distribution. The idea that Europe and America should exhibit policy convergence on environmental issues deemed more important by virtue of the size of those issues is a chimera because there is so little policy convergence to begin with. The contrasting repartition of environmental policymaking and enforcement powers in the US and the EU has given rise to environmental politics so different that they only resemble each other because they both regulate the environment. Barring exceptional economic motives for environmental regulation, environmental policy cooperation will tend not to work.
Chapter Four: A Comparison of National Level Environmental Law Enforcement

This chapter will address two remaining factors in the discussion of impediments to EU-US environmental policy cooperation, legal traditions and judicial culture. To find the true meaning of the supposed partnership between business and ecology in Europe, we must look to the national level of governance. Enforcement of environmental law takes place at the national level in the European Union, and its outcome depends heavily on national traditions of jurisprudence. As the cases of England and France will illustrate, the practice of environmental protection implies fines and penalties that are in almost all cases light (if not lax) in comparison to punishments levied for environmental offenses in America. The degree of legal uncertainty linked to environmental regulation is much lower in these countries than in the US, and environmental offenses rarely lead to punishments that threaten the viability of businesses. The comparison shows that the reservation of enforcement power to regulators and the restricted penalties for offenses have prevented environmentalism from becoming polemical in Europe. When considered in tandem with the decidedly elitist policymaking of the EU, it is no surprise that Europe lacks polemical political struggles about environmental regulation. The ‘partnership’ of business and ecology has come at the price of forgoing public enforcement (and accompanying policy sway), which makes the European environmental policy process disagreeable to American NGOs. Moreover, the country studies illustrate why in Europe businesses tend to agree with environmental protection.

European countries have both resisted and had difficulty with transforming environmental offenses into crimes that carry punishments. The progress of the directive
2004/35/EC on environmental liability shows the limits of any attempted ‘Americanization’ of European environmental law. The directive is a weak version of the Polluter Pays Principle, which entitles (but does not oblige) administrative authorities to require remediation of narrowly defined environmental damage by private or public entities at fault\textsuperscript{13}. It also provides standing for NGOs, but only during an administrative complaint procedure\textsuperscript{14}. The relatively mild directive was drafted in an atmosphere in which, “hardly anybody publicly favoured an EC system on liability for traditional damage while the restoration of the impaired environment was generally considered to be a public responsibility”\textsuperscript{15}. Lacking support despite its weakness, the directive was only transposed by Italy, Lithuania, and Latvia three years after Member States received it from the Commission\textsuperscript{16}, evincing problems with integrating liability for environmental damage remediation into national legal systems. The difficulties here generally stem from assigning fault to environmental offenders, which is a foreign concept to many European countries. A look at England and France will show how two European nations have integrated environmental punitive law into their own national systems. In the British case, accommodating environmental litigants has been an ongoing challenge. The French case, on the other hand, shows how national governments can actively work to incorporate environmental litigants into the judicial system. Both cases illustrate restrained enforcement of environmental laws, especially in comparison to American patterns of environmental regulatory enforcement. To begin, we will look at English environmental law.

A. English Environmental Law: Exceedingly Mild-Mannered


\textsuperscript{14} Section 5 ibid.

\textsuperscript{15} Section 1 ibid.

\textsuperscript{16} 5 Jacob
The English system of law presents a puzzling case, due to its simultaneous generous requirements for legal standing and dearth of environmental lawsuits. For scholars searching to understand why Europe has not witnessed the advent of adversarial legalism, the following paragraph describing an individual's right to sue on environmental grounds in England may be perplexing:

Where an offense is not an individual grievance but involves a matter of public policy and utility, any person has a general right and power to prosecute unless the statute creating the offense contains some restriction or regulation limiting the right to a particular person or body. [...] This right allows pressure groups to 'focus' the attention of prosecution authorities and, in default, to bring prosecutions where it is felt that the statutory authorities have failed properly to exercise their duties. [...] There have been few private prosecutions for environmental matters in recent years."¹¹十七

British standing rights are nominally even broader than those of the US, for "the question of knowing if a plaintiff has a legal interest is not considered as a prerequisite to examination of the case by the court, but is integrated into the general examination of the affair"¹¹十八. And yet, observers see "private litigation as a last resort" in England¹¹十九. Bethell (2009) concurs, observing, "while private prosecutions can play a major role in highlighting environmental issues they are the exception rather than the rule"¹¹二十. How can an environmental legal system so evidently open to environmental lawsuits not result in adversarial litigation? The UK's resistance to private litigation is partly related to 'loser pays' laws and high court fees, which have helped the courts become self-financing¹²¹. Such laws can be seen as quality controls on the lawsuits filed. The dearth of private litigation can be explained by the different outcomes of court cases in the UK. Lawsuits are much less of a deterrent of environmental offenses. The effectiveness of English environmental law speaks to an environmental legal culture very different than that of America.

English environmental protection is a generally lax affair in terms of penalties and

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¹¹十七 (69 Woolley et al.)
¹¹十八 3 Jacob
¹¹十九 Parpworth (2007), cited in a footnote at 69 Woolley et al
¹¹二十 5 Bethell
¹²¹ 6 Jacob
enforcement. In the UK, environmental law is prosecuted in criminal rather than civil court, and criminal law requires that a ruling be based on mens rea, or a 'guilty mind.' This basis of law has made prosecution of environmental offenders difficult because of an ambivalent attitude that has arisen towards cases where pollution is not necessarily a matter of purposeful wrongdoing. The resultant tradeoff in enforcement is that the English Environmental Agency will generally prosecute offenses, but offenders have a strong recourse to arguments based on mens rea, which may absolve them of liability. Judges, accordingly, have tended to side with the defendants. "While the main justification for imposing criminal penalties for environmental offences is public protection, it is the public themselves, ably assisted by the judiciary, who are undermining environmental protection". Punitive sentences for environmental offenses are rare, with fines in the magistral (low) and Crown (high) courts generally ranging between five and ten thousand pounds. Rarely adjudicated jail time for environmental crime is capped at a maximum of twelve months total in magistrate rulings and two years in most Crown Court rulings.

Fines too are generally so low as to "not act as a deterrent but rather encourage and promote non-compliance as the cheaper option." For example, an oil spill that imposed a 50 million pound cleanup cost on the government resulted in a 750,000 pound fine on the company at fault. Administrative punishments are scarce as well. The Environmental Agency has the power to revoke licenses of firms out of compliance, however in the case of waste managers, "only 6 waste management licenses [were] revoked between 1996 and 2001..."
despite hundreds of prosecutions every year"\textsuperscript{127}. EC directive 2004/35 on environmental liability, aimed at promoting the polluter pays principle, is not hoped to improve environmental protection because it relies on a narrow definition of environmental damage and was not well-received by the English government\textsuperscript{128}. Jacobs notes that the UK has made no effort to reconcile common law with environmental concerns, evincing 'reticence' on the advent of environmental concerns\textsuperscript{129}. Bethell concludes, "Harm to the environment is in no sense labelled as a 'criminal' activity, both by the public, who see it as morally acceptable, and the judiciary, who have perpetuated its "trivialization" as something not worth criminal protection"\textsuperscript{130}.

How has English environmental law worked, then? In the English system, corporations generally report their environmental performance using standardized reporting formats and submit to audits by the Environmental Agency. Complaints from NGOs or citizens can also attract an auditor's attention. Regulators can enforce environmental laws with tactics including warnings, revocation of permits, press releases, and prosecution\textsuperscript{131}. The low penalties adjudicated for environmental offenses reduce the seriousness of the threat of last resort. A report on legal compliance with UK environmental law revealingly states, "Regulators have complained that the levels of fines imposed by the courts are often insignificant in comparison to the offending organisation's annual turnover or profit. But the biggest worry for an organisation is usually the indirect effect of enforcement action, and sensitivities to this vary according to circumstances"\textsuperscript{132}. The same report offers a table of the effects of environmental regulatory enforcement action in the UK, featured below. It is noteworthy that the table does not list any grave financial consequences for environmental offenses.

\textsuperscript{127} 21 ibid.
\textsuperscript{128} 23 ibid.
\textsuperscript{129} 3 Jacob
\textsuperscript{130} 24 Bethell
\textsuperscript{132} 57 ibid
Table 4.1 Effects of enforcement action

<table>
<thead>
<tr>
<th>Commercial</th>
<th>Loss of business</th>
</tr>
</thead>
<tbody>
<tr>
<td>Industrial relations</td>
<td>Workforce concerns</td>
</tr>
<tr>
<td>Reputational</td>
<td>Customer perception, other stakeholders, corporate reporting</td>
</tr>
<tr>
<td>Environmental</td>
<td>Workforce concerns, site contamination, pollution incidents</td>
</tr>
<tr>
<td>Operational</td>
<td>Loss of production, accidents and injuries, business continuity, additional management time</td>
</tr>
<tr>
<td>Individual liability</td>
<td>Corporate manslaughter and dismissal</td>
</tr>
<tr>
<td>Financial</td>
<td>Fines and insurance premiums</td>
</tr>
</tbody>
</table>

Figure 14: This table from a guide to compliance with UK environmental law shows the potential effects of enforcement action. Lawsuits and high damage are not listed, and the deterrents are notably soft.

It is no surprise, then, that the UK found an average of 45 violations per every 100 inspections in 2007, three times as many as French regulators found per 100 inspections in 2006133. The English case speaks strongly against the stereotype that all Europeans care more about the environment than do Americans! Moreover, it demonstrates how a nation’s cultural expectations for the severity of punishment directly influence the aims and outcomes of regulation. In England, legal levers are given to the public, but they transfer little power to citizens. An example from Woolley et al is a case in point.

In 1994, the case *Cambridge Water Company v. Eastern Counties Leather* proved to be an important test of liability in pollution cases. In the case, a leather tannery polluted an aquifer, and the water company dependent on the aquifer sued in civil court for remediation of the aquifer. “The pollution of this water by chemicals meant that there had been a breach of the new UK water quality standards, which had been introduced as a result of European

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The plaintiff claimed a million pounds in damages, but “the House of Lords ultimately dismissed the plaintiff’s nuisance action, on the main ground that it had not been able to establish that the pollution of its water supply by the defendant’s actions was foreseeable in the circumstances.” Due to ‘loser pays’ laws, the water company covered the legal costs of the trial. As for the environmental remediation, the National Rivers Authority took over the case and agreed to accept a 50,000 pound cleanup payment from the tannery, which was an alternative to a two million pound option that the company could not afford.

The impact of the recent Environmental Liability Directive is yet to be seen on cases like this one. The French system of environmental law offers a stricter interpretation of environmental liability due to special provisions made for environmental enforcement.

B. French Environmental Law: A Balanced Approach

In contrast to the British regime, the French system of environmental law represents a successful integration of environmental law with criminal and civil law because the French have solved the problem of mens rea in court proceedings. Although the French system is much more likely to punish environmental offenses than the British system, it is still distinguished from the American system of environmental law by the low caliber of punishment delivered. French law has bridged the gaps left by common standing and liability laws with a special provision (Article L 14202 of the Code of the Environment) that grants standing to approved environmental groups for a defined set of environmental crimes. Only a few dozen environmental NGOs have been approved at the national level, but the

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134 26-27 Woolley et al.
135 27-28 ibid.
136 See footnote 8 at page 28 ibid.
courts have interpreted the listed crimes very broadly. Criminal damages in environmental suits can be awarded to concerned NGOs for losses incurred when environmental offenders obstruct the groups' mission. Criminal damages are assessed by three criteria, namely "the extent of the damage to the environment, the applicant association’s (compromised) efforts to fight environmental deterioration (either in general, or in the case in question), and finally the polluter's attitude during and after the identification of damage." In civil courts, charges can be brought against environmental offenders on the grounds of a 'manifestly unlawful nuisance' or 'imminent damage,' the former of which is most commonly invoked. (A lawsuit on the grounds of nuisance will be reviewed in Chapter 3, under the section on the Precautionary Principle.) Importantly, the problem of mens rea is generally resolved by prosecuting the offense as an administrative crime on the grounds of an industrial permit violation.

Unlike English environmental law, French environmental law is strong enough to dissuade potential polluters, but unlike American law it is not harsh enough to be polemical. As Papadopoulou argues, "the systematic and consistent engagement of civil liability by associations may, and actually does seem to induce general prevention, by obliging polluters to consider the risk of liability in the course of their actions." Jacobs notes that two factors strengthen French environmental law vis-à-vis the English system. First, judges can order the remediation of the environmental damage at the cost of the polluter. Second, the categories of fines that can be imposed on polluters have been increased as a reflection of the Polluter Pays Principle. Methods of calculating remediation and criminal punishments

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138 94 ibid.
139 99 ibid.
140 102 ibid.
141 103 ibid.
142 91 ibid.
143 4 Jacobs
have included attempts to approximate the economic values of waterways, measures based on the demonstrated remediation efforts of environmental groups, and somewhat arbitrary calculations of damages caused by illegal dumping. However, three factors keep the amounts of pecuniary awards low. First, judges "allegedly seek a balance in their awards, and yet the factors of this ‘balance’ are nowhere defined, and usually tend to be sympathetic to polluters." Secondly, since environmental NGOs are generally unable to repair environmental damage, they usually claim reparation for 'moral loss' to their mission in civil court, which "usually involves substantially lower amounts than would have been granted, had restoration been the measure"\(^\text{144}\). Third, the common practice of prosecuting offenses under the guise of permit violations reduces the potential fines to a maximum of 75,000 euros for an individual of 375,000 euros for a corporation\(^\text{145}\). The punishments for violations of French environmental law are thus limited in scope and harshness.

C. A Comparison with American Environmental Penalties

A comparison of the damage awards and fines that can be expected for environmental violations in each country gives the most succinct sense of this comparison. In the UK, fines that can be expected from the English Environment Agency rarely exceed 10,000 pounds, and in France, the corporate cap is 375,000 euros for the most commonly prosecuted forms of offense. In the US, the total pecuniary damages vary greatly due to the unpredictable nature of juries, but the following tables from Karpoff et al (2005) display actual pecuniary damages and compliance costs for American businesses that lost environmental lawsuits. The data were collected from a Wall Street Journal database on environmental lawsuits against publicly traded companies. Of the nearly 500 cases in the file for the period 1980-

\(^{144}\) Papadopoulou

2000\textsuperscript{146}, 107 resulted in fines and remediation payments (Panel A), and 70 of those case records contained details of the final remediation costs (Panel B)\textsuperscript{147}. The median combined fine and damage award for environmental violations levied against publicly traded companies was $1.5 million, although many awards have been much higher.

**Sizes of the Legal Penalties Levied for Environmental Violations**

**Panel A: Actual Fines and Damage Awards ($ millions)**

<table>
<thead>
<tr>
<th>Type of environmental harm</th>
<th>Air</th>
<th>Surface or Drinking Water</th>
<th>CERCLA / Contaminated Site</th>
<th>Miscellaneous or Multiple Media</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean</td>
<td>31.7</td>
<td>4.0</td>
<td>11.0</td>
<td>6.1</td>
<td>13.2</td>
</tr>
<tr>
<td>Median</td>
<td>1.2</td>
<td>0.8</td>
<td>3.0</td>
<td>1.5</td>
<td>1.5</td>
</tr>
<tr>
<td>Observations</td>
<td>26</td>
<td>22</td>
<td>32</td>
<td>17</td>
<td>107</td>
</tr>
</tbody>
</table>

**Panel B: Actual Compliance and Cleanup Costs ($ millions)**

<table>
<thead>
<tr>
<th>Type of environmental harm</th>
<th>Air</th>
<th>Surface or Drinking Water</th>
<th>CERCLA / Contaminated Site</th>
<th>Miscellaneous or Multiple Media</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean</td>
<td>123.0</td>
<td>36.7</td>
<td>108.0</td>
<td>102.0</td>
<td>93.6</td>
</tr>
<tr>
<td>Median</td>
<td>27.9</td>
<td>5.7</td>
<td>18.8</td>
<td>17.8</td>
<td>13.5</td>
</tr>
<tr>
<td>Observations</td>
<td>12</td>
<td>16</td>
<td>33</td>
<td>9</td>
<td>70</td>
</tr>
</tbody>
</table>

*NOTE:* Data on the legal penalties imposed for 148 events in our sample for which penalty data are available in The Wall Street Journal or Factiva\textsuperscript{m} database, 1980-2000. Panel A provides summary information on the actual fines or damage awards assessed in 107 environmental violations, categorized by the type of environmental harm. Panel B reports on the compliance or cleanup costs imposed in 70 cases of environmental violations. Twenty-nine cases appear in both panels because they have both fine and cleanup cost data. Amounts are in millions of constant year 2000 dollars.

Figure 15: The median fines and damage awards in this dataset totaled $1.5 million, and the average final compliance and cleanup cost reached a median of $13.5 million.

As for the notion that American standing rights alone are the most effective explanation for adversarial legalism, the following table puts it in doubt. Of the nearly 500 lawsuits filed

\textsuperscript{146} The case of Exxon Valdez was excluded from the dataset because of the abnormally large $5.3 billion award.  
against public corporations in that time, only about a sixth of them came from private litigants or NGOs. The following figures\textsuperscript{148} offer some interesting counterpoints to the assumption in the literature that American environmental groups are at the helm of environmental litigation.

**Panel B: Type of Action**

<table>
<thead>
<tr>
<th></th>
<th>Criminal Lawsuit</th>
<th>Civil Lawsuit</th>
<th>Regulatory Fine/Action</th>
<th>Consent Order</th>
<th>Product Recall</th>
<th>Liability Assignment</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>28</td>
<td>197</td>
<td>146</td>
<td>31</td>
<td>38</td>
<td>38</td>
<td>478</td>
<td></td>
</tr>
</tbody>
</table>

**Panel C: Party Bringing Action**

<table>
<thead>
<tr>
<th></th>
<th>State or Local Agency</th>
<th>EPA</th>
<th>Justice Dept</th>
<th>Environmental Group</th>
<th>Individuals or Class Action Lawsuit</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>101</td>
<td>221</td>
<td>86</td>
<td>8</td>
<td>62</td>
<td>478</td>
<td></td>
</tr>
</tbody>
</table>

Figure 16: While environmental NGOs have historically been responsible for many lawsuits, this dataset portrays a different origin of litigation. The figures speak to the ethos of punishment in American environmental protection.

These figures do not take into account how many lawsuits were threatened or how many projects were revised due to the threat or worry of a lawsuit. These figures underscore the influence of justice culture in the United States. Administrators at all levels of government can bring highly public, punitive lawsuits to be judged by juries against environmental offenders in order to appeal to an anti-corporate environmentalist public or to appear tough on corporate crime. Some further figures give a fuller sense of the gravity of environmental law enforcement in the US.

\textsuperscript{148} 29 Karpoff et al
In the EPA’s “Top 25” register of the largest civil enforcement cases based on the estimated cost of actions taken to comply with lawsuits to enforce environmental laws\textsuperscript{149}, the costs range from $38 million dollars in the case of a municipality to $758 million in the case of a national oil refiner\textsuperscript{150}. Twelve of the top twenty-five cases cost corporations and municipalities over $100 million in equipment upgrades and environmental remediation costs. In the register measuring the twenty-five highest civil penalties, fines ranged from $10 million to $107 million\textsuperscript{151}. To give an example of the cases at hand, a $40 million fine was imposed on an oil transporter for spilling a total 1.45 million gallons of oil from its interstate pipeline on seven separate occasions. In the EPA press release about the case, Attorney General John Ashford states, "Today's settlement sends the message that we will vigorously pursue violations of environmental laws that subject our citizens and our environment to potentially catastrophic consequences\textsuperscript{152}." The heavy-handed enforcement of American environmental law renders the threat of lawsuits from citizens, NGOs, elected government officials and regulators credible and fearsome. To say that Americans do not value the environment is patently false. The unique distribution and characteristics of environmental enforcement power in the US, whether just or unjust, contrasts so sharply with the European system as to become an influential factor precluding policy convergence.

From these country studies, several aspects of environmental law enforcement distinguish the European sense of environmental justice from the American one. The US has a unique and heavy-handed sense of liability and punishment in environmental offenses. By contrast, in England, there is an insistence above all that environmental crime can only be

\textsuperscript{149} EPA, National Enforcement Trends, Section J-5
\textsuperscript{150} All figures in this paragraph are in 2010 dollars
\textsuperscript{151} EPA National Enforcement Trends, Section J-1
punished if it was indeed a crime meeting the criteria of *mens rea*. In effect, this criterion precludes punishment for events such as pollution of water supplies by leaky storage tanks or the harming of a protected ecosystem by over-application of pesticides. In France, this bottleneck on environmental justice has been removed through special provisions, but punishments under administrative law and with capped fines have prevented environmental law from becoming a polemical issue. What this comparative study of environmental justice illuminates is the enduring nature of the ecological problem that each polity is trying to resolve. In the US, environmental and business interests are institutionally opposed because punishment for environmental offenses is more than a credible threat to business; it is a constant menace. In the UK and France, care for the environment (or lack thereof) is not a credible threat to the viability of an enterprise. Comparing the EU with the US federal government expands the notions of this conclusion.

Why would the EU try to reduce the role of citizen-based enforcement of environmental policy? The deliberately restrictive actions of the EC and the ECJ are beyond the reach of a simple path dependence argument. They constitute a recognition of the fact that in order to solve the environmental problem as it is posed by European environmental policy, environmental regulation is best left an inexact science. This allows for a maximum of consensual policymaking, optimistic discourse, and public enthusiasm. In Europe, the ecological crisis was at its origin a problem of the whole of society, not just its industrial sector. Such framing of the policy by the elitist distribution of regulatory power has had obvious benefits, making environmental protection a priority for all political parties and society at large. The European attitude contrasts starkly with the partisan and punitive ethos of American environmental regulation. While American environmentalists may envy the environmental consensus in Europe, they would be appalled if the lenient European
environmental legal system was transferred to the United States. These contrasting attitudes are rooted not in different opinions on whether or not the environment is worthy of protection but in deep historical processes and values.

The very different outcomes of environmental regulation for firms serve to explain the two main puzzles of the transatlantic environmental conflict, divergent actions on climate change regulation and the Precautionary Principle, which are the subjects of the next chapter.
Chapter Five: Climate Change

In this chapter, three aspects of American non-participation in international climate change regulation schemes will be resolved. The aspects include the partisan status of environmental politics in the United States, Americans' disbelief in climate change, and American industry lobbying against greenhouse gas regulations. Each of these features of American environmental politics, which have arguably been unique to the United States, have implied moral and cognitive difference between Europe and the US. Explanations for these differences include that Americans have a different conception of science and therefore do not trust the International Panel on Climate Change, or that Americans believe that they will not be affected by climate change. Others have focused on the difficulty of passing legislation in the Senate as an explanation for the US rejection of the Kyoto Protocol, but this mode of investigation is superficial. Finally, the burgeoning risk management literature suggests that Europeans are for some reason more risk averse than Americans, a point that this thesis argues strongly against. The subject of investigation here will be the reasons why environmental matters are so thorny, polemical, and partisan in the US in the first place.

That it is a struggle for the Senate to reach a two-thirds majority on greenhouse gas regulation is a phenomenon whose basis lies deeper than problems of coalition-building or simple public opinion arguments.

This thesis takes a different path and argues that the three unique aspects of American environmental politics listed above are endogenously related to the repartition of regulatory power by the environmental laws of the 1970s. To be more specific, American public opinion on climate changed was heavily influenced by the American oil industry

lobbying, which in turn was abetted by the partisan status of environmental protection in the US. Environmental partisanship was caused by a conservative reaction to the redistribution of regulatory power that occurred as a result of the new environmental laws. Environmental partisanship contributed to oil company lobbying not because oil firms are necessarily anti-environmental; the European case proves that oil companies can 'talk the talk' of the environment as well as any other industry. Rather, in Europe, firms did not suffer the same redistribution of policymaking influence, which led to a high degree of legal and subsidy uncertainty for American oil companies. By making environmental politics democratic in the 1960s and 1970s, American lawmakers unintentionally closed off opportunities for transatlantic environmental cooperation in the 1990s and 2000s.

A. The Republican Party and Anti-Environmentalism

The Republican Party did not create the political divide over the environmental crisis; Republicans took advantage of a cleavage in society that would add to their constituency in the wake of the major political party reorganizations of the late 1960s. It is often forgotten in political writing that the Republican Party had been fixated upon "internal improvements" before the age of Ronald Reagan\textsuperscript{154}. The Republican Party before the loss of Barry Goldwater by a large margin in the 1964 presidential campaign was primarily supported by wealthy northeast liberals who were the nation's foremost environmentalists. Goldwater's loss prompted a reconsideration of Republican strategy, and Republicans absorbed the south and midwest of the country, which were regions displeased by Democratic support for the civil rights moment. The former idols of the Republican Party, who have been effaced from the party's highly curated image, include the 'patron saint' of American national parks, Theodore Roosevelt, the New York liberal Nelson Rockefeller, and

\textsuperscript{154} Deborah and Frank Popper
the architect of a major avenue of federal control over the country, Dwight Eisenhower, whose name adorns the country's interstate highways. The dissolution of the prolific liberal legacy by the 1970s Republican Party indicates that the party seized upon a new anti-regulatory constituency composed of business interests disaffected in part by the outcome of the environmental revolution.

As the table below shows\textsuperscript{155}, environmental lawsuits climbed in number throughout the first Reagan administration.

<table>
<thead>
<tr>
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<th></th>
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<td>Air-stationary</td>
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<td>77</td>
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<td>66</td>
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<td>11</td>
<td>56</td>
<td>81</td>
<td>60</td>
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<td>68</td>
</tr>
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<td>SDWA</td>
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<td>6</td>
<td>9</td>
<td>5</td>
<td>12</td>
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<tr>
<td>RCRA</td>
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<td>2</td>
<td>2</td>
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Table 4.1: Judicial action by EPA during the Reagan administration

Figure 17: Environmental NGOs declare war in response to a relaxation of environmental protection under the Reagan administration.

Along with the economic shocks that came in the 1970s to US industry, the laws of the environmental revolution provoked a judicial shock through the sheer number of lawsuits filed within the first years of their implementation. These lawsuits not only represented a major source of uncertainty and liability for industry but they reflected a major shift in the distribution of regulatory and planning power in the US. Businesses had enjoyed European style closeness with government regulators until the 1960s. The legal levers of power given to citizens, along with the public consultations required by environmental impact statements

\textsuperscript{155} 85 Manheim
(which in effect brought developers threats of lawsuits) reduced industry power over
development and industry projects that had been previously sanctioned by an insulated
policy process\textsuperscript{156}. Where business interests went, many conservative voters followed, and the
issue of environmental protection became bound up with a drastic fall in relative American
economic and military supremacy. The election of Ronald Reagan to the presidency aimed to
sweep away many of these regulations, which were perceived as economically damaging.
Anti-environmentalism thus became a hallmark of the Republican Party.

B. Industry and Republicans

During the first administration of Ronald Reagan, the increasingly adversarial
legalistic dynamic of environmental regulation coincided with increasing environmental
partisanship, concretizing the polarized atmosphere of environmental politics. Oil industry
diversification also aligned US oil companies with the prerogatives of the Reagan
administration. In a decisive move, Reagan appointed James Watt to the position of
Secretary of the Interior. A veritable zealot of an administrator, Watt aimed with monastic
dedication to permanently reverse conservation policies made by previous administrations.
Hays notes that “Watt sought to change the ‘several hundred’ regulations in the [Department
of the Interior] so fully that no successor ‘would ever change them back because he won’t
have the determination I do.’”\textsuperscript{157} During his short tenure, which proved too polemical for
the Reagan administration to tolerate, he opened up federal protected federal lands to
mining and timber uses. Oil companies, which had recently diversified into mining in the
decade\textsuperscript{158}, supported this prerogative. However, Watt's actions unleashed the full potential of

\textsuperscript{156} 287 Hays
\textsuperscript{157} 495 Hays
\textsuperscript{158} David Levy and Ans Kolk, "Strategic Responses to Global Climate Change: Conflicting Pressures on
adversarial legalism. In response to James Watt's renegade rule changing and purposefully lax enforcement of policy, "environmentalists undertook a major drive to enforce the Clean Water Act of 1972 through their own litigation. They filed several hundred cases in many of which the EPA and industry had, in fact, agreed quietly that the agency would accept continued violations of the law. The 'moment of truth' of implementation and enforcement of environmental law proved to be formative. In response to the lawsuits, "dischargers complained bitterly; the EPA, they argued, had previously accepted their violations and agreed not to take legal action against them. They would be more careful in the future in agreeing to the terms of permits."

The legal uncertainty of environmental regulation was compounded with political uncertainty, which made companies wary of shifting political tides. First, the courts spooked firms by environmental regulations by generally ruling that even if one company had to go out of business due to its polluting equipment, the industry's health overall would be improved. "In this way the courts played a major role in broad social choice and decision, besides resolving more limited disputes between litigants" (488 Hays). Without an ally in the courtroom where environmental law was concerned, political support became crucial to industry. Policy swings coinciding with environmental partisanship made firms, which seek stability for optimal long-term planning, consider their political allegiances carefully. Levy and Kolk observed in an interview-based study that "inconsistent industrial policy in the US toward renewable energy appears to be a more important factor in explaining trans-Atlantic differences. Large subsidies initiated under the Carter administration were abruptly cut under Reagan. One Exxon manager stated that 'we are not looking to get into any business supported by government subsidies. We lost more than $500 million on renewables and

159 496 Hayes
160 524 ibid.
learnt a lot of lessons.' European companies lacked this history of large losses. Unable to trust government in respect to environmental politics, businesses set out to minimize their risk in the 1980s and 1990s through several public relations campaigns, the most effective of which was the conservative think tank.

In contrast, European alternative energy industries have enjoyed more or less constant support from national governments. This support has enabled the development of meaningful political constituencies of alternative energy industry groups. In effect, European governments have created a comparative advantage for European businesses in 'green' technology. The development of this constituency, which in turn serves to keep subsidy policy constant and predictable, could not have happened in a system characterized by policy swings like the US system.

C. American Public Opinion and the American Oil Industry

The tactics chosen by American oil companies to influence energy policy have primarily centered on informational campaigns. Public information campaigns have been a part of mass politics in democracies since the publication of Edward Bernay’s Propaganda in 1911, but the case of environmental information politics stands as an outlier and is causally linked with the divorce of ecological interests from business interests in the 1970s. American oil companies have not always been anti-environmental. Indeed in the 1960s, "an open communication between the oil industry and the academic earth science community flowered" in the US. However, by the late 1970s, "Industry's most fundamental tactic [became] to control the acquisition, assessment, dissemination, and application of information. Every environmental issue was laced with technical information. Much of the

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161 290 Levy and Kolk
163 12-13 Manheim
strategy of the environmental movement and much of the drama and outcome of environmental controversy lay in the use of information and attempts to control it. While providing "access goods" to policymakers is part and parcel of participating in the decision making process, the role of informational campaigns in the case of American oil companies and climate change has been particularly influential. Looking at differences between the US leadership on ozone regulation and US rejection of carbon regulation, Grundmann (2012) finds the oil company role to be a decisive factor:

“There is one very strong political economy argument, however: the different strategic orientations of US and EU oil companies... While the fossil fuel lobby in the United States has instigated a powerful campaign, including the funding of high-caliber skeptics, European companies have been much more open to regulation. Although the verdict is still open as to how far they have ‘greened,’ it is apparent that they did not finance contrarian voices to discredit the IPCC and advocacy scientists in Europe” (94 Grundmann 2012)

McCright and Dunlap concur, arguing that "conservative think tanks are the most influential anti-environmental countermovement organizations at the national level." The influence of industry on the flow of scientific information about global warming is so strong that one study found that 53% of American peer-reviewed studies cast the scientific consensus on climate change in doubt. The extent of American oil company public information campaigns about climate change prompted action by The Royal Society of the UK, which is a peer to the American National Academy of Sciences and the National Sciences Foundation. The Royal Society sent an open letter in 2006 to Exxon-Mobil, asking the firm to stop funding organizations "that have been misinforming the public about the science of climate change."

The message of conservative think tanks struck a chord with conservative voters, shaping public opinion on climate change. Analyzing 224 conservative think tank reports,

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164 319 Hayss
166 Augagneur et al
McCright and Dunlap find that three themes dominate their publications: That evidence for global warming is weak, that global warming would be beneficial, and that action against global warming would cause more harm than good. Oil company lobbying of Congress seems to have peaked just before the signing of the Kyoto Protocol in 1997, as evinced by the blitz of industry advocate testimonies in Congress that year. The figure below charts the prevalence of witnesses by affiliation in Congressional testimony on climate change in the run up to the Kyoto Protocol. Conventional scientist testimonies were fewer in number than industry advocate testimonies for the three years before the signing of the Protocol.

Figure 18: As the vote on the Kyoto Protocol neared, industry advocates came to dominate congressional testimony on global warming

McCright and Dunlap observe, "While the multinational business community is pragmatically shifting to deal with the reality of global warming by working productively with

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168 McCright and Dunlap
169 ibid.
governments around the world and collaborating proactively with the international environmental community, the more nationalistic American conservative movement is remarkably consistent in maintaining its pre-Kyoto position. It is no small wonder that American news media has covered climate change as if it were a political issue, giving equal coverage to scientific and industry voices, which moreover has been a major frustration for American climate scientists. In recent years, public pressure for greenhouse gas regulation has not ceased, but Congress has been unable to legislate on the matter due to the gridlock which has formed as a consequence of the wide distribution of environmental regulatory powers in the US.

D. The Waxman-Markey Bill

The failure of attempts to establish a national carbon market act in 2010 illustrates the enduring problems of political gridlock, which serve to defeat transatlantic cooperation on the matter. Thirteen years after the Senate’s rejection of the Kyoto Protocol, the issue of greenhouse gas regulation surfaced again. At this time, the EU had already instituted a carbon market covering about 40% of the polity’s greenhouse gas emissions, and as Peter Zapfel of the European Commission’s Directorate General of Energy and Climate explains, the revitalized US interest in greenhouse gas regulation opened an avenue to the transatlantic carbon market, which would have been a major moral and public relations victory for the EU. The dream fell through, however, as the bill was defeated in the Senate after passing in the House. European efforts to ‘reverse market’ the idea of emissions trading platforms,
which was first employed in the US Clean Air Act of 1990, to the United States failed to have sway. Possibly sensing a shift in public opinion towards greenhouse gas regulation and deeming regulation inevitable, industry seems to have acquiesced to some regulation since the bill was passed in the House. What doomed the Waxman-Markey Bill in the Senate, in the view of Zapfel, was its size and degree of detail.

At 1,427 pages, the House version of the bill laid out nearly every regulatory provision for greenhouse gases and energy efficiency over the next several decades. The changing nature of environmental problems, technology, and industry renders such detailed regulations obsolete quickly. Congress’s penchant for detailed regulation may be attributed to a fear of delegating to agencies viewed as easy targets for industry capture. Another viewpoint is that despite bemoaning the complexity of regulation, firms have historically sought to "increase the detail and complexity of administrative regulation so as to minimize its effect". Whatever the cause, it is clear that the bill was a legislative product symptomatic of Congressional gridlock. Whereas the EU has been able to update its carbon market regulations every three years, the strategy of Congress vis-à-vis persistent gridlock is to pass as many laws as it can at one time. The strategy proved self-defeating in this case.

The case of American attempts at congressionally mandated greenhouse gas regulation illustrates the reality of path dependence stemming from the environmental laws of the 1970s. Greenhouse gases are now regulated at a federal level in the US, but only because several states, led by Massachusetts, banded together to sue the EPA in 2007 for not fulfilling its regulatory duties. That it took a ruling from the Supreme Court in the case Massachusetts v. EPA to force the EPA to regulate carbon emissions shows how pervasive the environmental conflict is in the US. In its defense, EPA claimed that it did not have the

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174 316 Hays
authority to regulate greenhouse gases, an admission of the fact that it did not want to stick
its hand into the beehive of carbon gas emissions regulation.
Chapter Five: The Precautionary Principle

"In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

- Rio Declaration (1992) definition of the Precautionary Principle

The second puzzle this thesis will address is the transatlantic discord on the Precautionary Principle, which has become a subject of particular interest in the political literature as of late. The Precautionary Principle (hereafter referred to as PP) became an object of transatlantic dispute in 2000, after the European Commission put forth a communication on the application of the principle, which has formed the basis of EU environmental policy since the Treaty of Maastricht. Meanwhile, the US has proven “anti-Precautionary” in its actions:

“The U.S. government has not officially accepted the precautionary principle and actually fails to acknowledge in the international treaties that any substantive obligations flow from the precautionary principle. In 1992, the U.S. government insisted on qualifying the statement of the precautionary principle in U.N. Framework Convention on Climate Change. In 1993, President Clinton signed Biodiversity Treaty but the U.S. Congress refused to approve it. In 1999, the U.S. government clearly positioned itself against the precautionary principle at the WTO Ministerial Meeting in Seattle. In 2000, the U.S. Department of Agriculture Under Secretary for Food Safety and head of the U.S. Codex delegation announced that “the U.S. has not endorsed the ‘precautionary principle’ in any way” in Codex meeting. Recent years, the U.S. government actively objected to using the precautionary principle in some international trade agreements with regards to genetically modified food, phthalates in children’s PVC toys, bovine growth hormones and persistent organic pollutants and conflict to the EU in the trades.”

In the 1990s and 2000s, a torrent of political literature has investigated the PP, and as the PP becomes closer to a norm of international law, US resistance to the concept of Precaution is coming under increasing scrutiny. Why would the US not adopt a principle that appears

only to reinforce common regulatory sense?

The Precautionary Principle is a difficult regulatory tool to understand. Mostly American criticisms of the PP have fixated upon the contradictions and weaknesses of the concept of precaution, almost to the point of obsession. Meanwhile, mostly European authors have wavered between justifying the principle against the easy objections of observers (e.g. that it has multiple practical and formal definitions) and vaunting its theoretical benefits (e.g. that the Principle reduces uncertainty in regulation). Indeed, scholarly and political writing on the PP has become a veritable cottage industry. Few of these works contribute to an understanding of the PP beyond providing further information on its application at varying levels. As an observer notes, "there are so many weak criticisms of the Precautionary Principle because the Precautionary Principle is weak (débile) in itself." This chapter aims to break with this tradition and provide a useful contribution to the literature on the Precautionary Principle. It will do so by showing in an original way why it could appear in the European legal context and why it could not work in the American legal context. The reason is related to the regulatory attitudes towards business, government, and justice held by each polity. It is argued here that the PP is at heart a principle of liability that prescribes a certain type of justice, which is only compatible with a legal system requiring mens rea to prove fault. American environmental justice is inimical to the justice culture required to make regulatory use of the Precautionary Principle.

The political literature has provided incomplete answers to the central question of why European society has deemed itself "Precautionary." Scholars have portrayed the historical development of Precaution as the next iteration of the state's evolution from

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179 The introduction to Wiener et al (2011)'s volume cites 33 scholarly works that compare American and European approaches to risk management

180 Augagneur
source of ex-post remediation in cases of disaster, to a capable preventer of disaster, to finally a Precautionary actor, seeking to limit potential harms\textsuperscript{181}. Others see Precaution as an expensive way to temporarily quell unfounded public fears about innovations and potential health threats\textsuperscript{182}. It has also been pointed out that throwing precaution to the wind– as the US did with field tests of tryps-in-producing genetically modified corn, which necessitated the destruction of half a million bushels of contaminated soybeans at government cost– can be a costly mistake too\textsuperscript{183}. These answers show the potential benefits of such a principle but not why it has been adopted in Europe. A political argument underlines the political utility of the PP:

"The opacity of the principle of precaution lends reflection at the moment when, in response to a growing citizen demand, the principle imposes itself in positive law. The different legislators who have made use of the PP have employed it as a political tool to respond to the social demand all the while playing upon its confusing nature, which permits a multitude of interpretations, in order to avoid the adoption of an excessively constraining rule\textsuperscript{184}. This argument is the one of the most persuasive in the literature, but it does not answer the comparative political question of why the PP has become a distinctly European feature. To answer to this question lies not in Americans' attitudes toward risk, which Wiener et al insist are indistinguishable in the aggregate from European attitudes on the matter\textsuperscript{185}, but in the nature of the principle as a legal tool.

The public demand for risk regulation came about in the West in a way that was similar to the sudden onset of the environmental revolution. Kagan's (2003) chapter on Environmental Protection and Development starts with an ode to a sentiment common to both sides of the Atlantic, which gained strength throughout the 1970s and 1980s:

"Protect us, O Government, from harm! Protect us, surrounded as we are by the side effects of capitalist

\textsuperscript{181} 7-8 de Sadeleer
\textsuperscript{182} Jean De Kervasdeux, \textit{La Peur Est Au Dessus De Nos Moyens} (Paris: Plon, 2011)
\textsuperscript{185} 534 Wiener et al
production and modern technologies. For we dwell in fear that we and our children will ingest or inhale invisible chemical toxins […] In the name of human decency, O Government, protect us from harm! (181 Kagan)

Kagan is no pollster, but his remarks describe a popular sentiment of fear vis-à-vis the potential dangers (or risks) of modern life. The runaway success (for a sociological work) of Ulrich Beck’s *Risk Society* in Europe, as well as the cascade of literature that it has inspired, evinces academic interest in the subject of modern risks as well. In both Europe and the US, regulators have faced a public demand to better regulate potential carcinogens, potential causes of birth defects, and potentially dangerous products and chemicals of every type. This desire for risk management, common to both sides of the Atlantic and best characterized by “parity and particularity”\(^{186}\) in practice, was translated into legislative action differently by the two polities. The PP has been the formal basis of EU environmental policy since the Maastricht Treaty; the US did not ratify the Cartagena Protocol on Biodiversity, which would have brought the PP into the American legal-regulatory sphere. An explanation for the divergent regulatory response to a common public concern can be found in the legal implications of the PP, which could not function in the American system of strict liability and enforcement.

The Precautionary Principle implies a sense of regulatory justice that exists in Europe but not in the United States. Originally derived from the German *vorsorgeprinzip* or 'responsibility principle,' the PP implies not only societal responsibility but also liability for stringent environmental protection. The way in which the PP sets out to attain a high level of environmental protection is by regulating *technology rather than industry*. In other words, technology, not solely industry, is made blameworthy for the mishaps that characterize the path of innovation. By implicating a (supposedly) neutral actor in the regulatory process, not only does the PP reflect the European version of the environmental problematique (that the

\(^{186}\) 28 Wiener et al
environment is society's, not industry's, problem), but it avoids placing liability on industry.

That the principle has succeeded in Europe and not in the US is due to the European conception of justice, which generally requires *mens rea* to prove wrongdoing. In theory, where the *mens rea* tradition is strong, the PP should transfer some liability from corporations to government because regulators must ascertain and implicitly guarantee the safety of new technologies. This in theory allows corporations to use approved technology without fear of litigation because the highest reasonable standard of precaution would have been used in the regulatory approval process. However, in legal systems where standards for *mens rea* are relaxed, the PP may represent only an additional liability for businesses because it could be invoked against them. In this situation, a technological mishap using approved technology may lead to liability for a firm that took its actions under the sanction of regulators (an example will be seen shortly). To Americans who are accustomed to lampooning and suing individual corporations for their decisions gone awry (e.g. British Petroleum during the Gulf Coast oil spill of 2010), the Precautionary Principle seems fearful of new technology. In the US legal system the principle could indeed have an obscurantist effect through the creation of new liabilities.

The "fit" of the PP with a given legal system depends on how strongly the given legal system depends on *mens rea* in environmental matters. In the case of the UK, which insists on proving criminal fault to the extent of hampering environmental regulatory enforcement, "the High Court has held that the 'precautionary principle' informs policy only, and should not be used in its interpretation. This remains the position"\(^\text{187}\). A restrictive legal interpretation of the PP is logical in such a case because it would be more difficult to prove that a defendant knowingly committed wrong if regulators approved his action. In cases

\(^{187}\) 142 Woolley et al
involving the potential risk of cancer from cell phone radiation, UK case law has established that planning is not the appropriate stage of decision making to determine whether or not mobile phones are dangerous to health. "The implication is that although the decision-maker may give consideration to what weigh to attach to public health concerns, in the absence of clear evidence about the impact on health (i.e., where the precautionary principle might, on the ECJ approach, apply) very little weight can in fact be given. In a recent decision of the European Court of Human Rights, the court found that in the absence of conclusive scientific evidence, it had to be assumed that a mobile phone base station posed no health risks if radiation remained within the relevant guideline limits". Meanwhile, in legal systems that do not require mens rea to prove legal fault, the PP can cause legal-regulatory havoc.

The ability to invoke the Precautionary Principle in France, whose environmental legal system features relaxed requirements of criminal guilt thanks to the 'special provision' for environmental crimes, has proven entangling. In a system less exigent of mens rea, defendants will be more likely to have to justify their actions based on their outcomes, not their intents. The PP thus imputes more responsibility to the corporate actor because he cannot rely past a certain extent on the argument that extant regulations allowed him to carry out the actions in question in good faith. De Kervasdoué (2011) outlines a case, on the same subject of cell phone radiation, in France that shows the confusing legal consequences of allowing the PP into the courtroom in legal systems less reliant upon mens rea. In 2005, an operator of mobile telephones was forced to dismantle an antenna and to pay high fines because persons who claimed to be "electrosensible" won a lawsuit against the operator on the grounds of nuisance, the main grounds of civil environmental enforcement in France.

188 Woolley et al
189 de Kervasdoué
While the court recognized that "the scientific discussion remains open, [...] that did not prevent it from basing its conclusions on a risk of nuisance." The court reasoned that while the harm from the antenna was not certain, the risk of harm from the antenna certainly existed, as evinced by public authorities' not recommending to apply the Precautionary Principle. And exposing one's neighbor to a certain risk constitutes in itself an act of disruptive neighboring. Following this logic,

"which [De Kervasdoué] does not qualify as logical, it would be because the competent authorities recommend to apply the Principle of Precaution that the risk is certain! Certainty would therefore come from the systematic application of a principle that only applies in the case of scientific uncertainty. Otherwise said: it would be certain because it is certainly uncertain and in this sense, the dignity of the individual prevails alone against the collective interest. The principle of Precaution establishes a sort of unlimited responsibility."[190]

The appeals court upheld in part the decision, stating that "if the realization of risk remains hypothetical, it comes out of [the scientific publications cited as evidence] that uncertainty about the innocuousness of exposure to waves emitted by relay antennas remains and that it can be qualified as serious and reasonable." The judgment was not officially based on the PP, but the French legal system is less dependent on strict precedent than the 'Anglo-Saxon' systems of law. The 'unlimited responsibility' to which De Kervasdoué refers is a lack of precaution implying liability in the face of low mens rea requirements.

The combination of relaxed mens rea requirements and the Precautionary Principle is disruptive to regulation for several reasons. First, the antenna operator in this case held all the permits that the installation required. Second, the operator put up the antenna under official incentive since "the state incites the telephone networks to not leave a part of the national territory without coverage"[191]. Third, the PP allows condemnation of activity that was taken in complete legality[192]. Fourth, "not only were the allegations of the NGO never proved, but again, the height of irony, if the signal power of cell phone towers is reduced,

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[190] 193 de Kervasdoué
[191] 194 ibid.
[192] 195 ibid.
the signal power of phone handsets must be increased. The opinion of NGOs won out over
the detailed opinion of the National Academy of Medicine[193]. Finally, official treatment of
hypothetical risks serves to legitimate fears—which might be completely unfounded—to the
public. A 2005 study on the effect of Precautionary measures against cell phone radiation
found that,

"Precautionary measures implemented with the intention of reassuring the public about EMF risk potentials
seem to produce the opposite effect. They may amplify EMF-related risk perceptions and trigger concerns.
Referring to the WHO definition of health ["a state of complete physical, mental and social well-being and not
merely the absence of disease or infirmity" (WHO 1948)], it seems that precautionary they might impair well-
being. The results of the two experiments support the warnings in the WHO background document (WHO
2000) on precautionary policies "that such policies be adopted only under the condition that scientific assessments
of risk and science-based exposure limits should not be undermined by the adoption of arbitrary cautionary
approaches."[194]

Interestingly, the case above bears striking resemblance to adversarial legalistic NIMBY
lawsuits that are generally a feature of American legalism. Not surprisingly, a French council
on competitiveness recommended revoking the PP from French law in 2007.

Finally, in a system with no mens rea requirements to implicate environmental
offenders and high fines for offenses, the Precautionary Principle would likely result in vastly
increased liabilities for corporations. It is in this sense that Precaution would be understood
in the American legal context. Could a business be sued for subjecting consumers to risk
with new innovations and then have to pay a large fine or stop using a regulator-approved
technique or innovation? American writers on the Precautionary Principle have a penchant
for pointing out that American regulators use Precautionary reasoning when necessary, such
as when the Federal Drug Administration establishes health standards for novel medications,
and that a global precautionary approach would add nothing in particular to the regulatory
side of the US system. However, if the PP were made a legally-viable provision of law in the
US, it could have wide-reaching effects since in the US, strict adherence to the law can

[193] ibid
[194] Peter M. Wiedemann and Holger Schutz, "The Precautionary Principle and Risk Perception: Experimental Studies in the EMF
generally be enforced, regardless of the intent of the offender.

The legal understanding of the Precautionary Principle developed here is the first comparative legal study of the viability of the Precautionary Principle that the author is aware of. The argument developed here shows the influence of justice culture on regulation and how the differences have precluded cooperative emulation of European Precaution by the US. What can be seen from the distinctions drawn in this section is that the PP was conceived in a system, which allowed the transfer of blame from industry to regulators due to high *mens rea* requirements in court. Secondly, where the PP has given rights in place without the protection of *mens rea* requirements for corporations, legal-regulatory confusion has been the result. The proper usage, so to speak, of the PP is thus linked to a several elements of a legal culture that is not to be found in the United States. Americans are no less rational or fearful about preventing unforeseen ecological or health damages, but from an American point of view the Precautionary Principle makes no judicial sense. In France, the PP has been a polemical issue for obvious reasons. For the US, where environmental law is an exercise of strict liability, the Precautionary Principle is a poor fit.

This chapter has aimed to reevaluate the two most prominent cases of American non-cooperation in environmental affairs. The American positions on beliefs about global warming, Republican anti-environmentalism, and industry anti-environmentalism have been explained as results of the division of regulatory power by the environmental laws of the 1970s. The American rejection of the concept of Precaution has been shown to hinge on the type of justice applied by the American legal system. The arguments developed here are effective because they legitimize American and European public opinion toward global warming and modern risk as political facts, rather than portraying them as political anomalies.
Conclusion

In this thesis, the transatlantic environmental conflict has been explained as a phenomenon causally related to the allotment of legal power and its political and social consequences. Because US and European environmental policies rely on such highly contrasting distributions of regulatory and legal power, the idea that cooperation between them should be natural is a chimera. Environmental policy convergence between Europe and the US would be politically and socially unacceptable for both societies. This is because the types of regulation each polity has been able to enact are predicated on a particular distribution of regulatory and legal power. Deeply-held values determined and legitimized the repartition of those powers, and the laws in turn reinforced those cultural bases of political legitimacy. American firms cannot enjoy flexible regulation because of the questionable legality of removing certain regulations from the purview of adversarial legalistic enforcement. European citizens cannot enjoy the sometimes very beneficial policy input and enforcement power that each American holds by virtue of his legal powers. To enable policy convergence, the underlying distributions of regulatory and legal powers would have to be altered, calling into question the social and political legitimacy of the allotment of power in each society since the environmental revolution. As strong—if not politically invincible—constituencies have formed around the distribution of power in each society, the barriers to the redistribution of power might prove insurmountable outside of a larger revolution or political realignment.

The explanation offered in this work is significant for several reasons. By concisely and robustly explaining the transatlantic political and social divergence on ecological problems as a product of the (naïvely-legislated) repartition of regulatory and policymaking power, this thesis obviates many other claims. The idea that Americans are less
perceptive of global environmental risks, which implies cognitive differences between Europeans and Americans, is not tenable in light of the arguments presented here. Similarly, the idea that Americans care less about global warming for economic or unilateralist reasons, which implies moral distance from Europe, has not held its ground here. Also, this paper has surpassed the argument that the design of the Senate prevents US action on global environmental treaties. After all, the argument is moot in the case of the Senate's unanimous rejection of the Kyoto Protocol. Finally, this thesis rehabilitates the opinions of American conservatives. They are no less rational than other Americans or Europeans, but they simply followed the lead of businesses and politicians turned anti-environmental because of an unfavorable distribution of environmental policymaking power. This framework could be applied to other areas of transatlantic comparison, especially where economic arguments do not provide satisfactory explanations, such as comparing American and European financial and health regulations. The framework developed here allows several questions about transatlantic environmental cooperation to be answered:

1. Are European and American environmental policies destined to be different? Whether or not European and American environmental policies are "ships passing in the night," to use Vogel (2001)’s phrase, depends on the criteria for difference that one selects. In terms of policy tools, the evidence in this thesis points to active sharing across the Atlantic. The Environmental Impact Statement and emissions market tools were first employed in the US before spreading to Europe and worldwide. Hoping to emulate America’s sharing success, the EU tried to market the idea of applying the latter to greenhouse gases in the lead up to the failed Waxman-Markey Bill of 2010. However, in respect to the legal structure of environmental policy, convergence is unlikely. Attempts to

move past the 'false choice' between environmental protection and economic growth in the US have provided tepid results, and attempts to bring greater environmental rights to European citizens have generally failed. Policy convergence has failed because of resistance to change in the distribution of power in each polity. Moreover, this thesis has shown that to expect policy convergence on an issue simply because it is 'larger' is unrealistic.

2. Will the US emulate European environmental policy?

The conflict between business and ecological interests in the US is a problem that deserves much attention in itself. In the United States, within the conflict-laden regulatory atmosphere has caused severe congressional gridlock, several changes can happen. To address the culture of justice aspect of regulation, the US could potentially borrow from the UK and reform punishments for environmental crimes. This would serve to reduce the effective legal power held by citizens, which reduce the numbers of the most reviled lawsuits (those which challenge Environmental Impact Statements) as firms become more brazen against the threat of litigation. Also, the US could adapt from the French system the criterion of an environmental offender’s attitude during an investigation as a factor in assessing penalties. Whether or not an offender duly attempted to protect the environment—not just comply with regulations—should be a criterion of assessment in adjudication of environmental regulatory offenses.

The prisoner’s dilemma between business and ecological interests, which would prove resistant to these changes, demands a deeper fix. A solution can be found at the level of the bureaucracy, which borrows in some aspects from the French system, but it would require altruistic sacrifice on the part of the executive branch of government. As the section on Climate Change highlighted, a shift in policy direction, especially by the presidentially-appointed heads of agencies that deal with environmental issues, is a major risk for both
environmental and business groups. A meaningful way that the perception of risk, and the aggressive behavior it provokes, can be reduced is by removing the heads of certain government agencies from the purview of presidential selection. In the past, presidents have employed the tactic, but at the price of installing one party's leaders for life. Instead of allowing the executive to decide the agency chiefs, an outside organization of approved environmental and business groups could come to an agreement every four years on who should be the head of the EPA, for example. To prevent the agency from becoming wayward, the agency could be remodeled after strongly insulated bureaux common to some European countries, as well as Japan and Korea. The insularity, promoted through strict hierarchies and career paths, would protect its mission. With less pressure on Congress to make the rules, it could delegate more to the agencies and give the agencies greater discretion about new styles of regulation.

Whether such a solution is feasible is hard to ascertain. It is unlikely that a president would give up his power to appoint an agency chief, and given the structural nature of the ecological crisis, technological innovation could obviate the need for such a change over the next few decades. And yet, the political boon of removing environmental regulation from the domain of Congressional politics could provide the incentive for a strong executive to empower the bureaucracy. As Silberman writes, in a rational political system, "moving major issues from the realm of politics and debate to that of 'scientific' administration and expertise becomes the hallmark of political reform." The effect would be an end to the prisoner's dilemma of American environmental politics by removing each prisoner of his potential advantage if the other gives up his position. If a program of this sort could be instituted with

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197 70 ibid.
a sunset clause, meaning that after three or four rounds it could be reevaluated or scrapped, then it might a viable solution to the prisoner's dilemma of American environmental politics.

3. Will Europe emulate American environmental policy?

The EU’s ‘democratic deficit’ or crisis of legitimacy revolves in part around its hypocritical attitudes towards public participation, which it beckons in the preliminary phases of policy planning but excludes in the actual decision-making phase. European Union attitudes towards public participation reflect a general consensus in environmental regulation after nearly a half century of experience. While it was assumed in the late twentieth century that science would bring answers to environmental problems, allowing more reasoned public participation in the policymaking process, these hopes were disappointed. Instead, science brought more information and did not help resolve social problems or direct value choices. This has been the consensus among development planners in the United States, most of whom are dismayed by the NIMBYism and unrepresentative extremism that dominate public planning meetings. These lessons have not been lost on the European Union, which is walking a careful line between the rhetoric and practice of deliberative democracy.

Environmental law has been surprisingly resistant to the incorporation of public participation through the awarding of power to the public, which contrasts with the citizen-based enforcement increasingly used to ensure the application of EU law in other domains. The opening of other avenues of meaningful policy influence is unlikely, although the progress of the Environmental Liability Directive and the Aarhus Convention at the national level could provide unexpected advances in public regulatory power.

4. Can the transatlantic environmental conflict be ameliorated without policy convergence?

198 Deborah and Frank Popper.
199 An acronym for Not-In-My-Backyard
Even if policy change based on ‘hard’ political redistribution of regulatory and legal power must be foregone, then ‘soft’ political solutions to the transatlantic environmental conflict can still be applied. For example, Wiener et al suggest a transatlantic policy laboratory to facilitate the exchange of regulatory tools. To those authors, the transatlantic regulatory relationship should be "a collaborative process of exchanging ideas. Leadership can and should mean showing the way not just to more aggressive policies, but to better policies.\(^{200}\) While valuable, this idea is ultimately predicated on the potential for policy convergence. The sharp limits of policy convergence force us to look at political discourse for a better solution to the social problem of misunderstanding.

On the American side, to ameliorate international environmental relations the US should refrain from sanctioning crass and provocative statements on environmental issues. An exemplar of this insensitivity, the Hagel-Byrd Resolution\(^{201}\), which preempted the passage of the Kyoto Protocol, rejected ratification of any climate treaty that would:

- (1A) mandate new commitments to limit or reduce greenhouse gas emissions for the Annex I Parties, unless the protocol or other agreement also mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the same compliance period, or
- (B) would result in serious harm to the economy of the United States; and
- (2) […] would require the advice and consent of the Senate to ratification should be accompanied by a detailed explanation of any legislation or regulatory actions that may be required to implement the protocol or other agreement and should also be accompanied by an analysis of the detailed financial costs and other impacts on the economy of the United States which would be incurred by the implementation of the protocol or other agreement.

This resolution implies that the American economy is at risk of “serious harm” by unfairly distributed environmental burdens of foreign origin. It reflects very poorly on the US that when developing nations worry about the effects of climate change on their subsistence farming populations, they use the exact same argument! That the voice of two senators from West Virginia (Sen. Byrd) and Nebraska (Sen. Hagel) became the standard bearer of American environmental attitudes across the globe is an unfortunate consequence of

\(^{200}\) 522 Wiener et al

America’s domestic environmental political conflict. The lack of consideration for international relations in American environmental policy runs through other policymaking bodies too. Zasloff (2008) notes that in the ruling of Massachusetts v. EPA, "the court drily noted that although Congress, in the Global Climate Protection Act of 1987, directed the EPA to consult with other agencies, the Department of State- which had the legal authority to formulate foreign policy on the matter - was nowhere to be found on the EPA’s list of consultations". Despite the forbidding conditions for transatlantic environmental cooperation, American environmental policy is in a form of foreign policy, and commentary on international environmental treaties should be considered in that light. However, discourse contributing to the transatlantic environmental conflict does not all originate from the American side.

The ecological crisis is not a dispute over ends; it is a dispute over means. To believe that either American or European society has a devised a proven and feasible remedy to the ecological crisis is simply wrong. To believe that either society is less concerned by the ecological problems inherent to industrial and post-industrial society is equally misguided. The comparison in this thesis appeals to a larger question about international relations and domestic policy. It has been shown that due to the deeply-embedded cultural values and political processes in each polity, it is not possible to export one nation’s domestic policies to another. The attitude of Europeans towards the Kyoto Protocol represents not only an instance of stereotypical European amour propre (self love) but also a culturally insensitive attempt at rayonnement politique (political radiance). By beseeching the US to join a regulatory effort that is politically unworkable in the US, while simultaneously disregarding very serious

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calls from within for the Americanization of EU environmental regulation, Europe is embarking on a self-indulgent political mission. If this is the reality of Europe's much-vaunted soft power, a way of exerting influence without military might, then observers are correct to be suspicious.

Europe’s attempt to export its environmental policy in order to exert soft power through normative discourse closely resembles ‘epistemic violence,’ the Foucaultian concept of maintaining a hierarchy of knowledge and moral sentiment through normative discourse203. Merlingen (2007) identifies a highly analogous case of European domestic policy exportation involving the retraining of Bosnian police forces and concludes that Europe’s presumed authority on the matter is not grounded in fact and yet implies moral superiority. He finds that Europe’s imposition of its policing practices on a foreign country constitutes epistemic violence because first, in Europe there exists no uniform practice on which to base a supposedly superior standard, and second, “policing reality across the EU displays many of the features characterizing allegedly backward policing in countries emerging from violence and/or poverty” 204. In Merlingen’s estimation, European soft power relies upon the disqualification of the norms of foreign countries in favor of “supposedly apolitical, universal norms” imported from Europe. In the case Merlingen studied, the EU was implying moral superiority by retraining supposedly backward Bosnian police with supposedly advanced Italian, French, Polish, Portuguese, and other European police forces. A strict analogy can be made to the case of environmental regulations evaluated in this work. The European attempt to export its environmental practices, which this thesis has demonstrated rely inferior ways to ensure compliance with environmental

204 448 ibid.
regulations and provide no substantive ecological benefits, is a manifestation of epistemic violence. A political resolution of the transatlantic environmental conflict must involve a change in European normative discourse, which would conflict directly with Europe’s soft power strategy of influence.

Both of these solutions are difficult to enact, but a third option that would be optimal could avoid the problems created by the inflexibility of the division of regulatory power. If and when environmental policy is up for genuine reconsideration due to technological developments or material change related to the physical world, Europe and America should reflect on how best to regulate new environmental issues. This means considering if the American tendency to establish countervailing powers and the European proclivity for elitist decision-making are appropriate for the long-term nature of regulatory regimes. What would be ideal is a regular sunset clause on the legitimate societal division of regulatory power. Unseen in either the US or Europe, the ability to redraw divisions of power, would represent a true advance in the art of regulation. If such a system were to exist, meaningful environmental policy cooperation would be a possibility.

5. Can the underlying convergence of environmental policy ends be used to improve transatlantic relations?

The rigid differences between the US and its European peers prevent the synchronization of specific policies, but they do not preclude the harmonization of overarching prerogatives. Divided by an ocean and a few centuries of history, the US and Europe should be expected to disagree on policy means and even some policy ends. Yet, the frustration produced by this divergence can be avoided using the formula provided by the European experience of integration. In order to coordinate policy outcomes across disparate national systems, the EU relies on principles and framework directives to give direction to Member States. The Member States are left to their own devices to implement the directives,
and (in theory) it is the outcomes of national policies that matter most when the efforts of Member States are scrutinized. The same system can also be implemented at the international level. A yearly or decennial summit of world leaders to reaffirm that all parties are working to overcome the structural environmental crisis, would provide a stable basis for the recognition of the inherent partnership of nations seeking to enhance stability and safety. The disappointments of climate summits, such as the 2010 summit in Copenhagen, are discouraging and stoke conflict. Setting a tone of recognized cooperation on the ends of environmental regulation—surpassing the structural environmental problem with minimal costs and negative externalities—would go leagues to bringing higher quality and more realistic debate to both national political and media circles.

A Final Word:

A solution to the structural environmental problem, namely the advent of an energy panacea, would give rise to new problems of power sharing and eliminate many of the old. A failure to overcome the environmental problem, signified by a drastic increase in the price of energy and commodities, would have the same effect. What should be remembered is that regulation of the environmental problem cannot resolve the problem in itself; it merely picks political winners and losers to minimize environmental harm while waiting for technological or material conditions to change. In this respect, it is perhaps incorrect to say that we are in an environmental crisis. Currently enjoying the peak estimated production levels of many traditional fuels and not yet seeing any extreme effects of global warming, humanity is not in a true resource-energy-climate quagmire, and it may never encounter one. However, the future is unknown. The transformations of the two or three centuries to come will have to be enormous to sustain economic growth, and novel regulatory problems will arise. Once the limits of regulation to resolve the new environmental problems are recognized, power
should be redistributed to minimize social conflict, if for no other reason than to reflect the truth: We are indelibly committed to optimism.

"Social problems are never solved. At best they are re-solved- over and over again."²⁰⁵

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