

# RIGHTS, POLITICS, AND EXPERTISE: RIGHTING THE BALANCE

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Scholarly exchanges like this one are relative rarities. That is regrettable because, as in this public conversation between Robert Kagan and ourselves, such back-and-forth can both clarify and narrow differences. The rhetorical flourishes that show up in *Adversarial Legalism: Tamed or Still Wild?* (“*Tamed?*”)<sup>1</sup> could be read as suggesting that we are engaged in intellectual warfare: World War II and the United Nations indeed! But taken as a whole, Kagan’s rejoinder suggests that what divides us is less a fundamental disagreement about law as an imperfect tool for policy resolution than a significant but less basic difference about the respective role that is, and should be, played by rights-based arguments—what Kagan, loading the rhetorical dice, labels “adversarial legalism”<sup>2</sup>—as distinguished from politics, bureaucratic rationality and expertise.

The points of disagreement can be recast in terms of the policy pentacle around which our article is structured, and which Kagan also finds useful.<sup>3</sup> This model posits that all policy-making processes incorporate interwoven strands of rights, politics, expertise, bureaucratic norms, and markets (or some combination of these approaches).<sup>4</sup> It asserts that good policy results from the pull-and-tug among these competing approaches.

Problems arise when any one of these decision-making strategies becomes overly dominant, for then law degenerates into legalism, expertise into arrogance, politics into warfare, bureaucratic rationality into unresponsiveness. Thus, a mix of strategies, with the healthy tension this creates, is the preferred approach. The best mix will neces-

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1. Robert A. Kagan, *Adversarial Legalism: Tamed or Still Wild?*, 2 NYU J. LEGIS. & PUB. POL’Y 217 (1999) [hereinafter Kagan, *Tamed?*].

2. Legalism as distinguished from law (or rights) carries a negative connotation. One wonders what non-adversarial legalism would look like.

3. See Christopher Busch et al., *Taming Adversarial Legalism: The Port of Oakland’s Dredging Saga Revisited*, 2 NYU J. LEGIS. & PUB. POL’Y 179, 211-13 (1999).

4. See *id.* at 211-12.

sarily depend upon the policy problem: the importance of expertise, for instance, varies with the acknowledged reliability of the expertise (compare the design of a bridge with the design of an educational system) and with society's conception of the proper sphere of individual choice (compare the market for Ferraris with our unwillingness to create a market for kidneys).<sup>5</sup>

So far, we are on the same page as Kagan. Where do we part company? As a matter of legal and policy history, we read the saga of the dredging of the Port of Oakland's harbor differently. Kagan sees rights as so powerful as to approach hegemony, with all the abuses that hegemonic status characteristically implies.<sup>6</sup> Our reexamination of these events, with several critical years of additional history to draw upon, shows a better, though hardly ideal, balance among these decision-making strategies. As well, we disagree in our understanding of the Local Planning Groups that the Clinton administration developed to build on the success of negotiations in Oakland and elsewhere.

Our differences also have a normative dimension. We hold somewhat different beliefs about the nature of good public policy, not just with respect to harbor dredging in Oakland (for both Kagan and us, those events represent just one example of the interplay of law and other components of policy making), but also more generally about how the policy process should work. Kagan believes the American system would benefit from greater concentration of authority in the hands of bureaucrats.<sup>7</sup> In his view, bureaucrats would develop better public policies and implement them more efficiently if they could act with much less concern for the possibility of judicial review and without requirements that the process be readily permeable by the affected public.<sup>8</sup> By contrast, while we recognize that the permit process for dredging suffers from excessive fragmentation, we favor the benefits of balance among the several elements of the policy pentacle, with bureaucratic managers playing an important but not dominant role.

## I

### POLICY OR "HEURISTIC"?

Is Kagan advancing a policy proposal at all? If, as he insists in *Tamed?*, he has proffered merely a "heuristic," a thought experiment

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5. For a related approach, in terms of moral philosophy, see generally MICHAEL WALZER, *SPHERES OF JUSTICE* (1983), which approaches issues of equality as a function of distributive systems.

6. See Kagan, *Tamed?*, *supra* note 1, at 225-27, 234-36.

7. See *id.* at 237-38.

8. See *id.* at 237-40.

about how the policy making process might be redesigned,<sup>9</sup> then there is not much point to the interchange, since the very nature of our projects would be so different. This demurral represents, at the least, a rethinking of his position: *Adversarial Legalism and American Government* (“*Adversarial Legalism*”)<sup>10</sup> was less modest about its intention. There, Kagan states, he is trying “to . . . imagine changes in our political and legal institutions that may *facilitate responsive public policy implementation* and fair dispute resolution . . . .”<sup>11</sup>

Similarly, the claims he makes in *Adversarial Legalism* about the efficiency of Dutch-style decision making<sup>12</sup> bespeak a policy preference, not a “thought experiment,” as Kagan portrays it in *Tamed?*<sup>13</sup> In the latter article, he asserts that he has consistently acknowledged that this corporatist model, which concentrates authority in a single agency that can act with few procedural constraints or public requirements or oversight, cannot be emulated because it “is not politically or legally feasible in the United States.”<sup>14</sup> But, tellingly, he omits the beginning of that sentence taken from *Adversarial Legalism*: “*Some might object that my hypothetical alternative policymaking system . . . is not politically or legally feasible . . . .*”<sup>15</sup>

Is Kagan himself one of those doubters? Most readers of *Adversarial Legalism* would not have guessed so. Indeed, even *Tamed?* suggests otherwise, for it regards as inadequate the policy reforms already in place and the further reforms we propose;<sup>16</sup> it also urges that further “incremental steps” be taken in the direction of the corporatist model he develops.<sup>17</sup> While these further incremental changes are unspecified, *Tamed?* speaks to the virtues of a powerful regional agency with modest public participation, subject to quite limited judicial review.<sup>18</sup> To contend that this prose is not policy talk is disingenuous.

For both parties to this public conversation, then, policy matters.

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9. *See id.* at 239.

10. Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. POL’Y ANALYSIS & MGMT. 369 (1991) [hereinafter Kagan, *Adversarial Legalism*].

11. *Id.* at 379 (emphasis added).

12. *See* Kagan, *Tamed?*, *supra* note 1, at 228-29.

13. *See id.* at 238-40.

14. *Id.* at 238 (citation omitted).

15. Kagan, *Adversarial Legalism*, *supra* note 10, at 389 (emphasis added).

16. *See* Kagan, *Tamed?*, *supra* note 1, at 240-43.

17. *See id.* at 239.

18. *See id.* at 237-40.

## II

LEARNING FROM OAKLAND *REDUX*A. *Recent Developments at the Port of Oakland*

The Oakland dredging saga is our mutual focus. Here, as in the broader normative discussion, we balance differently the costs of legalism and the benefits of negotiation. Reviewing these same events—not “[f]rom satellite height,” as Kagan would have it,<sup>19</sup> but from sea-level “mudlock,” as we call it<sup>20</sup>—the lesson we draw is that cooperation and eventual agreement are possible when participation is relatively open and a broad array of participants, both public and private, have relatively easy access to the courts. Indeed, participation and access to the judiciary are interconnected, since the availability of litigation prompts the parties to “bargain in the shadow of the law.”<sup>21</sup>

There is no need to reiterate the points we made a handful of pages earlier. But we do want to take note of later developments at the Port of Oakland that offer additional support for our contention that the dredging story prompted policy learning.<sup>22</sup> Soon after the Port received approval to dredge its harbor to forty-two feet, it began developing an even more ambitious plan to deepen the channels an additional eight feet.<sup>23</sup> In *Taming Adversarial Legalism: The Port of Oakland's Dredging Saga Revisited*, much of which was written in 1997, we were cautiously optimistic that the Port had learned from its earlier missteps and that, this time, things would go better.<sup>24</sup> Subsequent events bear out our optimism. Port officials have worked assiduously to strengthen the coalition that made the earlier dredging project feasible.<sup>25</sup> Even more remarkable is the response of other parties to those earlier negotiations. The Bay Conservation and Development Commission, which has routinely and reflexively opposed

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19. *See id.* at 217.

20. Indeed, at one time one of the coauthors of this Article worked for the Port of Oakland.

21. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950, 968 (1979).

22. *See generally* Rick DelVecchio, *Oakland Port Wins OK to Dump Mud: Key Elements of Big Dredging Project*, *S.F. CHRON.*, Oct. 16, 1998, at A22 (documenting San Francisco Bay Conservation and Development Commission's approval of port plan) [hereinafter DelVecchio, *Port Wins OK*].

23. *See id.*

24. *See* Busch, *supra* note 3, at 196-98, 215-16.

25. *See* DelVecchio, *Port Wins OK*, *supra* note 22, at A22; *see also* Rick DelVecchio, *Key Vote Looms on Plans for Two Oakland Harbors*, *S.F. CHRON.*, Oct. 14, 1998, at A15 (reporting on political battles over dredging plan); Rick DelVecchio, *Oakland Port in Passage: Transitions Ahead with Shoreline Plan*, *S.F. CHRON.*, Oct. 14, 1998, at A17 (same).

projects that entail any filling in of San Francisco Bay, reversed course and endorsed the Port's plan, which calls for filling part of the harbor to construct a wetland.<sup>26</sup> The Save San Francisco Bay Association, which has been a predictable opponent of the Port, decided to monitor rather than to block the new plan.<sup>27</sup> The fact that the Port of Oakland has passed a critical regulatory milestone even before obtaining a federal funding commitment for additional dredging shows that the organization has learned from its past mistakes: now, as a classic account of negotiation strategy makes the point, it knows how to "get to yes."<sup>28</sup>

Perhaps a similar strategy would have worked for the earlier dredging project. While the Port began to pursue that undertaking in 1972, Port officials never solicited public opinion during the fifteen years it took for Congress to authorize funding.<sup>29</sup> As Kagan points out, regulators and Port officials attributed much of Oakland's problem to "failures of political skill and environmental sensitivity."<sup>30</sup> The unhappy events that Kagan blames on adversarial legalism might instead be attributed, at least in part, to a bureaucracy unready to acknowledge that, in what was then the brave new era of environmental awareness, the old ways of doing business no longer worked.

The Port now appreciates that public involvement is not just a necessary evil but a useful component of decision making. Officials acknowledge that, as a major property holder, its activities impose costs on its neighbors and so those neighbors are entitled to a say.<sup>31</sup> As Port Environmental Manager James McGrath observes: "There is community frustration with the Port. It's an issue we've begun to

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26. See DelVecchio, *Port Wins OK*, *supra* note 22, at A22.

27. See Michael V. Copeland, *Port Closer to Wildlife Refuge Plan*, OAKLAND TRIB., (Oct. 16, 1998) <[http://search.newschoice.com/angtr/local/98-10-16\\_t1bs316.asp](http://search.newschoice.com/angtr/local/98-10-16_t1bs316.asp)>.

28. See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., Penguin Books 2d ed., 1991) (1981) (outlining effective negotiating strategy).

29. See Kagan, *Adversarial Legalism*, *supra* note 10, at 370, 379 (explaining that budgeting process was responsible for fifteen-year lag between project approval and funding). It took another eight years following budgetary approval for the Port to win authorization for deepening the harbor to its planned depth. See Kagan, *Tamed?*, *supra* note 1, at 223.

30. Robert A. Kagan, *The Dredging Dilemma: Economic Development and Environmental Protection in Oakland Harbor*, 19 COASTAL MGMT. 313, 326 (1991).

31. One example of such costs is truck traffic, a significant source of air and noise pollution. Insofar as the prime waterfront property occupied by the Port could be used for other purposes, the Port's activities impose what economists refer to as opportunity costs, the benefits not gained from alternative uses of a resource.

learn to listen to.”<sup>32</sup> Recent activities demonstrate that this is more than rhetoric. The Port has proposed building a public park and wetlands covering more than thirty acres of its property.<sup>33</sup> Citizens’ groups have been invited to help shape the design of the park, as well as assure greater public access to its nineteen miles of waterfront.<sup>34</sup> To that end, the Port organized an event called “Community Design Fair: Envision a Park,” complete with voting on design options.<sup>35</sup>

Kagan emphasizes the economic costs that resulted from delay at the Port. He suggests that jobs were lost, and notes that “[a] major shipping company (as BKS point out) scrapped plans to expand its terminals in Oakland, a blow from which the city has not recovered.”<sup>36</sup> That is not quite right. The shipping company, APL, had originally planned to expand its facilities in Los Angeles. Rather than canceling a planned expansion, APL rejected the Port of Oakland’s counter-proposal to its plans for Los Angeles. The President of APL noted that the firm’s expansion there would not affect any employees in Oakland.<sup>37</sup> It is also incorrect to suggest that the delay seriously impaired the Port’s competitive position. In 1992—with mudlock not yet broken—the Port of Oakland’s container volume increased by 8 percent over 1991, pushing Oakland past Seattle as the third-largest container port on the West Coast.<sup>38</sup> Today, the Port of Oakland remains one of the top twenty busiest ports in the world in terms of container traffic.<sup>39</sup>

While *Tamed?* recognizes the important economic role played by the Port of Oakland, it fails to acknowledge the ecological significance of the San Francisco Bay, the largest estuary in California.<sup>40</sup> Despite

32. Jessica Scully, *Port Suggests New Park on Waterfront: Public Access, Wetlands the Size of Lake Merrit*, MONTCLARION, Nov. 4, 1997, at 1.

33. See *id.*

34. See Chauncey Bailey, *Shoreline Park Plan Gets Input from Public*, OAKLAND TRIB., (Aug. 31, 1998) <[http://search.newschoice.com/angtr/local/98-08-31\\_tlbs331.asp](http://search.newschoice.com/angtr/local/98-08-31_tlbs331.asp)> (reporting on public fair designed to gather public input on park); *Fair to Elicit Public Opinion on New Park*, OAKLAND TRIB., (Aug. 29, 1998) <[http://search.newschoice.com/angtr/local/98-08-29\\_tlbs429.asp](http://search.newschoice.com/angtr/local/98-08-29_tlbs429.asp)> (same).

35. See Bailey, *supra* note 34; *Fair to Elicit Public Opinion on New Park*, *supra* note 34.

36. Kagan, *Tamed?*, *supra* note 1, at 230.

37. See *Oakland to Remain a Major Port-of-Call, Headquarters Location, Says Top APL Executive*, PR NEWswire, June 30, 1993.

38. See *Oakland Moves Up in West Coast Rank*, TRAFFIC WORLD, March 22, 1993, at 38.

39. See *Maritime Facts & Figures* (last modified Jun. 8, 1998) <<http://www.portofoakland.com/facts.html>>.

40. California had lost more than 90% of its wetlands by 1992. See SAN FRANCISCO PLANNING AND URBAN RESEARCH ASS’N, REPORT NO. 297, SAN FRANCISCO BAY DREDGING/WETLANDS RESTORATION PROJECTS: MATCHING ENVIRONMENTAL

the fact that wetlands have been proven to control floods, protect topsoil and decontaminate water,<sup>41</sup> *Tamed?* gives little credence to the benefits of wetland restoration.<sup>42</sup> Kagan also refuses to acknowledge that the participatory process that led to the Sonoma Baylands wetlands restoration solution was responsible for this consensual—and superior—policy outcome.<sup>43</sup> Because of the participation of environmental groups, the cost of dredging remained the same, but, instead of causing ecological damage to offshore fisheries, the project restored a natural resource that will yield environmental benefits for years to come.<sup>44</sup>

### B. *Is the Port of Oakland Story Unique?*

The Oakland story is neither a rarity nor an exception to the iron rule of adversarial legalism. *Tamed?* cites numerous illustrations of what Kagan sees as the costs of legalism.<sup>45</sup> As it happens, two of those cited pieces were written by one of us;<sup>46</sup> the citations are appreciated, but, at least in those instances, Kagan oversimplifies and overstates his argument. Moreover, there are many counter-examples in the literature, studies of issues ranging from hemophilia activists to comparable worth, environmentalism to disability, which reach a different conclusion.<sup>47</sup>

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PROTECTION AND ECONOMIC DEVELOPMENT (1992) (noting value of Bay as ecological filtering system, vital nursery for fish and crabs, and haven for nesting and migrating waterfowl).

41. In addition to the benefits listed in the text, wetlands offer spawning grounds for fish and shellfish, “recharge” underground water aquifers, and afford habitats for migratory birds, animals that can be harvested for pelts, and a disproportionately high number of endangered species. See WILLIAM J. MITSCH & JAMES G. GOSSELINK, *WETLANDS* 517-25 (2d ed., 1993); see also Robert Costanza et al., *The Value of the World's Ecosystem Services and Natural Capital*, 387 *NATURE* 253, 259 (1997) (examining wealth created by wetlands ecosystems).

42. See Kagan, *Tamed?*, *supra* note 1 at 233-34. At note 83 of *Tamed?*, Kagan cites an Army Corps of Engineers biologist saying that the environmental benefits of environmental protection amount to fifteen cents per dollar invested. The figure is virtually meaningless without specific reference to the values and time frame being considered. Does it take into account the social benefits of flood mitigation or enhancement of water quality and availability? The temporal aspect is also important. Wetlands restorations projects have their greatest benefits over time after the restored ecosystem has taken root.

43. See *id.* at 233.

44. See *id.* (noting costs of wetland restoration and ocean disposal were equal).

45. See *id.* at 219.

46. See *id.* (citing DAVID L. KIRP, *DOING GOOD BY DOING LITTLE: RACE AND SCHOOLING IN BRITAIN* (1979); David L. Kirp, *Professionalism as a Policy Choice: British Special Education in Comparative Perspective*, 34 *WORLD POL.* 137 (1982)).

47. See, e.g., MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 278-82 (1994) (summarizing various legal cat-

One such example, substantively not so different from the Port of Oakland case, is the consensus ultimately reached in a long-standing dispute over how to manage Wildcat Creek in Richmond, California.<sup>48</sup> Richmond's economic difficulties and the Army Corps of Engineers' economic policy appraisal methodology allowed the creek to remain one of the few natural streams in the region. Although, in 1968, the Corps had proposed following its then-standard practice of transforming the creek into a concrete channel for purposes of flood control, the Corps could not provide an economic justification for doing so because the community in which the creek is situated was (and remains) poverty-stricken.<sup>49</sup> Property values were too low to make the project viable in cost-benefit terms.<sup>50</sup> A decade later, another attempt by the

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alysts for pay equity reform); SUSAN M. OLSON, CLIENTS AND LAWYERS: SECURING THE RIGHTS OF DISABLED PERSONS 8-11 (1984) (discussing sources of redress available to legal reformers). GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (analyzing ability of courts to initiate reform in context of civil rights, women's rights, environment, reapportionment, and criminal law); David L. Kirp, *AIDS, Hemophilia and the Emergence of a Social Movement, in BLOOD FEUDS* (R. Bayer & E. Feldman eds., forthcoming 1999) (discussing hemophilia); Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1632 (1985) (discussing public deliberation of air pollution in Washington).

48. See Gina Covina, *Up the Creeks!*, EXPRESS, June 5, 1998, at 1. Another striking example of the value of citizen participation and judicial involvement is the case of Mono Lake, in California. In the late 1970s, a handful of scientists working in collaboration with local residents formed the Mono Lake Committee to challenge the siphoning off of the streams that feed the lake to satisfy Los Angeles' ever expanding thirst for water. The Mono Lake Committee sought to prevent the lake from suffering the fate of nearby Owens Valley, where a water project had completely drained Owens Lake, transforming the lake bed into the largest anthropogenic source of dust storms in the nation. The result was millions of dollars in economic costs and damage to public health. See Thomas E. Gill & Thomas A. Cahill, *Playa-generated Dust Storms from Owens Lake, in THE HISTORY OF WATER: EASTERN SIERRA NEVADA, OWENS VALLEY, WHITE-INYO MOUNTAINS* 63, 63 (Clarence A. Hall, Jr. et al. eds., 1992). Gill and Cahill found that the Owens lakebed:

is now the source of massive dust storms, the largest single source of fugitive dust in North America. The fine dust particles are transported over a wide downwind area, causing millions of dollars in economic losses each year, potentially affecting the health of tens of thousands of individuals, and adversely affecting sensitive ecosystems.

*Id.*

With the crucial help of the courts, the Mono Lake Committee prevailed. Eventually, the California Water Board, which had initially proposed diverting the Mono Lake water, acknowledged that saving the lake was the right decision; by a unanimous vote, the Board reversed course and opted to raise the water level of the lake, which had already been lowered by earlier water projects. See JOHN HART, STORM OVER MONO: THE MONO LAKE BATTLE AND THE CALIFORNIA WATER FUTURE 171-75 (1996).

49. See Covina, *supra* note 48, at 1.

50. See *id.*

Corps to create a concrete channel, this time with such amenities as landscaping and a nature trail, failed when the city could not pay for the federally mandated local contribution and Richmond businesses refused to contribute to the project.<sup>51</sup>

In the interim, researchers had learned that concrete channels were a misguided approach to flood control.<sup>52</sup> They increased the speed, and thus the erosive force, of water flowing in streams; they also destroyed marine life.<sup>53</sup> It took some time, though, to reverse what had long been the Corps' standard operating procedure. Richmond citizens were quicker off the mark. When, in the wake of the failed concrete-plus-amenities plan, the Corps reverted to its original plan, residents resisted.<sup>54</sup> The local neighborhood council, working with University of California-Berkeley scientists who had done the seminal research, rejected that plan on hydrological as well as aesthetic grounds.<sup>55</sup> The council was prepared to go to court, but that proved unnecessary when the U.S. Fish and Wildlife Service accepted the community's proposal as "the prudent and reasonable alternative."<sup>56</sup>

Eventually a compromise was reached: the Richmond project would embrace the principle of natural channel geometry.<sup>57</sup> This transformation occurred at least in part because, as one of the Richmond community leaders recalled: "[W]e didn't let up on them [the Army Corps of Engineers]. We were prepared to go to the President . . . They didn't live here so they didn't know."<sup>58</sup> In Richmond, as in Oakland, the benefits of public participation are evident. In this instance, local demands linked to expertise drawn from outside government eventually led the Corps to rethink its position and a better solution was devised.

### C. Policy Learning at the National Level

When it comes to policy learning on the national level, there is more common ground than *Tamed?* implies.<sup>59</sup> Kagan argues, as do

51. *See id.*

52. *See* THOMAS DUNNE & LUNA B. LEOPOLD, *WATER IN ENVIRONMENTAL PLANNING* 700-04 (1978).

53. *See* Covina, *supra* note 48, at 1.

54. *See id.*

55. *See id.*

56. *Id.*

57. *See id.*

58. *Id.*

59. In light of our detailed recommendations to reduce the number of agencies with permitting authority in the dredging sphere, we are perplexed by Kagan's observation

we, that the process that led to the Port of Oakland's dredging project was too fragmented and protracted.<sup>60</sup> He endorses the additional policy changes that we also favor to reduce fragmentation in regulatory decision making,<sup>61</sup> changes that build on the Clinton administration's procedural reforms to further reduce the number of permits required for a dredging project. As well, we concur with his criticism of the current system of piecemeal funding.<sup>62</sup> Indeed, although one would not know this from reading *Tamed?*, budgetary politics in Congress held up the Port's dredging project for fifteen years<sup>63</sup>—almost twice as long as the interest group disputes, regulatory debates, and court challenges on which Kagan focuses.

*Tamed?* argues that the Local Planning Groups developed by the Clinton administration in order to coordinate planning bear a "striking resemblance" to the centralized decision making of Kagan's corporatist model.<sup>64</sup> But there is an essential difference. Unlike the super-agency advanced in the corporatist approach, the Local Planning Groups are open to participation by any affected group and their deliberations are subject to public scrutiny. By contrast, as *Adversarial Legalism* points out, "[Western European regulatory agencies] meet informally, privately, and repeatedly with a relatively small network of interest-group representatives who, to retain influence, must develop a reputation for integrity and reasonableness."<sup>65</sup>

Ironically, while Kagan emphasizes the faults of the American system, much of the industrialized world has replicated the United States environmental impact assessment ("EIA") process. Since Congress passed the National Environmental Policy Act ("NEPA")<sup>66</sup> in 1969, environmental assessment regulations have been instituted in every Western European nation as well as in Canada, New Zealand, Australia, Columbia, and Thailand.<sup>67</sup> Procedural requirements on openness and public participation, as well as analytic requirements

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that we do not "mention any statutory changes that consolidate decision-making authority . . . . [Our] silence in that regard is not surprising." Kagan, *Tamed?*, *supra* note 1, at 242.

60. See *id.* at 234-36.

61. See Kagan, *Adversarial Legalism*, *supra* note 10, at 398; Kagan, *Tamed?*, *supra* note 1, at 242-43.

62. See Kagan, *Adversarial Legalism*, *supra* note 10, at 379.

63. See *id.* at 370, 379.

64. See Kagan, *Tamed?*, *supra* note 1, at 240.

65. Kagan, *Adversarial Legalism*, *supra* note 10, at 398.

66. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970).

67. See CHRISTOPHER WOOD, ENVIRONMENTAL IMPACT ASSESSMENT: A COMPARATIVE REVIEW 3-4 (1995).

such as the preparation of an EIA report, have become increasingly common.

This is true of the Netherlands, Kagan's favorite example; the Environmental Management Act of 1994 moved that country closer to a NEPA-style system.<sup>68</sup> The Dutch system now incorporates statutory requirements related to screening (that is, whether or not an EIA report is required),<sup>69</sup> consideration of alternatives to initial project configuration,<sup>70</sup> scoping (the analytic determination of which project impacts to focus on),<sup>71</sup> review of EIA reports,<sup>72</sup> and monitoring of impacts of implemented projects.<sup>73</sup> Under this new legislation, the EIA report is reviewed by an EIA Commission to determine its adequacy.<sup>74</sup> Public participation is mandated at both the scoping and EIA report review stages.<sup>75</sup> Moreover, virtually all documentary material associated with the process is publicly available.<sup>76</sup> Affected interests have broad rights to appeal to a review board.<sup>77</sup>

Some requirements in the Dutch process, such as screening, are enforceable in the courts.<sup>78</sup> The fact that environmental litigation rarely occurs in the Netherlands is a cultural artifact rather than an indication of a radically different system of environmental regulation. A recent evaluation of the Dutch approach "stressed the importance of public participation in EIA. . . . The open nature of the Dutch EIA process, with consequent minimisation [sic] of the possibility of abuse, was seen as one of its great strengths."<sup>79</sup>

### III

#### DISTINCTIONS AND DIFFERENCES: THE NORMATIVE ISSUES

The pivotal normative divide between Kagan and us concerns which elements of the policy pentacle deserve pride of place. In *Adversarial Legalism*, the preference for more bureaucracy and less law is sharply drawn. Kagan emphasizes the benefits of a system where a single agency is given sufficient authority to produce "*administra-*

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68. See *id.* at 80-81 (outlining provisions of NEPA and Environmental Management Act of 1994, statute which created EIS system in Netherlands).

69. See *id.* at 122-23.

70. See *id.* at 108.

71. See *id.* at 136.

72. See *id.* at 171.

73. See *id.* at 205.

74. See *id.* at 171-72.

75. See *id.* at 136-37, 171-72.

76. See *id.* at 80-81.

77. See *id.* at 80.

78. See *id.* at 81.

79. *Id.* at 236.

tively final, multi-factor balancing.”<sup>80</sup> He constructs an analytical matrix to assess various modes of policy making. One axis displays hierarchical versus party-influenced processes. This dimension can be understood as showing the degree of centralization—that is, the extent to which a single party controls the process. As Kagan explains: “The vertical dimension concerns the extent to which the decisionmaking process is *hierarchical*—dominated by an authoritative official decisionmaker, applying authoritative norms or standards—as opposed to *participatory*, that is, influenced by disputing parties and their lawyers, their normative arguments, and the evidence they deem relevant.”<sup>81</sup>

The other dimension of Kagan’s matrix depicts what he refers to as the degree of formality in the process. Here, “formality” means not only the predominance of legal dispute resolution but also the amount of discretion policy makers have in deciding how to manage the process. Rules that require an open process and invite participation fall on the formalistic end of the spectrum. The United States system is legally constrained and fragmented:

[W]hen compared to policymaking in European democracies, regulatory decisions in the U.S. entail more legal formality—more complex legal rules concerning public notice and comment, open hearings, *ex parte* contacts, evidentiary standards, formal response to interest-group arguments, and so on. But hierarchical authority is weak. Agencies cannot restrict participation by interest groups.<sup>82</sup>

This characterization of the difference between the two systems of decision making is fair enough. But which approach is to be preferred? In *Adversarial Legalism*, Kagan contends that, in the United States, there is too much obligatory openness to public participation, too easy access to the courts, and too little agency discretion. While *Tamed?* restates the two modes of decision making, it does not identify guarantees of public participation as among the pathologies of the American approach. In this respect, the differences between us have narrowed. As Kagan writes: “[I]t is important to retain or devise mechanisms that guarantee some forms of public participation in many bureaucratic decision systems.”<sup>83</sup> Still, there are rhetorical gestures that bespeak hostility to politics, for example: “the final division

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80. Kagan, *Adversarial Legalism*, *supra* note 10, at 387.

81. *Id.* at 373.

82. *Id.* at 374.

83. Kagan, *Tamed?*, *supra* note 1, at 244.

of the dredging spoils;”<sup>84</sup> “unyielding [political] counterparts;”<sup>85</sup> and “extortionate pattern.”<sup>86</sup> On this key point, Kagan wants to have it both ways, at once praising and deploring politics.

The specifics of those “forms of public participation” are crucial, of course. While *Tamed?* does not specify criteria for determining which groups should be involved in the process, it suggests that participation be restricted to mainstream organizations selected by the agency. The approach taken by a number of European countries comes in for praise (as it did in *Adversarial Legalism*): “Through a variety of corporatist mechanisms (e.g., permanent representation on key committees), a stable consortium of interest group representatives consulted regularly with government officials on a range of issues.”<sup>87</sup>

While stability has its virtues, a system that authorizes an agency to determine what level of participation is optimal differs significantly from the more open participation we endorse. An emphasis on participation was built into the NEPA<sup>88</sup> because of widespread agreement that secretive governmental decision making was not adequately taking into account environmental costs.<sup>89</sup> For his part, Kagan points to the potential for disputes attributable to such bottom-up involvement as a weakness in the current system. “The clash of adversarially advanced argument, rather than top-down application of official norms, is the most important influence on [agency] decisions.”<sup>90</sup> Embedded in this critique is the belief that giving agencies the authority to decide whom to listen to and curtailing the role of courts will reduce the time and expense of decision making. Indeed it will—but at what policy price? As an appraisal of decision making by the Army Corps of Engineers, an agency whose operations have been profoundly affected by NEPA, concludes:

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84. *Id.* at 232.

85. *Id.* at 235.

86. *Id.* at 227.

87. *Id.* at 237.

88. The openness of the process is evident in the implementing regulations, for example: “After preparing a draft environmental statement . . . the agency shall: . . . Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.” 40 C.F.R. § 1503.1(a)(4) (1998).

89. See R.B. Smythe, *The Historical Roots of NEPA*, in ENVIRONMENTAL POLICY AND NEPA: PAST, PRESENT, AND FUTURE 3, 11-12 (Ray Clark & Larry Canter eds., 1997) (explaining that NEPA was passed because pre-NEPA laws failed to address environmental costs and factors). See generally RACHEL CARSON, SILENT SPRING (1962), catalyst of the environmental movement.

90. Kagan, *Adversarial Legalism*, supra note 10, at 374.

[I]rrespective of the form of open planning adopted in the studies we examined, the effect such planning had on changing the Corps' decisions was appreciable . . . [W]henever a substantial effort was made . . . a greater balance clearly existed between environmental and economic considerations . . . . The open planning process enabled new and previously ignored interests to directly press their demands and in several instances to contribute previously overlooked alternatives.<sup>91</sup>

A more recent study similarly concludes that when agencies engage the public in the NEPA process, the result is greater citizen confidence in the process, more trust in the agency and a deeper appreciation of community values.<sup>92</sup>

Kagan contends that we minimize the costs of openness, that we believe that one "need not worry overmuch about the costs, delays, and policy distortions that flow from adversarial legalism."<sup>93</sup> Our point is more subtle. On most issues, the benefits of public participation outweigh the costs, even though such a process of decision making takes longer and sometimes costs more. Participation boosts civic capacity by making citizens more connected to, and ultimately more trusting of, government.<sup>94</sup> Those are significant benefits, especially in an era when trust in many of the institutions of government is weak and contingent.<sup>95</sup>

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91. DANIEL MAZMANIAN & JEANNE NIENABER, *CAN ORGANIZATIONS CHANGE? ENVIRONMENTAL PROTECTION, CITIZEN PARTICIPATION, AND THE CORPS OF ENGINEERS* 189 (1979). *See also* SERGE TAYLOR, *MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM* 251 (1984) ("When . . . environmentally concerned outsiders pay attention to the EIS process, some of the worst projects . . . get eliminated.").

92. *See* J. Douglas Wellman & Terence J. Tipple, *Governance in the Wildland-Urban Interface: A Normative Guide for Natural Resource Managers*, in *CULTURE, CONFLICT AND COMMUNICATION IN THE WILDLAND-URBAN INTERFACE* 337, 345-46 (Alan W. Ewert et al. eds., 1993) (discussing Municipal Arborist and Urban Foresters Society survey and noting positive impact of public participation in management of Upper Delaware Scenic and Recreational River).

93. *See* Kagan, *Tamed?*, *supra* note 1, at 217.

94. *See* JEFFREY M. BERRY ET AL., *THE REBIRTH OF URBAN DEMOCRACY* 254-55 (1993) (finding, in study of five cities, that participation increases sense of community and trust in government). *Cf.* MATTHEW A. CRENSON, *NEIGHBORHOOD POLITICS* 155 (1983) (noting that majority of respondents who actively participated in neighborhood discourse felt that such discourse resulted in governmental action); R. PUTNAM, *BOWLING ALONE* (forthcoming 1999) (finding decreasing ties to community-based organizations); SIDNEY VERBA ET AL., *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 132 (1995) (reporting that political activists are civically motivated and believe their efforts will help their communities and country at large).

95. *See generally* E.J. DIONNE, JR., *WHY AMERICANS HATE POLITICS* 334 (1991) (explaining that as American society turns to individualistic ideals, sense of civic obligation and trust in democracy erode); MICHAEL J. SANDEL, *DEMOCRACY'S DISCON-*

In his eagerness to criticize adversarial legalism, Kagan forgets that, not so long ago, decision-making processes were far less open; the pentacle was unbalanced in the direction of bureaucracy and expertise. As recently as the 1960s, ordinary citizens could do almost nothing to promote accountability in, and better decisions by, government agencies.<sup>96</sup> Public participation in agency decision making was a rarity, as was recourse to the courts. It was precisely the abuses committed in the name of expertise and bureaucratic rationality, in policy domains ranging from the management of the environment to the treatment of the disabled, which prompted Washington to temper the power of the experts and bureaucrats by strengthening the authority of the courts and the citizenry. In some policy domains, the pendulum may have swung too far, the value of expertise overly discounted. On that point, we all agree—but the saga of the Port of Oakland suggests the need for caution in adjusting the balance.

## CONCLUSION

### A. *The Narcissism of Small Differences?*

Much of this debate is of the “half-full versus half-empty glass” variety. Even as we all concur that streamlining the process of decision making is needed, we perceive a somewhat different history and a different policy reality.

Kagan regards the “mudlock” in Oakland as “legally induced.”<sup>97</sup> Fragmented authority, overly demanding and restrictive regulations, and easy court access without sufficient administrative discretion yield large, unnecessary costs. According to Kagan, the laws on the books “seem to provide for multi-factor balancing. But they fail to create a comprehensive, authoritative decision maker, capable of making binding decisions . . . .”<sup>98</sup> Kagan sees a need for greater centralization, for a more substantial shift in the direction of a corporatist model, than we do.

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TENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 331-32 (1996) (describing decline of national community as affluent individuals shift from reliance on public to private institutions).

96. While the ballot box is supposed to hold public officials accountable, it is an unsatisfactory instrument in this context. For one thing, how one votes is usually not based on any single decision (say, how a politician voted on NEPA) but on an overall assessment of the politician’s record (or promises). For another, one votes for elected officials, not bureaucrats, but the key environmental decision makers are often the administrators who implement the laws, not the politicians who enact them.

97. Kagan, *Tamed?*, *supra* note 1, at 232.

98. Kagan, *Adversarial Legalism*, *supra* note 10, at 388.

By contrast, we read the Oakland history as illustrating organizational learning. Over time, federal agencies have developed the institutional capacity needed to manage the requirements of NEPA. Moreover, other countries have come to appreciate what Kagan refuses to acknowledge: an open and participatory policy-making process offers important benefits that in many cases outweigh the associated costs. Those benefits include greater trust in government and substantively better policies. Other countries have borrowed elements of the American system of environmental regulations, procedural requirements of an open and participatory process with some form of review as well as analytic requirements like an EIS.<sup>99</sup>

Nor are the benefits of greater openness confined to the environmental domain. As Robert Reich points out in *Public Administration and Deliberation*, “both the process and the substance of policy decisions necessarily generate profound social learning about public values . . . . [T]hey reconfigure social ideals.”<sup>100</sup>

Greater flexibility is indeed needed in environmental policy making (and in other realms as well). But “adversarial legalism” is not, as Kagan would have it, “still wild, lurking in the wetlands (dare I say ‘swamps’?) until someone gets angry and wants to bring it to the surface. . . . a barely latent, easily triggered potentiality in virtually all contemporary American political and legal institutions.”<sup>101</sup> Quite the contrary: in environmental matters, there has been a shift in the balance, among modes of decision making, away from reliance on law (the number of lawsuits brought under NEPA has decreased)<sup>102</sup> and bureaucratic rationality, toward politics, expertise, and markets.

This shift is not confined to environmental issues. While no one would quarrel with the proposition that the judiciary remains a major policy player in American policy, changes both in the composition of the federal courts and the design of legislation have had a notable

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99. See WOOD, *supra* note 67, at 1-5.

100. Reich, *supra* note 47, at 1631.

101. Kagan, *Tamed?*, *supra* note 1, at 244-45.

102. While the number of lawsuits related to the EISs required by NEPA has dropped, the percentage of EISs challenged in court has increased. This is because the number of EISs has been decreasing over time. More and more, agencies are undertaking environmental mitigation measures in advance and filing a Finding of No Significant Impact, which relieves them of having to take further action. This, in itself, is a form of institutional learning. See WOOD, *supra* note 67, at 24-26. It is worth noting that the courts have long afforded agencies substantial deference in disputes over EIS preparation and other procedural matters. See *generally* Vermont Yankee v. National Resources Defense Council, Inc., 435 U.S. 519, 558 (1978) (stating that Court will only set aside administrative decisions made by government agencies for substantial procedural or substantive reasons as mandated by statute).

impact. A reaction against the excesses of rights-consciousness and proceduralism is one explanation. Another is that the courts have already done their job—that basic procedural rights, previously unacknowledged, are now imbedded in the system of governance, treated as given by the Army Corps of Engineers and its counterparts across the broad policy landscape.<sup>103</sup> To the extent this is so, it is only fitting that politics, markets, and expertise should be relatively more significant factors, and law relatively less central in crafting public policy, than was the case a generation ago.

### B. Coda

“I hope they don’t sue me,” Kagan writes at the end of *Tamed?*<sup>104</sup> On the contrary, we look forward to continuing the conversation over a meal. Given Kagan’s fondness for how things are done in the Netherlands, though, that meal will have to be Dutch treat.

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103. See TAYLOR, *supra* note 91, at 196-97 (noting that early litigation has led Corps to institute “procedural scrupulousness” in their preparation of EISs, focusing especially on procedures that courts examine).

104. See Kagan, *Tamed?*, *supra* note 1, at 245.