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# REGULATING AFTER THE FACT

*Samuel Issacharoff\**

## INTRODUCTION

In 1998, as the last vestiges of the Soviet empire were passing from the world scene, Daniel Yergin and Joseph Stanislaw presented an early balance sheet of the postwar lessons on government regulation of the economy. Their work, *The Commanding Heights*, chronicles the turn from command-and-control models of regulation to more subtle market mechanisms that leave more to the worlds of innovation and entrepreneurship, including the full-scale dismantling of state-run enterprises and their sale or license to private firms.<sup>1</sup>

One of the highlights of Yergin and Stanislaw's analysis involved the question of market entry. Highly regulated societies typically require advance administrative approval for all sorts of market initiatives, whether the opening of new businesses or the introduction of new products to the consuming public.<sup>2</sup> By contrast, one of the central features of the deregulatory impulses of the late twentieth century was the liberalization of market access for goods and services without anticipatory governmental approval.<sup>3</sup> The ability to open a business provides a case in point. Prior to Putin-era reforms, for example, a typical business in Russia needed to acquire between 300 and 500 different permits before opening.<sup>4</sup> By 2001, that number had diminished considerably, but it was still a formidable seventy.<sup>5</sup>

The turn in *The Commanding Heights* to the problems of market entry built on the considerable foundations laid by Hernando de Soto. In his remarkable account of barriers to economic participation in

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1. DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE FOR THE WORLD ECONOMY* 329, 417 (2002).

2. The Soviet Union is, of course, the textbook example of a highly regulated market. See PAUL R. GREGORY & ROBERT C. STUART, *SOVIET ECONOMIC STRUCTURE AND PERFORMANCE* (3d ed. 1986). In the USSR, *Gosplan*, the State Planning Committee, coordinated virtually all economic activity.

3. YERGIN & STANISLAW, *supra* note 1, at 417.

4. *Id.* at 305–06.

5. *Id.*

Peru, de Soto chronicled the suffocating effects of regulation—its attendant costs and time consumed, as well as its seemingly inescapable accompaniment by corruption and further bureaucratic delay.<sup>6</sup> As de Soto subsequently developed, the inability to enter the marketplace was part of a more systematic exclusion of the world's poor, preventing them from translating their holdings—even if relatively meager—and their capacity to work into legally recognized and legally protected capital.<sup>7</sup> For de Soto, suffocating bureaucracy and stagnant legal systems deprive the working poor in nonadvanced societies of the potential benefits of what he describes as “trillions of dollars in dead capital.”<sup>8</sup>

More recently, a systematic study of entry barriers forcefully established a distinct overlap between the wealth of countries and the ease of entry into their marketplaces.<sup>9</sup> The conclusion is presented starkly:

An analysis of the regulation of entry in 85 countries shows that, even aside from the costs associated with corruption and bureaucratic delay, business entry is extremely expensive, especially in the countries outside the top quartile of the income distribution. We find that heavier regulation of entry is generally associated with greater corruption and a larger unofficial economy, but not with better quality of private or public goods. We also find that the countries with less limited, less democratic, and more interventionist governments regulate entry more heavily, even controlling for the level of economic development.<sup>10</sup>

As summarized by another study taking a similar tack, “[o]nce a developing country's government establishes fair rules of the game and ensures their enforcement, that government is well advised to interfere minimally with privately generated growth.”<sup>11</sup> No doubt, the political costs of deregulation are high, particularly for parts of the economy (e.g., agriculture in developed countries) that depend heavily upon government subsidies. The disruptive pressures of globalization are real, but so is the breadth of an international market. There are, of course, pockets of resistance, as seen last year when French students took to the streets to beat back a government proposal that would have allowed a two-year “testing” period in which employers

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6. HERNANDO DE SOTO, *THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM* (1989).

7. See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000).

8. *Id.* at 210.

9. Simeon Djankov et al., *The Regulation of Entry*, 117 Q.J. ECON. 1 (2002).

10. *Id.* at 35.

11. Richard Roll & John R. Talbott, *Political Freedom, Economic Liberty, and Prosperity*, 14 J. DEMOCRACY 75, 76–77 (2003).

could freely hire and fire undesired employees.<sup>12</sup> Yet despite the inevitable protests from the immediate beneficiaries of particular government regulations, the argument in favor of deregulation appears inescapable.

In all these exchanges over the benefits of a liberalized economic order, the United States is invariably Exhibit A. No country seems to realize the benefits of wide open markets, of relaxed entry into the world of commerce, and of economic dynamism as fully as the United States. No country seems to have an economy so freely operating—indeed, so unregulated—as does the United States.

Or so it would seem. This Article takes mild issue with the implicit view of the United States found in many of these studies. What distinguishes the United States is not that it is an unregulated market—far from it. What is distinctive about the United States is the extent to which we regulate not entry but consequences. There is a significant difference between an unregulated market and a deregulated market featuring low entry costs but careful scrutiny after the fact. What really sets the United States apart is the fact that its basic regulatory model is *ex post* rather than *ex ante*, a form of regulation that draws heavily on its common-law tradition.<sup>13</sup> It is precisely the availability of meaningful *ex post* accountability that comes to define much of the operation of the rule of law in the United States.<sup>14</sup>

In this Article, I want to make three brief points about the centrality of *ex post* regulation at the deepest levels of the American conception of the rule of law. First, I want to contrast two regulatory models employed in this country, regulation under the Food and Drug Administration (FDA) and under the Securities and Exchange Commission (SEC), to highlight the difference between *ex post* and *ex ante* regulation. Second, I will look more closely at the SEC model to show

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12. See David R. Howell & John Schmitt, *Vive Les Jeunes*, AM. PROSPECT, June 2006, at 16.

13. For a somewhat critical account of this state of affairs that focuses attention on *ex post* versus *ex ante* regulatory interventions, see ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 16 (2001). Professor Kagan makes clear that “[i]t is only a slight oversimplification to say that in the United States lawyers, legal rights, judges, and lawsuits are the functional equivalent of the large central bureaucracies that dominate governance in high-tax, activist welfare states.” *Id.*

14. There is a long literature on the trade-offs between the certainty of *ex ante* regulations and the greater flexibility and market-responsiveness of *ex post* liability rules. See Donald Wittman, *Prior Regulation Versus Post Liability: The Choice Between Input and Output Monitoring*, 6 J. LEGAL STUD. 193 (1977); see also Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357 (1984). More recently, efforts have been made to develop formal models of the trade-offs between the two. See Charles D. Kolstad et al., *Ex Post Liability for Harm vs. Ex Ante Safety Regulation: Substitutes or Complements?*, 80 AM. ECON. REV. 888 (1990) (using this approach to model regulation of potential environmental harm and proposing as optimal a mix of *ex ante* regulation and *ex post* liability).

just how critical private enforcement is to ex post regulation. Finally, I will conclude with a concern about the general tenor of tort reform and other initiatives whose effect, when examined *en masse*, is to circumscribe the availability of ex post accountability as a necessary complement to the liberalized ex ante economic environment in the United States. This final point ties into the central question of this Symposium: “Is the Rule of Law Waning in America?”

## II. COMING TO MARKET

The FDA is the federal agency that most closely resembles the prevailing model of permit-based market entry prevalent in much of Europe and—in less elegant fashion—the rest of the world. Even in the *Lochner* era, regulation of potentially contaminated foodstuffs was a recognized and protected part of the police power of the state.<sup>15</sup> The exceptional regulatory reach of the FDA is premised on the notion that market-based solutions, such as loss of reputation, are insufficient in the context of contaminants that carry the potential to do vast harm to the consuming population.<sup>16</sup> The FDA minimizes the potential harm of new pharmaceuticals by requiring manufacturers of drugs to conduct specific tests before the FDA will license them for sale, and by exposing these manufacturers to strict liability.<sup>17</sup> The FDA itself conducts extensive prerelease testing of drugs and monitors their health impact after they are authorized for sale. FDA regulations cover the waterfront of the pharmaceutical market, including preapproval testing, drug manufacturing, labeling, advertising, and postapproval monitoring for adverse drug reactions.<sup>18</sup>

The Hart-Scott-Rodino Antitrust Improvements Act of 1976<sup>19</sup> also provides an interesting partial exception to the general rule of ex post review, though milder than the ex ante review required to bring new drugs onto the market. Under this Act, certain parties are required to notify the Federal Trade Commission (FTC) before merging to ensure that no antitrust concerns are triggered by the merger.<sup>20</sup> If the merger

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15. See, e.g., *Lochner v. New York*, 198 U.S. 45, 57 (1905) (contemplating the validity of legislation designed to provide “[c]lean and wholesome bread,” though concluding that a maximum hours regulation does not do so).

16. See generally Richard A. Nagareda, *FDA Preemption: When Tort Law Meets the Administrative State*, 1 J. TORT L. (2006), <http://www.bepress.com/jtl/vol1/iss1/art4> (detailing FDA preemption of ex post remedies and rationales in the context of premarket approval).

17. See Kolstad et al., *supra* note 14, at 889.

18. Gregory C. Jackson, Comment, *Pharmaceutical Product Liability May Be Hazardous to Your Health: A No-Fault Alternative to Concurrent Regulation*, 42 AM. U. L. REV. 199, 210 (1992).

19. 15 U.S.C. § 18a (2000).

20. *Id.* § 18a(a)(2).

would create a certain level of economic concentration in the market,<sup>21</sup> the parties must notify the FTC and wait before closing the deal.<sup>22</sup> The presumption is that the potential market disruption resulting from such mergers requires the unusual step of ex ante review. But even here, the regulations require only a waiting period; if the FTC does not respond after a certain period of time, the parties may proceed.

At the other end of the spectrum, we find the SEC, an agency that compels standard forms of disclosure and general corporate organization, but does little to regulate actual business transactions in the highly fluid and volatile securities market.<sup>23</sup> Issuing an offering, or engaging in other forms of securities transactions, is completely unlike bringing a new drug onto the market. There are no laborious testing processes for securities, and there is no federal licensing required before they may issue. Rather, the only question is whether the SEC's reliance on ex post enforcement has justified the charge that it lacks "meaningful, orderly, and fair regulatory processes."<sup>24</sup> The SEC takes advantage of its ability to regulate conduct ex post out of a concern that promulgating specific regulations may result in underinclusive standards that are "susceptible of easy evasion."<sup>25</sup> Because of the technical issues and rapidly changing substantive context, there are significant administrative benefits to the SEC's approach,<sup>26</sup> including the ability to enlist the private bar as a key participant in enforcing laws against securities fraud.<sup>27</sup> Former SEC Commissioner Harvey Goldschmid emphasized this point: "Private enforcement is a necessary supplement to the work that the [SEC] does. It is also a safety valve against the potential capture of the agency by industry."<sup>28</sup>

The ex post regulatory model is premised on the idea that parties should be able to internalize the risk of liability—perhaps even for

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21. *Id.*

22. *Id.* § 18a(d)–(e).

23. See KENNETH B. WINER & SAMUEL J. WINER, *SECURITIES ENFORCEMENT: COUNSELING AND DEFENSE* § 4.01 (2d ed. 2005) (noting that recent years have seen only a few hundred investigations annually, and those few that are done tend to be focused on "financial fraud and accounting," "insider trading," "offerings," and "regulated entities (e.g., broker-dealers, investment advisors)"—in other words, ex post enforcement of disclosure, fraud, and conflict of interest laws).

24. Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 *YALE J. ON REG.* 149, 156 (1990).

25. *Id.*

26. *Id.*

27. *Id.* at 182.

28. Stephen Labaton, *Businesses Seek New Protection on Legal Front*, *N.Y. TIMES*, Oct. 29, 2006, at A1.

punitive damages—and regulate themselves accordingly. The extensive literature on the deterrent function of ex post remedies need not be discussed here.<sup>29</sup> The simple point is that ex post remedies require two forms of access: access to the relevant information to establish liability after the fact, and access to an effective enforcement tribunal. Whereas ex ante government regulation sets standards for regulated economic actors to meet, ex post regulation uses the threat of liability to force an internalization of potential damage payments and allows parties to calibrate their anticipatory remedial measures.<sup>30</sup> The key is that *both* ex ante and ex post review are essential parts of the regulatory model—sometimes operating in tandem, sometimes as substitutes. As Professor Susan Rose-Ackerman explains, relative to after-the-fact enforcement methods, anticipatory statutory regulation utilizes government officials “to decide individual cases instead of judges and juries; resolves some generic issues in rulemakings not linked to individual cases; uses nonjudicialized procedures to evaluate technocratic information; affects behavior ex ante without waiting for harm to occur, and minimizes the inconsistent and unequal coverage arising from individual adjudication.”<sup>31</sup> Most countries use some mix of ex post and ex ante regulation to control undesirable market conduct. What is *not* found in developed countries is a complete absence of regulation—a system with neither ex ante entry barriers nor means of enforcing ex post accountability.

### III. PRIVATE ENFORCEMENT IN THE EX POST WORLD

The SEC provides a perfect example of how enforcement is accomplished even in deregulated markets. Enforcement, if needed, will occur only after allegations of wrongdoing surface. Further, there is no assumption that the SEC itself will be the primary enforcement agent. A recent study by Professor Howell Jackson finds that in the two-year period from 2000 to 2002, private class actions were responsible for twice the recovery for victims of alleged securities fraud as actions

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29. For foundational works on deterrence in the law, see generally JEREMY BENTHAM, *Rationale of Punishment*, in 1 THE WORKS OF JEREMY BENTHAM 388 (John Bowring ed., Simpkin, Marshall & Co., London 1843) (1830); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (6th ed. 2003); *Encyclopedia of Law and Economics* (Boudewijn Bouckaert & Gerrit De Geest eds., 2000), <http://encyclo.findlaw.com>.

30. W. Kip Viscusi, *Toward a Diminished Role for Tort Liability: Social Insurance, Government Regulation, and Contemporary Risks to Health and Safety*, 6 YALE J. ON REG. 65, 82 (1989).

31. Susan Rose-Ackerman, *Regulation and the Law of Torts*, 81 AM. ECON. REV. 54, 54 (1991).

brought by the SEC and the Department of Justice.<sup>32</sup> There is little dispute about the centrality of private actions in enforcing the complex web of securities law. Indeed, the most sophisticated critical assessments of securities laws turn not on the lack of public enforcement, but on the insufficiency of private enforcement to deter misconduct as a result of complicated incentive structures that make it easier to collect from the firm itself or its insurers than it is to collect from corporate malefactors.<sup>33</sup>

Private enforcement is not a necessary feature of a system of ex post review. One could easily imagine a system of liberalized market entry that is followed by stringent public enforcement of norms of accountability. Under such a system, the SEC could be the exclusive enforcement agency and private rights of action could be eliminated. We reserve the enforcement of the criminal code to public agencies and there is no theoretical reason why the enforcement of civil law—particularly in regulated walks of life—could not also be reserved to public agencies. But this would require public agencies to assume markedly different functions than they now have. It is almost inconceivable that the SEC, with its allocation of less than a billion dollars a year,<sup>34</sup> would be able to perform its current functions *and* serve as an investigator and prosecutor of securities fraud.

Whatever the potential merits of restricting enforcement to public entities, what is clear is that this is decidedly not the system that we have. But beyond the positive account of what we have, there are strong arguments that can be made for decentralized enforcement in which government does not stake out the entire enforcement terrain, either *ex ante* or *ex post*. Professor Richard Stewart captured the role of a privately initiated claim for redress: “It frees individuals from total dependence on collective bureaucratic remedies and gives them a personal role and stake in the administration of justice. It provides a back-up guarantee of redress. In a society such as ours, these are important virtues.”<sup>35</sup> Thus, although it is possible to imagine a better funded public enforcement agency that assumes complete *ex post* enforcement authority, it may be that private enforcement is the method

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32. Howell E. Jackson, *Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications* 27 (Harv. Univ. Olin Ctr. for Law, Econ. & Bus. Discussion Paper No. 521, 2005), available at <http://ssrn.com/abstract=839250>.

33. See generally John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534 (2006).

34. SEC, FISCAL 2006: CONGRESSIONAL BUDGET REQUEST (2005), available at <http://www.sec.gov/about/secfy06budgetreq.pdf>.

35. Richard B. Stewart, *Crisis in Tort Law?: The Institutional Perspective*, 54 U. CHI. L. REV. 184, 198 (1987).



best suited for after-the-fact regulation. Professor Richard Marcus also makes the point that private enforcement—not to be confused with the absence of regulation—is a natural outgrowth of a certain kind of regulatory regime:

[T]he American tendency to litigate about topics that are handled without litigation in other societies is not pathological, but rather a logical consequence of the American method of providing activist government without a centralized bureaucracy. On the positive side, it can provide remarkable protections on the initiative of a few, including the dispossessed; those who champion the remedial potential of adversary legalism are right.<sup>36</sup>

Even at the purely descriptive level, private enforcement is so central to our system of ex post accountability that the idea that a sufficient level of state or federal regulation could effectively displace private litigation is almost inconceivable. Thus, it reads as some combination of puffery and the bizarre to have the little-known United States Consumer Product Safety Commission proclaim its leading role in ensuring product safety in this country:

The U.S. Consumer Product Safety Commission is charged with protecting the public from unreasonable risks of serious injury or death from more than 15,000 types of consumer products under the agency's jurisdiction. Deaths, injuries and property damage from consumer product incidents cost the nation more than \$700 billion annually. . . . The CPSC's work to ensure the safety of consumer products—such as toys, cribs, power tools, cigarette lighters, and household chemicals—contributed significantly to the 30 percent decline in the rate of deaths and injuries associated with consumer products over the past 30 years.<sup>37</sup>

Such claims from a relatively obscure federal agency would likely come as a shock not only to the affected industries, who clamor ceaselessly for tort reform and not for freedom from regulatory overreaching, but to any foreign observer asked about the distinctive features of American products liability law.<sup>38</sup>

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36. Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901, 907 (2002).

37. Consumer Product Safety Commission, CPSC Overview, <http://www.cpsc.gov/about/about.html> (last visited Jan. 2, 2007); see also Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007) (describing the growing efforts of regulatory agencies to proclaim preemptive authority through the use of such statements in regulatory preambles that are not even subject to the notice-and-comment requirements of the Administrative Procedure Act). My thanks to Cathy Sharkey for pointing out this seemingly exaggerated claim by an unheralded agency.

38. Invariably, the perception is that in the United States “the creation of standards is still largely a private procedure.” Geraint G. Howells, *The Relationship Between Product Liability and Product Safety—Understanding a Necessary Element in European Product Liability Through a Comparison with the U.S. Position*, 39 WASHBURN L.J. 305, 308 (2000).

In previous work, I have suggested why, in the context of consumer claims, exclusive reliance on ex post governmental enforcement actions is undesirable.<sup>39</sup> The same argument can be extended to broad swaths of our legal system, whether in the securities markets, consumer protection, or products liability. Across these domains, governmental enforcement actions are typically hampered by a lack of resources, a confined jurisdictional authority that may not correspond to the sweep of market-wide harms, a lack of access to local sources of information about perceived harms, the distance of governmental centers from where harms occur, and the political dependence or the risk of political capture of government regulators by politically savvy regulated entities. The basic argument is that decentralized enforcement combining public vigilance with the eagerness of entrepreneurially motivated private actors best protects the public interest.

The arguments in favor of decentralized, ex post regulation tie into a highly contested account of the superiority of the common law to the more rigid code-based civil law in permitting the flexibility that liberal market societies require. The chief advocate on this side of the debate is Friedrich Hayek, who famously argued that “the ideal of individual liberty seems to have flourished chiefly among people where, at least for long periods, judge-made law predominated.”<sup>40</sup> For Hayek, who believed that individual liberty was the best engine of economic growth, this meant that there was a strong link between a common-law court system and the absence of onerous overregulation, an absence that would help the marketplace flourish. Professor Paul Mahoney summarized Hayek’s comparative claim as follows:

[T]he English legal tradition (the common law) is superior to the French (the civil law), not because of substantive differences in legal rules, but because of differing assumptions about the roles of the individual and the state. In general, Hayek believed that the common law was associated with fewer government restrictions on economic and other liberties.<sup>41</sup>

In testing Hayek’s claim on a sample of 102 countries over a thirty-two-year period, Mahoney concluded that “the common-law countries grew, on average, 0.71 percent per year faster than the civil-law countries.”<sup>42</sup> In common-law countries, “[j]udges are invested with greater prestige and insulated more from political influence,” which results in

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39. Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 TEX. INT’L L.J. 135 (1999).

40. F.A. HAYEK, 1 LAW, LEGISLATION AND LIBERTY: RULES AND ORDER 94 (1973).

41. Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503, 504 (2001).

42. *Id.* at 514–16.

“stricter protection for property and contract rights against government action.”<sup>43</sup>

I am less interested in making a normative claim for why private enforcement is important than the simple positive claim that it is. Not only is *ex ante* regulation by the FDA a decided outlier in American regulatory practice, but even primary reliance on governmental actors is exceptional outside the criminal context. In fact, many laws which appear to be *ex ante* regulations are in fact designed only to ensure *ex post* accountability, as with licensing rules that focus heavily on bonding. One quaint example is New York’s milk control laws, which require that milk dealers pay monthly funds into a bond so that subsequent claims by milk producers may be guaranteed as payable.<sup>44</sup> If the milk commissioner believes a milk dealer is at fault, the commissioner “may authorize the comptroller to pay any such producer up to seventy-five percent of such estimate”<sup>45</sup> from the milk dealer’s bond.

Ensuring *ex post* accountability through *ex ante* regulation is not limited to dairy disputes. California requires anyone “who has charge of, handles or has access to any state property to file an official bond” so that accountability is secured in the event of damage to state property.<sup>46</sup> Additionally, vendors who contract with the California government to provide health equipment are subject to a bonding requirement that ensures accountability should the equipment prove faulty or should they not deliver in good faith.<sup>47</sup> All of these regulations, which operate *ex ante* only in a formalist sense, are in practice nothing more than minimal entry barriers that ensure *ex post* accountability if harms occur.

#### IV. THE THREATENED RULE OF LAW

In conversations with representatives of large multinational firms, it is commonplace to hear complaints about the excesses of the American legal system. Their complaints invariably focus on the high costs of litigation in the United States. Large international companies claim that, despite operating around the world, their ventures in the United States routinely command more than half of their annual litigation budget. These concerns are undoubtedly real; they resonate with a central vulnerability of a system in which the power of enforcement is

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43. *Id.* at 523.

44. N.Y. AGRIC. & MKTS. LAW § 258-b(3)-(6) (McKinney 2004).

45. *Id.* § 258-b(5). A basically identical requirement can be found in California. CAL. FOOD & AGRIC. CODE § 61408 (West 1997).

46. CAL. GOV'T CODE § 14625 (West 1992).

47. CAL. WELF. & INST. CODE § 14100.75 (West 2001).

largely turned over to self-interested actors. Moreover, the claims of excess correspond to the general chorus assailing the cost of the tort system in the United States. One need look no further than the weblogs of *Overlawyered.com* to hear stories of the abuses carried out in the name of law—some apocryphal, but some unfortunately all too real.<sup>48</sup>

Flip the inquiry, however, and another picture emerges. Ask about the ease of bringing a product to market, or of engaging in a complex financial transaction, and it is as if we were discussing a different world. Now, all of a sudden, the talk is of bureaucratic delay, corruption, and the high cost of regulatory compliance abroad. The United States then emerges not as a vexatious and difficult place to do business, but as a robust economy generating both opportunity and wealth.

Both of these pictures are accurate. They are misleading only when viewed in isolation from each other. *Ex post* accountability is the prerequisite for *ex ante* liberalization. Without *ex post* mechanisms, the American experiment in deregulation becomes a free-wheeling descent into nonregulation. In some markets, particularly those that are close-knit and have a great deal of repeat play among the participants, reputation and other informal mechanisms may be sufficient to police improper conduct. But in our increasingly global economy, with buyers and sellers interchangeable and unknown to each other, it is unlikely that a developed market society would simply abandon any form of oversight of the marketplace.

This brings me to my concern about the future of the rule of law in America. The country is awash in efforts to restrict the mechanisms of *ex post* accountability. Although generically falling under the rubric of “tort reform,” many of the proposed alterations of the American legal system are simply efforts to eliminate wholesale the availability of redress for harms suffered in the marketplace. Sometimes these reforms take the shape of prohibitions on getting to court at all, as with some compelled arbitration rules that effectively foreclose any prospect of enforcing legal rights.<sup>49</sup> Other times, the proposed reforms change the jurisdictional rules of courts or create caps

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48. *Overlawyered.com*, [http://www.overlawyered.com/2002/12/about\\_this\\_site.html](http://www.overlawyered.com/2002/12/about_this_site.html) (last visited Jan. 2, 2007) (“*Overlawyered.com* explores an American legal system that too often turns litigation into a weapon against guilty and innocent alike, erodes individual responsibility, rewards sharp practice, enriches its participants at the public’s expense, and resists even modest efforts at reform and accountability.”).

49. I have elsewhere addressed the particular use of compelled *individual* arbitration as a means of preventing cardholder class actions in the credit card context. Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157 (2006).

on remedies. Indeed, many of these may be necessary correctives to real defects in our legal system.

Sophisticated critiques of ex post regulation are by no means left to the realm of overheated claims for tort reform. The same pathologies that infect ex ante regulation<sup>50</sup> can consume ex post regulation as well, as when awards are unpredictable or when rival sets of tort standards between different states impede rational economic planning. All regulatory systems have their vulnerabilities, and a weak point of ex post accountability is the uncertainty that may accompany the existence of multiple agents of enforcement. As with current debates over the scope of FDA preemption of state common-law claims,<sup>51</sup> the question is whether the aims of regulation are better served by centralized ex ante regulation or ex post common-law claims.

Nonetheless, it must be stressed that this is not the current tort reform agenda. The trend does not repair so much as it assaults the civil justice system. The list starts to look like an institutional anti-accountability hit parade. Recent federal legislation, both proposed and enacted, presents a telling array, with examples such as the Class Action Fairness Act of 2005,<sup>52</sup> the Private Securities Litigation Reform Act of 1995,<sup>53</sup> the Attorneys' Anti-enrichment Act of 1998,<sup>54</sup> the Loser Pays Act,<sup>55</sup> the Frivolous Lawsuit Reduction Act,<sup>56</sup> the Common Sense Medical Malpractice Reform Act of 2001,<sup>57</sup> and the Medical Malpractice and Insurance Reform Act of 2005.<sup>58</sup> Similar tort reform proposals not only crowd state legislative dockets, but have become a mainstay of the ballot initiative process.<sup>59</sup>

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50. Among the most well-known criticisms of the ex ante regulatory regime is John Morrall's assessment of the cost-benefit ratio for various regulations, claiming that some cost over \$72 billion per individual life saved. This chart appears in many works. See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 24-27 (1993). Some works provide critical accounts. See Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 *YALE L.J.* 1981 (1998) (criticizing the Morrall table and responding to the substantive claims of regulatory cost); Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 *COLUM. L. REV.* 941 (1999).

51. For a discussion of the role of preemption in mediating between ex ante federal regulatory authority and ex post state tort accountability, see Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 *UCLA L. REV.* 1353, 1356-57 (2006).

52. Pub. L. No. 109-2, 119 Stat. 4 (2005).

53. Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.).

54. H.R. 3907, 105th Cong. (2d Sess. 1998).

55. H.R. 2880, 103d Cong. (1st Sess. 1993).

56. H.R. 2393, 109th Cong. (1st Sess. 2005).

57. S. 1370, 107th Cong. (1st Sess. 2001).

58. H.R. 3359, 109th Cong. (1st Sess. 2005).

59. See National Conference of State Legislatures, *Medical Malpractice/Tort Reform Measures on the 2004 Ballot* (Nov. 17, 2004), <http://www.ncsl.org/programs/legman/statevote/tortreform-mea.htm>.

## V. CONCLUSION

An effective civil justice system is essential to the rule of law in this country. It works imperfectly, spasmodically, and at times with maddening imprecision. It is fueled by self-interest and driven by lawyers eager to stake claims to financial rewards. There are significant variations in those cases that do go to trial—a small but highly salient group of cases.<sup>60</sup> There are mistakes made in trial processes, and judgments may vary significantly among similarly situated claimants. It is also costly to maintain. We as a society pay not only for the infrastructure of courthouses and judges and the time and expenses of juries, but we pay the high transactional costs associated with privately retained counsel in the adversarial system.

But we would be remiss in not recognizing what we get in exchange. Our clumsy and imperfect world of ex post accountability protects our citizens in a remarkably free economic environment, one whose growth and vitality sustains us well. The question is not whether we abandon our ex post legal system, but whether we would tolerate the push for ex ante regulation that would likely be its substitute.

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60. For a cautionary note on the romance of trial versus the more quotidian reality of settlement, see Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004).

