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Process Choice

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Regulation scholars have long searched for the best tools to use to achieve public policy goals, generating an extensive body of research on what has become known as instrument choice. By contrast, analysis of options for structuring how officials make regulatory decisions – process choice – remains in relative infancy. Notwithstanding the emphasis legal scholars and political economists have placed on administrative procedures, surprisingly little research has investigated why regulators choose among different process options or what value they and the public receive from different choices. In their book, *Regulation by Litigation*, Andrew Morriss, Bruce Yandle, and Andrew Dorchak make a significant contribution by empirically and normatively examining regulators' choices between notice-and-comment rulemaking, negotiated rulemaking, and what they call “regulation by litigation.” This review considers three central questions about regulation by litigation. First, how if at all does regulation by litigation differ from other uses of litigation to achieve policy goals? Second, why do regulators choose litigation over other process options? Third, is regulation by litigation as bad as Morriss, Yandle, and Dorchak say it is? By addressing these conceptual, empirical, and normative questions, this review not only reveals the specific strengths and limitations of the book, *Regulation by Litigation*, but it also highlights more general opportunities and challenges for future research on process choice.

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From its infancy, the study and practice of regulation has been dominated by a search for the best tool to fit the job of achieving specific policy objectives. Under the general banner of research on *instrument choice*, economists, legal scholars, and policy analysts have extensively debated the relative merits of what they have called command-and-control regulation when compared against various alternatives, such as market-based instruments, information disclosure, planning requirements, and taxes and subsidies, each viewed as a distinct means of achieving substantive goals and improving social welfare. The vast body of research on regulatory instrument choice contrasts with the relatively small amount of attention paid to the choices embedded in structuring the *process* of deciding what regulatory tool to use to address specific problems. This separate question -- what might be labeled *process choice* -- emerges from the recognition that regulatory tools can be selected through a variety of different processes involving decision makers across several distinct branches of government. The decision makers who select regulatory tools can be legislators, regulatory agency officials, or even sometimes judges, and they can go about making their decisions by using different means of engaging with the organizations and individuals affected by their decisions.

Admittedly, administrative law scholars have long recognized and written about various procedures to use in making new regulations, and in recent decades political economy scholars have shown how administrative procedures can be used by legislators,

presidents, and judges to impose oversight and control on the unelected regulatory officials that run the agencies making up what is sometimes called a “fourth” branch of government. Yet for different reasons, in neither research tradition – administrative law or political economy – have scholars asked the type of empirical and normative questions that, with different purposes, dominate the literature on instrument choice.

Administrative law scholars have tended to assess procedures against various rule-of-law values, such as consent, accountability, and transparency, but generally have not analyzed empirically why regulatory officials choose to adopt one procedure versus another when they are confronted with more than one procedural option. Political economy scholars have focused on procedures as mechanisms for solving government-level principal-agent problems, namely, those arising from the risk that delegating regulatory authority from the legislature to unelected bureaucrats will undermine democratic accountability. They have focused much less on explaining the strategic choices those bureaucrats confront about how to structure their own decision making.

In their book, *Regulation by Litigation*, Andrew Morriss, Bruce Yandle, and Andrew Dorchak (“MYD”) provide a welcome and helpful focus on precisely such process choices that regulators find themselves confronting. MYD introduce a process they call “regulation by litigation” and, after comparing this process with both traditional and negotiated rulemaking, they proceed to raise both empirical and normative questions about regulating through litigation. Their main empirical question is explanatory. Recognizing that policy decision makers, particularly those who work in administrative agencies, face different process options, what explains why they sometimes choose litigation as a lever to achieve policy objectives? MYD’s answer follows a reasonable

public choice framework whereby individual decision makers act on the basis of the cost and benefits that they face, both in terms of their own personal preferences but also from the kind of rewards and sanctions that they face in their political environment. MYD's normative question is, straightforwardly, whether having regulators choose the option of regulation by litigation is a good thing. MYD's negative answer to this second question is not unrelated to their views about the answer to the first question. They see unelected regulators using regulation by litigation as a strategic option to lower their costs of regulating, namely by allowing them to escape public scrutiny, without yielding any comparable public benefits in return. Indeed, MYD argue that "[f]rom the public's perspective, there are no benefits to [regulation by litigation]...and there are substantial costs" (50-51).

Regulation by Litigation's thesis is clear and provocative. Although not all readers will agree entirely with its conclusions, *Regulation by Litigation* nevertheless makes an important contribution by laying down key questions for future empirical research on process choice as well as for future normative evaluations of alternative regulatory procedures. The book also provides the first in-depth account of the process choices faced by the U.S. Environmental Protection Agency (EPA) in regulating nitrogen oxide (NOx) pollution from diesel trucks.

In this review essay, I consider three major questions raised by MYD's work. First, what exactly is the process that MYD call "regulation by litigation"? Second, why do regulators choose this process? Third, would an increase in regulation by litigation be a serious problem? In provoking each of these questions, *Regulation by Litigation* makes a signal achievement in illuminating avenues for the study of process choice.

What is Regulation by Litigation?

In order to investigate different process choices empirically and assess them normatively, it is essential first to understand exactly what each choice entails. At its most general level, the choice of regulation by litigation is one that, according to MYD, involves the use of “litigation and the courts to achieve and apply regulatory outcomes to entire industries” (p. 1). Regulation by litigation arises when lawyers use litigation to achieve “ends that could be and traditionally had been achieved by regulatory agencies using rulemaking procedures” (p. 1).

Of course, lawyers have long used litigation to achieve policy objectives. In the United States, the practice dates back at least to the early nineteenth century, when Alexis de Tocqueville observed that nearly all major political issues ultimately become ones for resolution in the courts. Over the last century, lawyers have used litigation to break-up ATT’s phone service monopoly (Coll 1986, Chen 1997) and desegregate public schools (Rosenberg 1991, Vose 1958), to establish regulatory protection for air quality (Melnick 1983) and give the disabled greater access to employment and public services (Katzman 1986, Olson 1984, Burke 2002). Nearly three decades ago, Donald Horowitz, in his classic book entitled *The Courts and Social Policy*, observed the “increasing subordination” of traditional adjudication to policy making, lamenting “the expansion of judicial responsibility more nearly to overlap the responsibilities of other governmental institutions” and the tendency of lawsuits to become “mere vehicles for an exposition of more general policy problems” (Horowitz 1977).

Is “regulation by litigation” just a new label for an old wine? According to MYD, regulation by litigation is different. It is actually a “new phenomenon,” a “new trend,”

even a “new form of regulation” (p. 1). They suggest it is on “the rise,” if not even “taking hold” (p. 2). What, then, distinguishes this supposedly new phenomenon from the longstanding use of litigation to affect public policy? Regulation by litigation, MYD tell us, requires more than just litigation, even litigation with larger policy ambitions. More is needed than just an enforcement or liability suit alleging “a violation of an existing statute, regulation, or common-law rule” (p.47). Litigation must be used as the vehicle to apply new, binding rules on an entire industry, much like a regulatory agency would do through the rulemaking process.

MYD specify three criteria for distinguishing regulation by litigation from other uses of litigation:

1. Forward-looking relief. The litigation needs to be used to seek prospective relief. MYD state that the plaintiff must persuade or coerce “the regulated entity to agree to the imposition of regulatory provisions that serve as substantive constraints on the defendants’ behavior in the future, not simply the payment of fines for past behavior” (p. 48). Presumably *any* litigation seeking injunctive relief or obtaining behavioral concessions as part of a settlement would meet this criterion, so by itself the forward-looking criterion is not enough to distinguish regulation by litigation from other policy-oriented litigation.
2. Large portion of an industry. Regulation by litigation also requires the use of litigation to shape the behavior of private sector institutions – particularly, business firms. But it must do more than target a single firm. Instead, it “must impose requirements on enough of the regulated industry to be an

effective substitute for a generally applicable rule” (p. 48). Of course, thanks to the common law’s system of stare decisis, a precedent established in litigation against a single firm may well typically induce behavioral changes by a large portion of the same industry. When McDonald’s is successfully sued over its hot coffee, other restaurants may learn of the jury verdict and reduce the temperature of their coffee too. But MYD apparently would view such changes by other restaurants as “voluntary,” preferring instead to treat as regulation by litigation only those cases that “*mandate* prospective changes to an entire industry,” presumably by having most members of the industry as named defendants in the litigation (p. 2, emphasis added).

3. Out-of-Court Settlement. Although apparently not a strict definitional necessity, the settlement of claims out of court seems part and parcel of MYD’s conception of regulation by litigation. Regulation by litigation “is more likely when the result is a series of settlements than when a court conclusively interprets a statute or rule” (p. 49). The reason is that regulation by litigation, especially when used by an administrative agency, occurs when the “agency ... exceed[s] the unambiguous authority it has under its organic statute” (p. 49). Regulation by litigation also restricts public participation, as settlement negotiations take place in the secret confines of litigation between a limited number of parties – not in a setting open to all affected parties. As such, MYD worry that “regulators’ factual assumptions and policy decisions receive much less scrutiny in a settlement than they do in rulemaking and negotiation” (p. 49).

Although forward-looking relief obtained through settlement that is binding on a large portion of an industry appears to constitute the definitional core of regulation by litigation, MYD further indicate that, to their minds, “the most important features of regulation-by-litigation are:”

- “lack of public participation,”
- “elimination of political competition and...oversight,”
- “reduced opportunities for challenges to the agency’s views,”
- “piecemeal nature of the regulatory outcome, with settlements binding only on individual parties and not the public generally,” and
- “litigation with sufficient coverage of the regulatory industry to serve as a substitute for generally applicable rules” (p. 49).

Obviously there is some overlap between these features and the three main criteria. And of course, again, at least some of these features apply equally to the old uses of litigation to achieve policy objectives. For example, the public really does not participate in *any* litigation, and binding decisions by judges eliminate political competition and oversight whether in the supposedly new regulation by litigation or the older, more traditional policymaking litigation.

If MYD’s definition does not fully clarify how regulation by litigation differs from ordinary policy making litigation, perhaps concrete examples can make the difference clearer. Fortunately, a substantial part of *Regulation by Litigation* consists of three case studies that serve to illustrate what the authors mean by regulation by litigation. The three cases are: (1) private tort litigation filed against manufacturers of

asbestos and silica products; (2) lawsuits filed by state attorneys general against major cigarette companies; and (3) litigation brought by the EPA against manufacturers of heavy-duty diesel engines. In each of these cases, litigation resulted in forward-looking change across the respective industries, but unfortunately they do not appear, in the main, to be much different than other cases of policy litigation in the courts. Moreover, it is not even clear whether the asbestos case neatly fits MYD's own definitional criteria. The tobacco and diesel engine litigation resulted in major out-of-court settlements that, by their very terms, resulted in prospective standards of industry conduct, whereas the asbestos litigation involved adjudicated outcomes in some cases and settlements in others, without a single injunction or settlement that operated as a form of regulation. Despite the scope and impact of the asbestos litigation on the industry, the curtailment of asbestos production in the U.S. appears to have stemmed less from a forward-looking mandate contained as part of any litigation relief as from bankruptcies that the litigation drove. The asbestos litigation, MYD write, "became truly regulatory only when the volume of claims began to force otherwise healthy companies into bankruptcy" (p. 123; see also p. 109). It is also possible that, rather than serving as direct regulatory devices, these resulting bankruptcies may actually have provided more of a means for the asbestos industry to escape from under a cascade of tort claims, allowing them to continue to produce and sell asbestos products, if not in the United States then at least elsewhere in the world.

MYD might have made a clearer case for distinguishing the purportedly "new" regulation by litigation from the "old" policy litigation had they restricted regulation by litigation to lawsuits brought by regulatory agencies. Indeed, at a number of parts of the

book, MYD write as if that is actually what they have in mind, referring to an agency as the prototypical plaintiff involved in regulation by litigation. In framing the process choice that lies at the core of their book, for example, they write that regulation by litigation occurs when, “[r]ather than issue a proposed rule or invite affected parties to negotiate a rule, an agency (or a private actor) sues one or more regulated entities, charging them with violation of an existing statute, regulation, or common-law rule” (p. 47). The parenthetical – “or a private actor” – reads as if it had been inserted as an afterthought, for no private actor could bring litigation “rather than issue a proposed rule...or negotiate a rule.” The alternative of regulating by something other than litigation only exists for agencies like the EPA. Indeed, in most states, even attorneys general would not have the authority to issue proposed, substantive rules regulating an industry.

The case study of the EPA’s diesel engine emissions regulation -- and litigation -- seems to fit best with MYD’s definition of the core process choice they analyze. This case study is also probably the best candidate of the three in the book to support the claim that regulation by litigation is a “new phenomenon.” Simply because the modern U.S. regulatory state is much newer than the nation’s common law origins, the strategic use of litigation by regulatory agencies as an alternative to rulemaking is bound to be a newer phenomenon than the longstanding use of litigation to achieve public policy objectives. Furthermore, others have already extensively written detailed accounts of the asbestos litigation and the tobacco litigation (e.g., Viscusi 2002). What *is* new in MYD’s book is its exceptionally detailed account of the EPA’s heavy duty diesel regulation and, specifically, of the EPA’s deployment of a risky enforcement strategy to leverage change

in the industry without relying squarely on rulemaking. To be sure, others have written about agency use of litigation to achieve regulatory goals, as well as the imposition of additional requirements through the settlement of enforcement actions (Kagan 2001, Rossi 2001, Schmidt 2005), but MYD's case study of the EPA's diesel engine litigation is still well worth the price of MYD's book. That case study, if no other, reveals a regulation-by-litigation phenomenon that does indeed merit further analysis: namely, the practice of a regulatory agency choosing to take aggressive, and perhaps even long-shot, enforcement litigation against an industry or large segment thereof, seeking to settle with agreement on binding, forward-looking action, akin to what the agency would obtain by promulgating a new regulation.

Why Regulate by Litigation?

When regulation by litigation is understood as an alternative strategy for achieving regulatory goals – a process choice – the empirical question arises: Why do regulators choose this strategy? MYD set out to answer this question, seeking “to achieve an explanation of why, when, and how the episodes occurred” and “laying a theoretical foundation that will help explain [regulation by litigation] as an alternative regulatory phenomenon” (p. 3). They recognize they cannot fully test their explanation, given that they present (at most) only three case studies. But what helpfully emerges from the book is an interesting set of hypotheses or propositions that should, if nothing more, generate further productive empirical testing and theoretical development.

Those interesting empirical propositions, though, unfortunately only come at the very end of *Regulation by Litigation*. On the last two pages, MYD outline a strong set of plausible hypotheses about the conditions under which regulators might be expected to choose to regulate by litigation as opposed to engage in conventional rulemaking or even perhaps negotiated rulemaking. They claim that “regulation-by-litigation is possible...only under limited conditions” (p. 176). Specifically, three conditions must be met before regulators will choose to regulate by litigation. First, the targeted industry must have only a small number of firms, so that the defendants in litigation will be a concentrated group. Second, the regulator needs to be able to wield a large legal hammer in order to extract a settlement. Finally, the settlement has to protect the defendants from new entrants who would ordinarily not be subject to the constraints imposed in the settlement.

These three conditions strike me as suggesting plausible factors that could help explain regulators’ decisions to use of regulation by litigation. Yet on the basis of just a small number of case studies, it is always hard to reach general conclusions, especially those claiming that specific conditions are *necessary* ones. As MYD acknowledge, neither they nor the general research community are “at a point where we can randomly draw a sample of such cases and test our theories” (p. 3). As this stage, richly detailed case studies, such as MYD’s chapter on EPA’s diesel emissions regulation, can serve a helpful role in the larger enterprise of advancing knowledge and anyone interested in domestic environmental rulemaking in the U.S. should certainly read at least that particular chapter of *Regulation by Litigation*. In terms of actually explaining what triggers regulation by litigation, though, *Regulation by Litigation*’s lasting contribution

may simply be to have others later test, refine, and respond to their three-factor theory. If MYD's book motivates additional research on regulatory process choice, I would view this in itself as a meaningful contribution.

But we do not need to await future research to say one thing about the strong empirical claims MYD put forward. The three conditions they postulate cannot be *necessary* conditions, as MYD claim. If each of the three cases they present should be properly characterized as regulation by litigation, one of these cases – the asbestos litigation – actually disproves MYD's claim that “the defendants *must be* a concentrated group” (p. 176, emphasis added). Although MYD at one point claim the asbestos suppliers constituted a “small group” (p. 177), they also report earlier in their book that the asbestos litigation involved 8,400 defendants (p. 164)! Perhaps this inconsistency is just another reason to treat the asbestos tort litigation as something other than “regulation by litigation.” Or perhaps MYD should simply temper their empirical claims. Their three conditions may make regulation by litigation *more likely* to occur, but it strikes me as implausible – and certainly unsupportable at present – that these conditions “must” be met for regulation by litigation even to be “possible” (pp. 176-177).

MYD do pay appropriate homage to the limitations of their empirical work, noting that they “lack sufficient data points for any sort of formal statistical analysis” (p. 92). But at other parts of the book they seem insufficiently attentive to even more fundamental limitations. For example, in one telling passage, MYD acknowledge that their interview respondents at EPA “elicited numerous hypotheses about the rationales for the EPA's behavior” in using litigation to regulate diesel engine emissions (p. 77), such as:

- “career advancement strategies for particular individuals at EPA,”
- “political pressure related to Vice President Al Gore’s campaign for president,”
- “rivalries between the air and enforcement offices,”
- “a lack of internal communication,” and
- “outrage by litigators and top policymakers at having failed to secure compliance by the engine manufacturers with the ‘spirit’ of their regulations” (p. 77).

MYD recognize that each of these factors may have contributed to EPA’s decision to litigate, but they quickly sweep them aside by asserting that “we think that the most convincing explanation is ... one that takes into account the institutional framework and the incentives facing the agency” (p. 78). They argue that EPA found itself under pressure to reduce NOx emissions quickly but could neither afford to take the time demanded by rulemaking, which would have also necessitated giving manufacturers sufficient lead time, nor invest the staff time in negotiated rulemaking, which probably would have failed to yield consensus anyway. Quite possibly they are right. They do elaborate the plausibility of their preferred explanation – but they never really show why their explanation is better than the others. Of course, MYD really cannot show that their explanation is better than the five alternative suggested by their interview respondents. There is no way to use a single case – or even three case studies – to show why one of six explanatory accounts is the best. This is a classic case of inferential over-determination. At a minimum, however, MYD could have done much more to provide reasons not

merely for why they found their explanation plausible but also for what exactly they found lacking in the alternative hypotheses suggested by their respondents.

It is hard to disagree with the key public choice premise underlying MYD's explanatory account – namely that regulators “will act, or not, depending on the costs and benefits of their actions for themselves” (p. 34). However, the well-known potential for such a theoretical approach to become tautological provides still further reason to read *Regulation by Litigation*'s explanatory claims much more tentatively than MYD sometimes make them seem. What counts as a *cost* and as a *benefit* needs to be carefully defined and separated from the behavior to be explained. Yet despite *Regulation by Litigation*'s engagingly thick description, the book actually provides relatively little independent evidence of regulators' costs and benefits beyond the very behavior these costs and benefits are supposed to explain. Unfortunately, one cannot conclude that regulation by litigation, or any process, arises due to regulators' interests by using the regulators' own process choice as the principal evidence of those interests.

Is Regulation by Litigation a Good Thing?

MYD's answer to the normative question about regulation by litigation comes through clearly from the earliest pages of their book. They argue that, from the standpoint of overall social welfare, “there are no benefits to regulation by litigation...and there are substantial costs” (pp. 50-51). According to MYD, regulation by litigation's shortcomings generally stem from its lack of openness. They claim that regulation by litigation's insularity limits rather than expands the information base

available for regulatory decision making. They also argue that regulation by litigation cannot readily offer a comprehensive solution for many regulatory problems because it only targets those firms and organizations that are named as defendants in litigation.

These seem like plausible and important worries about regulation by litigation. Yet the very kind of tunnel vision and lack of information MYD attribute to regulation by litigation can certainly afflict ordinary rulemaking too (Breyer 1995), a point they do recognize (p. 12). As MYD also acknowledge, the proper normative test of regulation by litigation involves assessing its “relative effectiveness” against other probable alternatives (p. 22) – not just determining whether it meets, in some absolute sense, an ideal test.

Precisely for this reason, MYD would have done well to show that regulation by litigation performed *relatively* poorly by *explicitly* comparing its outcomes with those of other processes in comparable regulatory contexts. Consider, in this regard, the EPA’s diesel engine emissions case. MYD tell us that EPA faced a choice: lower NO_x emissions by targeting mobile sources (like diesels) or go after stationary sources (like power plants) through the Clean Air Act’s normal regulatory process. But MYD then proceed mainly to tell us just how costly and unproductive it was for EPA to target the diesel engines. Notwithstanding the high compliance costs resulting from EPA’s regulation by litigation, the benefits of EPA’s approach turned out to be lower than expected because of what MYD call the pre-buy phenomenon – namely, customers stocking up on old engines in the face of future regulatory strictures. As a result, MYD suggest, air quality may have actually worsened following EPA’s actions. Their argument that the diesel engine strategy proved ineffectual, if not counterproductive,

seems convincing; however, it also seems possible that targeting stationary sources would have been even more costly and less beneficial. Even if diesel engine regulation resulted in negative net benefits, we need to know whether these negative net benefits would have been smaller in absolute value than the negative net benefits that would have resulted from stationary sources. Of course, in both instances the net benefits would be negative, meaning it would have been better for EPA to have done nothing rather than to regulate either mobile or stationary sources. However, if EPA had been legally required to take some action due statutory language in the Clean Air Act, then choosing the least bad option is clearly the better choice – and perhaps that is exactly what the EPA did in the diesel engines case. The more general lesson is that in those instances where an agency is required to regulate even when the net benefits of doing so will be negative, regulation by litigation could well be a good thing if it allows the agency to get around an absurd statutory command and find a solution that yields at least *less* bad outcomes than otherwise would result.

MYD also question the fundamental fairness of regulation by litigation. They argue that “[t]he more serious cost of the diesel regulation by litigation relates to the integrity of the regulatory process itself” (p. 91). They claim that among regulation by litigation’s many problems, the most important “is the relative lack of due process afforded when litigation supplants traditional notice-and-comment rulemaking, which allows for participation by all interested parties” (p. 2). I am certainly sympathetic to questions about the fundamental fairness and democratic robustness of any regulatory procedure; however, MYD’s normative “due process” argument suffers from several weaknesses.

First, any normative argument against regulation by litigation that relies on its lack of public participation is circular. MYD say that “[a]n important cost is that regulations imposed through litigation do not provide for public participation” (p. 51). Although I think they actually mean to say that such regulations do not emerge from a *process* that has provided or allowed for public participation, the main problem with MYD’s normative argument is that a lack of public participation is one of their central if not defining features of regulation by litigation. Given MYD’s definition, saying that the lack of participation is a cost of regulation by litigation is simply saying that rules created through a process without public participation (that is, regulation by litigation) are created without public participation. In other words, the problem with regulation by litigation is that it is, well, regulation by litigation.

Second, although MYD explain that a lack of public participation can limit the amount of useful information that comes before the decision maker, they fail to consider whether regulation by litigation may provide offsetting informational advantages. At least in theory, regulation by litigation might generate information due to courts’ subpoena authority. In rulemaking, the kind of information submitted voluntarily by industry participants in their comments is presumably self-serving information – not necessarily false, but almost certainly selective in a manner that best advances firms’ interests (Coglianese 2007). Compared with the potentially biased information that comes in over the transom, the ability of an agency, with a court’s blessing, to compel a business to turn over requested information may well prove more successful in terms of information generation. Not all agencies have their own subpoena authority, so regulation

by litigation could be a very good strategy in some cases where an agency suspects industry has information that the agency has been unable to obtain through other means.

Finally, MYD's claim that the lack of public participation in litigation makes the process less legitimate needs to be supported with a clearer account of legitimacy.

Legitimacy can be understood in both an ideal sense – that is, what truly makes a process legitimate from the standpoint of an omniscient observer – as well as in a public opinion sense – that is, whether members of the public themselves actually think regulations developed through litigation are less legitimate. It is not clear whether MYD are making an ideal moral assessment of regulation-by-litigation's legitimacy, or whether they are worried about what the public will think about it and how much support the public will give to outcomes achieved through this process. If their concern is the latter type, it bears noting that courts and the legal system do cast their own patina of legitimacy in the public's mind – simply as an empirical matter. If their concern is of the former kind, MYD fail to offer a convincing argument with sufficient normative bite. This is not to say that such an argument does not exist or could not be made; rather, it is only to say that MYD fail to deliver such a philosophical argument. At times, MYD seem to suggest that regulation by litigation is illegitimate simply because it does not follow the steps the law normally requires for agency rulemaking, such as notice and public comment. But if legitimacy is defined as what the law permits, it seems evident that the law provides for exactly the types of tort and enforcement actions that MYD write about in *Regulation by Litigation* -- as well as the settlement of these cases with agreements by defendants to undertake any variety of actions, even ones that they would not otherwise be obligated to undertake.

Nothing MYD describe is *per se* illegal, even if MYD or others might think it should be. It may not be unreasonable to quarrel, as MYD do, with the legal theories plaintiffs advance in some cases; however, this is often true with litigation.

Disagreement with a legal argument seems hardly sufficient to make the general approach of regulation by litigation illegitimate. Of course, if regulation by litigation were conceived as encompassing only those cases where plaintiffs bring questionable legal cases, then perhaps one can make a general claim that this process is illegitimate – but in that case, the basis would again be circular or tautological.

Furthermore, some readers may wonder about how far MYD's normative critique of regulation by litigation extends. Does it extend to any instance in which the government alters the incentives of private sector actors to get them to do something that is costly and that those actors would not do on their own? In recent decades, regulatory agencies like the EPA have created voluntary programs in an effort to provide positive rewards and encourage industry to go beyond compliance, achieving gains in environmental performance beyond what regulations would otherwise require. For many observers, such a voluntary approach to the attainment of regulatory goals is laudable. If businesses can regulate themselves, they presumably will be more likely to do so in a sensible, less costly, and perhaps even more effective way than the government might command through ordinary regulation. And yet, the legitimacy critique MYD offer of regulation by litigation would seem to apply presumptively with equal force against these voluntary programs as well, because the agency is trying to get firms to take action in a way that goes outside the normal notice and comment process.

The connection between MYD's concerns in *Regulation by Litigation* and voluntary approaches to environmental problems is not as remote as one might think, especially considering that sometimes businesses' voluntary efforts are prompted precisely by the threat of litigation. It has been suggested, for instance, that the U.S. chemical industry's creation of the oft-touted Responsible Care program came about after the Union Carbide disaster in Bhopal, India, precisely because industry worried about the threat of new regulation and financial liability should such an accident ever occur in the United States (Lyon & Maxwell 2004). Although MYD distinguish between such voluntary actions and true regulation by litigation, it is harder to see how their normative argument can be so cabined, nor why it should be. A more developed normative analysis than MYD provide would be needed to determine whether (or how) industry self-regulation should be lauded while regulation by litigation is disparaged.

Conclusion

Although I have raised a number of questions prompted by *Regulation by Litigation*, these questions themselves speak to the richness of the book and the significance of its inquiry and argument. *Regulation by Litigation* serves as an excellent example of an empirical and normative investigation of what I have called *process choice*, an important research area in need of additional work. MYD do well to remind us that regulatory agencies have “a limited number of people, a limited budget, and limited time to get the job done, and there is almost an endless call for action,” so they confront crucial choices about their work: “How to set priorities? Which problems are

most critical? What are the benefits and costs?” (p. 13). What *Regulation by Litigation* does so well is show how these priorities and choices are not only the highly studied *substantive* ones about the actual design and stringency of regulatory instruments; they are also priorities and choices about how to make decisions and structure the regulatory policy-making *process*. If *Regulation by Litigation* ultimately serves to motivate another generation of students and scholars to extend the inquiry MYD have begun, the book will most certainly have proved itself an enormous success.

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