

How Policy Shapes Politics

*Rights, Courts, Litigation and the
Struggle Over Injury Compensation*

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*Introduction**The Question*

Litigation is everywhere in American society, casting its long shadow over businesses, schools, public spaces, private lives, and nearly every aspect of government and policymaking. In recent memory, litigation has transformed how Americans finance election campaigns, how they buy health insurance, whom they can marry; it has even decided a presidential election. It has been central to struggles over civil rights, abortion, regulating tobacco, drawing electoral districts, cleaning up the environment, reforming the criminal justice system, making society more accessible to people with disabilities, and foreign policy matters such as the detention of “enemy combatants.” Not every political question in the United States becomes a judicial question, as Alexis de Tocqueville claimed about 1830s America, but a remarkable share does (Silverstein 2009; Derthick 2005; Sabel and Simon 2004; Sandler and Schoenbrod 2003; Kagan 2001; Feeley and Rubin 1998; Melnick 1983, 1994; Barnes and Burke 2006, 2012). According to scholars, the United States has become a “litigation state” (Farhang 2010) in which “juridification” (Silverstein 2009), “litigious policies” (Burke 2002), “adversarial legalism” (Kagan 2001), “legalization” (Sutton et al. 1994), and “legalized accountability” (Epp 2009) proliferate.

However you label it—and we will discuss our preferred label below—the expansion of legal rights and litigation evokes deep ambivalence. In the United States, the mythic qualities of law, associated with heroic lawyers such as Thurgood Marshall and Perry Mason, landmark cases such as *Brown v. Board of Education*, and cultural touchstones such as *To Kill a Mockingbird*, are a familiar aspect of the popular culture. In this view, law is majestic and godlike, transcending the pettiness of everyday life and the partisanship of politics (Ewick and Silbey 1998). In the words of Judith Shklar (1964: 111), law “aims at justice, while politics only looks to expediency. The former is neutral

and objective, the latter the uncontrolled child of competing interests and ideologies. Justice is thus not only the policy of legalism, it is a policy superior to and unlike any other.” Steeped in this view, lawyers and legal scholars often celebrate litigation as a mechanism for vindicating and expanding individual rights, imposing accountability for the negligence and heedlessness of corporations and governmental agencies, and checking private influence on governmental rule-makers (Crohley 2008; Barnes 2009; Bogus 2001; Mather 1998).

Yet the deployment of courts, rights, and litigation to address social problems also generates powerful criticisms. Some see litigation and the invocation of rights as a rupture of community order, a sign of social breakdown (Engel 1984). For them, increasing reliance on courts, rights, and litigation is an indication of the decline of American civilization. The “common good,” they contend, has been eclipsed by the litigious society (Howard 1995); Americans have lapsed into a “culture of complaint” (Hughes 1994) in which the virtues of stoicism and grit have been replaced by the entitled whines of victims (Cole 2007). Policy analysts and political scientists, less enamored with the rhetoric of moral decline, have sought to document the more tangible downsides of litigation. They warn that it is far less efficient and predictable than other modes of policymaking, such as social insurance programs (e.g., Carroll et al. 2005; Kagan 2001; Rabkin 1989; Schuck 1986; Melnick 1983; Bardach and Kagan 1982; Horowitz 1977), and that it often leaves those harmed by violations of law to “lump” it (Abel 1987; Bumiller 1988; Haltom and McCann 2004). Litigation in this view fails both ordinary citizens, who cannot afford to use it, and organizations, which cannot efficiently plan for it.

The claims most often made about the rising prominence of courts, rights and litigation, then, tend to concern its potential cultural, administrative and economic downsides. In this book, however, we do not seek to weigh the economic costs and benefits of litigation, or its relationship to various cultural vices or virtues. Instead this book probes the *political* effects of what some have called the judicialization of public policy. To put it more precisely, we assess how the design of public policy—around courts and litigation on one hand, or through agency implementation on the other—shapes politics. We ask questions like these: *Do “judicialized” and “non-judicialized” policies differ in the interests they mobilize? The coalitions they generate? The way problems are framed? What kinds of issues do they highlight? What issues do they obscure?*

Although these questions may not be as prominent as the moral and economic concerns that are frequently voiced in popular debates about law, they also tap into deep-seated concerns about using courts, rights, and litigation to make social policy. Some worry that the appeal of litigation will

divert interest groups and social movements with limited time and resources from purportedly more consequential and legitimate modes of political advocacy, such as grassroots mobilizing, coalition building, and lobbying (Rosenberg 1991). Moreover, reliance on litigation and the pursuit of legal rights is said to be self-reinforcing because it creates a template for political action that frames grievances in legalistic terms (Silverstein 2009: 69; see generally Pierson 2004). This can choke off the pursuit of comprehensive social programs, even when litigation has produced mixed policy results, as legal doctrine and individual rights displace alternative approaches to social problems. From this vantage, litigation is not only ineffective as a policy matter—a “hollow hope”—but also politically counter-productive, acting either as “flypaper” that traps groups in the courts or as a lightning rod that attracts powerful backlash and hardens opposition (Rosenberg 1991; Klarman 1994, 2004; see also Forbath 1991). Litigation and the pursuit of individual rights, it also is claimed, privatizes social problems, framing them as discrete conflicts between individuals, thus obscuring the communal dimensions of social life. The individualization inherent in litigation creates a more fragmented, less communal polity that can fail to realize common interests (e.g., Tushnet 1984; Glendon 1987, 1991; Haltom and McCann 2004; Barnes 2011).

Concerns about the expansion of law seem particularly urgent at the moment in which we write, the early twenty-first century. In the United States, we live in an era when Congress has become increasingly dysfunctional (e.g., Mann and Ornstein 2012), making “Law’s Allure” (the title of Gordon Silverstein’s recent book on the risks of juridification) ever more alluring. The combination of tight budgetary constraints, party polarization, narrow majorities in Congress, and divided government create a policy vacuum that court-enforced rights can fill. Disgruntled interests may feel that litigation is their only viable option for pursuing their policy agendas; elected officials may be glad to have intractable political disputes resolved elsewhere and at the expense of private litigants (Farhang 2010; Silverstein 2009; Lovell 2003; Burke 2001; Kagan 2001; Barnes 1997; Graber 1993).

Beyond the United States, the growing significance of rights, courts, and litigation is even more apparent. Over the last two decades, a bevy of comparativists and international relations scholars have been documenting rising levels of “judicialization” (Kapiszewski, Silverstein, and Kagan 2013; Ginsburg 2003; Hirschl 2004, 2008; Sweet 1999, 2000; Shapiro and Sweet 2002; Tate and Vallinder 1995), various types of “legalism” (Kelemen 2006, 2011; Bignami 2011; Kagan 1997, 2007), and “legalization” (Goldstein

et. al 2001) in other nations and at the international level. The judicialization of politics, Ran Hirschl claims, “is arguably one of the most significant phenomena of late twentieth and early twenty-first century government” (Hirschl 2008: 69). The global rise of judicial power reflects a variety of possible factors, including the growth of transnational associations like the European Union (Alter 2001; Kelemen 2009) and the expansion of international human rights institutions and organizations (Sikkink 2011; Goodale and Merry 2007; see also Epp 1998). Whatever its causes, the rising prominence of rights, courts, and litigation in politics worldwide suggests that scholars and commentators will be increasingly drawn to studying the questions raised in this book.

Our Approach

The prominence of rights, courts, and litigation in social life makes its political effects a subject of great interest, but also a challenge to study. If law is “all over,” as one particularly influential article in sociolegal studies put it (Sarat 1990),¹ how do researchers figure out what law is doing? To date, those who have been most interested in understanding what law does to politics have focused mainly on a small number of dramatic cases in which courts took center stage, usually through a ruling on the constitutionality of some statute or executive action (e.g., Rosenberg 1991; Silverstein 2009). This approach has yielded important insights into the potential political risks of relying on rights, courts, and litigation, but it can be misleading for two reasons. First, the literature’s focus on high-profile, constitutional cases may provide a distorted lens for viewing the effects of judicialization, which can take many forms and arise in a variety of contexts. Second, by definition, claims about the political effects of judicialization/juridification/legalization necessarily imply that politics would have been different if rights, courts, and litigation had not intervened or had intervened to a lesser degree. By not focusing more explicitly on what social scientists call the “counter-factual”—what would have happened in the absence of judicialization—the existing literature on the political risks of litigation may overstate its actual impact.

Accordingly, we start with the assumption that the best way to understand the political effects of judicialization/juridification/legalization, whether in the United States or elsewhere, is through comparison, and so in this book we compare the politics of policies that are structured around rights, courts, and litigation with policies that do not have this structure. We focus on the field of injury compensation, which, like many realms of American public policy includes a vast array of policies of diverse design, some based on litigation,

others on regulation and social insurance. We first make our comparisons using a quantitative study of patterns of participation in congressional hearings on injury compensation policies, and then with three in-depth case studies.

What do we find? There are some twists and turns along the way, but we come to two fundamental conclusions. First, at least for the cases we study, many claims about the use of rights, courts, and litigation in politics seem overblown. We see, for example, little evidence that the allure of law traps activists in its spell, or that law-focused public policies are any more difficult to reform than their bureaucratic alternatives. In many respects, then, the politics of rights and litigation does not look much different from other forms of politics.

But secondly, we find support for some of the long-standing criticisms of rights, courts, and litigation voiced by theorists, commentators, and social scientists. By organizing social issues as disputes between parties, the use of litigation does seem to individualize politics in some of the ways they have suggested. Litigation assigns fault to specific entities, and creates a complex array of winners and losers on the ground. That over time creates a distinctively fractious politics, in which interest groups associated with plaintiffs and defendants fight not only each other but among themselves as well. This pattern is particularly pronounced when we compare it to the political trajectory of social insurance policies that compensate for injuries, especially our main comparison case, Social Security Disability Insurance. There we see moments of great contention, but long periods of relative peace, and greater solidarity among interests. The bottom line, we think, is that some of the critics of judicialization/juridification/legalization are onto something when they claim that the effect of litigation is to individualize conflict over social issues, and so generate a more divisive, fractious politics.

In attempting to uncover the political effects of rights, courts, and litigation, we encountered a series of conceptual obstacles, and alas, we must begin by describing those obstacles and what we have tried to do to get around them. Discussions of concepts can be dry and technical, but to understand how we frame the rest of the book, you must first understand the reasoning behind our conceptual choices. After addressing these conceptual issues, the remainder of the chapter explains our case selection, summarizes our findings in greater detail, and outlines the chapters that follow.

Key Concepts and Comparisons

Our first assumption is that the central question of this book—what are the political consequences of relying on rights, courts, and litigation to address social problems?—implies a comparison between the politics of

“judicialization” and “non-judicialization,” or to put it more simply, between “law” and “non-law.” Defining “non-judicialization” or “non-law,” however, is more difficult than you might think. In *Law’s Allure*, Silverstein argues that “law is different,” but different from what? What is the thing that “judicialization” “juridification,” “legalization,” and “legal rights” are being compared to?² One possibility is that a “judicialized” policy could be compared to some kind of “non-judicialized” one, but which kind? Is the normal baseline of politics legislative? Executive? Electoral? Social movement mobilization? Some combination? Or is the baseline no policy at all?³ So we need to know: Different from what?

There is yet another problem here, one that points to the profusion of terms used in this literature. We worry that these terms—judicialization, juridification, legalization and so on—can obscure rather than sharpen our understanding of the relationship of law and politics. When scholars argue that “law is different,” they undoubtedly mean something like: courts are different from agencies or legislatures. But of course agencies and legislatures also produce law, and agency decision-making is often highly litigious. Indeed, it is hard to imagine anything in American public policy that is not connected to law and the potential threat of litigation in some way. Perhaps this point is so simple that scholars assume their readers could understand that when they write “law” they mean the kind of law produced by courts, but they rarely define the boundary of their concepts, and this creates difficulties (Burke and Barnes 2009). For example, if “law” is made up of the doctrines that appellate courts propound, what do we do with trial court decisions, or even more importantly, the vast majority of legal claims that are disposed of or settled prior to trial? What about the ideas people have about legal rights, which may or may not have much to do with decisions that courts make? Are all these things part of what’s different? Some conceptual openness about the scope of “juridification” or “judicialization” is probably inevitable given the complexity (and contested nature) of scholarly accounts of law and rights, and the decentralized processes through which they are given meaning, but we also want to have some sense of the boundaries of these terms.

To cut through this conceptual morass, from this point forward we generally avoid formulations in this book such as “judicialization,” “juridification,” and “legalization.” We are just not confident about how these terms should be defined. Instead, we start from the assumption that courts, like legislatures and executive branch agencies, are policymakers, and so we reject the law/politics distinction that underlies so much commentary on litigation and rights. We operate within the tradition of “political jurisprudence” pioneered

by Martin Shapiro (Shapiro 1964a, 1964b, 1966, 1968; see generally Gillman 2004), in which courts are considered comparable to other political institutions, but with their own tilts and tendencies,⁴ and we heartily concur with Stuart Scheingold's insistence that *The Politics of Rights* (Scheingold 2004) be analyzed as a species of politics rather than a different kind of animal entirely. This leads us to use concepts that are comparative, but not based on static assumptions about essential features of law or courts.

Although originally designed to describe cross-national differences, we think Robert Kagan's typology of policymaking processes (1991, 2001) offers a productive response to the conceptual problems we have posed for studying within-country variation, both because it is reasonably well-defined and because it is explicitly comparative. (An added benefit of using Kagan's typology is avoiding the introduction of yet another set of terms to the already confusing lexicon of judicialization/juridification/legalization.) The typology of policymaking is set forth in Table 1.1. Each cell in the box represents an ideal-type of policymaking regime, which connotes a distinct form of authority for creating and implementing policy—in this book, injury compensation policy.

The horizontal axis is the level of *formality* in defining and determining the underlying claim, meaning the degree to which decision-makers use preexisting rules in resolving disputes. The use of rules in dispute resolution involves all the paraphernalia of legal processes: precedents, records, documents, and written procedures. Informal processes, for example the use of expert administrative judgment by the Federal Reserve Board to adjust interest rates, are not closely constrained by preexisting substantive rules; the underlying policy decisions are made based on the professional judgment of its members and staff.

Table 1.1 Four Modes of Policymaking (Kagan 2001)

Organization of Decision-Making Authority	Decision-Making Style	
	Informal	Formal
Hierarchical	Expert or political judgment	Bureaucratic legalism
Participatory	Negotiation/mediation	Adversarial legalism

On the *formal* side of the horizontal axis are *adversarial legalism* and *bureaucratic legalism*. Adversarial legalism involves formal but participatory structures, meaning that the parties to the underlying dispute drive the decision-making process. In adversarial legalism, parties dominate policy construction from the bottom up: they make policy by arguing over the meaning of substantive standards and procedural rules, the application of those rules to the decision at hand, and even the fairness of the relevant rules and procedures. In the formulation and implementation of policy under adversarial legal regimes, then, everything is a matter of dispute, and all those affected by a decision are free to participate in the disputing process. There is an official decision-maker, but the decision-maker acts as a referee and so does not dominate the proceedings. Bureaucratic legalism, by contrast, is formal and hierarchical. It connotes a Weberian bureaucracy that centers on civil servants implementing formal rules from the top down, as in the case of social insurance programs in which government officials determine compensation according to preexisting medical criteria and payment schedules.

The structural differences between adversarial legalism and bureaucratic legalism correspond to different emphases in decision-making. In adversarial legalism, the decision-makers (judges and juries in the American civil litigation system) are not tightly bound to a centralized higher authority and so a premium is placed on particularized justice, tailoring decisions to specific circumstances. In the bureaucratic model, civil servants are bound to a centralized authority, so that emphasis is placed in the uniform application of rule across cases. As a result of these different emphases, adversarial legalism is likely to be more unpredictable and administratively costly, though also more flexible, than bureaucratic legalism (Kagan 2001).

On the *informal* side of the horizontal axis are processes in which no pre-existing rules are used to resolve disputes or make policy decisions. The hierarchical version is *expert or political judgment*; the decentralized party-centered version is *negotiation/mediation*. In expert or political judgment, the expertise can be purely scientific, as when a government commission like the National Transportation Safety Board investigates the causes of an accident, or it can mix expertise with political prudence, as when the Securities and Exchange Commission decides whether to use its authority to create a rule governing some market practice. Negotiation/mediation, the bottom/left quadrant, fits any situation in which decisions must be made among roughly equal parties. Although legislatures can be highly hierarchical, many would roughly fit this cell, as each elected legislator has the right to bargain over and vote on legislation.

The cells in Kagan's table offer a way to address the "Law is Different" problem. Adversarial legalism is a capacious term that we believe gets at many of the qualities that writers are referring to when they decry or praise the use of courts, litigation, and legal rights to address social problems. Further, we think negotiation/mediation, bureaucratic legalism, and expert judgment are the points of comparison implicit in criticisms of courts as defective (or commendations of them as heroic) in policymaking and implementation. Negotiation/mediation is considered the "normal" way in which policies are created through legislative deliberation, and bureaucratic legalism and expert judgment are considered the "normal" ways in which those policies are implemented by executive agencies. The combination roughly comports with textbook versions of federal policymaking in which elected lawmakers—the President and members of Congress—negotiate fundamental policy decisions, whereas issues of implementation are delegated to executive branch agencies. Commentaries about judicialization/juridification/legalization are, we think, reacting to a view that adversarial legalism is reaching into areas normally left to other less court-based modes of policymaking and dispute resolution.

Sharp-eyed readers, though, will see immediately that adversarial legalism does not mean "courts," that negotiation/mediation does not mean "legislatures" and that bureaucratic legalism does not mean "agencies"—in fact all institutions can vary in the extent they reflect these ideal-types. For example, American courts are more adversarial than European courts because they are less hierarchical, making American litigation more party-centered (Atiyah and Summers 1987; Damaska 1986). American legislatures also better fit the negotiation/mediation ideal better than typical parliaments because of their relative decentralization. Executive agencies too vary in their degree of bureaucratic legalism because they vary in the extent to which hierarchical rules structure behavior. An agency that, for example, responds to complaints, and that does not provide street-level officials much guidance in resolving those complaints, has moved away from the Weberian ideal and more toward the pole of party-centered adversarial legalism. It is important to remember that our terms represent ideal-types, which imply characteristic divisions of labor among the branches, but that in the real world, policies and institutions typically fall on a spectrum between them, not at the ends.

In fact, we believe this is another strength of the typology, particularly for studying American politics, because in the separation-of-powers, checks-and-balances American system it is hard to find pure examples of anything, be it judicial, executive, or legislative, state or federal. Policymaking

and implementation in such a system, we believe, is best thought of as a dialogue among the federal branches of government and with the states (Barnes and Miller 2004; Barnes 2007a, 2013). In this context, separating out the influence of rights, courts, and litigation on American politics is particularly difficult, because it requires analysts to weigh the influence of each line in the dialogue, to try to measure how a court ruling influenced a legislature that in turn influenced an agency which in turn may have influenced the judiciary. Two of the most prominent books in the literature on the effects of law on politics, Silverstein's *Law's Allure* and Rosenberg's *Hollow Hope*, which try to isolate the effects of particular decisions such as *Brown v. Board of Education* or *Buckley v. Valeo*, wrestle particularly hard with this problem. Kagan's typology leads us instead to make more holistic characterizations. Instead of trying to parse the effect of a single decision in a complex, ongoing dialogue among multiple branches and levels of government, we code the design of policies as being more or less adversarial or bureaucratic, and trace how the politics within an issue area develop in the shadow of these institutional arrangements.

Our approach, then, is fundamentally comparative, but it is also multi-method, mixing quantitative and qualitative data, and developmental, analyzing change over time. We start with a quantitative analysis of 40 years of congressional hearing data on adversarial and bureaucratic injury compensation policies. These data provide a useful starting place for probing the threshold question of whether the politics of adversarial and bureaucratic legalism differ by providing a common vantage to view a key point in the ongoing policy dialogue in multiple cases. We find important cross-sectional differences between the politics of the two types of policies, which raise questions about whether (and how) these differences play out beyond congressional hearings and over time.

To explore these questions, our case studies pick up where the hearings data leave off, tracing the politics of adversarial and bureaucratic policies as they mature from creation to expansion and retrenchment, and in some instances as they become more bureaucratic or adversarial. These case studies allow us not only to explore how the politics of policies evolve over time and across multiple political institutions, but also, where appropriate, to compare the politics of different structures, adversarial and bureaucratic, within the same policy field. In adding this developmental dimension to our analysis, we build on the work of Paul Pierson (1994), who famously argues that the politics of program retrenchment differs from the politics of program creation. Pierson leaves open whether the shifting politics of

policy development differs across policy types. By contrast, we explore whether “policy feedbacks”—the ways in which institutional features of policies shape politics (see generally Campbell 2006, 2012; Mettler and Soss 2004; Pierson 1993)—not only vary across different stages of development, but also vary across different types of policy designs within the same issue area. The result is a comparative developmental approach to understanding the political consequences of adversarial legalism versus bureaucratic legalism.

Case Selection

If you think about it, the critical claims made about the effects of rights, courts, and litigation—that they tend to crowd out other forms of political participation, polarize and create backlashes, get a polity stuck in unproductive policy arguments, and undermine social solidarity—are really claims about propensities, not regularities. It is easy to think of cases that support each of the claims, but also easy to think of counter-examples. *Roe v. Wade* and *Brown v. Board of Education* clearly created a political backlash, but *Loving v. Virginia*, the anti-miscegenation case, seemed to have no such effect. Similarly, gay marriage has generated considerable political contention, while the right of gay couples to adopt children has mostly slipped under the political radar (Gash 2013). Victories in litigation can create polarizing backlashes, but they can also consolidate support for legislative reform, as when states joined parents for expansion of federal special education programs, in part because they feared courts would impose unfunded judicial mandates on them (Melnick 1994). The language of rights and the use of litigation may frame social life in individualistic ways, but rights claims can be used by activists to raise consciousness about common concerns and build coalitions that bring groups together (McCann 1994; Epp 2009). So part of the problem of assessing the political effects of adversarial legalism is the familiar one of sampling. It is easy to pick cases that support your claims and easy to find cases that go against them, but not so easy to come up with a strategy for picking cases that help you generalize beyond them to get a sense of overall tilts and tendencies.

Our primary strategy for addressing this problem is comparison. We want to compare policies that are closely related and similar in important respects, but that differ in their structure, with some falling on the adversarial side of the spectrum and others on the bureaucratic side. To do this we need to

sample from a policy field that has a mix of adversarial and bureaucratic policy designs. The structure of the U.S. state makes this relatively easy, because it is remarkably fragmented and layered, built through the accretion of overlapping public and private programs, benefits and rights (Orren and Skowronek 2004; Hacker 2002; Berkowitz 1987). The resulting patchwork of programs and policies means that, in many areas of U.S. public policy—for example, the environment, health care, civil rights, safety regulation, and consumer protection—adversarial and bureaucratic designs operate side by side. This offers many opportunities for comparing the political consequences of different policy designs.

One such opportunity lies in the field of injury compensation, which features a vast array of overlapping public programs and private remedies, some adversarial, others bureaucratic, and still others hybrids. The overlap of many programs makes them confusing to navigate. Imagine, for example, that you fell off a ladder at work and broke your leg. You might bring any or all of the following claims: a tort lawsuit against the manufacturer of the ladder for poor design, a workers' compensation claim at either the federal or state level (depending on your job), a claim against your health insurer, and a claim for private and/or public disability insurance benefits (depending on the severity of your injury). In 1991, the Rand Institute of Civil Justice published a landmark study of this *mélange* of injury compensation programs, audacious because it tried to estimate both the cost of all injuries in the United States and all sources of compensation. The study concluded that accident injury costs \$175 billion per year—more than \$300 billion in today's dollars—consisting of roughly \$100 billion in direct costs and \$75 billion in lost earnings (Hensler et al. 1991, Table 4.21, 103). The study found that roughly 23 million people received \$110 billion dollars in injury compensation each year, almost 4% of GNP at the time (102). A central finding of the study—and crucial for our purposes—was that compensation for accidents came from a variety of sources, including private insurance, employer benefits, public programs, and lawsuits (Table 4.22, 108). Given the array of policies that compensate for injury and the ways they are used, injury compensation provides promising cases for our study.

Indeed, injury compensation is almost too good, providing so many candidates for analysis that we cannot possibly cover them all. We can, however, take advantage of the institutional variation in these policies by targeting policies that feature different levels of adversarial and bureaucratic legalism. As summarized in Table 1.2, we have selected three sets of cases. All of these cases are included in our quantitative analysis of congressional hearings and

a subset of these cases involving SSDI, asbestos, and childhood vaccines are subject to in-depth case analysis.

The first set of cases includes examples of adversarial legalism: litigation over product liability, medical malpractice, and securities fraud. You may be surprised to see these forms of litigation labeled as “policies” comparable to more conventionally legislated programs like Social Security or workers’ compensation. Traditionally, these forms of litigation were considered “private law” because they governed disputes between individuals and so were not thought to raise the same kinds of political or policy concerns as public law fields such as constitutional law. Today, however, what is usually labeled “tort law” is a matter of great political conflict and ferment, and public policies governing tort are regularly debated at both the state and national level. (We will see in the following chapter how often Congress has held hearings to consider changes to the tort system over the past 40 years.) As with all injury compensation policies, disputes over tort center on issues of who decides, who gets what, from whom, and how much. These forms of litigation differ from each other in interesting ways. Product liability affects a broad array of manufacturers; medical malpractice targets a group of well-organized professionals. Securities fraud litigation is an unusual case for our study because it compensates financial losses and not physical or mental injuries.

The second set of cases are characterized primarily by bureaucratic legalism: SSDI, the Black Lung Disability Trust Fund (the black lung program), and the Longshore and Harbor Workers’ Compensation Act (the longshore workers’ program). While all share common bureaucratic institutional features, there are some important differences. SSDI is funded from a payroll tax on workers and employers and covers disabled workers and their families. Like SSDI, the

Table 1.2 Three Sets of Cases

Type of Case	Policy
Adversarial Legalism	Product liability, medical malpractice, and securities fraud
Bureaucratic Legalism	SSDI, the Black Lung Disability Trust Fund, and the Longshore and Harbor Workers’ Compensation Act
Shifting Regimes	Vaccine injury compensation (adversarial legalism to bureaucratic legalism), asbestos litigation (bureaucratic legalism to adversarial legalism to a layered system)

longshore workers' program is funded by a payroll tax, but unlike SSDI, only covers injured workers from a specific industry. The black lung program targets a specific category of injuries, and it is funded differently from the other programs, through a tax on products. The size of SSDI dwarfs the other programs in our sample. In 2010 alone, the SSDI trust fund paid out over \$12.4 billion in benefits; by contrast, the longshore workers' and black lung programs paid only about \$26.6 and \$208 million in benefits in 2010, respectively. Finally, these policies differ on federalism: SSDI is a federal program that is partly administered by the states while the other programs are federally administered.

The final set of cases is especially theoretically interesting for our study: injury compensation fields in which the structure of the policy shifted over time. The case of vaccine injury compensation is particularly valuable for our project because it involves an adversarial policy that was largely replaced by a bureaucratic policy, allowing for before-and-after comparisons of the politics of policies dealing with the same set of injuries. The asbestos case illustrates a more subtle pattern of development in which different types of policies are layered, so that adversarial legalism remains the dominant policy response but some bureaucratic sub-policies remain alongside tort law. If adversarial policies generate a politics different from bureaucratic policies, then we should observe changes in the politics of these fields that coincides with their change in structure. In the vaccine case, we should see a shift after bureaucratic legalism replaces adversarial legalism. In the asbestos case, we should observe a difference in the politics when activity centers on its adversarial as opposed to bureaucratic sub-policies.

Our historical case studies allow us to trace the politics of SSDI, asbestos, and vaccine policy through different stages of development, from creation through expansion and (attempted) retrenchment. They also give us the second major way we probe our questions, through within-case comparisons. Comparisons across cases are always vulnerable to the charge that what's driving differences in outcomes among the cases is not the factor that the researcher is interested in but some other unconsidered variable. Injury compensation policies have some common features, but there are many differences, say, between the history of product injury law and SSDI, and it would be problematic to assume that those differences can all be attributed to the fact that tort law is primarily adversarial and SSDI bureaucratic. By tracing developments within cases, however, we can make comparisons inside the case that are not so vulnerable to this problem. In two of our cases, covering vaccine and asbestos injury compensation, the structure of public policy shifts over time, and we take advantage of this variation by analyzing how this is

related to changes in the politics of these two areas. Within the SSDI case, we compare the politics of an adversarial policy, the Americans with Disabilities Act, which addresses some of the same issues. We cannot replicate the ideal situation in social science—randomly assigning bureaucratic designs to some public policies and adversarial designs to others—but we can, by combining within-case and across-case studies, reduce some of the limitations of inductive, non-experimental research.

Our cases are not intended to be representative of the universe of injury compensation regimes within the United States, much less the universe of adversarial and bureaucratic policies. We have, for example, focused entirely on the national politics of federal programs and tort law. The vaccine case, moreover, is highly unusual in that reformers were able to replace adversarial legalism with bureaucratic legalism. We chose these examples because they provide clear examples of adversarial and bureaucratic policies in the area of injury compensation, and because they vary in several important respects: size, scope of targeted injuries, funding sources, and setting. Thus comparing patterns of politics within and across these cases should offer insight into the central question of what, if any, are the key differences between the politics of adversarial and bureaucratic legalism. We will save for our conclusion our thoughts about the possible limits on the generalizability of our cases, and the ways in which they connect to the vast literature on judicialization/juridification/legalization.⁵

Summary of Findings

We consider four serious charges against adversarial legalism: (1) it crowds out other forms of political action, especially lobbying for legislative change, (2) it is particularly “sticky” and path-dependent, potentially locking governments into bad policies, (3) it creates polarizing backlashes, and (4) it individualizes interests, thus undermining social solidarity. We find the first three counts are overstated, at least in our cases. Adversarial legalism is either not guilty or no more prone to these tendencies than bureaucratic legalism. On the fourth count, however, we find evidence to support the charge.

Crowd out and “flypaper courts”

Gerald Rosenberg’s *The Hollow Hope* is perhaps the most prominent critique of the use of courts to make policy within political science and law. Rosenberg’s argument is largely focused on the constraints on courts as

policymakers, maintaining that courts can make social policy effectively only under very narrow circumstances. There must be precedent for the court's action; the elected branches must support the court's decisions; there must be some public support for the court's decisions and at least one of the following must be present: (1) incentives for compliance, (2) costs for non-compliance, (3) supporting market incentives, or (4) support from local officials. Unless these conditions are met, Rosenberg argues, relying on law and courts to make policy is a "hollow hope."

Reviewers have often commented about the seeming disjunction between Rosenberg's social science approach, in which he develops the theory of the "constrained court" and lists the variables that he thinks affect its performance, and the anguished rhetoric about the pitfalls of seeking social change through law that erupts in some passages of his book and is reflected in the title. It is one thing to find that courts are constrained, but why then are they "Hollow Hopes"? Congress cannot unilaterally dictate broad social change either; to translate its formal commands into social practice, it too needs help from the other branches and levels of government and some local support, but no one would suggest that seeking legislation is an empty exercise. The answer is that Rosenberg assumes that the use of courts inevitably crowd out other presumably more effective (and legitimate) modes of political advocacy, such as grassroots mobilization, lobbying, and coalition building. From this perspective, courts are not only a hollow hope but also "political flypaper," trapping interest groups in an expensive form of advocacy that is unlikely to yield results.

Rosenberg is certainly not alone in his concerns about the turn to adversarial legalism. In his analysis of the labor movement, William Forbath makes a parallel argument, that unions diverted resources to litigation at the expense of the broader political movement (Forbath 1991). You can compare this to the most familiar claim about the diversion of political activity from the elected branches, that it is "undemocratic," a criticism voiced both inside and outside the academy. Take for example Justice Scalia's scathing dissent in *United States v. Windsor*, the divided Supreme Court decision that struck down the Defense of Marriage Act.⁶ Scalia argues that judicial policymaking in the area of same-sex marriage diverted the debate from the elected branches and so tarnished the victory for advocates of gay and lesbian rights. Scalia's reasoning is that litigation channels activity away from the hard work of lobbying elected officials and members in the executive and persuading "the People."⁷ For him the problem is that the judiciary is too powerful, sweeping away democratically-decided outcomes; for Rosenberg and Forbath, who clearly

sympathize with the movements they are writing about, the worry is the courts and litigation are too weak. In either case, though, the critics are concerned that the turn to adversarial legalism is a turn away from other modes of politics.

In our study, however, we find no evidence that adversarial legalism “kills” politics, fixing social movements and interest groups on the pursuit of individual rights at the expense of other goals or means. Indeed, adversarial legalism seemed to fuel group mobilization, creating a more fragmented, pluralistic politics featuring more diverse interests with competing viewpoints. The high costs of litigation provided a stimulus for legislative campaigns for alternatives to litigation. The converse was also true: bureaucratic legalism did not kill *litigation*. We found a number of striking examples of interest groups using the courts to challenge the status quo within bureaucratic legal policies. The interest groups in our study seemed adept at moving from one institution to another, looking for levers wherever they could find them.

In part because interest groups were able to move across branches and levels of government, policymaking was shared among the branches and levels of government in our cases.⁸ Elected officials often created policy designs that empowered litigants and judges, deferred to courts that developed adversarial policies, or at least invited judicial interpretation of vague or open-ended phrases (and then codified these judicially developed interpretations). Whatever the mix of adversarial and bureaucratic legalism in each case, interest groups found ways to try to influence policy. In the American system of overlapping, diversely representative forums, policymaking takes place in many forums, often at once, and American interest groups in our cases were adapted to this context, routinely combining litigation with lobbying.

Path dependence and framing effects

A related charge is that adversarial legalism is particularly prone to “path dependence,” so that bad or outdated policies are stuck in place, and frame political debate in ways that are problematic. The concept of path dependence has proven to be a bit like an inkblot in a Rorschach test; it means different things to different scholars. In some writings, path dependence seems merely to note that events in the past have an effect going forward, that “history matters.” We prefer Paul Pierson’s formulation, which defines path-dependent processes as those involving “increasing returns,” meaning that with each step it gets more and more costly to get off whatever path one is on (Pierson 2004).

Life seems filled with *decreasing* returns. Your first mouthful of ice cream is much more pleasurable than the last. As more businesses move into a city, it becomes more affluent, real estate prices increase and wages rise, increasing the costs of business and reducing the appeal of the location for new ventures. A product that satisfies a lot of consumers leads rival manufacturers to develop an alternative that is even more attractive. But sometimes we see *increasing* returns, cases in which every bite of ice cream, strangely enough, tastes better and better. Silicon Valley grows richer and richer, but also more and more the place for certain companies to locate, whatever the cost. The QWERTY keyboard may or may not be the best arrangement of the keys, but as more people learn to use it, it becomes harder to sell a different design, especially if the design becomes embedded in other technologies (Pierson 2004).

Litigation is arguably somewhat like the fabled ice cream cone that gets tastier with each bite. This is certainly true for some litigants. “Repeat players” with each iteration theoretically gain over “one-shotters,” as Marc Galanter posited in his classic “Why the Haves Come out Ahead” (Galanter 1974; Kritzer and Silbey 2003). Lawyers and the organizations they work for accrue expertise in how to litigate and attract new clients. They learn how best to make litigation pay, both in terms of their long-term goals but also in a more crude material sense. As the expected returns of litigation increase, interest groups may eschew other modes of advocacy, such as lobbying for new legislation, which is almost always a long shot in the lawmaking obstacle course on Capitol Hill. In contrast to the crowd out argument, in which the costs of litigation divert groups from other modes of advocacy, the claim here is that, the path dependence argument implies that groups come to *prefer* litigation to other modes of advocacy given its increasing returns, even when they can afford to fight in other forums.

Particular legal doctrines can also, at least theoretically, become like the ice cream cone you just cannot stop eating. Or to put it more like Gordon Silverstein (2009) would, when a public policy is juridified, the resulting accretion of precedents narrows the scope of political debate, not just in court but also in the larger political system. The idea is that legal precedents do not merely shape legal discourse but also the terms of policy debates outside the courts. As legal precedents become “givens,” reform proposals that are inconsistent with them are deemed out of bounds, which limits policy options. Affirmative action becomes a matter of weighing “diversity”; abortion is framed around a woman’s right to privacy. Silverstein uses campaign finance to illustrate his contention. He argues that the claim that “money is speech”—a

point that was controversial at the time *Buckley v. Valeo* was decided—has become taken for granted in the politics of campaign finance, sharply delimiting the scope of reforms that are seriously considered. Silverstein explains his claim:

When policy bounces from Congress to courts, to the administration, and back again, . . . the influences [of legal precedents] become more complex and often more constraining. We might think of a game of *Scrabble*, a game in which players often end up where none had originally planned or imagined. In a game of *Scrabble*, players start with a blank board, and the first player can head off in any direction he or she chooses. But slowly, over the course of the game, the players often end in one corner of the board, whereas another part of the board is totally empty. . . . In theory, it is still possible to move the game off in a radically different direction, but it becomes increasingly difficult (and unlikely) for that to happen (2009: 66).

Juridification, according to this claim, can lead to a highly constrained politics in which public policy debate looks like the end of a Scrabble game rather than the beginning.

Silverstein's case studies focus on constitutional issues, where the institutional barriers to reversing judicial doctrines are the highest. It may be that path dependence is not so much a function of "juridification," or to use our preferred term, adversarial legalism, but merely the one form of it, American federal judicial review, in which it is hardest to reverse course once a ruling has been made. Constitutional rulings are particularly "sticky" because, as Charles Evans Hughes once said, the U.S. Constitution is what the judges say it is⁹—it is rare for a ruling to be reversed through constitutional amendment, and so difficult to recast the political debate over campaign finance or abortion in ways that would conflict with Court rulings. That said, there are reasons to believe that, U.S. constitutional law aside, adversarial legalism in all its forms should be resistant to change. The underlying dynamics of path dependence that Silverstein and Pierson identify—framing effects and increasing returns—are not wholly dependent on the existence of institutional barriers to formal revision. These dynamics are largely generated by the litigation process itself, and so apply to other forms of litigation, including common law and statutory interpretation decisions, where judicial decisions can be overridden through the passage of ordinary legislation (which itself is no mean feat).

In our study, adversarial policies were in fact prone to some degree of path dependence. The law in our cases is mostly common law, which is much easier to change than constitutional law, but still hard to reverse entirely. As a formal matter, once a legal doctrine was established, it became difficult to reform. But in our study, path dependence was hardly a unique property of adversarial legalism. Bureaucratic legal policies in our cases exhibited the same tendency: once created, agency-based programs proved hard to retrench or reform. The fact that adversarial and bureaucratic legal regimes are both formally sticky should come as no surprise. The influence of pre-existing institutional arrangements in public policymaking and administration was sketched out at least as far back as Herbert Simon's *Administrative Behavior* (1947). As John Kingdon (2011: 79) once observed, policymakers of all stripes tend to "take what they are doing as given, and make small, incremental, and marginal adjustments" (see also Epp 2010). In fact, when we looked beyond the formal structures of programs and examined how the details of policies were adapted through practice over time—what Erkulwater (2006) calls "microlevel" as opposed to "macrolevel" changes—bureaucratic programs and agencies often proved *less* flexible than legal doctrines and courts, failing to adjust existing rules to new policy circumstances and political demands, and forcing stakeholders to turn to the courts, which proved remarkably adept at adjusting administrative regulations and legal doctrines to new circumstances.

Similarly, it is true, as Silverstein (2009) persuasively argues, that adversarial legalism can have powerful framing effects that preclude the consideration of various types of claims, but bureaucratic legalism also has framing effects that bound debate and cut off consideration of alternatives. As our case study of the politics of SSDI describes, attempts to change people's understanding of the problem of disability have run up against the powerful framing that bureaucratic policies have reinforced. So, leaving aside the special case of U.S. judicial review, we found little evidence that adversarial legalism was any *more* path-dependent than bureaucratic legalism; indeed it seemed less so at the microlevel.

Backlash

Critics charge that adversarial legalism engenders strong reactions from powerful interests that lose in courts, in part because policymaking by unelected judges is seen as illegitimate, a form of judicial encroachment on the prerogatives of elected officials' turf. This argument has been made perhaps most

prominently by Michael Klarman in his account of the civil rights movement. Klarman's analysis of backlash is subtle. On one hand, he argues *Brown v. Board of Education* set back the struggle for civil rights by catalyzing resistance by even relatively moderate Southern states. Litigation, in effect, eliminated the moderate middle. On the other hand, violent resistance by Southern extremists was instrumental in setting the stage for a counter-backlash at the national level. Klarman's (2013) more recent account of the fight for marriage equality is also subtle, arguing that early cases recognizing civil unions and gay marriage, like the Massachusetts litigation, engendered backlash, but the risk of backlash has ebbed as public opinion continues to swing in favor of gay marriage.

Rosenberg (1991), by contrast, makes stronger claims in connection with *Roe v. Wade*, arguing that the decision resulted in an organized counter-movement by social conservatives that has stigmatized abortion and limited access to it. In a similar vein, Mary Ann Glendon has argued that *Roe* polarized the politics of abortion, thus helping to explain why the United States continues to have such a fervent pro-choice/pro-life politics even as other nations (even largely Catholic ones) have largely resolved the issue (Glendon 1987).

Although we tend to think of the backlash argument in connection with high-profile constitutional rights, others have noted the catalytic effect of more mundane types of litigation in mobilizing opposition. A good example of this is William Haltom and Michael McCann's study of conservative and business counter-mobilization against tort law, which documents a sustained effort to shift public discourse on personal injury litigation by emphasizing one-sided and sometime false anecdotes about "frivolous lawsuits" and bogus claiming practices (Haltom and McCann 2004). Backlashes are problematic in this account partly because they divert attention from the underlying substantive issues to the propriety of judicialization itself, but also because they polarize interests and hinder compromise. The backlash argument takes many forms, but a common thread is that reliance on adversarial legalism has a potentially polarizing effect on politics.

In our cases we found lots of examples of the counter-mobilizing tendencies of adversarial legalism. Lawsuits against manufacturers for injuries purportedly caused by their products eventually stimulated massive mobilization, as one would expect. But this counter-mobilization was far more complex and variegated than is implied by the backlash literature. The targets of litigation, for example, often internally divided based on the degree of their exposure to litigation. Moreover, in some cases, by raising important

issues, bringing all the parties to the table, and stimulating the building of coalitions across the plaintiff/defendant divide, litigation set the stage not for backlash but political resolution. In our cases, adversarial legalism engendered counter-mobilization but not necessary a polarizing backlash.

Individualization of political interests (and undermining of social solidarity)

A final charge is that adversarial legalism makes it harder to resolve social problems because it frames them as individual disputes and so divides interests from one another. Unlike the backlash argument, the concern is not that adversarial legalism will engender *unified* opposition but that it will Balkanize interests or internally fragment them, making the finding of common ground difficult even among groups that we might expect to be allies.

This charge takes many forms and has deep theoretical roots. A long line of political theorists, starting with Edmund Burke and Karl Marx, have critically examined how legal rights structure people's grievances and understanding of social obligations (Waldron 1987). Burke criticized the espousal of the leaders of the French Revolution of the "rights of man" as abstract, extreme, ahistorical, and so removed from the practicalities of governance. Government, he insisted, "is a contrivance of human wisdom to provide for human *wants*," and attempting to govern through abstract rights ignores the complexity of social arrangements and the intricacies of human nature (Burke 1987: 52). Marx contended that "the rights of man" are merely the rights of "egoistic man, of man separated from other men and from the community." The struggle for these political rights, Marx argued, are a symptom of the individualism and lack of social connectedness that plagues capitalist societies (Marx 1978: 43). These are very different diagnoses—and Burke and Marx were radically different thinkers—but both point to the gap between the magisterial promise of universal rights and the practical, material consequences of framing social issues as matters of rights, which they argued neglect the communal aspect of human life.

One can see echoes of these Burkean and Marxian themes in the critiques of rights that sprung up in the 1970s and 1980s, a period when the luster of social change through law began to fade in the United States. Communitarian political thinkers such as Alasdair MacIntyre, and Critical Legal Studies scholars on the left, such as Mark Tushnet and Duncan Kennedy, for all their differences, shared a basic premise: framing political conflicts as matters of legal rights (and thus channeling them through the courts and litigation

process) individualizes politics, undermines social solidarity, and reinforces a narrowed and flattened view of social life (Tushnet 1984; Gabel and Kennedy 1984; Freeman 1978; MacIntyre 1981; Taylor 1998). Critics such as Wendy Brown, on similar grounds, argue that rather than emancipating citizens, rights are liable to reinscribe the very power relations they are meant to challenge (Brown 1995; Baynes 2000).

Although they start from quite different premises, we do not think it is too much of a stretch to link these legal and political theorists' commentaries to critical accounts of judicial policymaking in law and political science. The judicial policymaking literature is typically grounded in Pluralism, the interest group–focused approach to politics, rather than Marxian or Burkean themes, and so would be anathema to many radical critics of rights, but it too concerns the way in which litigation narrows and individualizes the framing of social problems. Litigation, this literature suggests, requires multi-faceted problems with many dimensions to be reduced to discrete legal disputes between individual claimants. The legalistic framing of social problems, it is contended, precludes consideration of broader concerns, and excludes some stakeholders from the deliberative process, as not all relevant parties will necessarily participate in precedent-setting lawsuits (or their settlement) (e.g., Fuller 1978; Horowitz 1977; Katzmann 1986; Melnick 1983; Derthick 2005). The process undermines the Pluralist ideal of bargaining among all affected interests.

It is admittedly a long distance from Marx to Melnick, but the common element we see is a concern about the divisive, fragmenting effects of the way in which adversarial legalism addresses social issues. And this is the concern that seems vindicated by the data in our study, which not only show a correspondence between adversarial legalism and a fractious brand of politics, but also illustrate the mechanisms that connect policy and politics.¹⁰

Our findings on the connection between legal policies and their politics dovetail nicely with the enormous literature on “policy feedbacks,” which tend to focus on how traditional welfare programs shape politics (e.g., Schattschneider 1935; Lowi 1964; Wilson 1973; Walker 1991; Skocpol 1992; Pierson 1993, 1994, 2004; Thelen 1999; Pierson and Skocpol 2002; Mettler and Soss 2004; Mettler 2011; Campbell 2003, 2012). This literature illustrates how policies “define, arouse, or pacify constituencies” by creating incentives for political actors and by influencing beliefs about what is “possible, desirable, and normal” (Soss and Schram 2007: 113). In a widely cited review of this literature, Paul Pierson (1993) identified two general categories of policy feedbacks, resource or incentive effects

(now often simply referred to as resource effects), and interpretive effects. Policies in this view provide material resources to actors that affect the way they engage in politics, but policies also frame the way social problems and actors are conceived.

We find both types of feedback mechanisms arising from the injury compensation policies in our study (Figure 1.1). First, injury policies create distinctive *distributional effects*, patterns of payout and compensation for injury that affect the material interests of the stakeholders. These distributional effects shape the stakes of interest groups in preserving or reforming the policy; this in turn affects how groups mobilize and build coalitions. Second, injury policies shape the *assignment of blame*, the framing of fault for injury. Blame assignment, in turn, affects how policymakers argue about the appropriate scheme for compensating injury.

In our cases, adversarial legalism and bureaucratic legalism created distinctive patterns of distributional and blame effects, and these effects result in distinctive political trajectories, patterns of politics over time. The distributional and blame effects of adversarial policies initially *limit* the scope of political conflict. Because adversarial legalism organizes injury compensation claims into discrete, private lawsuits, at an early stage it tends to have a privatizing effect. When there are just a few lawsuits against, say, a particular manufacturer who uses asbestos, or a particular vaccine producer, the cost and the blame for injury falls on just a few individual actors. At this stage members of Congress are disinclined to get involved, and quite willing to defer to judges who act in their traditional role as adjudicators of individual lawsuits. Even other companies in the affected industry or field fail to mobilize. They may calculate that the problem is limited to the named defendants. But as litigation expands, more and more companies and stakeholder groups become

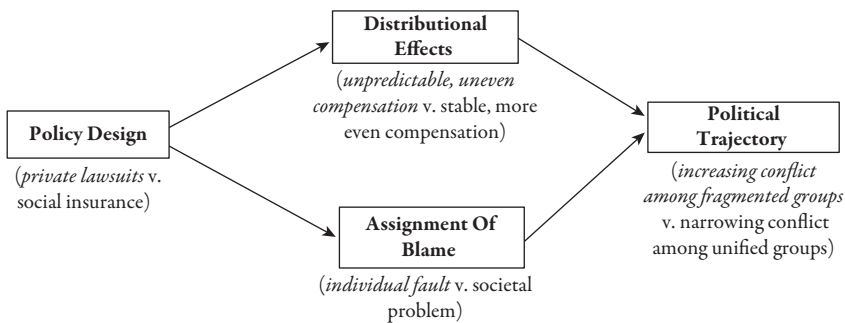


FIGURE 1.1 How policy shapes politics: injury compensation policy (*adversarial legalism* versus bureaucratic legalism)

involved, and the stakes increase. At this stage, the distributional effects of adversarial legalism are powerful: as some plaintiffs and defendants win while others lose, the uneven patterns of costs and benefits generates cross-cutting interests within and across key stakeholder groups. Those most affected by litigation on the defendant side run to Congress to try to make the pain go away. Those with lower risk, even in the same field, stay on the sidelines or even fight to preserve the adversarial legal system. The distributional effects of litigation then, reduce political conflict at an early stage, but increase factionalization at a later stage.

The other mechanism, blame assignment, also shapes injury politics in a powerful way: it forces those who seek reform to reframe responsibility for injury. Where individual lawsuits frame the problem as the culpability of individual entities, would-be reformers have to recast the issue as a social problem so as to make the sins of individual actors less relevant. This is a difficult political task. The combined effect of distribution effects and blame assignment associated with adversarial legalism is to create a political trajectory of increasing intensity and factionalization.

The distributional effects and blame assignment generated by bureaucratic legalism create a strikingly different political trajectory. Here the intensity and scope of conflict diminishes over time. Our cases of bureaucratic legalism all involve social insurance in which some kind of tax is created to fund an injury compensation scheme. At creation, there is a bitter and familiar conflict over the assignment of blame: business groups and their conservative allies argue against the tax as unfair and unwarranted. If there are injuries, they contend, it is not their problem. Liberals and their allies, on the other side, argue that it is a social responsibility to provide for suffering individuals. This is a fundamental political conflict, and in two of our cases, Social Security Disability Insurance and vaccine injury compensation, it is ferocious. But once the compensation scheme in those cases is enacted, the distinctive distributional effect of bureaucratic legalism kicks in: costs are spread so widely and evenly that the incentive to mobilize against the programs dissipates. Business groups largely demobilize, and conflict over the maintenance and expansion of the programs is reduced. Moments of conflict occasionally redevelop, but they are narrower in scope and less fragmented than in our cases of adversarial legalism. Again, there is a central irony here: the same aspect of policy design that increases conflict at the outset—the socialization of the costs of injury—over time seems to reduce conflict.

In sum, from a comparative developmental perspective, adversarial legalism and bureaucratic legalism have political trajectories that are mirror opposites. The politics of adversarial legalism commences in a decentralized fashion but becomes more pluralistic and fractious. The politics of bureaucratic legalism, by contrast, is highly polarized at the outset but over time becomes more consensual, coinciding with bureaucratic legalism's more even and predictable spreading of costs and benefits, and with the acceptance of its underlying principle of social responsibility for injury.

Road Map for the Following Chapters

We provide the grounds for our conclusions in the following five chapters. Chapter 2 is a quantitative analysis of patterns of congressional testimony from 1971 to 2011 on a range of adversarial and bureaucratic injury compensation policies. The data in this chapter suggest that adversarial legalism and bureaucratic legalism generate radically different types of congressional oversight. Hearings on adversarial policies, as compared to bureaucratic policies, feature more diverse types of interests, more conflicting testimony, and relatively high levels of participation by business interests. The fragmented patterns of participation and greater degree of conflict seem consistent with the concern that adversarial legalism individualizes conflict and fragments interests.

These cross-sectional findings are suggestive but only a start because they rely on the narrow prism of congressional hearings. Relatively quiet politics in Congress might mask high levels of conflict in other venues, particularly the other branches of government. Accordingly, chapters 3 through 5 feature three historical case studies of the politics of injury compensation policies. We begin with Social Security Disability Insurance, a bureaucratic policy that provides a baseline for comparison with the adversarial cases. We then turn to the asbestos case, tracing its evolving politics in several steps, first as claimants established a right to recovery, then as business interests attempted to contain their liability, resulting in a layered response to the problem of asbestos injury compensation. We end with the vaccine injury compensation case, in which an adversarial design was largely replaced by a bureaucratic design. Consistent with our quantitative analyses, these case studies suggest that the politics of adversarial legalism and bureaucratic legalism differ, but the case studies demonstrate that the differences are developmental: they lie in how patterns of conflict develop

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over time, with adversarial policies generating an increasing scope of conflict and bureaucratic policies tending to narrow conflict. In the concluding chapter, we summarize our findings and their limitations, and put our study in the broader context of research on law and public policy.

Notes

CHAPTER 1

1. The quote comes from an interview with a man on public assistance, and was used by Sarat to summarize an aspect of the legal consciousness of poor people on welfare, but we think it equally appropriate as a summary of the role of law in American public policy.
2. Gerhard Teubner's analysis of the concept of "juridification" demonstrates the slew of ways in which the concept has been deployed in law and social science, most of which have little to do with comparing the work of courts and legislatures. Teubner, for example, approves Jurgen Habermas's use of the concept of juridification to mark the "'constitutionalization' of the economic system," the growing use of purpose-oriented laws to regulate social life (Teubner 1987).
3. If you insist, for example, that a civil rights law like the Americans with Disabilities Act has been ineffective, is your comparison point some idealized agency-based policy that you imagine a legislature might have adopted instead, or just the conditions of people with disabilities before the ADA was adopted? On this point see Burke 1997.
4. Shapiro, for example, noted that judges are typically generalists, whereas agency officials tend to be specialists, and that courts often exercise negative power by striking down laws through judicial review as opposed to agencies, which shape policy through the promulgation of specific regulations (1968: 44).
5. We can think of our analysis as searching for patterns that are consistent across five types of comparisons: (1) cross-sectional comparisons of policies that feature different types of institutional structures (i.e., adversarial versus bureaucratic policies); (2) cross-sectional comparisons of policies that feature similar types of institutional structures but address different compensation areas (e.g., asbestos litigation, vaccine litigation, medical malpractice, product liability, and securities fraud litigation); (3) cross-sectional comparisons within policy areas where different policy types co-exist side-by-side (e.g., asbestos litigation and workers' compensation); (4) longitudinal comparisons across and within policies at different

stages of development (e.g., the politics of creating asbestos litigation versus the creation of SSDI or the politics of creating, expanding, and retrenching vaccine injury compensation); and (5) longitudinal comparisons within a policy where one type of regime replaced another (e.g., the vaccine compensation program and vaccine litigation).

6. *U.S. v. Windsor*, 570 U.S. ____ (2013) (Docket No. 12-307).
7. *Ibid.* (Scalia Dissent), pp. 25–26.
8. Commentators often decry judicial policymaking as inherently undemocratic and “counter-majoritarian,” as Scalia did in *Windsor*. Our finding of intentionally shared policymaking powers adds to the long list of reasons for questioning simplistic arguments that judicial policymaking is necessarily less “democratic” than its legislative counterparts (see Barnes 2004; Friedman 2001, 1993; Whittington 2001; Peretti 1999; Feeley and Rubin 1998; Mishler and Sheenan 1993; Klarman 1994; Graber 1993; Rosenberg 1992). At its core, this argument—the so-called counter-majoritarian difficulty (Bickel 1962)—presupposes that the president and Congress are majoritarian and represent the “will of the People” simply by virtue of their elected status. Elections clearly matter in any democracy, but they do not guarantee majoritarian results, given low voter turnout, incumbency advantages, gerrymandering, unregulated campaign financing, and many other staple features of today’s elections. Even if we accept that elections produce members of Congress that fairly represent the preferences of a majority of citizens in their districts or states (and effectively resist pressure from well-organized and wealthy groups)—a big “if”—no guarantee exists that a majority of lawmakers will be able to act given the large number of veto points in the American legislative process, including a host of supermajority requirements in the Senate. Conversely, majority rule legislative processes may not produce laws that reflect a clear majority preference of elected officials, much less concerns about public opinion; preferences cycle and votes can be manipulated (Arrow 1963; Shepsle 1992). Moreover, legislation can reflect a variety of motivations and purposes, some of which are plainly inconsistent with the majoritarian ideal, such as credit claiming, blaming shifting, and providing benefits to groups that can help officials get reelected (Mayhew 1974; Fiorina 1989; Arnold 1990). By the same token, federal judges are not heedless of public opinion simply because they are appointed for life (see, e.g., Mishler and Sheenan 1993; Marshall 1989; Feeley and Rubin 1998; Peretti 1999: 178–180 (collecting authority); Devins 2004). The question then is not whether judicial policymaking is *inherently* anti-democratic or counter-majoritarian; it is how reliance on litigation shapes the ongoing inter-branch colloquy on significant policy matters and whether it advances important democratic activities, such as broad political participation, coalition building among divergent interests, and deliberation within diversely representative branches and levels of government. That is why, in this book, we move beyond simplistic criticisms of judicial policymaking based on the counter-majoritarian difficulty and explore how adversarial legalism

- shapes the underlying interest group politics that drive inter-branch relations over the making of policy.
9. See Powell (2006: 318), quoting Charles Evans Hughes, *Addresses of Charles Evans Hughes* 185 (1916). As Powell notes, Hughes did not literally believe that the Supreme Court controlled the meaning of the Constitution, and lived to regret the way the quotation was used.
 10. We recognize that the term “mechanism” is deeply contested. In a thoughtful review, John Gerring (2010: 1500–1501) finds no less than ten definitions of mechanism in the relevant literature, some of which are contradictory. We have no desire to become bogged down in this debate, nor is it necessary to do so. In using the term “mechanism,” we simply mean a pathway or link between an explanatory variable and an outcome, which is analogous to an intervening variable (see Weller and Barnes 2014; Gerring 2004, 2007).

CHAPTER 2

1. We are not alone in using congressional hearings data to probe patterns of political participation in public policy fields. Other scholars have used data drawn from CIS hearing abstracts in leading journal publications in both American politics and socio-legal studies (e.g., Sheingate 2006; Miller 2010).
2. One could argue that ATRA should be coded as a business group instead of falling under the “other” category. Because we believe that conservative public interest groups might have distinct perspectives on injury compensation programs, and, in fact, business groups were often split on issues related to tort reform, we coded it as a separate interest. Nevertheless, we coded it both ways in our sample and the results were nearly identical regardless of how we coded this particular group.
3. The coding of Judge Becker and Jeffrey Robinson’s participation raised issues that illustrate some of the choices (and challenges) we confronted in coding these data. With respect to Judge Becker, the hearing abstract listed Becker as “Judge, U.S. Court of Appeals, Third Circuit,” raising the question of whether he was testifying as a federal official representing the courts or as a legal expert explaining the bill. To decide this issue, we read his testimony, which focused on his explanation of many technical legal aspects of the bill that he helped craft. (Senator Cornyn called the legislative proposal under consideration the “Becker Bill” because of the Judge’s role in writing it. Judiciary Committee, “Hearing on the Fairness in Asbestos Injury Resolution Act,” 109th Cong., 1st Sess., January 11, 2005, 6.) Accordingly, we coded him as a legal expert. Similarly, the hearing abstract listed Robinson as “attorney, also Equitas Reinsurance Ltd., also Equitas, Ltd.” Here, we had to decide whether to code him as counsel (and, if so, defense or claimant) or as another representative of insurance companies (whose testimony was redundant of other insurance representatives). Again, we turned to his testimony to make an assessment, which made it clear that he was a defense lawyer and a member