

*Adversarial Legalism: The American Way of Law*

*2<sup>nd</sup> Edition*

*Uncopyedited Draft September 2018*

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## *The Concept of Adversarial Legalism*

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### American Legal Exceptionalism

Everywhere in the modern world legal control of social, political, and economic life is intensifying (Galanter, 1992; Dewees et al., 1991). Law grows from the relentless pressures of technological change, geographic mobility, global economic competition, and environmental pollution—all of which generate social and economic disruption, new risks to health and security, new forms of injustice, and new cultural challenges to traditional norms. Some citizens, riding the waves of change, demand new rights of inclusion, political access, and economic opportunity. Others, threatened by change, demand legal protection from harm and loss of control. Democratic governments pass laws and issue judicial rulings responsive to both sets of demands (Schuck, 2000: 42; Kagan, 1995).

In some spheres of activity, such as land use regulation and worker protection, Western European polities typically have more restrictive laws than does the United States. Compared to the United States, Japan has a more detailed and extensive set of legally mandated product standards and premarketing testing requirements (Edelman, 1988: 292; Vogel, 1990). Germany has stricter recycling regulations and much tighter legal restrictions on the opening and operating of new retail enterprises (Davis and Gumbel, 1995). Compared to most American states, Sweden has tougher laws, and tougher law enforcement, concerning fathers' obligations to provide child support. The Netherlands regulates how much manure a farmer can spread on his fields (Huppel and Kagan, 1989: 215) and, like Germany, has more stringent emission standards than the United States for some major air pollutants (Rose-Ackerman, 1995: 27–28). An increasing number of nations, as well as the European Union, now have active constitutional courts (Kapiszewski et al, 2013), supporting Torbjorn Vallinder's (1995: 13) claim of a worldwide trend toward the "judicialization of politics," defined as "(1) the expansion of the province of courts or the judges

at the expense of politicians and/or the administrators . . . or . . . (2) the spread of judicial decision making methods outside the judicial province proper.” As the EU has extended its regulatory reach, rights-oriented judicial rulings and litigation have become increasingly salient aspects of governance in European member states (Kelemen, 2011 ; Stone Sweet, 2000; Lasser, 2013)

But the United States, as mentioned earlier, has a unique legal “style.” That is the message of an accumulating body of careful cross-national studies, such as those listed in Table 1. Each study examines a specific area of public policy, law, or social problem-solving in the United States and at least one other economically advanced democracy. The studies focus not merely on the formal law but on how the law is implemented in practice. Cumulatively, the studies compare national systems for compensating injured people, regulating pollution, punishing criminals, equalizing educational opportunity, promoting worker safety, discouraging narcotics use, deterring malpractice by police officers, physicians, and product manufacturers, and so on. The studies do not, of course, cover all of the many fields and subfields of law. But the comparative empirical studies mentioned are sufficient to show that for one social problem after another, the American system for making and implementing public policy and resolving disputes is distinctive. It generally entails (1) more complex bodies of legal rules; (2) more formal, adversarial procedures for resolving political and scientific disputes; (3) a much larger role for private lawsuits in enforcing antidiscrimination, consumer protection, and regulatory law; (4) more adversarial and costly forms of legal contestation; (5) stronger, more punitive legal sanctions;<sup>1</sup> (6) more frequent judicial review of and intervention into administrative decisions and processes;<sup>2</sup> (7) more political controversy about legal rules and institutions; (8) more politically fragmented, less closely coordinated legal decisionmaking systems; and (9) more legal uncertainty and instability. More recently published comparative studies suggest that these differences have persisted into the 21<sup>st</sup> Century. <sup>3</sup>

Comparative studies are hardly necessary, moreover, to show that in no other economically advanced democracy are judges elected, or appointed, through such an openly partisan political process. In no other democracy do judges so readily make new law, rather than simply apply it. The legal system of no other democracy so fully empowers and encourages lawyers and non-governmental advocacy organizations to act as “private attorneys’ general,” bringing lawsuits against government bodies and business corporations for violating statutory or Constitutional

rights. Thus in no other economically advanced political system do public policy entrepreneurs and advocacy groups so readily turn to the courts to achieve policy goals that have been ignored

**Table 1**

Cross-national studies

Author	Policy area	Countries compared with U.S.
Badarraco (1985)	Exposure to polyvinyl chloride	France, Germany, Japan, U.K.
Bayley (1976)	Police behavior	Japan
Bok (1971)	Selection of labor representatives	Several West European
Boyle (1998)	Litigation in the licensing of nuclear power plants	France, Germany, Sweden
Braithwaite (1985)	Coal mine safety	Australia, Japan, Germany, France
Braithwaite (1993)	Nursing home care	Australia, U.K.
Brickman et al. (1985)	Hazardous chemicals regulation	Several West European
Charkham (1994)	Corporate governance	France, Germany, Japan, U.K.
Church & Nakamura (1993)	Hazardous waste cleanup	Denmark, Germany, Netherlands
Day & Klein (1987)	Nursing homes	U.K.
Feldman (2000)	Blood safety	France, Japan
Glendon (1987)	Regulation of abortion and child support	Several West European
Greve (1989b)	Public interest litigation in environmental regulation	Germany
Hoberg (1993)	Environmental regulation	Canada
Jacob et al. (1996)	Role of courts	France, Germany, Japan, U.K.
Jasanoff (1986)	Carcinogens regulation	Several West European
Johnson (1998)	Criminal prosecution	Japan
Kagan & Axelrad (2000)	Environmental and product safety regulation; patents; labor; debt collection	Germany, Japan, U.K., EU, Canada, Netherlands
Kelman (1981)	Workplace safety	Sweden
Kirp (1979)	Racial discrimination in schools	U.K.
Kirp (1982)	Special education	U.K.
Langbein (1979b)	Criminal adjudication	Germany
Langbein (1985)	Civil litigation methods	Germany

**Table 1**

Cross-national studies

Author	Policy area	Countries compared with U.S.
Litt et al. (1990)	Banking regulation	Japan
Lundqvist (1980)	Air pollution regulation	Sweden
Pizzi (1999)	Criminal adjudication	Germany, Netherlands, Norway, U.K.
Quam et al. (1987)	Medical malpractice compensation	U.K.
Schwartz (1991)	Products liability lawsuits	Several West European
Sellers (1995)	Land use decisionmaking	France, Germany
Tanase (1990)	Compensation for vehicle accidents	Japan
Teff (1985)	Pharmaceutical products regulation	U.K.
Vogel (1986)	Environmental regulation	U.K.
Wallace (1995)	Environmental regulation	Japan, several West European
Wokutch (1992)	Workplace safety regulation	Japan

or blocked by legislatures. And nowhere have judges so often made crucial decisions in political struggles over the delineation of electoral district boundaries, the management of forests, the breakup of business monopolies, the appropriate funding level for inner-city versus suburban public schools, or the effort to discourage cigarette smoking.

Consequently, the United States has by far the world's largest cadre of politically-oriented "cause lawyers" who seek to influence public policy by means of innovative litigation—and who use the threat of litigation in order to promote institutional change (Epp, 2009, 1998; Kavar, 2015). In no other country are lawyers so entrepreneurial in seeking out new kinds of business, so eager to challenge authority, or so quick to propose new liability-expanding legal theories. In no other countries are the money damages assessed in environmental and tort suits nearly so high, or have major manufacturers been driven into bankruptcy by liability claims, or have disagreements over tort law generated such intense interest group clashes in the legislatures. Notwithstanding the aggressive prosecution of governmental corruption by Italian and French magistrates, the United States leads the league of nations in the extent to which political parties' struggles for political advantage regularly include investigations and prosecutions arising from

charges that the chief executive, his aides, cabinet members, or legislators have committed criminal violations (Ginsburg and Shefter, 1990). The United States is remarkable in its propensity to stage highly publicized, protracted legal donnybrooks such as the multicourt battle over Florida's votes in the 2000 presidential election, and the waves of litigation by political conservatives opposed to the 2009 Affordable Health Care Act—struggles that inject huge televised doses of politicized legal argument into the nation's everyday experience.

### What *Is* Adversarial Legalism?

All these legal propensities are manifestations of what I call “adversarial legalism”—a method of policymaking, policy-implementation and dispute resolution with two salient characteristics. The first is *formal legal contestation*—competing interests and disputants readily invoke legal rights, duties, and procedural requirements, backed by recourse to formal law enforcement, litigation, and/or judicial review. The second is *litigant activism*—a style of legal contestation in which the assertion of claims, the search for controlling legal arguments, and the gathering and submission of evidence are dominated not by judges or government officials but by disputing parties or organizations, acting primarily through lawyers. Organizationally, adversarial legalism typically is associated with and is embedded in decisionmaking institutions in which *authority is fragmented* and in which *hierarchical control is relatively weak*.

Table 2 presents a typology designed to contrast adversarial legalism with other modes of policy-making, policy-implementation and dispute resolution.<sup>4</sup> The table outlines a two-dimensional space based on two variables: (1) the relative density of controlling legal rules and (2) the degree to which legal authority is organized and exercised in a hierarchical as opposed to a participatory fashion (that is, influenced by the affected parties). Along the horizontal, “density of legal control” dimension of Table 2, legal processes vary in the extent to which substantive decisions and procedures are structured by, and expected to conform to, specific legal rules, rights, and duties. The more detailed and prescriptive those pre-existing legal rules – that is, the further along the continuum toward the right side of the table, the more “formal” or “legalistic” the system can be said to be.<sup>5</sup> Conversely, decisionmaking systems can be placed toward the left side, and characterized as “informal,” to the extent that guiding legal rules are more general, less constraining, both substantively and procedurally.

In the second dimension, displayed vertically on the table, the higher up toward the top that a policy-implementation or dispute-resolution process is located, the more “hierarchical” it is, that is, dominated or controlled by an official who is relatively insulated from pressures from disputing parties or affected individuals and organizations. Toward the bottom end of that continuum, authority is exercised in a more participatory manner, so that affected parties have considerable opportunity to make arguments and actually influence legal outcomes.

Taking each of these dimensions to their extreme form produces four “ideal types” – conceptual constructs which “real world” decision-processes may approximate to various degrees. In fact, legal systems often employ “hybrids” -- policy-implementation and dispute resolution systems in which one ideal type predominates but which combine elements of two or more others. Such real-world hybrids thus occupy various intermediate points on either the informal-formal dimension, or the hierarchical-participatory dimension, or on both, edging closer to the center of the two-dimensional space. The “ideal types,” however, give us images or conceptual starting points for comparing and contrasting real-world systems.

**Table 2**

Modes of policy making, policy implementation and dispute resolution

Organization of decision-making authority	Density of Legal Control	
	INFORMAL	←→ FORMAL
HIERARCHICAL ↑	Expert or political judgment	Bureaucratic legalism
↓ PARTICIPATORY	Negotiation/mediation	Adversarial legalism

### *Negotiation/Mediation*

A process in the lower left quadrant of Table 2 is participatory in the sense that it is dominated by the contending parties, not by an authoritative governmental decisionmaker. But it is informal or nonlegalistic, since neither procedures nor normative standards are dictated by formal law. One example would be dispute resolution via negotiation, with or without lawyers. For example, the Congressional statute mandating “special education” programs requires local school districts to negotiate an individualized education plan with the parents or guardians of each ‘special needs’ student.<sup>6</sup> The quadrant would also include mediation, whereby an “official” third party attempts to induce contending parties to agree on a policy or settlement but refrains from imposing a settlement based on law or official policy. Often, for example, regulatory officials charged with implementing anti-discrimination or consumer protection law mediate disputes between a complainant and an employer or a merchant, fostering a negotiated settlement (Silbey, 1984).

### *Expert/Political Judgment*

In modern administrative states, many administrative decision processes would fall in the upper left quadrant of Table 2. They are *hierarchical*, in the sense that an official decision maker (as opposed to the individual or organization subject to agency action) controls the process and the standards for decision, yet *informal* in the sense that decisions are entrusted to the professional or political judgment of individual officials, rather than requiring them to conform to detailed legal rules. For example, in many Western European countries decisions concerning eligibility for disability benefits and the extent of workers’ compensation benefits are made by a panel of government-appointed physicians (or a mixed panel of physicians and social workers) without significant probability of intensive judicial review. In Japan disputes over fault in motor vehicle accidents regularly are resolved by special traffic police who rush to the scene, question the parties, “hammer out a consensual story as to what happened,” and file a detailed report on their findings (Tanase, 1990: 651, 673–674). In the United States, government programs to protect human subjects and laboratory animals in biomedical research are characterized by broadly-worded legal standards, implemented by university review boards consisting of scientific professionals.



### *Bureaucratic Legalism*

A policy-implementing or decisionmaking process characterized by a high degree of hierarchical authority and legal formality (the upper right quadrant of Table 2) resembles the ideal-typical bureaucratic process as analyzed by Max Weber. Governance by means of bureaucratic legalism emphasizes uniform implementation of centrally devised rules, vertical accountability, and official responsibility for fact-finding. The more hierarchical the system, the more restricted the role for legal representation and influence by affected citizens or contending interests. In contemporary democracies the pure case of bureaucratic legalism usually is softened in some respects, but it is an ideal systematically pursued, for example, by tax collection agencies. Also tending toward this ideal are German and French courts, where judges are bureaucratically recruited and supervised – as contrasted with American emphasis on election or political appointment. In court, these bureaucratically- judges—not the parties’ lawyers and not lay juries—dominate both the evidence-gathering and the decisionmaking processes (Langbein, 1994). Another illustration: in contrast to American criminal prosecutors’ offices, in which individual assistant district attorneys usually make their own judgments about which charges to make and bargain with defense counsel about how much to reduce them in return for guilty pleas, prosecutors in Japan are subject to detailed rules and close hierarchical supervision concerning the investigation of facts, determination of the proper charge, and the recommendation of penalties (Johnson, 1998).

### *Adversarial Legalism*

The lower right quadrant of Table 2 includes policy-making, policy-implementing and decision processes that are procedurally formalistic but in which hierarchy is relatively weak and party influence on the process is strong. Regulatory and antidiscrimination laws in the United States, for example, frequently are implemented and enforced not merely by government bureaucracies but also, and sometimes primarily, by means of lawsuits that are initiated by a decentralized array of private individuals, entrepreneurial lawyers, and advocacy organizations. American methods for compensating victims of highway and medical accidents prominently include a decentralized and adversarial tort law system driven by claimants and their lawyers, as contrasted with Western European compensation systems, which operate primarily through social insurance or benefit-payment bureaucracies. In American civil and criminal adjudication, the introduction

of evidence and invocation of legal rules are dominated not by the judge (as in Continental Europe) but by contending parties' lawyers. Even in comparison with the British "adversarial system," hierarchical, authoritative imposition of legal rules is relatively weak in the United States (Atiyah and Summers, 1987). Trial court judges share decisionmaking power with lay jurors, whose decisions are not explained and largely shielded from hierarchical review, which reduces legal certainty and magnifies the influence of skillful legal advocacy. Hierarchical control of judges in the US also is weakened by jurisdictional fragmentation between the federal and the 50 separate state judiciaries. Due to the large role of political parties and interest groups in the selection of judges, American judges, compared to more professionally-selected and supervised judiciaries, more often are influenced by their political commitments, so that decisions more often are influenced by which judges decide the case, or by in which city or county the case is heard Levin, 1972: 193–221; Rowland and Carp, 1983: 109–134).

Similarly, compared to European democracies in which regulatory policymaking tends to prioritize a combination of expert judgment and officials negotiations with affected interests, regulatory policy-making in the United States is more legalistic and adversarial. Complex legal rules concerning public notice and comment, restrictions on ex parte and other informal contacts with decisionmakers, legalistically specified evidentiary and scientific standards, mandatory official "findings" and responses to interest group arguments all are intended to facilitate interest group participation and judicial review of administrative decisions. But hierarchical authority is correspondingly weak. Policymaking and implementing authority is often shared by different agencies, at the same or at different levels of government, with different interests and perspectives. Agency decisions are frequently challenged in court by dissatisfied parties and not infrequently reversed by judges, who dictate further changes in administrative policymaking routines. Lawyers, scientists, and economists hired by contending industry and advocacy groups play a large role in presenting evidence and arguments. Overall, the clash of adversarial legal argument has a larger influence on decisions than in other countries' regulatory systems, where policy decisions more often are characterized by a combination of political and expert judgment and consultation with affected interests (Badaracco, 1985; Brickman et al., 1985; Strauss ).

### *Sequential Decision Systems*

As the example of judicial review of regulatory agency decisions shows, governments often

establish a sequence of modes of policy-making and policy-implementation. Often legal decisions made the first instance via bureaucratic legalism can then be appealed to court or an administrative body more closely resembles adversarial legalism. For example, in the massive US Social Security Disability program, where front-line decisions are structured via bureaucratic legalism, an individual whose application has been denied can obtain a *de novo* re-hearing that has some features of adversarial legalism. The appeal is heard by an intra-agency (but quasi-independent) “administrative law judge.” The applicant appears and speaks in person, often with the assistance of legal counsel – although the Social Security Administration itself is not represented by counsel defending the initial decision. Ultimately, however, applicants who are turned down by repeated intra-agency appeals can (and often do) appeal to a US Circuit Court of Appeals, in which both sides are represented by lawyers. (Mashaw, 1983: 139-40; Kagan, 2017). More generally, a very wide array of legal decisions made in the first instance in the United States by administrative bodies -- from local police departments and land use permitting agencies to state regulatory enforcement offices and federal immigration authorities -- can be appealed to courts, where the processes of adversarial legalism kick in. Conversely, the vast majority of processes *initiated* via adversarial legalism – everyday criminal prosecutions and civil lawsuits – end up being resolved via negotiation, primarily to avoid the costs, delays and uncertainties of full-scale adversarial legalism. In automobile accident cases in the United States, most legal claims for damages against the allegedly negligent other driver, based on tort law, are resolved via bureaucratic processes in the potential defendants’ liability insurance company.

No modern democratic legal system is characterized entirely by any of the quadrants in Table 2. National legal styles are not monolithic; their ways of making, invoking, and enforcing law vary internally. Litigation resembling adversarial legalism can and does occur in more “cooperation”-oriented nations, such as the Netherlands and Japan (Niemeijer, 1989: 121–152; Upham, 1987). Privatization, deregulation, intensified economic competition, and the advent of transnational regulation by the European Union and the European Court of Justice all have increased the role of courts and litigation in the governance of European countries (Kelemen, 2011; Kagan, 1997a). Meanwhile, in the United States, bureaucratic legalism is common. Most bureaucratic decisions are not appealed to courts. Most accident victims, outraged customers,

and others with legal grievances do *not* resort to lawsuits as their first recourse (Hensler et al., 1991; Miller and Sarat, 1981). Politicians and legal elites have often created less adversarial, less costly alternatives to adversarial litigation—juvenile courts, family courts, small claims courts, workers’ compensation tribunals, court-annexed mediation processes, negotiated regulatory compliance plans, and so on. American judges and legislatures periodically issue rulings and enact statutes that are designed to *discourage* lawsuits and appeals. A wave of such reforms affected the tort systems in many states in the 1980s and 1990. The early 21<sup>st</sup> Century has seen an even stronger wave of anti-adversarial legalism, as discussed in the final chapter of this volume.

Most importantly, to reemphasize a point made earlier, in social arenas in which the processes of adversarial legalism often *are* invoked, full-scale legal contestation usually does not occur. The overwhelming majority of criminal and civil cases are resolved short of a jury trial. That is largely because the extraordinary costs, delays, and uncertainties associated with formal adversarial litigation impel most disputants to negotiate an informal plea bargain or settlement—even if it means abandoning valid claims or defenses (Feeley, 1979; Macaulay, 1979). Thus it is helpful to think of “adversarial legalism” as referring both to (1) *a method of policy implementation and dispute resolution* (characterized by a set of legal institutions, rights, and rules that facilitate or encourage adversarial, party-dominated legal contestation) and (2) *the day-to-day practice of adversarial legal contestation* – “adversarial legalism in action” In principle and in practice, institutionalizing the methods or structures of adversarial legalism—that is, establishing the kinds of judiciaries, legal rules, and law firms that facilitate adversarial litigation—does not completely determine how often conflicting parties actually *use* those institutions. The incidence and intensity of “adversarial legalism in action” varies over time and across settings, depending on the motivations and resources of potential disputants.

Yet viewed in comparative perspective, the United States is distinctive in both dimensions. At the level of legal structures and rules, it is much more inclined to authorize and encourage the use of adversarial litigation to implement public policies, to challenge existing laws and policies, and to hold law enforcement officials, administrative agencies, school systems and business corporations legally accountable.. And according to the comparative studies of particular policy fields listed in Table 1, adversarial legalism as a matter of day-to-day practice is far more

common in the United States than in other democracies.<sup>7</sup> The dual aspect of adversarial legalism—as decisionmaking structure or method and as day-to-day practice—is crucial to understanding its social consequences. It means that adversarial legalism’s importance cannot be measured by litigation or adjudication rates alone, any more than the significance of nuclear weapons rests on the frequency of nuclear war. For example, even if only a small minority of aggrieved persons or organizations actually file lawsuits, and even if most lawsuits are settled before trial, the mere threat of costly, embarrassing, and potentially punitive adversarial litigation can deter malpractice by hospitals, business organizations, and governmental bodies. Even if only a small percentage of those who object to plans for new waste disposal facilities challenge the proponents’ permits in court, and even if only a handful of businesses mount legal appeals against new regulations, the legal rules and practices that facilitate such adversarial legal actions matter a great deal because the governmental officials who formulate solid-waste permits and new regulations cannot predict either the incidence or the outcomes of such actions. Because its structures always stand ready to be mobilized, adversarial legalism—litigant-driven, potentially costly legal contestation—is a barely latent, easily triggered potentiality in virtually all contemporary American political, economic, and administrative processes. It creates a set of incentives and expectations that have come to loom very large in American governmental, commercial, and social life. For these reasons, adversarial legalism can meaningfully be called the American way of law.

### The Roots of Adversarial Legalism

By drawing many conflicts over law and public policy into the courts, adversarial legalism enhances the role of judges in legal change, and in that sense blurring the line between law and politics. And so, especially since the 1980s, it has stimulated partisan political battles concerning judicial selection. Those features of adversarial legalism are jarring to the professional legal elites of European democracies, who have long regarded legal change as the province of representative legislatures alone. Judges in those countries are selected, trained, and supervised in non-political ways that emphasize careful legal craftsmanship, consistency and predictability. Thus their adjudicatory processes lean more toward the ideals of bureaucratic legalism than toward adversarial legalism.

Adversarial legalism *is* consonant, however, with the legal culture of American judges, lawyers, legal scholars and teachers, who tend to view law as a “pragmatic instrument of social improvement (Atiyah & Summers, 1987:404), and view courts as essential checks on the elected branches of government. Consequently judicial creativity and problem-solving is valued, as is creative legal advocacy. Adversarial legalism is used and defended by politically conservative lawyers for advancing conservative values and by politically liberal ones for advancing liberal values. But the roots of adversarial legalism go deeper than in American professional legal culture alone. Adversarial legalism in the United States stems primarily from distinctive American political traditions, attitudes, structures, and interest groups pressures.

Most of the men who founded the United States had rebelled and fought against a powerful, distant monarchy. Great Britain, they believed, had violated their fundamental political and legal rights and had squelched their desires for local self-government. They believed in individual liberty, and they understandably were wary of concentrated government authority. Most “federalists” (who wanted a stronger national government) and “antifederalists” (who did not) believed that government should be mostly decentralized, subject to accountability by state and local electorates, and constrained by law. In his comparative analysis of political cultures, Seymour Martin Lipset (1996: 21) wrote that with its emphasis on individualism and its mistrust of government, “America began and continues as the most antistatist, legalistic, and rights-oriented nation.”

Those attitudes were embedded the political structures of the young nation. Through written constitutions, both federal and state, government was to be decentralized and divided into cross-checking branches, and limited by law. The constitutions also contained Bills of Rights, enforceable in independent courts at the behest of ordinary people. The states also adopted the British common law tradition, which vested considerable law-making power in judges. That pattern of fragmenting authority was repeated in the states’ separate court systems: the adjudicatory power of judges was shared with locally-selected juries and, via the adversary system, was checked by contending lawyers. By the mid-19<sup>th</sup> Century, a majority of states had instituted democratic election of judges to ensure accountability and political responsiveness.

Adversarial legalism, therefore, soon was woven into the fabric of American life and politics. In the early 19<sup>th</sup> Century, the county courthouse, for most people, was the most salient institution of government. Courts and juries were widely used, widely valued. Lawyers, as

Alexis de Tocqueville observed in the late 1820s, were prominent at every level of government. Because state legislatures met only for short periods each year, state court judges, deciding case-by-case under the common law, became the primary policymakers for broad swaths of property, contract, and tort law. Thus four basic engines of American adversarial legalism were already chugging away: (1) a politically selected judiciary that not only “applied” but also *made* law, via common law adjudication and via constitutional review of legislative and other governmental decisions; (2) litigant-and-lawyer-dominated modes of dispute-resolution and adjudication, structured around the right to trial by jury; (3) a large, entrepreneurial, and politically-active legal profession; and (4) a legal culture that reflected a view of law, litigation, and courts as important instruments for protecting individual rights, improving governance, and checking the exercise of political power. In the economic sphere, American businesses, compared to their counterparts in Europe, relied more on lawyers, litigation, and judges to resolve conflicts, to adapt the law to a nascent capitalist economy, and later in the century, to limit governmental regulation of markets.

Fast forward now to the second half of the twentieth century. In that period, adversarial legalism’s role in American governance expanded and intensified. Earlier, in the late 19<sup>th</sup> and early 20<sup>th</sup> Centuries, a more pro-government strand had developed in American political culture. Prairie populists and urban “Progressives,” responding to the social disruptions and harms generated by industrialization, urbanization, and larger-scale market dynamics, demanded government regulation of public utilities and railroads, food and workplace safety, and agricultural price supports. That strand of political culture flourished again during the Great Depression. The Roosevelt Administration’s “New Deal” instituted nationwide price and labor and financial market stabilization measures, regulation of anti-labor union practices, and social insurance programs for the retired workers, the unemployed, and single mother families. During the New Deal and World War II, the national government’s taxing powers and administrative capacities had grown enormously. Washington had become expected to play an active role in stabilizing the economy and promoting economic growth. In the post-war decades, most of the population enjoyed markedly higher standards of living, was better educated, and was linked by modern communications technologies.

In that context, the pro-government strand in American political culture intensified, generating demands for higher nationwide standards concerning criminal and social justice,

health and safety, and environmental protection. It was manifested in the powerful political movements that swept the United States beginning in the 1960s – the civil rights movement, environmentalism, and feminism. -- as well as in the efflorescence of “public-interest groups” which demonstrated, petitioned the courts, and lobbied legislatures on behalf of Latinos, consumer interests, the aged, tenants, children, disabled persons, impoverished families, and more.

Cumulatively, these movements were demanding a major expansion of governmental authority, particularly on the part of the federal government. That demand, however, ran up against an inherited political tradition and political structures grounded in distrust of centralized political authority and “big government.” From that tension sprang increases in adversarial legalism’s role in governance. Here are two illustrations of that dynamic, summarized quickly here but explicated more fully in Chapter 3:

Between 1965 and 1977, responding to the new political movements, Congress passed 25 major environmental and civil rights acts, plus far-reaching statutes regulating workplace safety, consumer lending, product safety, private pension funds, and local public education. It created federal regulatory agencies or bureaus to issue implementing regulations, binding on millions of business firms. But to enforce those laws and regulations, Congress was compelled to bow to the inherited demands for decentralization of government. Rather than creating and funding large new national regulatory inspectorates with offices in every locality, Congress often delegated implementing authority to state and local governments. Yet the politically liberal reformers and their Congressional allies had little trust that many of these politically-varied government would be enthusiastic or competent enforcers of the transformative new federal statutes and regulation. To meet those concerns, Congress turned to adversarial legalism. It empowered individual citizens and public interest organizations to haul state and local governments into court for noncompliance, or to sue noncomplying regulated businesses directly. Lawyers and judges, it was hoped, would ensure the faithful implementation of law. Similarly, responding to partisan distrust, by both liberals and conservatives, of how *federal* regulatory agencies would employ their broad new law-making powers, Congress – and the federal courts themselves – expanded interest groups’ rights to demand searching judicial review of new administrative regulations. Judges thus became deeply involved in enforcing and definitively interpreting federal regulatory law.



Secondly, as suggested above, the judiciary itself expanded the realm of adversarial legalism. To mention just one example, in the realm of criminal justice, politically liberal reformers were increasingly critical of unfair – and often brutal and racist – practices by local police departments and courts, not only in southern states but also in the big cities and racial ghettos of the north. But the national government had no European-style ministry of justice that could discipline and impose national norms on the hundreds of local police departments, prosecutors’ offices, and courthouses. The federal courts, however, had a point of leverage. In the 1960s during Chief Justice Earl Warren’s tenure, the U.S. Supreme Court reinterpreted the Constitution, elaborating new, nationally-binding Constitutional rules regulating pretrial detention, interrogation of suspects, police searches for evidence, and jury selection. And to help ensure local police, prosecutors, and judges would enforce the norms, often described as the “due process revolution,” the Court also ruled that state and local judges were constitutionally obliged to block the use of unconstitutionally obtained evidence. And to prod them to do so, the Court ruled that state governments were constitutionally obliged to provide free defense counsel for indigent defendants. Over time, responding to defense lawyers’ arguments, judges, not state or federal legislatures, worked out the principles for when police can arrest and use lethal force, when they can search a suspect’s car, and much more.

In those and myriad other ways, in state law as well as federal law, adversarial legalism became a crucial component of the American version of the contemporary activist state. It is only a slight oversimplification to say that in the United States, lawyers, legal rights, judges, and lawsuits became functional equivalents for the large central bureaucracies that dominate governance in the activist states of Western Europe.

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## Endnotes

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<sup>1</sup> Feldman (2000) describes an exception. He shows that in the United States, Japan, and France alike, contaminated blood products infected thousands of hemophiliacs with HIV. Litigation ensued in all three countries, but the legal sanctions levied against respondent companies and government officials in Japan and France were harsher than in the United States, and the litigation in those countries became more of a political *cause celebre*. It does appear, however, that the behavior by Japanese and French government officials and companies was more clearly egregious, since “both Japan and France delayed the licensing of a U.S. blood test and continued using unheated blood products months after they had been abandoned in the United States” (id. at 694).

<sup>2</sup> Sellers (1995) is a partial exception, since he found that appeals to courts of local land use decisions in the 1980s and 1990s were as common and just as likely to be successful in France and Germany as in the United States. The French and German appeals were to special administrative courts rather than to courts of general jurisdiction, as in the United States.

<sup>3</sup> See Hamlin (2014 ) (determination of refugee asylum cases, US, Australia, Canada); Kelemen (2011) (Securities regulation, Competition policy, and Disability Rights, US and EU); Lieberman (2005) (anti-discrimination law in US, Great Britain, France); Kavar (2015) (immigrant rights litigation in the US and France); Cioffi (2010) (corporate governance law in the US and Germany); Jewell (2007) (welfare administration in US, Germany, and Sweden); Bignami (2011) (data privacy regulation in Europe and the United States); Saguy (2000) (sexual harassment regulation in France and the US) .

<sup>4</sup> The typology in Table 2 reflects the distinction between hierarchical and party-influenced modes of legal decisionmaking and adjudication developed by Thibaut and Walker (1978) and Damaska (1986), as well as the typology of bureaucratic decision modes in Mashaw (1983), from which I derive the additional category “expert judgment.”

<sup>5</sup> The term “legalistic” is used here to refer to a rule-oriented style of governance or decisionmaking. See also Shklar (1964); Wilson (1968); Levin (1972: 193). In this context, I do not use the term legalistic in the more pejorative sense of the rigid adherence to rules without regard to their purpose or to the fairness of the outcome. See in that regard, Nonet and Selznick (1978); Kagan (1978: 6, 92–93).

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<sup>6</sup> U.S. C. sec 1414 (d). Of course, when parents are passive, the plan may be hierarchically imposed by the school's special education staff, making the process de facto an expert judgment one.

<sup>7</sup> Cross-national and historical data on national litigation rates—for example, focusing on civil litigation per 100,000 population—are very spotty and probably misleading. Litigation rates are very sensitive to differences in the various kinds of civil courts: those dealing with smaller versus larger claims, courts of general jurisdiction versus those that specialize in certain types of cases. Those jurisdictional boundaries are not the same across nations and change over time, making it difficult for researchers to be sure they are comparing like with like. Review articles dealing with such studies indicate that the American litigation rate, while higher than that of most countries, is not extraordinarily higher. Galanter (1983); Clark (1990); Markesinis (1990); Kritzer (1991).