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Courts and the Puzzle of Institutional Stability and Change

Administrative Drift and Judicial Innovation in the Case of Asbestos

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The institutional development literature has begun to move beyond the concept of punctuated equilibrium and consider how the forces of stability and change interact. A central theme involves drift—the shifting of the effect of stable institutions through changing circumstances. This article uses the case of asbestos injury compensation to highlight how the very features of American government that make drift likely also promise to displace it, as courts step in when Congress fails to act. The broader implication is that drift is best understood as a transitional stage of development, not a dominant mode of change, in fragmented policy-making systems with multiple access points.

Keywords: *institutional change; American political development; court–Congress relations*

Until recently, leading accounts of institutional and policy development invoked models of punctuated equilibrium, which assume that external shocks or critical junctures produce abrupt shifts that briefly interrupt extended periods of continuity (e.g., Katznelson 2003; Weingast 2002; Mahoney 2000; Pempel 1998; Collier and Collier 1991; Krasner 1988). An emerging body of work questions this view, arguing that the forces of stability and change cannot be neatly compartmentalized into historical periods. Instead, scholars must grapple with the "puzzle of institutional stability and change"—the ways in which these seemingly contradictory forces coexist (e.g., Streeck and Thelen 2004; Thelen 2003, 2004; Hacker 2002, 2004, 2006; Schickler 2001; Clemens and Cook 1999; Weir 1992; see generally Orren and Skowronek 2004; Campbell 2004).

In an important synthesis of this recent literature, Hacker (2004) identifies three modes of change in addition to the formal revision of rules, each of which envisages how old and new elements combine to transform the status quo. They are drift, the alteration of the effect of existing institutions on social life because of changing circumstances; conversion, the adaptation of existing institutions and policies to new ends; and layering, the creation of new institutions or policies without the elimination of existing ones. In a critical move, Hacker also posits the preconditions for each mode of change, suggesting that different policy areas and configurations of institutions should promote distinct modes of institutional development with characteristic policy trade-offs.

Building on these arguments, Hacker (2004, 248) contends that, while examples of conversion and layering are not hard to find, drift has been the "most pervasive dynamic" in U.S. social policy since the 1980s. Indeed, American politics seems a virtual recipe for drift, which occurs when institutions and policies remain fixed while new risks emerge. Consistent with these conditions, the United States combines fragmented political institutions that are notoriously status

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quo oriented and a vibrant economy that generates waves of unforeseen risks from market shifts, technological innovations, and new products.

Hacker's argument is not an academic quibble over the description of institutional and policy evolution. Drift matters. Theoretically, it forces scholars to join policy and institutional analysis and consider how shifting environments and evolving practices affect programs and policies. At the grassroots level, drift may leave ordinary people vulnerable to growing risks and uncertainties (Hacker 2006).

This article uses the case of asbestos injury compensation to take a closer look at Hacker's influential typology and, along the way, examines the evolving politics of compensating victims of asbestos-related diseases. It argues that the asbestos case began as a textbook example of drift but that drift only partially captures its dynamics because courts stepped in and implemented "court-based tort reforms"—the use of existing legal procedures to create alternative dispute resolution mechanisms (Barnes 2007). This finding, it is contended, highlights a central irony in American institutional and policy development: the very features of American government that make administrative drift likely also make its attenuation possible, as the fragmented U.S. policy-making process encourages disgruntled program beneficiaries to seek redress in other policy-making forums, such as courts.

The point is not to eschew the concept of drift. Drift remains an essential mechanism of change in U.S. politics. However, the asbestos case suggests that drift is likely a transitional stage of institutional development, not a final result. Recognizing this tendency, moreover, is vital to assessing the long-term policy consequences of drift because judicial innovations are likely to distribute benefits and risks very differently than unyielding administrative programs.

The broader implication concerns aligning conceptions of institutional change with the underlying nature of the American state. As the asbestos case shows, even relatively narrow policy issues feature an "intercurrence" of overlapping and competing institutional arrangements (Orren and Skowronek 2004, 113)—some of which may be prone to drift while others are not. Under these circumstances, it is unlikely that American policies and institutions will feature a dominant mode of change. Instead, they will likely feature multiple change mechanisms. Thus, the subtle modes of change identified by Hacker and others may offer essential pieces of the story, but only pieces. In the U.S. system of "separated institutions sharing power" (Neustadt 1990, 34), the whole story inevitably lies in fitting these pieces together (Miller and Barnes 2004). Here too the asbestos case is useful, illustrating how administrative drift engenders judicial conversion, how the limitations of judicial conversion encourages attempts at formal revision, how failed formal revisions encourage judicial layering, and how judicial conversion and layering are politically self-reinforcing and thus undermine efforts at comprehensive program reform through the legislative process.

To develop these arguments, this article begins with a provisional definition of institutional change. It next details Hacker's typology and applies it to the case. It then elaborates the lessons learned and suggests several future avenues of inquiry.

Defining Institutional Change

The literature bristles with competing definitions of institutional change. No attempt is made to resolve these conflicts or plumb their depths. Instead, this article follows leading studies of institutional evolution in contemporary welfare states that treat institutions as rules that may be enforced by a third party (e.g., Streeck and Thelen 2004, 10). In the context of the case of asbestos, institutional change means significant shifts in who decides, who pays, how much, and to whom.

The Complex Landscape of Institutional and Policy Evolution

In grappling with the puzzle of stability and change, the literature has produced a new vocabulary for describing change despite seemingly stable formal structures. Focusing on U.S. social policy, Hacker (2004) significantly advances this literature by identifying four key modes of change—revision, drift, conversion, and layering—and their structural prerequisites. Each is discussed below.

Revision

Formal revisions fundamentally reform or eliminate existing institutions and policies through explicit changes in governing rules. Consistent with its tendency to overlook the courts, the literature tends to equate revision with major legislation, perhaps because it is assumed that legislatures are best positioned to erase or substantially remake institutions. Hacker (2004, 246) points to the 1996 welfare reforms as an example. Another is "replacement reform" (Burke 2002, 38-41), such as no-fault insurance programs that provide an administrative alternative to litigation.

According to the literature, revision is likely when barriers to authoritative change and internal adaptation are low. At least with respect to "big-bang" legislation, these conditions are hard to satisfy in the United States for familiar reasons. The fragmented structure of American lawmaking features multiple veto points that provide reform opponents ample opportunities to water down or block major revisions (Steinmo and Watts 1995). Equally important, the politics of revising programs and rights through the legislative process fundamentally differs from the politics of creating new ones (Pierson 1994). Creating statutory programs and rights offers concentrated benefits to potential beneficiaries while imposing diffuse costs on the public, usually in the form of larger deficits or marginal tax increases. Revision often entails the opposite, which is always an uphill battle. To make a difficult task even harder, existing programs and rights often retain significant popular support, engender well-organized constituencies dedicated to their preservation, and employ a small army of governmental officials and professionals determined to protect their turf. The bottom line is that, despite mounting pressure for liberalization in the 1980s, "the fundamental structure of social policy remains comparatively stable" (Pierson 1994, 182; Pierson 1996, 2000; also see Huber and Stephens 2001; Bonoli, George, and Taylor-Gooby 2000; Esping-Andersen 1999; Weaver 1998).

Drift

In the absence of revision, change may arise from drift—the transformation of the effect of institutions and policies because of changing circumstances. A leading illustration is the functional erosion of public and private insurance protection stemming from increasing uncertainties related to globalization (Hacker 2006).

Drift emerges when barriers to authoritative change and internal adaptation are high—both of which are likely in the United States. Authoritative change is often unattainable for reasons already discussed. Internal adaptation is often difficult because governmental programs and legal rights tend to be "path dependent," meaning prone to self-reinforcement through positive feedback mechanisms (Pierson 2004, 20-21; Campbell 2003; Hacker 2002; David 2000; Mahoney 2000; Levi 1997; also see Burke 2001; Kagan 2001; Hathaway 2001).

Existing programs and rights tend to bring about increasing returns—the more they are used, the greater their expected returns. For example, as claimants and their representatives seek benefits from complex programs, they gain valuable experience in navigating the system, which makes future claims more likely to succeed. As claims gain success, potential claimants adapt their expectations accordingly, wanting to pursue established remedies as opposed to diverting resources to the uncertain task of creating new ones, whether through legislation or other means.

Moreover, as practices become increasingly central to a policy environment, all relevant actors, including those not already invested in the status quo, have strong incentives to master them. Because organizational learning can require substantial commitment, groups may become increasingly less likely to pursue alternative modes of policy making that entail high threshold costs and uncertain prospects. As the prospects for establishing alternatives dim, groups are likely to invest further in improving their command of the existing system, thereby increasing their "asset specificity," entrenching existing practices, and opening the door to drift.

Conversion

Conversion is the adaptation of existing institutions and policies to new ends (Thelen 2003, 2004). President Lyndon Johnson's use of poverty programs in the 1960s, which were initially conceived along nonracial lines, to channel resources to communities affected by race riots is one example (Weir 1992, 205). Employers' restructuring of publicly subsidized workplace benefits is another (Hacker 2004).

Conversion is likely when barriers to authoritative change are high but obstacles to internal adaptation are low, as when rules are ambiguous and thus open to adaptation. This is common because rules—whether constitutions, statutes, common laws, or administrative regulations—tend to be broad and abstract, leaving decision makers ample discretion when applying them to the complexities of actual disputes or the daily operation of multifaceted organizations.

Given the inherent ambiguity of rules, it is not surprising that conversion abounds in the vast literature on courts and institutional and policy change. Legal scholars describe the transformation of American tort law through common law interpretation (e.g., Ursin 1981; Henderson and Eisenberg 1990; Eisenberg and Henderson 1992; Schwartz 1992; Kagan 2001). Judges have also used adjudication to carve out significant authority (Stone Sweet 1999, 2000) and equitable powers and consent degrees to takeover policy issues (Derthick 2005; Mather 1998) and reform

public institutions (Sandler and Schoenbrod 2003; Feeley and Rubin 1998; Horowitz 1977). Others discuss the alteration of adjudication through the reinterpretation of procedural rules and case management practices (e.g., Barnes 2007; Resnik 1982, 2000; Fiss 1984) and how creeping legalism displaces agency goals and priorities (e.g., Rabkin 1989; Melnick 1983; Horowitz 1977). The list goes on. The common thread is how judges' interpretative powers can reshape policies and reallocate resources in the absence of sweeping formal revisions.

Layering

Layering involves grafting new institutional arrangements or policies on old ones. The evolution of Congress provides a standard illustration (Schickler 2001). In that case, reformers lacked the ability to replace existing arrangements, while the old guard could not wholly resist change. The resulting compromises produced an accretion of institutional arrangements, each of which reflects its own logic and purposes, such as the Congressional Budget and Impoundment Act of 1974 that added the budgeting committees to the old appropriations, authorization, and revenue committees.

Layering is said to emerge when barriers to authoritative change are low while barriers to internal adaptation are high. Because it requires some formal change, one might expect layering to be less prevalent than drift or conversion in the U.S. system of checks and balances. However, whenever formal changes are enacted, layering should be more common than revision because new rules rarely replace existing arrangements wholesale. As Riker (1995, 121) once noted, "No institution is created de novo. Consequently, in any new institution one should expect to see hangovers from the past."

The Case of Asbestos and Institutional and Policy Change

Overview

The primary goal is to use the case of asbestos injury compensation to probe this leading theoretical framework of institutional change. Accordingly, this article proceeds thematically, using a few theoretically interesting institutional developments in asbestos injury compensation policy to illustrate the strengths and weaknesses of Hacker's typology. Specifically, after a brief primer on the asbestos problem, the analysis unfolds in stages, beginning with a discussion of administrative drift and then turning to judicial conversion, the absence of revision, and layering. Throughout, particular attention is paid to the interaction among discrete modes of change set forth in the literature and how the combination of these modes of change produced significant institutional shifts, as judicial innovations in the shadow of drifting administrative programs altered who decides, who pays, how much, and to whom (see Table 1). In the process, the case study charts the political interplay among administrative programs, Congress, and courts on asbestos injury compensation issues, which is largely overlooked by asbestos litigation studies that tend to focus as narrowly on the courts as the institutional literature tends to focus on legislation and administrative programs.

Background: The Asbestos Problem

Asbestos is literally a fiber made of rock, which is waterproof, fireproof, corrosion-proof, and stronger than steel. It can also be lethal. Inhalation of asbestos fibers can cause asbestosis, a progressive and potentially fatal scarring of the lungs; mesothelioma, a deadly cancer of the lining of the chest or abdomen; and lung cancer (Roggli, Oury, and Sporn 2004). Asbestos can also produce pulmonary abnormalities, such as pleural plaques and thickening. These abnormalities are often asymptomatic and may not develop into serious illnesses. But even if they do not take a turn for the worse, their discovery can subject victims to years of stressful uncertainty about the onset of asbestos-related diseases, some of which, including asbestosis and mesothelioma, have latency periods of twenty to forty years.

The combination of widespread use and deadly side effects has been disastrous. The RAND Institute for Civil Justice (RAND) reports that millions of Americans have been exposed to asbestos, and as of 2002, industry has spent over $70 billion on asbestos claims (Carroll et al. 2005). Total costs could reach $265 billion (Bhagavatula, Moody, and Russ 2001), or more than the entire 2006 gross domestic product of South Africa, the world's thirtieth largest economy.

The Asbestos Case and Drift: Workers' Compensation Programs

Asbestos injury compensation issues gained urgency in the 1960s, as thousands of workers who used asbestos during World War II began falling ill.

Table 1
Institutional Change in the Case of Asbestos

Dimension of Change	Workers' Compensation	Judicial Conversion (Tort Suits)	Judicial Layering (Chapter 11 Trusts)
Who decides?	Public administrators (subject to judicial review)	Judges and juries	Private administrators
Who pays?	Social insurance programs (funded by state-mandated employer premiums)	Wrongdoers (and private insurers)	Chapter 11 trusts (funded by an equity stake in the reorganized company)
How much?	Benefits based on medical costs and two-thirds of salary subject to limits and offsets (no punitive damages)	Damages based on open-ended rules (punitive damages allowed)	Payments based on medical criteria and payment schedules subject to trust liquidity (no punitive damages)
To whom?	Claimants injured at work	Plaintiffs who establish liability, causation, and damages	Claimants meeting exposure criteria

At that time, workers turned to state and federal workers' compensation programs. These programs emerged during the Progressive Era as an alternative to tort suits, providing workers their sole remedy against employers for workplace injuries. Under these no-fault employer-responsibility programs, workers need not prove their employer was negligent, and employers cannot sidestep liability by arguing workers assumed the risk or contributed to their injuries. Instead, employers are absolutely liable for workers' medical costs and about two-thirds of weekly wages (subject to certain limits and offsets).

Two problems emerged. First, these programs were designed to compensate workers for traumatic injuries, such as broken limbs, and not slowly manifesting occupational diseases, such as asbestosis and mesothelioma. As a result, asbestos workers' claims often fell outside the programs' preexisting categories of injury. Second, by the 1960s, workers' compensation programs had become fiercely adversarial and legalistic (Brodeur 1986; Kagan 2001). Fault was not an issue, but employers and insurers argued that smoking, not asbestos, caused workers' lung problems. They alleged workers suffering from asbestosis—a slowly debilitating disease—were not "totally disabled," as required under many state laws. And they insisted states' statutes of limitation barred many asbestos workers' claims because these provisions (at the time) required claims to be filed within one to three years of an injury, and many of the worst asbestos-related diseases take decades to appear.

The result was drift. Barriers to formal revision were high, as the legislative process was impassive or unmovable, and efforts to adapt these programs internally were blocked by employers and their insurers, which actively worked to ensure that benefits were construed narrowly. The combination of institutional intransigence and a rising tide of illnesses rendered existing programs inadequate and shifted the lion's share of the risks and costs associated with asbestos exposure to workers and their families.

The Asbestos Case and Conversion: The Rise of Tort Litigation

Drift provides very useful shorthand for the initial stages of institutional and policy development in the asbestos case, but only the initial stages. Having grown frustrated with stingy and uncertain social insurance benefits, American asbestos workers turned to the tort system in the late 1960s, seeking compensation from third-party manufacturers that supplied asbestos-containing products to the workplace. A confluence of medical and legal factors helped pave the way to the courthouse (Brodeur 1986). In October 1964, a team of doctors and epidemiologists led by Dr. Irving Selikoff presented a detailed study of mortality rates among asbestos-insulation workers, which provided scientific support for workers' claims that asbestos had caused their illnesses (Selikoff, Churg, and Hammond 1965). In the spring of 1965, the American Law Institute published the second edition of its *Restatement of the Law of Torts*, a comprehensive summary of tort law by leading law professors, judges, and lawyers. Section 402A of the restatement recognized an evolving theory of products liability

that held that if manufacturers fail to warn users of a product's dangers, they are strictly liable for resulting harms, even if the product is unavoidably unsafe.

Armed with these medical findings and Section 402A, plaintiff lawyers working on contingency fees began suing companies that allegedly failed to provide adequate warnings about their asbestos-laden products. Companies countered that Section 402A was inapplicable. Professor W. Page Keeton, a preeminent expert on tort and an author of the restatement, agreed. He testified under oath that Section 402A was never intended to apply products such as asbestos, which had few known substitutes and served beneficial purposes (e.g., fireproofing ships; Brodeur 1986, 66).

Nevertheless, in *Borel v. Fibreboard Paper Products Corporation* (1973), the Fifth Circuit for the U.S. Courts of Appeal recognized that workers could sue suppliers of asbestos products to the workplace under Section 402A. Other circuits followed suit (e.g., *Karjala v. Johns-Manville Products Corporation* 1975; *Moran v. Johns-Manville Sales Corporation* 1982). In so ruling, courts converted common law principles and shifted the primary mechanism for deciding asbestos injury compensation issues from drifting social insurance programs to privately funded tort suits.

Contrary to punctuated equilibrium models, however, this shift occurred gradually in the 1970s and accelerated in the 1980s, after plaintiffs found smoking-gun evidence that some manufacturers knowingly concealed the risks of asbestos. In 1976, 159 cases were reportedly filed against the Johns-Manville Corporation, the leading asbestos mining company and manufacturer in the United States. In 1978, 792 claims were filed against Johns-Manville. In 1982, the year it filed for bankruptcy, the company faced 6,000 new claims per year (Brodeur 1986). Johns-Manville is not alone. RAND estimates that over 730,000 individual claims for asbestos-related injuries had been filed as of 2002 and that annual claims are rising (Carroll et al. 2005, xxiv). These claims have targeted over 8,400 firms, including at least one company in 75 of 83 categories of economic activity in the Standard Industrial Classification (Carroll et al. 2005, xxv).

The Costs of Judicial Conversion and the Need for Further Change

At the outset, asbestos tort suits served important—even heroic—policy functions (Brodeur 1986; see generally Frymer 2003; Bogus 2001; Mather 1998). Courts provided asbestos workers a forum to raise their concerns when other branches and levels of government did not. Once established, asbestos litigation provided asbestos workers a means to bypass inadequate state workers' compensation programs, it raised awareness about the dangers of asbestos, and it helped uncover decades of corporate malfeasance.

But judicial conversion did not repair the gaps in the social safety net left by drift because asbestos tort litigation is highly inefficient. A 1983 RAND study showed that asbestos plaintiffs received only 37 cents of every dollar spent to resolve asbestos claims, which is significantly less than ordinary tort claims (Kakalik et al. 1983). Recent follow-up studies show that these patterns have persisted as administrative cost still consume over half of all compensation paid (Carroll et al. 2001; Carroll et al. 2005). By contrast, the administrative costs of the Black Lung Program, a federal program that compensates miners from coal dust–related diseases and is often criticized as wasteful, accounted for 4.5 to 5.8 percent of the program's annual obligations and 9.5 to 13.1 percent of yearly benefits from 1992 to 2001 (Office of Workers' Compensation Programs 2001, Table B-4).

The costs of asbestos litigation might be tolerable if it produced fair and consistent decisions, but it has been erratic. In Texas, five juries in a multiplaintiff trial heard exactly the same evidence and ruled differently on specific liability and causation issues (Bell and O'Connell 1997, 22). Jury damage awards also have varied case to case and jurisdiction to jurisdiction, providing similarly situated plaintiffs different compensation and those with harder-to-prove claims nothing at all (Sugarman 1989, 46).

Some may counter that the unpredictability of asbestos suits might enhance the effectiveness of tort law as a deterrent, forcing companies to become extra vigilant and thus providing citizens an extra measure of safety. But even under the best circumstances, tort law's deterrent value is uncertain (Kagan 2001). As Sugarman (1989) has argued, manufacturers are subject to other pressures to act with care, including market forces that provide strong financial incentives to prevent widely publicized problems. Moreover, as concerns about fraudulent claims have emerged (Mealey's 2005) and asbestos litigation has increasingly focused on defendants who played a relatively minor role in exposing workers to asbestos and covering up its dangers, the deterrence value of these suits has become even more attenuated (Carroll et al. 2005).

Others may stress that asbestos litigation promises individualized treatment of asbestos claims, which is essential to perceptions of procedural fairness and trust in the legal system (Tyler 1990). But, as early as

the mid-1980s, many asbestos claimants did not enjoy their day in court. After six or more years of asbestos litigation, the state court in San Francisco had completed only 11 percent of their asbestos cases. In Massachusetts, the news was worse—the state court had resolved only 10 of 2,141 claims, or less than 1 percent (Hensler et al. 1985, 84-85).

Given these problems, the legal community has repeatedly urged Congress to reform asbestos tort litigation. In 1991, the Judicial Conference (1991, 31) called for "congressional action to establish a national asbestos claim resolution system." The Supreme Court reiterated these calls in *Amchem Products, Inc. et al. v. George Windsor et al*. (1997), *Ortiz et al. v. Fibreboard et al.* (1999), and *Norfolk and Western Railway Co. v. Ayers* (2003), arguing that "the elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation" (*Ortiz et al. v. Fibreboard et al.* 1999, 821).

The Asbestos Case and the Difficulty of Revision: The Legislative Response to Date

Congress has largely turned a deaf ear to these judicial blandishments. Despite the introduction of over fifty asbestos litigation reform bills, Congress has enacted only one bill related to asbestos injury compensation, the Bankruptcy Amendments of 1994, which, among other things, retroactively approved the bankruptcy court's power to issue "channeling injunctions" that direct future litigation from a reorganized company to private trust funds. In other words, far from replacing litigation, the only major federal law passed to date tightened the courts' considerable grip on the underlying policy issues.

With Congress sidelined, the states have taken some action, enacting or considering a whole host of reforms, such as limits on punitive and noneconomic damages, requirements for pre- and postjudgment interest appeal bonds, and restrictions on the imposition of strict liability. But these state measures provide only piecemeal responses to a national problem and, according to leading practitioners, can often be circumvented through forum shopping. Equally important, these reforms do not provide an alternative to litigation or even seek to streamline the litigation process. They aim to reduce the number of suits while leaving many structural features that drive tort litigation firmly in place, such as juries, contingency fees, and pliable common-law rules.

Of course, Congress could unexpectedly act tomorrow. But even if Congress acts or states act more aggressively, the absence of formal revision to date would remain an important part of the story. Why? The sputtering legislative process (coupled with soaring litigation costs) encouraged judges and defendants to implement court-based tort reforms, which permanently altered the institutional landscape of asbestos injury compensation.

The Asbestos Case and Layering: Court-Based Tort Reforms

The story of court-based tort reform in the case of asbestos is complex (Barnes 2007). Suffice it to say that, beginning in the 1980s, judges and defendants began experimenting with aggregating individual tort suits to contain—or at least shift—the costs of litigation. Judges used their equitable powers to conduct group trials. The federal courts used the rules for multidistrict litigation to consolidate thousands of claims for pretrial (and settlement) purposes. Defendants banded together in litigation consortiums to create economies of scale and coordinate settlement efforts. When these broke apart, they sought (unsuccessfully) to use mandatory class actions to force plaintiffs into large group settlements. Perhaps most strikingly, judges and defendants used Chapter 11 to create no-fault compensation schemes on a company-by-company basis. Over seventy companies have created these trusts and thereby altered who decides, who pays, how much, and to whom in hundreds of thousands of claims involving billions of dollars.

Compare tort law and the trusts. Under tort law, judges and juries decide the core issues of liability and damages in a lawyer-intensive process. Under the trusts, a private administrator decides who pays based on routine filings, which, according to practitioners, are typically prepared by paralegals. Under tort law, the tortfeasor—the alleged wrongdoer—pays. Under the trusts, a channeling injunction protects the tortfeasor from litigation and directs claims against the trust, which is a separate entity. Under tort law, liability is determined by applying general common law principles and open-ended damage rules to individual cases. Under the trusts, payments are calculated based on categorical medical criteria and detailed payment schedules. Under tort law, claimants must establish liability, causation, and damages. Under the trusts, claimants typically need not prove causation but rather must meet minimal exposure requirements. Finally, tort allows for punitive damages; the trusts typically do not.

The differences between workers' compensation programs and the trusts are less stark because both

establish no-fault schemes that categorize claims according to medical criteria and payment schedules. But they still differ as to who decides, who pays, how much, and to whom. Workers' compensation programs are social insurance schemes. Public administrators adjudicate claims subject to judicial review. Chapter 11 trusts are private. Private administrators make the key decisions. Workers' compensation programs mandate employer participation, pool costs and risks across companies, and ensure workers receive full payment of their claims. The trusts are limited funds. They are financed by an equity stake in a single company and thus do not pool risks and costs. Payments are made subject to the availability of trust assets and, in most cases, offer claimants only partial compensation. Finally, workers' compensation programs are limited to workplace injuries; the trusts are not.

Just as tort suits have failed to offer a policy antidote for drift, Chapter 11 trusts have not wholly ameliorated the costs of asbestos litigation or plugged the holes left by drift. Instead, these trusts have produced mixed results. On one hand, Chapter 11 trusts have saved individual companies transaction costs. Administrative costs of the Manville Trust, the largest and longest running Chapter 11 trust, are about 5 percent of the total dollars spent on claims (Austern 2001). Assuming that attorneys limit themselves to 25 percent as required by the trust, plaintiffs receive 70 cents of the total dollars spent, as compared to only about 40 cents in ordinary litigation. In addition, once established, Chapter 11 trusts seem to reduce the time from filing a claim to payment when compared to tort suits (Peterson 1990). As of 2003, the average waiting time under the Manville Trust was about four months.

It is unclear, however, whether these individual savings translate to overall savings or litigation costs are merely shifted as new defendants are dragged into court. As noted above, Chapter 11 trusts create limited funds that pay according to the trusts' liquidity. Under these terms, payments have plummeted in some cases. In the Manville Trust, payments have dropped from 100 percent of liquidated value, then to 10 percent, and now to 5 percent. Whether claimants will receive more hinges on their ability to find alternative "deep pockets" under the rules of joint and several liability, which allow plaintiffs to sue any company in the chain of distribution for the full amount of damages, or some other theory. The net effect is that the cost of litigation and risk of insolvency falls to either (1) claimants who cannot find other solvent defendants in the supply chain or (2) nonbankrupt companies in the supply chain.

Under these conditions, Chapter 11 trusts paradoxically replace tort suits and help fuel their growth. They replace litigation by diverting thousands of claims into administrative dispute resolution programs. They encourage further litigation by paying only pennies on the dollar, which forces claimants to seek new defendants under the rules of joint and several liability and other theories. As a result, the more individual defendants have used Chapter 11 to manage their liability, the more asbestos tort litigation has spread as entrepreneurial trial lawyers reach ever deeper into the chain of distribution, which stretches across thousands of businesses in the case of asbestos. Institutionally, the symbiosis between Chapter 11 trusts and litigation ensures a deeply layered response to asbestos injury compensation in the United States.

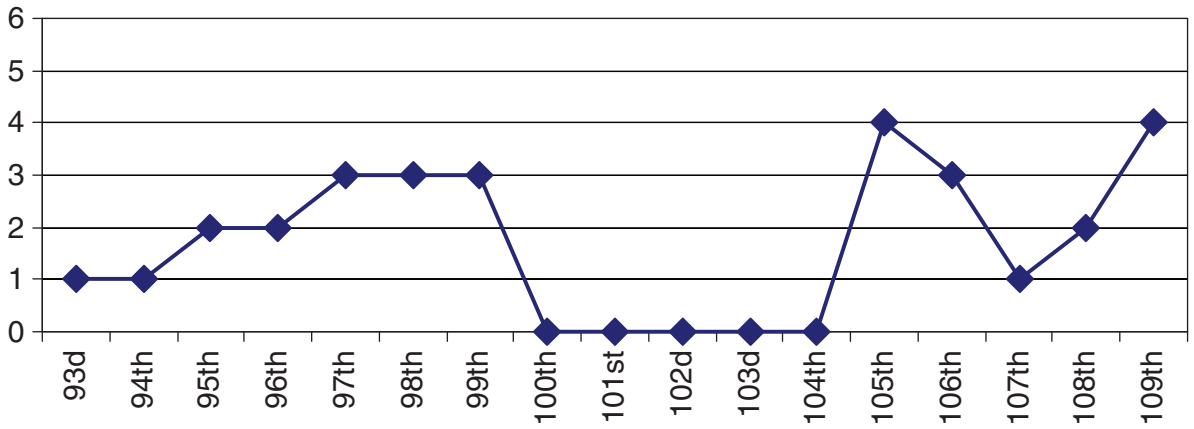
Two additional points bear emphasis. First, although Chapter 11 trusts may offer more consistent payments than individual tort suits, they do not ensure uniform payment. Trust terms and liquidity vary over time and across companies so that similar claims are not always treated the same over time or across trusts (Coffee 1995). Second, although Chapter 11 trusts may be more efficient than tort, bankruptcy is still very costly. In a widely cited analysis, Stiglitz, Orszag, and Orszag (2002) estimated that asbestos-related bankruptcies could cost as many as 423,000 jobs, while the average value of these firms' pensions dropped 25 percent. The broader point is that judicial layering in the case of asbestos does not erase the negative policy outcomes from administrative drift and conversion; it only complicates the picture.

Judicial Innovation and Congressional Inertia

Thus far, the story has mainly focused on how drift and the absence of revision have engendered judicial innovations. But the interactions go both ways. Judicial innovation has produced political feedback loops that have complicated efforts to enact formal revisions. For example, judicial innovation has engendered the politics of wait and see, especially in the mid-1980s when court-based tort reforms promised to "solve" the asbestos problem. After all, Congress has limited resources, and asbestos injury compensation issues are complex and contentious. Under these circumstances, Congress could reasonably—and conveniently—wait and see if litigation worked.

Consistent with this logic, a prominent Washington lawyer and lobbyist explained as follows: "You stop getting bills around 1986 . . . [because] everyone thought that this was really a solved problem. The

Figure 1
Number of Replacement Reforms: 93rd to 109th Congresses (1974 to 2006)



Source: Complied by the author from THOMAS bill summaries.

coverage issues were largely resolved; the people were getting into agreements that processed them more or less administratively." In fact, bills seeking to replace litigation with administrative compensation programs do suddenly disappear during this period and then return when it became clear in the 1990s that court-based tort reforms would not resolve the underlying problems (see Figure 1).

Equally telling, reform advocates have always framed the need for congressional action in terms of the adequacy of available compensation mechanisms. In 1980, the Senate held hearings on the Asbestos Health Hazards Compensation Act, a replacement reform, and both unions and Johns-Manville argued that Congress should act because existing remedies were inadequate. In 1982, the chief proponent for asbestos reform, Representative George Miller (D-CA), argued that his bill was necessary because the existing system "failed to meet the needs of occupational disease victims" (U.S. Congress, House 1982, 93). The following year Miller convened a special hearing on the effect of bankruptcy cases and private settlements, arguing that the "testimony we will hear this morning will further establish the need to replace years of failure with a compensation system that can meet the needs of the disabled asbestos workers" (U.S. Congress, House 1983, 2). The leading asbestos litigation study at the time states echoed this view, stating, "Whether one believes that alternatives to the tort system, such as those proposed in recent legislation introduced by Congressmen George Miller and others, are necessary, should rest in part on an assessment of how well the tort system has processed asbestos claims" (Hensler et al. 1985, 4-5). Given this framing, it is not surprising that congressional activity ebbed as judicial innovation flowed.

In addition to reinforcing congressional incentives to pass the buck, judicial innovation has complicated the interest group politics of revision. The crux is that judicial conversion and layering have shifted the winners on the ground. These winners have become active veto players in the legislative process, which adds another obstacle to passing replacement reforms. So the rise of tort litigation created a lucrative source of business for some lawyers. It is hardly surprising then that the influential American Justice Association (formerly the American Trial Lawyers Association) has generally opposed asbestos litigation reform.

Similarly, one would expect businesses with high levels of tort liability to support replacement reform (Epstein 1988). But Chapter 11 has provided some high-exposure defendants an effective exit and cost-shifting strategy. These businesses—the Chapter 11 defendants—have no incentive to support reforms that would bail out their competitors from the tort system. In fact, the Chapter 11 defendants insist that any national program allow them to opt out, as they have no desire to replace their trusts with a public program that may be less favorable and provides less long-term certainty. Moreover, without tapping the assets of the Chapter 11 trusts, most agree that any federal program would be underfunded and politically infeasible. Extending this logic, as more companies file for bankruptcy, fewer companies with high exposure to litigation, which are

critical to any successful reform coalition, will support formal revisions.

Rethinking Drift

The story of asbestos injury compensation is only a single case and in some ways an extreme one. Nevertheless, it began as a classic example of drift, and yet drift was not the only change mechanism—or even the dominant one—in the case. As such, the asbestos case seems promising for rethinking drift in several ways. First, a core insight from Hacker's analysis is that drift can significantly limit the reach of stable institutions, producing functional policy shifts in the absence of formal revision. The asbestos case pushes this argument another step. It shows how courts promote significant change in the shadow of administrative drift.

The point is not that judicial innovation reverses the effects of drift. It is that drift creates a policy vacuum that judges can fill through conversion and layering, which create distinct trade-offs (see Kagan 2001). On the plus side, judicial innovation may provide a forum for addressing concerns when other branches and levels of government are unresponsive. At the same time, judicial innovation can produce inefficient and inconsistent patterns of compensation, as in the case of tort suits, and troubling patterns of cost and risk shifting, as arguably in the case of Chapter 11 trusts. Any revised theory of drift should account for judicial innovation, weigh its policy implications, and better integrate the literature on how legislative inaction fosters judicial action (e.g., Frymer 2003; Graber 1993; McCubbins, Noll, and Weingast 1989; Atiyah and Summer 1987).

Second, the asbestos case raises fundamental questions about the reach of drift. By definition, drift occurs when barriers to authoritative change and internal adaptation are high, as when entrenched, path-dependent administrative programs dominate a policy area. But single administrative programs—or, for that matter, single branches or levels of government—rarely have the final say on policy, even when programs formally limit access to the courts. Instead, American courts have deeply penetrated administrative processes and, given the pliability of many laws, provide opportunities for conversion and other less familiar modes of change, such as layering via court-based tort reform.

If administrative drift creates pressure for change through judicial conversion and layering as seems likely, drift may be best understood as a transitional stage of development, except in the narrow subset of cases where court access is effectively blocked. In fact, court-based tort reforms are finding their way into a whole host of social and regulatory issues beyond compensating victims of defective products, where we might expect a large role for the courts, including the use of Chapter 11 to rewrite union contracts, reduce pension obligations, and avoid environmental cleanup costs. Indeed, once administrative drift is seen as a spur to judicial innovation, aspects of litigation that seem far removed from institutional and policy change become important aspects of what Howard (2007) calls the "welfare state nobody knows," as tort law becomes a potential source of social benefits and conversion and Chapter 11 becomes a tool of private retrenchment and layering.

Third, the asbestos case contributes to our understanding of the underlying causes of administrative drift. The literature tends to emphasize structural barriers to formal revision, such as checks and balances, which are largely static, and the process of increasing returns, which are internal to the underlying programs. The asbestos case illustrates how litigation strategies may be a source of positive feedback for formal structures distinct from increasing returns within specific programs, as judicial innovation reinforces congressional inertia through the politics of wait and see and the creation of new veto players in the legislative process.

Parenthetically, the asbestos case also enriches our understanding of institutional change and the courts. As noted earlier, there is a host of studies that show how and why courts step in when other branches of governments remain on the sidelines. Other studies detail the limitations of judicial interventions into the policy-making process (e.g., Derthick 2005; Sandler and Schoenbrod 2003; Rosenberg 1991; Rabkin 1989; Melnick 1983; Horowitz 1977). However, these studies leave open a crucial question: why do other policy makers often fail to step in when judicial policy making goes awry? Part of the reason, as Kagan (2001) and Burke (2002) argue, lies in structural features of American government and political culture that favor reliance on the courts. But as the asbestos case shows, evolving litigation strategies can fragment stakeholders within and across party lines and thereby complicate the already difficult task of building winning legislative reform coalitions.

Finally, the asbestos case is more than a bland reminder that institutional change in the United States is messy. It underscores the need to align theories of institutional change with viable conceptions of the

state. In states with well-defined divisions of labor among various governmental actors, stable institutional arrangements, and limited access points, delimiting dominant modes of change across policy areas makes sense. However, as seen in the case of asbestos, the United States does not feature well-defined and stable institutional arrangements that govern discrete policy areas, even in relatively narrow issues where programs formally restrict access to the courts. Instead, the modern American administrative state rests on constellations of overlapping and interacting policy-making forums that feature distinct historical legacies, norms of reasoning, and structural barriers and opportunities for change (see generally Orren and Skowronek 2004). Under these circumstances, broad categorical typologies of change are likely to falter.

That does not mean American institutional development defies systematic analysis or that we should jettison the subtle modes of change identified by Hacker and others. It suggests that greater emphasis should be placed on tracing patterns of interaction among overlapping regimes and coexisting mechanisms of change within policy areas over time. The concepts of drift, conversion, and layering offer useful building blocks for developing this understanding, but these concepts must be fit together to identify recurring patterns of development that encompass the multiple forums, access points, and exit strategies inherent in the striated American state. The combination of administrative drift and politically self-reinforcing judicial innovations is surely one such pattern; others await exploration.

Conclusion

Drift is central to emerging narratives of how ostensibly stable institutions and policies evolve in part because it dovetails with broader arguments about U.S. legislative incrementalism and administrative path dependence. This article has explored the dynamics of drift using the case of asbestos injury compensation, which began as an archetype of drift but soon diverged as judicial conversion and layering emerged. At a minimum, this divergence suggests existing theories of drift must better anticipate judicial responses to intransigent administrative and legislative processes. Moreover, if drift occurs when barriers to authoritative change and internal adaptation are high, as is argued in the literature, then extended periods of administrative drift may be limited to the relatively narrow set of policy domains where courts have little say because American laws are notoriously vague and flexible and thus prone to judicial conversion and layering. Clearly, further research is needed to clarify the interplay between drift and other modes of institutional change. However, by illustrating interactions among drift, revision, conversion, and layering in a substantively important policy area, the asbestos case points to a promising method for unraveling the puzzle of institutional stability and change in contemporary American politics.

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Courts and the Puzzle of Institutional Stability and Change: Administrative Drift and Judicial Innovation in the Case of Asbestos

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