THE POLITICS OF LITIGATION

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ABSTRACT

Litigation is part of the American policymaking playbook as diverse groups routinely turn to courts to pursue their agendas. All of this litigation raises questions about its consequences. This essay examines the literature on the political risks of litigation. It argues that this literature identifies four potential risks – crowd out, path dependence, backlash, and individualization – but offers less insight into the likelihood of these risks in practice. It ends by offering suggestions about how to advance our understanding of when litigation casts a negative political shadow in the current age of judicialization.

Keywords: Litigation; judicialization; Supreme Court; political risk; United States AU:1

INTRODUCTION

On June 26, 2013, the US Supreme Court handed down *United States v. Windsor* (2013). The decision struck down the Defense of Marriage Act (DOMA), which defined marriage as excluding same-sex partners for purposes of federal law. In a scathing dissent, Justice Antonin Scalia argued that the Court's decision represented a "jaw dropping […] assertion of judicial supremacy" that envisions "a Supreme Court standing (or rather enthroned) at the apex of government" (Scalia Dissent, p. 2). Scalia did more than criticize the majority's legal reasoning, which he dismissed as inconsistent and disingenuous. He hinted that the decision would have significant negative downstream effects, which would place the nation on an "inevitable" policy path (*United States v. Windsor*, 2013, p. 23) and rob the winners "of an honest victory" through the legislative process (*United States v. Windsor* 2013, p. 26), thereby tarnishing the legitimacy of their newly established rights.

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Putting aside Scalia's heated rhetoric, his dissent taps into broader concerns about courts and litigation on several fronts. First, consistent with his warnings about the Court's outsized policymaking role, scholars have found a growing "litigation state" in the United States (Farhang, 2010; Melnick, 2014, 2015), which features high levels of "juridification" (Silverstein, 2009), "legalized accountability" (Epp, 2009), "litigious policies" (Burke, 2002), and "adversarial legalism" (Kagan, 1991, 1994, 2001). Comparative scholars document similar developments abroad, finding increased "judicialization" (Ginsberg, 2003; Hirschl, 2004, 2008; Kapiszewski, Silverstein, & Kagan, 2013; Shapiro & Stone Sweet, 2002; Stone Sweet, 2000; Tate & Vallinder, 1995), "legalization" (Goldstein, 2001), various types of "legalism" (Bignami, 2011; Kagan, 1997, 2007; Kelemen, 2011), and even "juristocracy" (Hirschl, 2004). AU:2

Second, Scalia's concerns about *Windsor*'s unintended consequences dovetails with the "policy feedbacks" literature, which shows how policy shapes politics (e.g., Campbell, 2003; Schattschneider, 1935; Soss & Schram, 2007). The idea is that policies with different structures "arouse and pacify" different constituencies by creating distinct incentives and influencing assumptions about what is "possible, desirable, and normal" (Soss & Schram, 2007, p. 113; see also Pierson, 1993, 2004). Because litigation is a form of policymaking (Burke, 2002; Farhang, 2010; Feeley & Rubin, 1998; Kagan, 2001; Melnick, 2014, 2015, 2018), it too can shape politics (Barnes & Burke, 2015). Consistent with this logic, scholars have asserted that litigation can negatively influence the political trajectory of policy by crowding out (allegedly) more legitimate and effective modes of advocacy (Forbath, 1991; Rosenberg, 2008), creating path dependence and limiting policy options (Silverstein, 2009), engendering powerful backlashes (Klarman, 1994, 2004, 2012; Rosenberg, 2008), and undermining social solidarity by framing broad policy problems as narrow contests between individual litigants and dividing the world into victims and villains (Barnes & Burke, 2015).

Assessing these types of "radiating effects" of litigation (Galanter, 1983) seems particularly urgent today. As Thomas Keck (2014) documents in his book on constitutional politics, groups on the left and the right routinely turn to the courts to pursue policy in the areas of abortion, affirmative action, gun rights, and gay rights (see also Teles, 2008). His account illustrates the degree to which rights-based litigation is ensconced in American policy, despite its high cost, unpredictability, and sometimes mixed results (Kagan, 2001; Rosenberg, 2008; Silverstein, 2009). Interest groups' reliance on the courts is not an accident. While the decision to file any particular lawsuit may reflect many context-specific factors, the extensive use of litigation to pursue policy partly reflects the constrained opportunity structure of American policymaking for those seeking new rights or significant reforms (Barnes, 1997; Burke, 2002; Farhang, 2010; Kagan, 1994; Melnick, 1994). After all, convincing Congress to pass major legislation is always daunting because its fragmented lawmaking process creates multiple veto points that favor the status quo (Steinmo & Watts, 1995). The current era of political party polarization and narrow majorities in Congress makes the already uphill battle to enact new laws even steeper and more

precarious (Barnes, 2011; Mann & Ornstein, 2012). Accordingly, activists may feel litigation is currently their best bet (Rubin & Feeley, 2003; Silverstein, 2009).

More subtly, when Congress does act, it often encourages litigation and judicial policymaking. Sometimes, it intentionally leaves controversial issues in legislation vague, which effectively delegates policy formulation to the courts (Graber, 1993; Lovell, 2003). Congress also increasingly relies on private enforcement through the courts, ensuring that litigation is central to policy implementation (Farhang, 2010). These "private enforcement regimes" can be attractive to politicians on both sides of the aisle for a variety of reasons. They bypass executive branch agencies that can be captured by industry and political rivals; they enable members of Congress to shift tough decisions that inevitably arise during implementation to the courts; and they are "off budget," allowing elected officials to claim credit for passing statutes while transferring the costs of policy administration to private litigants (Barnes, 1997; Burke, 2002; Farhang, 2010; Kagan, 2001).

In short, litigation often drives policy in the United States, so we need to get a better fix on its political risks. This essay takes an initial step in exploring this issue. It begins by setting forth the relevant literature's basic assumptions and distinguishing them from two more familiar types of law and policy studies: judicial implementation and judicial mobilization studies. With this background in place, it identifies four stories about how litigation allegedly shapes politics: crowd out, path dependence, backlash, and individualization. It then turns to several counter-arguments and alternative narratives, which suggest that these risks may not be particular to litigation and that, even if they are, they do not arise automatically. This variation presents tricky methodological and conceptual challenges and so the essay ends by suggesting some research strategies for assessing when these risks are likely to emerge.

The bottom line is that we need to define "judicialization" more carefully, so that we can better compare the political costs of litigation and its alternatives. These comparisons are crucial. If the political risks associated with litigation are equally likely to arise when groups pursue policy in other institutional settings – if they are generic to *any* attempt to make policy – then they should not deter interest groups from litigating. However, if litigation is particularly prone to certain political and policy risks, then these risks should give activists pause before they turn to the courts. Similarly, if these risks are contingent, then activists need to know when they are prevalent. Of course, the existence of these risks does not imply that activists should abandon litigation, which is often their only viable strategy, but they should anticipate and try to manage them. The good news is the necessary comparative work has begun, providing templates for more systematic evaluations of the political risks of litigation in an age of judicialization.

Before turning to the argument, a few caveats are in order. The literature on the political risks of litigation is vast and sprawling, cutting across multiple disciplines. No short essay could do it justice, so the discussion will be selective by necessity. Under these circumstances, some important studies will be overlooked

and many nuances of the studies cited will be lost in highlighting general themes and approaches. So be it. This essay seeks to offer an analytic overview of a dense literature and not a summary of individual studies. A final caveat is that the discussion focuses mostly on studies in the United States and the field of political science, but many of the concepts could be adapted to other contexts and disciplines. It is hoped that this overview, whatever its limitations, will stimulate further discussion of the potential political consequences of using litigation to make policy and the ways to build a store of useful knowledge about them.

BACKGROUND

The literature on law and policy change encompasses studies with distinct assumptions about the law and litigation as well as typical empirical emphases. These different approaches and substantive domains naturally lead to different lines of inquiry, types of analyses, and conclusions about whether law and litigation are likely to matter (Barnes, 2016). Under these circumstances, a threshold task is to locate the literature on the political risks of litigation within the broader field of scholarship on law and policy change. Once we locate the political risk literature within this landscape, we can map its contours in greater detail.

Studies on the political risks of litigation assume that law and litigation represent a medium of pursuing policy – an institutional framework within which policies are sought – and that the medium matters. From this perspective, the critical question is how reliance on the law and litigation shapes the political trajectories of policies. So, in the fight for school desegregation, a paradigmatic example of cause lawyering that produced landmark judicial decisions, scholars might ask, did success in cases like *Brown v. Board of Education* (1954) lead civil rights groups to de-emphasize lobbying and other forms of advocacy? Did it engender powerful counter-mobilization by the targets of litigation? Did it hinder the formation of political alliances by dividing the world into rights-holders and rights-violators or facilitate alliances by creating a rallying cry for diverse groups to coalesce under the banner of new rights and the preservation of the rule of law?

This approach starkly contrasts with perhaps the most prominent type of law and policy change study: judicial implementation studies. These studies define law as providing a set of prescriptions, as in "thou shall," "thou must not," or "thou may." From a research design perspective, law, litigation, and judicial decisions act as independent stimuli or "treatments." These studies are sometimes called "gap studies" because they seek to measure the distance – or gap – between litigation's lofty ambitions and the often-stubborn persistence of unjust social conditions and practices. From this vantage, the issue is not how law and litigation structure politics over time, it is whether litigation and judicial decisions shift policy outcomes in the intended direction. The challenge is to isolate the policy effects of litigation in an inherently interactive policymaking process with multiple, overlapping policymaking forums and levels of government.

Both gap studies and political risk studies might focus on the effects of policy change litigation and landmark judicial decisions, like *Brown*. However, the outcomes to be explained – the dependent variables – differ. So, instead of tracing political dynamics in the shadow of litigation, gap studies would ask questions centered on policy outcomes, such as to what extent did *Brown* cause school desegregation in the South? Did *Roe v. Wade* (1973) open access to abortion? Did same-sex couples married under state law enjoy greater federal benefits after *Windsor*?

Judicial mobilization studies represent another common way of thinking about law and policy change that differs from studies on litigation's political risks. Judicial mobilization studies see law as inherently ambiguous and pluralistic in character. Under this view, law serves as a source of ideas and normative claims for activists and litigation is a means to activate legal norms as part of continuing (and highly contingent) struggles to make policy (Chayes, 1976; Sabel & Simon, 2004). Here, the inquiry centers on how activists use litigation, judicial decisions, and the language of rights to pursue their goals as the opportunities for policymaking open and close over time. So, in the case of desegregation, scholars might ask: How did activists use litigation, court rulings and the language of rights to help frame their demands, raise consciousness, mobilize interests, set agendas, and build reform coalitions that pressured Congress and the President to help transform Southern schools?

In asking these questions, judicial mobilization studies focus on a similar set of outcomes as studies on the political risks of litigation, as both aim to understand the politics of rights and litigation. As a result, there is inevitably some overlap among these types of studies. But they approach this topic from opposite angles. Judicial mobilization studies examine the use of law and legal norms from the bottom-up, stressing agency over structure (e.g., Francis, 2014), whereas studies on the political risks of litigation explore how litigation and legal discourse shapes the politics of change from the top-down, emphasizing structure over agency (e.g., Silverstein, 2009).

These three strands in the law and policy change literature also differ with respect to the types of litigation and judicial policymaking that they tend to study. These empirical propensities – they are not analytic requisites – shape the tone and findings of the different approaches. On one end of the spectrum, gap studies typically study litigation and judicial policymaking that challenges to the status quo, usually from the left. This focus overlooks how policy can be made by *resisting* change. Indeed, leading scholars of social policy argue that the most prevalent form of policymaking in the United States since the 1980s is "drift": the prevention of existing programs and rights to adapt to new risks and understandings of policy problems (e.g., Hacker, 2002). The idea is that the failure of policy to adjust to new environments can limit their value, just as inflation can erode the value of your paycheck. From this vantage, by focusing on the ability of litigation and judicial policymaking to shift policy to the left, gap studies might understate the ability of litigation and the courts to make policy (see Barnes, 2011).

On the other end of the spectrum, judicial mobilization studies have looked at a wider range of litigation strategies and types of judicial policymaking.

Specifically, while many early judicial mobilization studies may have tilted toward studying progressive policymaking efforts (e.g., McCann, 1994), more recent analyses include litigation by liberal and conservative groups and detail strategies that use courts to block change as well create (or facilitate the creation of) new rights (e.g., Keck, 2014). From this perspective, law, litigation, and judicial decisions are more likely to matter, as the test is not whether litigation unilaterally shifts policy outcomes but whether it meaningfully contributes to some part of the policymaking cycle, ranging from consciousness raising to group mobilization, agenda setting, rule-making, and implementation.

The literature on the political risks of litigation falls between these extremes. As elaborated below, some of the alleged political risks of litigation tend to equate policy change with the creation of progressive rights. So, for example, while it is theoretically possible that decisions preserving the status quo might engender powerful backlashes, most of the backlash literature analyzes reaction to the creation of controversial rights in areas like school desegregation, abortion, and gay marriage. Indeed, the implicit tilt toward liberal litigation campaigns is arguably reflected in the pejorative label "backlash," which connotes the visceral reaction of southern states to the civil rights movement. Not all counter-mobilization to litigation fits this template. If groups unified against litigation that relied on dubious science or inefficiently intervened in markets, we might call these efforts "policy corrections" and applaud them Other political risks – like path dependence – stem from internal dynamics of litigation that apply regardless of whether it seeks to challenge or preserve the status quo or whether the litigants are liberal or conservative. As a result, it is important to keep track of the empirical scope of these studies, as some are primarily associated risks arising from progressive litigation campaigns while others are linked to more generic features of litigation that apply beyond this context.

Table 1 summarizes the different approaches. It should be stressed that these approaches should not be used to place particular studies into rigid categories (Barnes, 2016). In practice, scholars often combine approaches in multifaceted

Table 1. Placing the Literature on the Political Risks of Litigation in Context: Three Types of Law and Policy Change Studies.

Type of Study	Conception of Law	Measure of Impact	Typical Empirical Focus
Judicial implementation	Formal commands	Significant shifts in outcomes attributable to rights, litigation, or judicial decisions	Creation of new rights (typically from the left)
Judicial mobilization	Political resource	Effective use of rights, litigation, and judicial decisions during the policymaking cycle	Use of litigation to either create or block policy change (from the left or right)
Political risks	As a medium (institutional framework) of policy change	Effective shaping of political and policy developmental trajectories over time	Depends on the underlying political risk

analyses that explore how litigation and judicial decisions contribute (or fail to contribute) to both policy change and the politics of change. Rosenberg, for instance, studies the direct effects of litigation on outcomes in accordance with the logic of gap studies but also considers the indirect effects of litigation, including its policy feedbacks. Michael McCann's *Rights at Work* (1994) is often cited as a leading example of judicial mobilization analysis, but his subtle account recognizes that law can be both a resource and a constraint, highlighting both aspects of structure and agency in the politics of rights (see also Epp, 2009). Accordingly, the different approaches represent ideal types of analysis, which offer a heuristic for placing studies on the political risks of litigation within the broader literature on law and policy change.

THE POLITICAL RISKS OF LITIGATION: A CLOSER LOOK

The idea that litigation shapes politics – just as the creation of Social Security has shaped its politics (Campbell, 2003) – may still seem a stretch to some readers. We tend to refer to the courts as the "non-political" branch of government and civil litigation is neither funded by taxes nor administered by executive agencies. It proceeds according to specialized legal rules and procedures and, when governmental entities do participate, they act as individual litigants subject to the same rules as private parties. On these dimensions, litigation seems a realm apart, a private remedy, not a type of public policy.

Yet socio-legal scholars have insisted for a long time that litigation should be seen a distinctive form of policymaking. In the 1960s, Martin Shapiro (1968), a pioneer in the field of political jurisprudence, recognized that courts and agencies serve parallel policy formulation and implementation functions by adapting general rules to specific cases. At the same time, he acknowledged that judicial and administrative policymaking is structured differently. Judges tend to be generalists, while bureaucrats tend to be specialists; federal judges are protected under Article III and as a result enjoy greater protections from removal than political appointees in agencies; and judges, as in the case of *Windsor*, often strike down laws through judicial review as opposed to shaping policy directly through the promulgation of specific regulations (Shapiro, 1968; see also Feeley & Rubin, 1998). Robert Kagan (2001), another leading figure in law and policy studies, also argues that American-style litigation – "adversarial legalism" – is a form of policymaking with characteristic tendencies. He sees litigation as a double-edged sword, which can be flexible, innovative and politically responsive but, when compared to other forms of policy, such as European-style social insurance programs, is a "markedly inefficient, costly, punitive and unpredictable method of governance and dispute resolution" (Kagan, 2001, p. 4).

The key to understanding these arguments is distinguishing form and function, recognizing that policy issues can be framed in different ways, some which fit a traditional model of legislation and regulation and others that fit within adjudication. The underlying issues involve the same policy, but the institutional settings differ. In *Windsor*, for instance, the policy issue was whether same-sex couples married

under state law were eligible for estate tax benefits for married couples under federal law. This matter could be seen in terms of benefit eligibility, which would be addressed by amending the DOMA (or the tax code) though the legislative process. However, the parties saw it through the lens of individual rights, which were naturally addressed through litigation and the courts. From this perspective, *Windsor* clearly set important federal policy and paved the way for same-sex couples to claim a whole host of governmental benefits from tax breaks to social security checks. Indeed, that is precisely what worried Scalia and inspired proponents of marriage equality. It is also why scholars are beginning to recognize the political significance of seemingly obscure fights over the rules of civil procedure, because these rules govern access to a critical policymaking forum in the fragmented American political process (e.g., Burbank & Farhang, 2016; Staszak, 2015).

In sum, the issue is not whether litigation is a distinctive form of policymaking – that point is well settled among socio-legal scholars – the question is: so what? In response, the next section reviews four recurring stories about the political risks of litigation – crowd out, path dependence, backlash, and individualization – which are summarized in Table 2.

Crowd out. In describing the American civil justice system, Kagan (2001, p. 104) argues that "[i]f one were starting from scratch, it would be difficult to imagine, much less design, a mode of adjudication" that would gobble up millions in attorney's fees and costs as some lawsuits do in the United States. These costs are worrisome. Rosenberg (2008) insists that litigation is not only a "hollow hope" – an ineffective tool for shifting policy outcomes – but also a "political flypaper" because of its costs. This vivid (and highly negative) imagery rests on a straightforward argument. Interest groups have limited resources. Accordingly, time and money devoted to litigation are time and money diverted from other pursuits. The result is interest groups that rely on litigation can become trapped in an expensive and largely fruitless form of advocacy. Indeed, relying on *any* single mode of advocacy in the American system of "separated institutions sharing powers" (Neustadt, 1990, p. 34) seems like a strategic mistake, as action in any single forum needs to be followed-up in others. Rosenberg is not alone in this concern. In his analysis of the labor movement, William Forbath (1991) similarly argues that unions diverted resources to litigation to

Table 2. Summary of Litigation's Alleged Political Risks.

Political Risk	Definition
Crowd out	Litigation's costs divert limited resources from other allegedly more consequential modes of advocacy
Path dependence	Litigation's ongoing uncertainty, "increasing returns" and framing effectively generates its own demand and limits consideration of alternative modes of advocacy
Backlash	Litigation engenders unified counter-mobilization and polarizes politics
Individualization	Litigation's unpredictability and framing of complex policy problems as individual disputes undermines social solidarity within and across stakeholder groups

the detriment of the broader political movement. Naturally, the risk of crowd out should fall disproportionately on groups that operate on a shoestring as opposed to groups with deep pockets, such as business groups, which can more easily absorb the costs of lobbying and litigating.

Path dependence. In describing the role of litigation in the welfare state, Kagan (2001, p. 171) describes how "litigation bred litigation" in formulating policy governing the treatment of absent fathers – the so-called deadbeat dads – in the administration of family welfare benefits. This example resonates with broader concerns that litigation is particularly prone to path dependence: the risk that, once litigation takes root, it is hard to pursue alternatives. The critical difference between crowd out and path dependence lies in the underlying mechanisms that drive political and policy ossification and the range of groups that might be susceptible. Crowd out assumes that groups cannot afford to litigate and lobby, so groups with limited resources become stuck in the courts even if they want to pursue change in multiple forums. Path dependence is not a function of the costs of litigation; it arises from the nature of the adjudication process, the perceived benefits of litigation, and its framing effects. Theoretically, any group that litigates is vulnerable to path dependence, not just those with few resources.

Part of the reason is that litigation might be path dependent stems from its piecemeal dispute resolution processes (Horowitz, 1977). Legislators can seek to pass comprehensive laws, while judges must decide the specific cases brought to them. Under these circumstances, the resolution of any single lawsuit is unlikely to settle policy issues comprehensively; rather, it will leave some important questions for later cases (and sometimes resolving one set of legal questions can raise others). This ongoing uncertainty creates the need for further litigation (Kagan, 2001; Shapiro & Stone Sweet, 1994; Stone Sweet, 1999, 2000). In this way, litigation can generate its own demand.

The dynamic of "increasing returns" is another reason litigation might be particularly prone to path dependence (Pierson, 2004). Most activities are subject to the law of "diminishing returns": the more you do something, the less benefits you receive. Adding fertilizer to a cornfield will initially increase its yield, but there will be a point where marginal returns on additional fertilizer will decrease and, if too much is added, the entire crop will fail. Litigation may work in the opposite fashion: they more you do it, the *higher* the expected return. After all, as groups successfully bring cases, they set favorable legal precedents and gather useful sources of evidence, such as expert witnesses, which increase their chances of winning future suits. As the expected returns of litigation increase, interest groups theoretically would be less likely to pursue alternative modes of policymaking, especially lobbying for new legislation, which is almost always resource-intensive and a long shot. Under these circumstances, groups come to *prefer* litigation to other modes of advocacy, even when they can afford to fight in other branches of government.

A related argument centers on how legal precedents may impact policy discourse. Of course, legal precedents formally influence subsequent judicial decisions under the doctrine of *stare decisis*. However, officials in every level and

branch of government rely on legal concepts and norms in making policy. Over time, the effect can be to limit policy options throughout the political system, as legal precedents become "givens" that define the universe of acceptable options. Gordon Silverstein (2009) forcefully makes this argument in his book on "law's allure" in policy areas including abortion, campaign finance, welfare rights, and environmental policy. He analogizes the role of courts in policymaking to a game of *Scrabble*, where the initial player faces an open board and can move in any direction. The next player, however, must build off the previous player's move. As play unfolds, players begin to build in one direction and the room to maneuver becomes increasingly limited. "In theory, it is still possible to move the game off in a radically different direction, but it becomes increasingly difficult (and unlikely) for that to happen" (Silverstein, 2009, p. 66).

Silverstein's case studies focus on constitutional law, where the institutional barriers to reversing judicial doctrines are the highest. However, litigation in all its forms, including litigation over the interpretation of statutes and common law principles, may be path dependent. One reason is that it remains difficult to pass legislation in response to court statutory and common law decisions, even though passing an override statute is obviously more feasible than amending the Constitution. Another is that the underlying mechanisms of path dependence – ongoing uncertainty of case-by-case adjudication, increasing returns, and framing effects – are not tied the existence of institutional barriers to formal revision. They stem from the litigation process itself, and so apply to all types of litigation and judicial policymaking, whether they lean left or right or seek to challenge or preserve the status quo. From this perspective, the decision to litigate is a potentially fateful one, which might lock in a mode of policymaking that is notoriously costly, inefficient, and unpredictable (Kagan, 2001).

Backlash. In order to pass new laws, activists must seek common ground with diverse interests and build coalitions broad and durable enough to withstand the arduous legislative process on Capitol Hill, which winds its way through diversely representative lawmaking forums. In litigation, activists must find defendants to sue in court. The more these targets can be vilified, the better because "good facts" allow activists to argue that both law and equity favor them. As a result, litigation can create a punitive, binary world of victims and villains, winners and losers, rights-holders and rights-violators. Some worry that this dynamic engenders backlash: unified counter-mobilization efforts that polarize the politics of a policy area and can lead the eventual reversal or hollowing out of any gains in the courts. The result is that the initial beneficiaries of litigation will be worse off in terms of policy, as their formal rights are eroded in practice, and politics, as the litigation serves to isolate them.

Michael Klarman (1994, 2004) raised the backlash hypothesis in his analysis of the civil rights movement and school desegregation cases. His analysis is subtle. On one hand, he argues *Brown* set back the struggle for civil rights by catalyzing resistance by even relatively moderate Southern states. Litigation, in effect, eliminated the moderate middle. On the other hand, violent resistance by Southern extremists was instrumental in setting the stage for a counter-backlash at the national level. Klarman's (2013) more recent account of the politics of

marriage equality litigation is also subtle, arguing that early cases recognizing civil unions and gay marriage engendered backlash, but the risk of backlash receded as public opinion shifted in favor of gay marriage.

In her comparative analysis of litigation strategies in marriage equality and same-sex family adoption, Alison Gash (2015) makes a set of complementary points. She finds that high-profile civil rights litigation for marriage equality, like the *Windsor* case, generated greater resistance than obscure administrative proceedings in family court for adoption rights, even though the issue of same-sex family adoption is just as fraught for social conservatives as same-sex marriage. The key is that prominent litigation turns up the political heat, while lower profile strategies change the facts of the ground below the political radar, complicating counter-mobilization efforts. After all, it is one thing to intervene in a lawsuit about scope of DOMA, it is another to try to break apart families who are happily living together.

Rosenberg (2008) offers a stronger version of the backlash argument in connection with *Roe*, the famous decision that regulated state limits on abortion. He argues that *Roe* resulted in a highly effective backlash by social conservatives that has stigmatized abortion and limited access to it. In a similar vein, Mary Ann Glendon (1987) has argued the *Roe* polarized the politics of abortion by framing it in terms of "rights talk," which pits the rights of women against the rights of unborn fetuses. This framing, she argues, helps explain why the United States continues to have such a divisive pro-choice/pro-life politics even as other nations (even largely Catholic ones) have largely resolved the issued.

A bevy of legal scholars have recently added their weight to the backlash argument. Reflecting on the Supreme Court's decisions of the past few decades, they see a "conservative counterrevolution" against the progressive legislation of the 1960s and signature decisions of the Warren Court (Dodd, 2015; see also Chemerinsky, 2011). The cumulative effect, they contend, has been a "rollback" of civil rights (Morgan, Godsil, & Moses, 2006), a "dismantling" of the Voting Rights Act (Issacharoff, 2015), and "judicial repeal" of the Civil Rights Act (Gertner, 2015). These substantive attacks have been joined by waves of "procedural activism" and "judicial retrenchment" that limit access to the courts and effectively cut off rights before they can be asserted (see Burbank & Farhang, 2016; Jois, 2010; Staszak, 2015; see also Barnes, 2007, 2011; Daniels & Martin, 2015). According to Bruce Ackerman (2014), the "sun is setting on the civil rights revolution" and it may continue to fade as conservatives have maintained their majority on the Supreme Court under the Trump Administration and may add to it if any liberal justices step down in the near future.

Individualization. Like the other stories of the political risks of litigation, the risk of individualization is rooted in characterizations of the adjudication process, most prominently how adjudication narrowly reframes policy problems. Donald Horowitz (1977) made this point in his classic account of courts and policy, emphasizing that litigation, unlike legislation, focuses on individual disputes, not broad policy issues, and proceeds in piecemeal fashion. Lon Fuller (1978) made a similar point by arguing that litigation relies on adjudication, which focuses on individual suits. The implication is that litigation inevitably

reduces "polycentric" (or multifaceted) problems into "dyadic" (or discrete) disputes (e.g., Derthick, 2005; Fuller, 1978; Horowitz, 1977; Katzmann, 1986; Melnick, 1983).

These concerns have deep theoretical roots. In the eighteenth and nineteenth centuries, Edmund Burke and Karl Marx critically examined how rights shape our understandings of social obligations and policy grievances (Waldron, 1987). Political theorists in the 1970s and 1980s, ranging from communitarians to critical legal studies scholars, picked up these themes and argued that using legal rights to frame policy demands (and thereby channeling conflict over them though litigation and the courts) distorted politics by reducing collective problems into discrete individual disputes (Gabel & Kennedy, 1984; MacIntyre, 1981; Taylor, 1998; Tushnet, 1984). Critics of judicial policymaking raise similar points, although their concerns stem from an entirely different theoretical tradition, which is grounded in the Pluralist ideal of competing interest groups bargaining in multiple policymaking forums. They contend that framing complex policy in legalistic terms tends to obscure important administrative issues, such as the budgetary consequences of judicial mandates and how to coordinate competing policies and goals, and threatens to exclude key stakeholders from the deliberative process (Derthick, 2005; Horowitz, 1977; Melnick, 1983).

We would expect this type of *ad hoc*, case-by-case policymaking to produce inconsistent results, which are likely to distribute the costs and benefits of policy unevenly. In addition, as already discussed, litigation tends to assign individual fault, finding that one group has denied another its rights and caused them harm. Indeed, Kagan (2001) argues that unpredictability and punitiveness are defining policy attributes of adversarial legalism. Under the logic of the policy feedback literature, the combination of uneven distribution and the assignment of individual blame should yield a fractious politics.

Thomas F. Burke and I (2015) find some empirical support for these concerns in our analysis of injury compensation policy, which, like many areas of American policy, includes policies of diverse design, some based on tort litigation, others on social insurance programs. We find that by organizing policy issues as discrete disputes between parties, tort litigation assigns fault to specific entities and creates a complex array of winners and losers, which divide material interests within and across stakeholder lines, as plaintiffs who are likely to win large jury verdicts favor maintaining the litigious status quo, while others with claims that are harder to prove claims (or not yet ripe) prefer to replace litigation with more centralized policy that would regularize payments over time. Meanwhile, defendants who have found ways to limit their liability (and effectively shift the cost of litigation to their competitors) also prefer the status quo, while other defendants bearing the brunt of revved-up tort litigation crave the certainty and cost sharing of a centralized, no fault compensation fund.

These divisions created a distinctively contentious and divided politics, in which interest groups associated with plaintiffs and defendants fight not only each other but among themselves. These divisions, moreover, made it difficult to build winning legislative coalitions in some cases, even in policy areas where most experts and the courts call for congressional action. This pattern is

particularly pronounced when compared to the political trajectory of more traditional administrative programs, which do not assign fault in assessing claims and distribute costs and benefits more evenly. These programs feature moments of great contention, especially at their creation, but long periods of relative peace, and greater solidarity among interests. It remains an open question as to whether these dynamics would emerge outside injury compensation policy, which centers on redistributive politics and features tort litigation that apportions costs and benefits very unevenly. Battles over social rights may differ, although this type of litigation does frame complex social issues in terms of individual rights and can assign blame to rights-violators.

THE POLITICAL RISKS OF LITIGATION AS TENDENCIES NOT CERTAINTIES

These stories have some facial validity – litigation is expensive, it can breed more litigation, and it frames collective problems as discrete contests – but they raise a number of objections. One is that these risks may not be particular to litigation. They may arise in connection with the creation of policies regardless of how they are structured. Consider path dependence. Litigation may be "sticky" and, once it takes hold, it may be hard to reverse course. But path dependence is not limited to litigation or judicial policymaking. To the contrary, bureaucratic programs are notoriously path dependent (Epp, 2010). Indeed, the idea of increasing returns was developed to describe characteristic properties of traditional governmental programs (Pierson, 2004), and public administration scholars since Herbert Simon (1947) have noted the influence of prior institutional arrangements on the development of public policymaking. John Kingdon (2011, p. 79) echoes this theme when noting policymakers of all stripes tend to "take what they are doing as given, and make small, incremental, and marginal adjustments."

The same can be said of the other alleged risks of litigation. Seeking legislation is costly and labor intensive, so it can theoretically crowd out other modes of advocacy. It also can engender backlash as well as divide stakeholders in a policy area. So, a threshold issue is whether the stories of the political risks of litigation are, in fact, associated with judicialization or whether they arise from pursuing policy in any forum.

Even if we accept that these stories identify particular risks of litigation, they do not arise in every case. For example, while litigation can drain resources from groups, it can also attract them. In fact, private enforcement regimes often provide fee-shifting provisions, which ensure that winning plaintiffs are reimbursed for their litigation costs (Farhang, 2010). Megan Ming Francis (2014), in her political history of the NAACP, identifies another possibility in the school desegregation cases, which is worth noting given the central role of these cases in Rosenberg's analysis of crowd out. She argues that the NAACP was founded in response to political violence against African Americans in the South and its initial anti-lynching campaigns were centered on raising public awareness through the media not creating rights through litigation. However, the NACCP

was flexible enough to join a legal challenge that culminated in *Moore v. Dempsey* (1923), which represented the first US Supreme Court intervention into the states' criminal justice systems. According to Francis, this court victory was critical in its securing foundation funding for the establishment of the Legal Defense Fund, which was instrumental in the school desegregation cases.[1]

More importantly, contrary to the crowd out hypothesis, careful case studies of policymaking show that diverse groups, including public interest groups, often find ways to lobby and litigate (despite its cost), using both victories and defeats in the courts as leverage in the legislative process. Shep Melnick's (1994) examination of special education programs offers a case in point. All things being equal, one might have expected these programs to shrink during the Reagan Administration because Reagan openly opposed the Department of Education and its intervention in the administration of local schools. Yet federal special education programs expanded under Reagan continuing a trend that began under Presidents Carter and Ford. The reason partly lies in how interest groups used relatively narrow court victories to build a broad reform coalition. Specifically, activists argued that federal judges were on the verge of creating a general right to special education. Facing the prospect of a massive, unfunded judicial mandate, states joined parents and other advocates to expand federal programs for enhancing educational opportunities to children with learning differences. Far from crowding out lobbying, litigation fueled it. (It also brought together interests across the plaintiff-defendant divide contrary to stories about the risks of individualization.)

We can also find counter-examples of path dependence. In his account of childhood vaccine policy, Thomas F. Burke (2002) shows how Congress managed to replace tort with a federal compensation program funded by a surtax on vaccines and thereby at least partially shift from the path of litigation. Equally important, litigation can significantly evolve in the absence of formal replacement, so that old doctrines can be converted to new policy ends. Occupational disease, for instance, represents a significant health policy problem in all modern economies (Boggio, 2013). In the United States, this issue has largely been dealt with through the tort system. From the perspective of path dependence, we might expect reliance on tort law to limit policymaking to common law adjudication in single cases. Yet courts have proven resourceful not only in adapting general tort principles to recognize novel claims (Gifford, 2010), but also in re-purposing complex litigation strategies, such as class actions, multidistrict litigation and Chapter 11 reorganization, to create collective remedies, which established alternative dispute resolution mechanisms that draw on principles of no-fault insurance programs (Barnes, 2007, 2011). State attorney generals have been equally creative in re-inventing litigation strategies to drive policy at the federal level (Nolette, 2015). Here, formal doctrines and procedures may appear "sticky" – they remain the same on the books – but their application has been fluid and evolving, which is the antithesis of path dependence.

Litigation also does not always produce backlash among the targets of litigation. Keck (2009), for example, carefully parses reactions to the gay marriage cases and does not find a unified response. Andrew Flores and Scott Barclay (2016) add to these findings, showing that that Supreme Court decisions on

marriage equality helped *increase* public support for it. In addition, socio-legal scholars have found that business do not always counter-mobilize against new policies. In some areas like civil rights, organizations have reacted by creating formal rules and bureaucratic structures, such as "Equal Employment Opportunity Polies" and "Affirmative Action Offices." Admittedly, some of these responses may offer only symbolic compliance that preserves the status quo or even provides legal cover for discrimination, undermining the goals of the law and representing a more subterranean form of courter-mobilization (Edelman, 2016; see also Talesh, 2012). Yet some organizations do make good faith efforts to comply with policies and sometimes even go "beyond compliance" (Barnes & Burke, 2012; Coglianese & Nash, 2006; Gunningham, Kagan, & Thornton, 2003). The point is the reaction of the targets of legislation and litigation varies and some groups embrace policy goals.

Finally, while litigation might divide interests and hinder the creation of reform coalitions in some instances, it can help build them in others. Melnick's account of special education litigation discussed earlier offers one example. Charles Epp's account of reforming police practices in *Making Rights Real* (2009) provides another. The gist is that activists used litigation and the threat of liability to challenge existing policies, forcing local governments to defend dubious practices in court and in the media. This pressure provided an opportunity for activists and reform-minded police officers to push for change. The preferences of these contending groups, however, did not align perfectly. Insiders wanted greater levels of professionalism while reformers wanted greater public oversight and participation.

Legal norms and the "fertile fear of litigation" helped to bridge this divide, resulting in a strange-bedfellows coalition between outsiders and insiders. Specifically, the contending reform factions converged on a system of "legalized accountability": An administrative model that states its commitment to legal norms provides training and communication systems to convey the importance of these norms and the need to change existing practices, and internal oversight to assess progress and adjudicate violations. Thus, the activists got a system of accountability while insiders made sure that professionals within the organization controlled the system. Malcolm Feeley and Edward Rubin (1998) tell a similar story in the prison reform cases, as state prison officials worked with activists to bring lawsuits against their own facilities in order to promote their goals of creating a more professional approach to facility management and rehabilitation.

In short, the stories of litigation's political risks identify possibilities, not certainties. The critical question is how to go beyond the identification of potential risks and assess when they arise. As seen below, this is easier said than done.

THE CHALLENGES OF ASSESSING THE POLITICAL RISK OF LITIGATION

The stories of crowd out, path dependence, backlash, and individualization imply that (1) the politics of "judicialized" issues, which rely on litigation to make policy, would be different if the issues had not been judicialized and (2)

the politics of "non-judicialized" issues would differ if they had been judicialized (Barnes & Burke, 2015). Assessing these claims cannot be accomplished by studying the politics of litigation alone; the analysis must rest on comparison (see generally Epp, 2010; Weller & Barnes, 2014).

The call for comparison may seem commonplace, almost banal, but it raises at least two difficult challenges; one is methodological, the other conceptual. The methodological problem is that we cannot observe the politics of an issue that has been judicialized *and* the politics of that same issue if it had not been judicialized. Either the issue is judicialized or not. As a result, scholars face what methodologists call the "fundamental problem of causal inference" (Gailmard, 2014, p. 339). The most direct way to deal with this problem is through randomized experiments that estimate an average effect by comparing results across treatment and control groups. Unfortunately, we cannot randomly assign reliance on litigation across different policy areas. Instead, we must seek cases of judicialization and non-judicialization for comparative analysis. Ideally, we would find cases where the underlying selection mechanism – the historical processes that channel an issue into the courts versus other forums – creates a natural experiment (see Dunning, 2012). Using this strategy, we can argue that our case selection provides a plausible basis for causal inference, even if it falls far short of the ideal of a randomized experiment in a laboratory setting. Of course, history often fails to cooperate by providing natural experiments in areas that we want to study. In their absence, scholars need to use comparative methods, including within-case analysis, to select promising cases, while acknowledging the limits of these designs for making causal claims.

Comparison in this area is conceptually tricky because it is often unclear how to distinguish judicialized and non-judicialized policies in an era when law, courts and litigation take so many forms and seem so ubiquitous (see Barnes & Burke, 2015; Burke & Barnes, 2009). The implication is that it will be extremely difficult, if not impossible, to identify examples of wholly non-judicialized policies. We can, however, do better than umbrella terms like "judicialization," "legalization," and "juridification."

The literature offers three strategies for framing our comparisons. The first is to examine policies with differing amounts of litigation at the state and local levels, as Charles Epp does in *Making Rights Real* (2009). Under this approach, scholars compare the political trajectories of policy issues in different jurisdictions and areas, some of which feature intensive litigation and others that do not. A great virtue of this approach is that it takes advantage state- and local-level variation within the same policy area, allowing for contemporaneous comparisons. Another plus is that there are a number of useful measures of the intensity of litigation that can be implemented in both case studies and surveys (Barnes & Burke, 2012; Epp, 2009). These measures facilitate mixed-method research, which can be a powerful form of observational empirical analysis.

The second strategy focuses on different styles of litigation, as Alison Gash does in her account of high- and low-profile legal strategies in *Below the Radar* (2015) and as Silverstein does implicitly in *Law's Allure* (2009) by focusing on constitutional litigation. Another possibility is compare litigation aimed at

creating new rights versus lawsuits seeking to block change. This strategy can also be implemented at the federal, state, or local levels, which would allow for within-policy comparisons. An advantage of this approach is that it promises useful prescriptions for advocacy groups, which have some agency over their litigation strategies. However, to utilize this research approach fully, scholars need to develop a generally accepted typology of litigation strategies. Such a typology would help comparisons and aggregation of findings.

The third approach focuses on different types of legalism, leveraging the comparative literature designed to contrast national legal systems (Barnes & Burke, 2015; Burke & Barnes, 2018). For example, Kagan's (2001) typology of policymaking modes usefully distinguishes adversarial and bureaucratic legalism. Adversarial legalism is *formal* and *participatory*: parties resolve disputes according to preexisting rules and procedures but the parties and their lawyers (as opposed to a government official) take the lead in framing the dispute, gathering, and presenting evidence and making arguments at trial. This means that the costs of adversarial legalism in its idealized form are privatized: the parties to the dispute pay for their representation and costs and risks are not shared. Under adversarial legalism, everything is open to dispute, including the relevance and admissibility of evidence and the fairness of underlying rules and procedures. Bureaucratic legalism is *formal* and *hierarchical.* It also relies on preexisting rules and procedures but a government official, typically a judge, controls the process from the top-down. It connotes classic Weberian bureaucracies, in which officials in a centralized bureaucracy seek to apply rules uniformly. In direct contrast to adversarial legalism, the costs of bureaucratic legalism are socialized: Programs are publicly funded and so costs and risks are shared. In this way, the underlying problem is also socialized: Responsibility is shared (as opposed to assigning fault to individual wrongdoers).

Using this typology to assess the political risks of litigation is appealing in part because it tracks the implicit comparisons in the judicialization literature. Bureaucratic legalism resembles textbook accounts of policymaking in which elected officials and executive agencies set the basic structure of policy while courts serve as referees to ensure policies and procedures meet basic constitutional requirements and administrative standards of non-arbitrariness. Adversarial legalism is far more lawyer- and court-driven and seems closer to the institutional arrangements that scholars are criticizing when they raise alarms about the political risks of litigation. Of course, both types of legalism involve some litigation, but the role of the courts differs within each policy regime. Accordingly, comparing the politics of adversarial and bureaucratic legalism offers some purchase on assessing the politics of different levels of judicialization. An added attraction is that Kagan's typology is relatively concrete and has been applied in a wide range of settings, both in the United States and abroad, so operationalization of these concepts should be feasible.

CONCLUSION

The 50th-year anniversaries of the Civil Rights Act of 1964 and Voting Rights Act of 1965 and the 25th-year anniversary of the Americans with Disabilities

Act (ADA) have naturally led to a period of introspection about the value of rights, litigation, and judicial decisions in the fight for social justice and policy change. Such reflection can be dispiriting. The Supreme Court has rolled back a number of important formal rights. Growing income inequality, persistent un- and under-employment of people with disabilities, and the treatment of African Americans in the criminal justice system provide several stark reminders of the shortcomings of law and litigation as a means for improving social conditions.

Yet litigation remains one of the only games in town. At a time when the chances of Congress enacting major policy seem slim, groups will inevitably continue to rely on the courts and litigation to formulate and implement policy. As seen in the fight for marriage equality on the left and gun rights on the right, victories are still attainable. So, litigation will remain a fixture in American policy and politics for the foreseeable future and it seems on the march abroad.

This reliance on litigation raises basic questions about its social, economic, and political consequences. This essay has sought to give some shape to the growing (and somewhat diffuse) literature of the political consequences of litigation by identifying its underlying assumptions and setting forth four stories about its political risks: crowd out, path dependence, backlash, and individualization. For the most part, these stories are rooted in careful case studies of litigation, showing how litigation and judicial policymaking coincides with particular political and policy dynamics in some cases.

Describing potential risks in case studies is a crucial first step in any research agenda but only a first step. To advance the literature, we need to develop systematic approaches for comparing the politics of litigation and its alternatives. The literature points the way toward comparing the politics of policy areas featuring (1) different levels of litigation, (2) different litigation strategies, and (3) different legal regimes that rely on varying levels of judicial policymaking. Each has merit and should be pursued. At a minimum, these types of comparisons will yield a more coherent literature, which will accumulate insights. Eventually, such studies may provide activists reliable insights into the trade-offs associated with their choice of forum and strategies for managing the political risks of litigation. At least that is the hope – hollow or not.

NOTE

1. Rosenberg considers the possibility that *Brown* attracted resources to the civil rights movement but questions whether it did so based on income data from various civil rights groups, even though the data show that the NAACP's income increased immediately following the decision. However, he argues that these data are subject to multiple interpretations. Francis' careful process tracing fills the empirical gaps in the income data and helps establish the link between litigation and foundation funding.

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