

## **Panel 1 - Adversarial Legalism: Exporting a U.S.-style Model?**

### Panel description

What is American-style adversarial legalism and how exactly does it differ from Kelemen's "Eurolegalism," its European variant? More importantly, what is causing the 'Americanization' of European law, as Kagan put it?

Kagan's iconic definition of adversarial legalism makes it clear that adversarial legalism is more than just the "American way of doing law." It is a broader mode of governance with a distinct "regulation through litigation" policy implementation style together with an emphasis on adversarial dispute resolution. The rise of this adversarial mode of governance was not organic or accidental, Kagan contends further – it was a deliberate attempt to deal with a central reality of American politics – the fragmentation of political and economic power. It brought with it a 'cultural' shift that saw lawyers dramatically rising in influence.

Farhang's recent work makes it clear that given the persistent nature of legislative-executive conflict in the U.S., Congress indeed preferred private enforcement regimes over empowering the bureaucracy to implement policy, resulting in a diminishing of executive power, even in policy areas such as civil rights, in particular regarding job discrimination suits.

While Farhang also observes that the U.S. model is sharply different from a centralized bureaucratic European model of state strength where "judges exercise far more power in managing the civil legal process," Kelemen characterizes the European regulatory approach differently, namely as generally more "informal, cooperative, and opaque."

Unlike others, Kelemen further argues that there is no direct causal connection between the rise of spread of adversarial legalism in the EU - which he terms a 'regulatory style' - and its dominance in the United States. Indeed, as he points out, Europeans typically view the American adversarial system with disdain. For him, both are parallel developments, driven by similar shifts within their political economies - in the case of Europe, economic liberalization and deregulation at the national level, coupled with juridical regulation at the EU level, together with increasing political fragmentation at the political level of the EU.

Trade relationships - together with the intensification of global competition - are critical to the growth of adversarial legalism in the U.S., Kagan noted. Krikorian's work on the WTO reminds us that this liberalization of trade relationships does not happen in an institutional vacuum. She assesses the impact of the WTO, in particular decisions arising from its judicialized dispute resolution mechanism, on domestic politics in the U.S. vs. Canada. Jarman's work extends the analysis of shifting trade relationships to the EU. Her research delves into the dynamics of

the liberalization of trade policy in the service sector in light of the “shrinking state.”

**Matthew Hennigar**, Associate Professor, Brock University; PhD, McGill University (*panel chair*).

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Professor Hennigar's research and teaching focus on the legal and institutional dimensions of Canadian and comparative politics, in particular the judiciary's organization and impact on public policy, the Canadian government's legal bureaucracy, rights litigation, and constitutional politics. He has held SSHRC grants to study the Federal Government's litigation strategy in Charter of Rights cases, and (with Troy Riddell and Lori Hausegger) the judicial appointment process for Canada's federal courts. He is the co-author of "Canadian Courts: Law, Politics and Policy," and his work has appeared in several venues, including the Canadian Journal of Political Science, Law & Society Review, Comparative Political Studies, Canadian Public Administration, and the University of Toronto Faculty of Law Journal. He has also served on the executive of the International Political Science Association's Research Committee (#9) for Comparative Judicial Studies and as the head of the Law and Public Policy Section of the Canadian Political Science Association.

**Sean Farhang**, Assistant Professor, Public Policy, University of California, Berkeley, JD, School of Law, New York University; PhD, Columbia University.

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Professor Farhang's research interests are in the areas of law and politics, regulation, litigation, and American political development. He is the author of *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* (Princeton University Press, 2010), which examines the sources and consequences of private litigation in the policy enforcement process, stressing Congress' role and motives in enacting incentives calculated to mobilize this form of regulatory implementation within a separation of powers context.

**Holly Jarman**, Assistant Professor, Department of Public Administration & Policy, Rockefeller College of Public Affairs and Policy, State University of New York, Albany, NY; PhD, London School of Economics and Political Science (*also chair of panel 2*).

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Professor Jarman's research and publications focus on policymaking across borders, specifically cross-border trade in health services, NGO lobbying in EU trade policy, and the impact of health policy reforms on US states.

Her 2009 PhD thesis "Imagined Commodities: The New Trade Politics in the EU and United States" is a comparative inquiry into the use of nontrade issues, including environmental protections and labor standards, as weapons and incentives in E.U. and U.S. trade policy. Professor Jarman continues her work on trade policy through the North American Digital Government Working Group, a network of researchers in Canada, the U.S. and Mexico formed with the support of the National Science Foundation.

**Jacqueline Krikorian**, Associate Professor, Department of Political Science & Social Science (Law & Society Program), York University; LLB, Queen's University; PhD, University of Toronto.

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Professor Krikorian undertakes research in the areas of constitutional policy, administrative law, federalism, and public international law, particularly involving trade issues. Her research has been published journals such as in the *Journal of Economic Law*, the *University of Toronto Law Journal*, the *Canadian Journal of Political Science* and *Policy Options*.

**Robert Wai**, Associate Professor, Osgoode Hall Law School, York University, LLB (British Columbia), SJD (Harvard), of the Bars of British Columbia and New York (*discussant & EUCE core faculty*).

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Robert Wai has been a professor at Osgoode Hall Law School since 1998 and served as Associate Dean of the Law School from January 2006 through June 2008. He teaches Contracts, Ethical Lawyering in a Global Community, International Business Transactions and International Trade Regulation. Prior to joining Osgoode, Professor Wai served as law clerk to Justice Gérard La Forest of the Supreme Court of Canada, articulated at the firm of Russell & DuMoulin in Vancouver, and worked as an associate in corporate/commercial law with the firm of Debevoise & Plimpton in New York. He completed graduate work in international relations as a Rhodes Scholar at Oxford University and his doctorate in international law as a Fulbright Scholar at Harvard Law School.

Professor Wai's current research focuses on governance through public and private law in areas such as international business transactions and transnational litigation.