A New Institutional Theory of Insurance

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INTRODUCTION

Insurance law scholars often analyze the forms and functions of insurance and discuss the various ways that insurance institutions (i.e., insurance companies, brokers, and agents) impact society.[1] The traditional and dominant conception of insurance is as a voluntary contractual agreement that transfers a risk of loss to a party whose business is selling such contracts.[2] However, insurance scholars also

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1. *See generally* Spencer L. Kimball, *The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471 (1961) (highlighting various approaches to thinking about insurance law).

2. For a comprehensive explanation of insurance as contract, see Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653, 658–68 (2013) and TOM BAKER & KYLE D. LOGUE, INSURANCE LAW AND POLICY: CASES AND MATERIALS 31–32 (3d ed. 2013). The insurance contract between an individual policyholder and an insurer is subject to the law of contracts. Of course, many insurance policies are written on standard forms that are usually considered adhesive contracts. *See* Abraham, *supra*, at 660. *But see generally* Daniel Schwarcz, *Reevaluating Standard Insurance Policies*, 78 U. CHI. L. REV. 1263 (2011) (showing that policy terms are not always the same). Insurance regulations attempt to adjust the insureds' unequal bargaining power by requiring premarket approval of insurance policy terms. Though not always successful, courts also attempt to clarify policy provisions and nudge insurers toward crafting clearer policy provisions and terms. *See* BAKER & LOGUE, *supra*, at 38–41.

examine how insurance functions in society as regulation,[3] governance,[4] a public utility,[5] and a product.[6] In addition to serving as a basis for knowledge production[7] and capital accumulation and allocation,[8] insurance increases and decreases social stratification in society.[9] Within these frameworks, scholars often draw from law

3. For a comprehensive explanation of the concept of insurance as regulation, see generally Tom Baker, *Insurance and the Law*, 11 INT'L ENCYCLOPEDIA SOC. & BEHAV. SCI. 7587 (2002); Tom Baker, *Insurance in Sociolegal Research*, 6 ANN. REV. L. & SOC. SCI. 433 (2001) [hereinafter Baker, *Sociolegal Research*]. *See also* Omri Ben-Shahar & Kyle D. Logue, *How Insurance Substitutes for Regulation*, REGULATION, Spring 2013, at 36 [hereinafter Ben-Shahar & Logue, *Substitutes for Regulation*], *available at* http://object.cato.org/sites/cato.org/files/serials/files/regulation/2013/3/v36n1-10.pdf [http://perma.cc/CN2U-ZTN8]; Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197 (2012). Insurance regulates many aspects of our lives. Insurance companies establish the underwriting criteria and standards and charge premiums. These mechanisms allow insurance companies to act as gatekeepers and control who can or cannot obtain insurance. *See* Ben-Shahar & Logue, *Substitutes for Regulation*, *supra*, at 37–42. *See generally* Baker, *Sociolegal Research*, *supra*. Through insurance policy terms and pricing, insurance companies also establish norms of conduct. Private insurance policies for life, health, and property often take the form of private legislation or regulation through exclusions and conditions. In addition to serving a gatekeeping function, liability insurance acts as a form of tort regulation and, in doing so, finances the civil litigation system. *See* Tom Baker, *Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1, 13 (2005) ("[L]iability insurance is a de facto element of tort law, . . . [and a] de facto cap[] on tort damages . . . ."). *See generally* KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11 (2008) (exploring how both first-party and third-party liability insurance influenced the development of tort liability); Stephen C. Yeazell, *Re-financing Civil Litigation*, 51 DEPAUL L. REV. 183 (2002) (highlighting how insurance and credit finance the civil litigation system).

4. For a comprehensive explanation of how insurance institutions, forms, technologies, and visions function as a form of governance beyond the state, see RICHARD V. ERICSON, AARON DOYLE & DEAN BARRY, INSURANCE AS GOVERNANCE 3–9 (2003). Scholars adopting an insurance-as-governance framework understand insurance as an institutional force that affects individuals, organizations, and institutions inside and outside the insurance industry. *See id.* at 9–10 (explaining nine interconnected dimensions through which insurance governs society). Similar to states, the private insurance industry often engages in "sharing similar goals of security and solidarity through the pooling of risks; using similar techniques for governing at a distance; and collaborating in insurance regimes." *Id.* at 65. The private insurance industry provides technologies and social arrangements for allocating risk across pools of risk takers, and establishes preventative security arrangements that try to reduce fraud, minimize harm and loss to its citizens. The private insurance industry also uses many of the same methods as the state to achieve its goals, such as surveillance, underwriting, and claims. *See id.* at 12–17.

5. *See* Abraham, *supra* note 2, at 668–73 (discussing the public utility conception of insurance).

6. *See id.* at 673–83 (discussing the product conception of insurance).

7. BAKER & LOGUE, *supra* note 2, at 16 (highlighting how insurance institutions accumulate and allocate capital).

8. *Id.* at 15 (highlighting how insurance institutions acquire information).

9. Insurance law scholar Tom Baker argues that "[t]he social stratification function of insurance is a more generalized way of thinking about the dynamic that makes insurance companies gatekeepers." TOM BAKER, INSURANCE LAW AND POLICY: CASES, MATERIALS, AND PROBLEMS 10 (2d ed. 2008). The relationship between insurance and law in society is often mediated by insurance institutions, namely, insurance companies. Those individuals who cannot obtain insurance from insurance companies occupy a different social position than those who are able to obtain insurance. Adverse selection or "cream skimming" of good risks by insurers leaves those most in need of insurance without being able to obtain coverage. *See id.* at 6–7; *see also* Tom Baker, *Risk, Insurance, and the Social Construction of Responsibility*, *in* EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY 33, 34, 47–48 (Tom Baker & Jonathan Simon eds., 2002). Conversely, insurance laws and regulatory schemes sometimes allow insurance companies to ameliorate social stratification and consequently

and economics principles to understand insurance company and insured behavior.[10] Analyses of insurance law view law as "top-down" and exogenous to the insurance institutions that draft, market, and sell insurance. In other words, law is treated as formed and defined outside of insurance institutions by courts, legislatures, and administrative agencies, and the role of the insurance industry is limited to reacting to law by either complying or not complying with law often due to rational, strategic considerations.[11] By exploring how and why insurance impacts society, and why insurance companies wield considerable influence in society, insurance law scholars lay an excellent foundation for thinking about insurance and insurance institutions. While existing approaches are helpful, there is not an insurance theory anchored in organizational behavior, culture, and decision making that explains how insurance companies respond to law.

This Article suggests that the relationship between legal regulation and insurance institutions is more "bottom-up" than we think.[12] The interaction between insurance companies and legal regulation is best illustrated not by examining the forms or functions of insurance or the insurance industry's broad impact on society, but rather through a processual model in which insurance organizations influence not just private law but public law. This Article, therefore, offers a theory that explains insurance industry behavior and, in particular, *how* insurance companies respond to laws in ways that end up influencing the meaning of law, not just in insurance companies' own legal environment, but also among public legal institutions such as courts, legislatures, and administrative agencies.

This Article proceeds as follows: Part I draws from new institutional organizational sociology research and offers a theoretical framework for understanding organizational responses to legal regulation as a process that specifies the institutional and political mechanisms through which organizations shape the content and meaning of law.[13] To help understand how the new institutional theoretical approach has been used to explain organizational responses to law in other contexts, I discuss prior empirical work in this area, especially in the civil and consumer-rights contexts. These studies reveal how ambiguous civil rights legislation led a majority of employers to create a variety of symbolic forms of compliance that, despite being more focused on managerial prerogatives than on

serve the public interest. *See generally* Shauhin Talesh, *Insurance Law as Public Interest Law*, 2 U.C. IRVINE L. REV. 985 (2012).

10. Of course, this is not to suggest that law and economics is the only framework used. There are certainly other approaches. However, it is safe to say that law and economics rationales dominate thinking on insurance.

11. *See supra* notes 2–9 and accompanying text.

12. For further conceptualization of the idea that the relationship between organizations and compliance with legal regulation as "bottom-up," see generally Lauren B. Edelman & Shauhin A. Talesh, *To Comply or Not to Comply—That Isn't the Question: How Organizations Construct the Meaning of Compliance*, *in* EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION 103 (Christine Parker & Vibeke Lehmann Nielsen eds., 2011).

13. *See infra* notes 18–42 and accompanying text.

legal ideals, were incorporated into judicial opinions interpreting civil rights law.[14] In particular, these studies note how managerial values such as rationality, efficiency, and maintaining decision-making discretion and flexibility influence the way in which organizations understand law and compliance. Just as judges incorporate institutionalized organizational practices into their decisions, other studies show how legislators and regulators incorporate organizations' institutionalized forms of compliance that are influenced by managerial values into consumer protection legislation and regulations.[15] However, because organizations directly interact with legislators and regulators, institutional *and* political mechanisms drive the manner in which organizations conceptualize compliance in ways that ultimately shape the meaning of law regulating organizations.

After setting forth this theoretical framework, Part II applies this theory to a series of case studies and explains how insurance institutions respond to legal regulations in ways that end up shaping the content and meaning of many laws that are designed to regulate them.[16] Similar to studies in other contexts, institutionalized logics within the field of insurance organizations and direct political mobilization work hand in hand as the insurance field influences legislation, regulation, and court decisions. However, unlike prior studies in other contexts that focus on managerial values, insurance institutions use a risk-based logic in addition to adhering to managerial values. In the insurance context, risk and managerial values work in a complementary manner. I show how insurance institutions construct the meaning of compliance with antidiscrimination laws through drafting, marketing, and selling Employment Practice Liability Insurance; use the National Association of Insurance Commissioners to influence legislation and regulation; and shape the nature of property insurance regulatory frameworks.[17] I also show how insurance institutions influence the nature of insurance regulation in Canada. In doing so, I refine how the new institutional framework applies in the insurance context to account for the logic of risk. My examples collectively illustrate that although laws regulating insurance institutions appear top-down, insurance institutions are actually shaping the content and meaning of laws that are designed to regulate them in very important and powerful ways.

This Article concludes by discussing the implications of my theory for studies on the relationship between insurance and legal regulation. Although prevailing theories of the forms and functions of insurance reveal the intertwined relationship between insurance and law, my new institutional theory of insurance helps reveal a missing part of the way that insurance institutions impact law in society. In particular, my new institutional theory of insurance offers a framework for understanding how institutionalized practices and norms among similar or likeminded organizations influence the way that law is interpreted and implemented

14. *See infra* notes 39–41 and accompanying text.
15. *See infra* notes 37–39 and accompanying text.
16. *See infra* notes 43–163 and accompanying text.
17. *See infra* notes 43–163 and accompanying text.

among public legal institutions. In doing so, I offer a different lens through which empirical research of insurance and insurance institutions can be conducted going forward.

I. NEW INSTITUTIONAL THEORIES OF LAW AND ORGANIZATIONS

Drawing from new institutional organizational sociology studies of law and organizations, this Part articulates a theoretical framework for understanding how organizations respond to law. I specify the institutional and political mechanisms through which private organizations influence law. New institutional organizational sociologists challenge the idea that organizations simply resist, obey, or avoid law in a way that yields the most rational or cost-benefit outcome.[18] New institutionalists argue that rationality is socially constructed by nonmarket factors such as widely accepted norms and patterns of behavior that become taken for granted and institutionalized among the community of organizations that make up an organizational field.[19] An "organizational field" refers to the subset of the environment that is most closely relevant to a given organization, including suppliers, competitors, and customers, as well as flows of influence, communication, and innovation.[20] Just as organizations exist within broader organizational fields, legal organizations such as courts, legislatures, and administrative agencies exist within legal fields.[21] Legal fields are institutional environments within which ideas about law evolve, are exchanged, and become institutionalized.[22] Ideas about rational legal behavior, including how to respond to legal regulation, tend to evolve and, in some cases, become institutionalized within legal fields.[23]

New institutionalists studying the relationship between law and organizations often start with the basic premise that there is nearly always some degree of legal

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18. *See* Diane Vaughan, *Rational Choice, Situated Action, and the Social Control of Organizations*, 32 LAW & SOC'Y REV. 23, 23–33 (1998) (highlighting both traditional rational choice models and calling for different approaches).

19. For a series of books and articles that lay out the general new institutional model that focuses on institutionalized norms operating within the organizational field, see generally W. RICHARD SCOTT, INSTITUTIONS AND ORGANIZATIONS (2d ed. 2001); THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Walter W. Powell & Paul J. DiMaggio eds., 1991); Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147 (1983); John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340 (1977).

20. *See* DiMaggio & Powell, *supra* note 19, at 148–52 (defining and discussing how organizational fields provide a better unit of analysis than one organization).

21. *See* Lauren B. Edelman, *Overlapping Fields and Constructed Legalities: The Endogeneity of Law*, *in* PRIVATE EQUITY, CORPORATE GOVERNANCE AND THE DYNAMICS OF CAPITAL MARKET REGULATION 55, 58 (Justin O'Brien ed., 2007) (defining legal fields as "the environment within which legal institutions and legal actors interact and in which conceptions of legality and compliance evolve").

22. *See id.*

23. *See id.*

ambiguity in laws regulating organizations.[24] This ambiguity in legal regulation leaves a space for the social construction of the meaning of law through a blending of, and sometimes contest between, the logics of legal and organizational fields.[25] In these situations, organizations respond by creating written rules, policies, and procedures that fill in law's meaning.[26] As organizations legalize themselves, managerial and business values such as rationality, efficiency, and discretion come to influence the way in which organizations understand law and compliance.[27] That is, organizations struggle to find rational modes of response to legal complexity and ambiguity and devise strategies to preserve managerial discretion and authority while at the same time maximizing the appearance of compliance with legal principles.[28]

Prior new institutional research shows that business, management, and legal professionals are key carriers of ideas among and across organizational fields. In particular, human resource officials, personnel managers, management consultants, and in-house lawyers communicate ideas about law as they move among organizations; participate in conferences, workshops, training sessions, and professional networking meetings; and publish professional personnel literature.[29]

24. *See* Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1535–38 (1992) (discussing ambiguities in law, especially in context of civil rights laws). Edelman highlights how the regulations implementing Title VII contain workforce composition reporting requirements, but do not require specific alteration of personnel policies or procedures. *See id.* at 1537.

25. *See* Edelman, *supra* note 21, at 58–65 (discussing how law is constructed by actors operating at intersection of overlapping legal and organizational fields); s*ee also* Shauhin A. Talesh, *The Privatization of Public Legal Rights: How Manufacturers Construct the Meaning of Consumer Law*, 43 LAW & SOC'Y REV. 527, 533–35 (2009) [hereinafter Talesh, *Public Legal Rights*]. *See generally* Shauhin A. Talesh, *Institutional and Political Sources of Legislative Change: Explaining how Private Organizations Influence the Form and Content of Consumer Protection Legislation*, 39 LAW & SOC. INQUIRY 973 (2014) [hereinafter Talesh, *Institutional and Political Sources*] (showing how multiple logics can influence organizational fields).

26. *See* Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC. 888, 898–900 (2011) (discussing legalization of organizational fields); *see also* Talesh, *Public Legal Rights*, *supra* note 25, at 533 ("In response to antidiscrimination laws that alter the 'legal environment,' organizations often adopt many legal practices and structures because their cultural environment constructs adoption as the legitimate or natural thing to do.").

27. *See* Shauhin A. Talesh, *How Dispute Resolution System Design Matters: An Organizational Analysis of Dispute Resolution Structures and Consumer Lemon Laws*, 46 LAW & SOC'Y REV. 463, 469 (2012) ("[L]aw becomes 'managerialized' when business values such as rationality, efficiency, and management discretion operating within an organizational field influence the way organizations understand law, legality, and compliance.").

28. *See* Edelman, *supra* note 24, at 1567–69 (finding that organizations created policies and procedures in ways that preserved managerial discretion). *See generally* Lauren B. Edelman, Sally Riggs Fuller & Iona Mara-Drita, *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589 (2001) (examining how managerial rhetoric about diversity influences employers' employment policies and procedures).

29. For a series of studies highlighting how the professions mediate and managerialize law, see generally SANFORD M. JACOBY, EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY, 1900–1945 (1985); James N. Baron, Frank R. Dobbin & P. Devereaux Jennings, *War and Peace: The Evolution of Modern Personnel Administration in U.S. Industry*, 92 AM. J. SOC. 350 (1986); Lauren B. Edelman, Howard S. Erlanger & John Lande, *Internal*

Existing empirical research reveals that when organizations attempt to comply with laws, managerial conceptions of law broaden the term "diversity" in a way that disassociates it from its original goal of protecting civil rights,[30] transform sexual harassment claims into personality conflicts,[31] deflect or discourage complaints rather than offering informal resolution,[32] and even shape the way arbitrators understand law and compliance.[33]

The process through which organizational ideas about compliance evolve occurs when taken-for-granted norms and cognitive ideas become so strongly institutionalized that they are not widely challenged. But as organizations struggle to define the meaning of compliance, that process may also be contested as the logics of organizational and legal fields come into conflict.[34] Contests over the meaning of compliance are particularly likely where multiple interest groups have stakes in the meaning of compliance.[35] Political battles over legal meaning are particularly salient in the legislative and administrative contexts, where interest groups engage in overt battles regarding the meaning of compliance.[36] In the

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Dispute Resolution: The Transformation of Civil Rights in the Workplace, 27 LAW & SOC'Y REV. 497 (1993); Edelman, Fuller & Mara-Drita, *supra* note 28.

30. *See* Edelman, Fuller & Mara-Drita, *supra* note 28, at 1590 (showing how professional personnel literature broadens how the term "diversity" is used in relation to discrimination claims).

31. *See* Edelman, Erlanger & Lande, *supra* note 29, at 516–17 (showing how grievance and antiharassment officers transform legal disputes into interpersonal disputes and focus on healing the relationship).

32. *See generally* Anna-Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 LAW & SOC'Y REV. 83 (2005) (showing how sexual harassment policies are constructed through a managerial lens).

33. *See* Talesh, *supra* note 27, at 469 (showing how business and consumer values influence the way that private arbitration dispute resolution systems are designed).

34. *See, e.g.*, Edelman et al., *supra* note 26, at 930–34 (highlighting how courts defer to the presence of employer structures as evidence of compliance); Lauren B. Edelman & Robin Stryker, *A Sociological Approach to Law and the Economy*, *in* THE HANDBOOK OF ECONOMIC SOCIOLOGY 527 (Neil J. Smelser & Richard Swedberg eds., 2d ed. 2005) (discussing political contestation); Carol A. Heimer, *Competing Institutions: Law, Medicine, and Family in Neonatal Intensive Care*, 33 LAW & SOC'Y REV. 17 (1999) (highlighting the overlap of legal and medical values); Nicholas Pedriana & Robin Stryker, *Political Culture Wars 1960s Style: Equal Opportunity—Affirmative Action Law and the Philadelphia Plan*, 103 AM. J. SOC. 633 (1997) (highlighting political contestation among competing groups); Marc Schneiberg & Sarah A. Soule, *Institutionalization as a Contested, Multilevel Process: The Case of Rate Regulation in American Fire Insurance*, *in* SOCIAL MOVEMENTS AND ORGANIZATION THEORY 122 (Gerald F. Davis et al. eds., 2005) (showing how fire insurance rate regulation was the product of political, legal, and business contestation); Talesh, *Public Legal Rights*, *supra* note 25, at 539–51 (highlighting how manufacturers influence the meaning of legislation).

35. *See* Edelman & Stryker, *supra* note 34, at 527–37 (discussing the relationship between institutional and political contestation); Talesh, *Institutional and Political Sources*, *supra* note 25, at 985–97 (providing a comparative empirical analysis of how differences in the political mobilization at the legislative level can lead to two different consumer warranty laws); Talesh, *Public Legal Rights*, *supra* note 25, at 539–51 (highlighting the political contestation over California's lemon law).

36. *See* Pedriana & Stryker, *supra* note 34, at 633–91 (revealing political contestation among competing groups); Nicholas Pedriana & Robin Stryker, *The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965–1971*, 110 AM. J. SOC. 709 (2004) (showing how institutional and political factors influence state policy); Talesh, *Institutional and Political*

legislative, administrative, and judicial contexts, forms of compliance that tend to acquire an aura of rationality in both organizational and legal fields are those that preserve managerial authority and discretion, while simultaneously realizing or appearing to realize the legal principle of due process.[37]

The infusion of managerial logics into law is not limited to organizations or organizational fields. New institutionalists show how law becomes endogenous as legal rules derived from court cases, legislation, and administrative regulations come to be determined by organizations—the very group such laws are designed to regulate.[38] For example, empirical work in the civil rights context shows how ambiguous civil rights legislation led employers to create a variety of symbolic forms of compliance that, despite being more attentive to managerial prerogatives than to legal ideas, were incorporated into judicial opinions interpreting civil rights law.[39] My own empirical research demonstrates how institutionalized logics operating among automobile manufacturers play an important role in determining the form and structure of consumer protection legislation and regulation.[40] In particular, although political mobilization and contestation remain prevalent in the legislative process, the political frames used by organizations lobbying the legislature reflect logics that are derived from institutionalized norms and structures developed by these same organizations.[41] In sum, through some combination of institutional logics and political contestation, private organizations are able to shape the content and meaning of laws that are designed to regulate them.

Thus, it appears that new institutional theories and studies of insurance law are ripe to be blended together. While insurance law scholars examine the forms and functions of insurance, there is little empirical research directed toward understanding the organizational behavior, culture, and decision making of insurance institutions. Conversely, existing new institutional research on law and

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Sources, *supra* note 25, at 984–96 (highlighting how institutional logics drive political contestation to varying degrees).

37. *See* Edelman & Talesh, *supra* note 12, at 104–13 (combining institutional approaches to explain how private organizations shape the content and meaning of law among public legal institutions).

38. For a comprehensive explanation of this theory, see *id.*

39. *See, e.g.*, Edelman et al., *supra* note 26, at 891, 922–31(showing how courts defer to employers' institutionalized practices); Lauren B. Edelman, Christopher Uggen & Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 407–08, 432–46 (1999) (same).

40. *See* Talesh, *supra* note 27, at 475–84 (showing how despite having similar consumer warranty laws, the law in action is different based on the way that business and consumer perspectives are accounted for in the design of the dispute resolution system); Talesh, *Institutional and Political Sources*, *supra* note 25, at 973–1005 (highlighting how businesses influence legislation in some, but not all, circumstances based on various political alliances that are mobilized during the legislative process); Talesh, *Public Legal Rights*, *supra* note 25, at 539–50 (in response to powerful consumer protection legislation affording consumers rights and remedies in court, manufacturers created private dispute resolution structures and ultimately convinced the legislature to adopt them into law).

41. *See* Talesh, *Public Legal Rights*, *supra* note 25, at 552 ("[T]he politics of consumer protection policy and what manufacturers lobby for are, at least partially, institutionally determined and rooted within the logic of organizational fields.").

organizations suggests that human resource officials, managers, and in-house counsel influence the meaning of antidiscrimination law by communicating an altered ideology, infused with managerial values, of what civil rights laws mean. While the new institutional framework has been applied in a variety of contexts, with a few exceptions, there has not been a concerted effort to apply the theoretical framework to studies of insurance.[42] In particular, new institutionalists have not focused on how insurance companies use insurance and risk-based logics and principles to influence the nature of law and compliance.

II. HOW INSURANCE COMPANIES INFLUENCE THE CONTENT AND MEANING OF LAW

This Part develops what I refer to as "a new institutional theory of insurance." I offer a theoretically-informed explanation of how the insurance industry responds to law from an organizational behavior, culture, and decision-making context. In particular, the insurance field's institutionalized logics and political mobilization mediate and, at times, influence what law and compliance mean among private organizations, but they also shape the content and meaning of legislation, regulation, and court decisions. My inquiry specifically focuses on how the insurance field shapes particular lines of insurance such as employment practice liability and property insurance. However, I also focus on how insurance institutions influence foreign and domestic intermediary organizations that are tasked with shaping insurance regulatory policy.

A. How Insurance Companies Influence the Content and Meaning of Law Among Public Legal Institutions

The rise of Employment Practice Liability Insurance (EPLI) illustrates how insurance institutions mediate the meaning of compliance with civil rights legislation and how these constructions of compliance end up being deferred to and legitimated by public legal institutions. Prior to the development of employment

42. Marc Schneiberg has conducted a few projects looking at "bottom-up" constructions of law in the insurance context. *See, e.g.*, Marc Schneiberg, *Combining New Institutionalisms: Explaining Institutional Change in American Property Insurance*, 20 SOC. F. 93 (2005) [hereinafter Schneiberg, *New Institutionalisms*] (property insurance); Marc Schneiberg, *Political and Institutional Conditions for Governance by Association: Private Order and Price Controls in American Fire Insurance*, 27 POL. & SOC'Y 67 (1999) (fire insurance). For other studies looking at how private organizations shape the content and meaning of public legal institutions, see, for example, Valerie Jenness & Ryken Grattet, *The Law-In-Between: The Effects of Organizational Perviousness on the Policing of Hate Crime*, 52 SOC. PROBS. 337 (2005) (criminal justice); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L. REV. 487 (2003) (securities regulation); Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. 571 (2005) (securities regulation); Justin O'Brien, *Introduction: The Dynamics of Capital Market Governance*, *in* PRIVATE EQUITY, CORPORATE GOVERNANCE AND THE DYNAMICS OF CAPITAL MARKET REGULATION 1, 1–17 (Justin O'Brien ed., 2007) (securities regulation); Nancy Reichman, *Moving Backstage: Uncovering the Role of Compliance Practices in Shaping Regulatory Policy*, *in* WHITE-COLLAR CRIME RECONSIDERED 244 (Kip Schlegel & David Weisburd eds., 1992).

discrimination law, workers suffering workplace discrimination rarely sought or took action in the legal system.[43] Title VII and other civil rights laws attempt to convert the broad guarantees established by the U.S. Constitution into tangible legislation that addresses the specific issue of workplace discrimination and harassment.[44]

In response to perceived threats of employment discrimination lawsuits, insurance companies began offering EPLI. Whereas previous forms of business insurance expressly excluded coverage for liability arising out of employment practices, EPLI filled this gap by providing employers with the means to manage the increasing litigation risk associated with discrimination, sexual harassment, wrongful termination, and other breaches of employment law.[45] EPLI policies provide insurance defense and indemnification coverage to employers for claims of discrimination (e.g., age, sex, race, disability), and other employment-related allegations made by employees, former employees, or potential employees.[46]

Consistent with new institutional studies, diffusion of EPLI occurred both among insurers and employers. While only a couple insurance companies in the 1990s offered EPLI, over seventy insurance companies offer EPLI today.[47] The majority of large employers and many midsize employers purchase EPLI.[48] Thus, while EPLI has become an institutionalized practice both among insurers and employers, until recently little attention has been paid to examining how the

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43. Joan Gabel, et al., *Evolving Conflict Between Standards for Employment Discrimination Liability and the Delegation of That Liability: Does Employment Practices Liability Insurance Offer Appropriate Risk Transference?*, 4 U. PA. J. LAB. & EMP. L. 1, 5 (2001) (noting that litigating over discrimination is a relatively recent phenomenon).

44. Title VII in particular states in relevant part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . . .

Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a) (2012); *see also* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e (1994)) (emphasizing the deterrent effect of financial liability by providing compensatory and punitive damages for disparate treatment lawsuits brought by private plaintiffs). *See generally* U.S. CONST. amend. XIV, § 1.

45. *See* Joan T.A. Gabel, Nancy R. Mansfield & Gregory Todd Jones, *The Peculiar Moral Hazard of Employment Practices Liability Insurance: Realignment of the Incentive to Transfer Risk with the Incentive to Prevent Discrimination*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 639, 640, 650–51 (2006) (highlighting the rise of EPLI); *see also* Gabel et al., *supra* note 43, at 28–30 (same).

46. *See* Nancy H. Van der Veer, Note, *Employment Practices Liability Insurance: Are EPLI Policies a License to Discriminate? Or Are They a Necessary Reality Check for Employers?*, 12 CONN. INS. L.J. 173, 175–77 (2005) (explaining what EPLI is and what it covers).

47. *See* Gabel et al., *supra* note 43, at 28 (tracing the history of EPLI); *see also* Glenn Kramer, *Reasonableness for Free: Why Buy Employment Practices Liability Insurance When EEOC.gov Gives Protection Away?*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 459, 459–63 (same).

48. *See* Gabel et al., *supra* note 43, at 28 ("It is estimated that more than half of Fortune 500 companies have purchased EPLI coverage."). "The volume of business (gross written premium) continues to be stuck at about $1.6 billion in the United States, and perhaps another $500–550 million outside the U.S." Richard S. Betterley, *Employment Practices Liability Insurance Market Survey 2012: Rates Continue to Firm, but Not for All Carriers*, THE BETTERLEY REPORT (Betterley Risk Consultants, Sterling, M.A.), Dec. 2012, at 6.

insurance field mediates or translates the meaning of compliance with antidiscrimination law to those that insurance institutions interact with when they draft, market, and sell EPLI.

Building on prior new institutional research, I conducted a qualitative empirical study for the past three years that explores *how* the insurance field (insurance companies, agents, brokers, and risk management consultants), through EPLI and the accompanying risk management services that the field offers, construct the threat of employment law and influence the nature of civil rights compliance.[49] Drawing from participant observation and ethnographic interviews at EPLI conferences across the country as well as content analysis of EPLI policies, loss-prevention manuals, EPLI industry guidelines, and webinars, my empirical data suggest that insurance companies and institutions use a risk-based logic and institutionalize a way of thinking centered around risk management and reduction.[50] Faced with uncertain and unpredictable legal risk concerning potential discrimination violations, insurance institutions elevate the risk and threat in the legal environment and offer a series of risk-management services that they argue will avert risk for employers that purchase EPLI.[51] By framing employers' legal environment in terms of uncertain legal risk,[52] heightened litigation risk,[53] and the

49. For a more elaborate analysis of the empirical study that I conducted, see Shauhin Talesh, *Legal Intermediaries: How Insurance Companies Construct the Meaning of Compliance with Antidiscrimination Laws*, 37 LAW & POL'Y 209–39 (2015).

50. *See id.*

51. *See id.* tbls.1, 2, 3 & 4 (highlighting a series of examples of how insurers frame legal risk as uncertain, heighten litigation risk, and encourage reducing risk).

52. Uncertain legal risk refers to the risk of loss to an organization based on some violation of law. My empirical research reveals that insurers frame employers' legal risk as uncertain, vague, and unpredictable. *See* Talesh, *supra* note 49, at 218–19. *The EPL Book*, the leading EPLI manual used by industry field actors, repeatedly notes the vague and unpredictable state of employment law: "While two states may each prohibit discrimination on a particular basis, the extent of the protection afforded, the process for the employee to make a claim and the possible remedies available against the employer may vary widely." GARY W. GRIFFIN ET AL., THE EPL BOOK: THE PRACTICAL GUIDE TO EMPLOYMENT PRACTICES LIABILITY AND INSURANCE 17 (3d ed. 2001). "The only consistent and reliable aspect of personnel laws and regulations is that they are in constant state of flux. Federal and state legislatures frequently enact new legislation and amend existing statutes. Courts continuously reinterpret the meaning of established labor laws." *Id.* at 88, 91. "Even human resource professionals can be frustrated when they attempt to make sense of labor laws that contradict each other." *Id.* at 91. For further analysis of how the insurer field frames employers' legal risk as uncertain, see Talesh, *supra* note 49, at 218–19.

53. Insurance field actors heighten the litigation risk facing employers by routinely discussing the growth, burden, and cost of employment lawsuits in documentary data and webinars: "Not-for-profit corporations and public entities, in addition to public and private businesses, are experiencing an explosion of employment-related claims." GRIFFIN ET AL., *supra* note 52, at 1. "The Supreme Court's decisions in these cases signal an increased likelihood that an organization may be held vicariously liable for sexual harassment committed by supervisors and managers." *Id.* at 7. "In light of today's increasingly litigious environment, it is not unusual to find a variety of common-law tort, quasi contract, or other state law claims attached to a complaint alleging discrimination, sexual harassment, or wrongful discharge." *Id.* at 35. For further analysis of how the insurer field heightens employers' litigation risk, see Talesh, *supra* note 49, at 219–21.

need for risk reduction,[54] the insurance field creates a space to encourage employers to engage in managerialized responses and develop formalized procedures by using the various risk-management services offered by insurers to help mitigate these risks. In this setting, risk and managerial values work in a complementary manner.

After analyzing the uncertain legal risks employers face and the high likelihood that employers are going to be sued, my fieldwork reveals that insurers encourage employers to purchase EPLI because these insurance policies and the value-added risk management services that insurers offer will reduce employers' risk.[55] In particular, EPLI insurers offer risk-management services to employers, including conducting compliance audits of employers, offering employers a confidential legal hotline that allows employers to ask legal questions to insurer-sponsored lawyers, and providing employee handbooks and employment "contract builders" to employers so that they can construct a handbook and develop contracts without actually drafting the documents.[56] These risk-management services can have positive and negative impacts on compliance: they may reflect some "best practices" and lead to improved employment policies and procedures, but they may also make it easier for employers to develop policies and procedures without actively participating in the creation of these policies and procedures.[57]

Insurers influence the meaning of compliance with antidiscrimination laws in a number of ways. First, conferences, training programs, loss-prevention manuals, and insurance policy language provide an opportunity for the insurance field actors to build discretion into legal rules. By "building discretion into legal rules," I mean that insurance companies develop policy language that provides work-arounds to certain legal rules that clearly forbid insurance coverage for certain acts or omissions in civil rights contexts. For example, the insurability of punitive damages highlights how the insurance field builds discretion into legal rules. Even though civil rights laws often potentially subject employers to punitive damages, and many states

54. Once the insurance field frames the legal risks facing employers as uncertain but elevated and likely to occur, the insurance field encourages employers and risk management consultants to avert or reduce this risk by purchasing EPLI insurance and the accompanying risk-management services: "But because the frequency and severity of EPL claims is rising, the importance of a coordinated risk management approach, including the consideration of specialized EPL insurance, should not be overlooked." GRIFFIN ET AL., *supra* note 52, at 70. My participation at EPLI conferences and analysis of EPLI webinars reveal that the insurance field follows almost a uniform formula: discuss the vague, complex, and uncertain legal risks facing employers; discuss the growth, costs, and inevitability of lawsuits; and then discuss how to reduce employment practice liability exposure by purchasing EPLI. *See* Talesh, *supra* note 49, at 221. For further analysis of how the insurer field encourages employers to reduce and avert risk by purchasing EPLI, see *id.*, at 221–23.

55. *See id.* at 223–31.

56. *See id.* at 223 (discussing risk-management programs insurers offer that include telephone hotlines, audits, and a series of written materials that employers can use to create, develop, or enhance their own employment practices materials).

57. In particular, my prior study notes that insurance company guidance on these issues largely focuses on how to avoid litigation as opposed to focusing on EPLI insurers' often-stated goal of providing mechanisms for building a discrimination free work environment.

prohibit the insurability of such damages,[58] EPLI insurers build discretion into their policies and broaden coverage to include punitive damages.[59] EPLI insurers insert various "most favored venue" clauses into their policies.[60] One kind of most favored venue clause expressly states that the enforceability of insurance coverage shall be governed by the applicable law that most favors coverage for punitive and exemplary damages.[61] Another approach involves insurance companies listing state jurisdictions in their policies that the insurance companies must consult in determining insurability.[62] If any of the listed states permit punitive damages to be insured, then the insurer must treat that jurisdiction as the applicable one for purposes of assessing its ability to pay punitive damages.[63]

Moreover, many insurers have offshore facilities in Bermuda and London or enter into relationships with foreign insurance companies to provide "wrap around" policies that will ultimately pay employers' punitive damages liability.[64] Thus, even though the law on the books often prohibits coverage for punitive damages, the law in action is that these damages are covered by EPLI. Framed as necessary risk management and risk aversion, EPLI weakens the ability of state and federal civil rights laws to hold employers directly responsible for paying such damages since employers now have the ability to transfer these risks to insurers.

My fieldwork also reveals that insurance companies recontextualize legal rules around a nonlegal risk logic that focuses on averting risk and making discrimination claims against employers more defensible. Employment progressive discipline policies such as performance improvement plans (PIPs), which are often used as mechanisms to improve employee performance, are now reframed by insurance field actors around managing and averting risk and avoiding a negative inference

58. *See* Betterley, *supra* note 48, at 9 ("We understand that there are 16 states that prohibit or restrict coverage for either Punitive Damages and/or Intentional Acts . . . .").

59. *See id.* ("Almost every carrier offers separate coverage to fill in such potential gaps in coverage, either via most favorable venue wording, or with an off-shore wraparound in a jurisdiction such as Bermuda that does not frown upon such coverage.").

60. *See* GRIFFIN ET AL., *supra* note 52, at 234–39 (providing a comprehensive explanation of the relationship between EPLI and punitive damages); Jeffrey P. Klenk, *Emerging Coverage Issues in Employment Practices Liability Insurance: The Industry Perspective on Recent Developments*, 21 W. NEW ENG. L. REV. 323, 331–32 (1999) (explaining how "most favored venue" clauses are used by EPL insurers to provide coverage for punitive damages claims); *see also* Jonathan H. Kurens, *Insurability Concerns Intentional Conduct and Punitive Damages*, *in* THE PRACTITIONER'S GUIDE TO DEFENSE OF EPL CLAIMS 75, 84–88 (Ellis B. Murov ed., 2005) (explaining the work-around that EPL insurers use to provide coverage for punitive damages).

61. *See* GRIFFIN ET AL., *supra* note 52; Klenk, *supra* note 60; Kurens, *supra* note 60.

62. *See* GRIFFIN ET AL., *supra* note 52; Klenk, *supra* note 60; Kurens, *supra* note 60.

63. *See* GRIFFIN ET AL., *supra* note 52; Klenk, *supra* note 60; Kurens, *supra* note 60.

64. *See* Klenk, *supra* note 60, at 331 ("[S]ome insurers have set up offshore facilities or entered into relationships with foreign insurance companies to provide 'wrap around' policies that will ultimately pay the damages."); *see also* Kurens, *supra* note 60, at 90 ("In order to provide an additional layer of coverage protection for punitive damages and intentional conduct when an insured does business in jurisdictions that restrict their insurability, employers can negotiate coverage changes to the standard Bermuda punitive damage wrap-around policies to specifically address EPL coverage concerns.").

from a jury at trial.[65] Specifically, while employers' institutionalized practice is to provide PIPs prior to terminating employees, the insurance field discourages using PIPs against employees who might be terminated.[66] Panelists at conferences spend considerable time discussing whether insurance coverage exists for emerging forms of liability against employers as opposed to focusing on ways for employers to avoid committing legal violations in the first instance.[67]

Discussion at the conferences concerning recent U.S. Supreme Court decisions is also framed around shifting risk and avoiding liability. For example, the Supreme Court in *Vance v. Ball State* narrows the scope of who constitutes a supervisor in sexual harassment cases.[68] In *Vance*, the Court established that a supervisor is one who has the ability to take tangible employment actions against the victim, such as hiring, firing, disciplining, promoting, and reassigning an employee.[69] Rather than focusing on the proper role of supervisors, EPLI risk-management consultants and lawyers steer employers toward avoiding liability and defending cases. Risk-management consultants and attorneys suggest that employers not have many supervisors, selectively use the term "supervisor," clearly document and communicate levels of authority, and avoid behavior that gives an inference that the employee is a supervisor.[70] In particular, field actors dissuade employers from having lots of employees participate in training programs that could suggest an employee is a supervisor.[71] Moreover, employers are encouraged to bring more motions for summary judgment since the law has narrowed the definition of supervisor.[72] Thus, unlike Tom Baker and Sean Griffith's study concerning directors and officer insurance loss prevention, insurers do engage in loss prevention but do so in a manner that is filtered by risk-management logics.[73]

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65. *See* Talesh, *supra* note 49, at 226.

66. My observations at EPLI conferences revealed that panelists routinely discourage using PIPs, especially if an employee has previously made a complaint to an employer. One panelist indicated: "PIPs are bad for litigation, 80% of people who receive a PIP end up being fired. Jurors view PIPs as a way to set someone up to be fired, especially if the employee raised a complaint or concern earlier." *See id.*

67. *See id.* For example, conferences and training sessions spend considerable time discussing workplace bullying, a relatively new workplace issue that is now being increasingly litigated by plaintiffs' lawyers. Although insurance institutions have an opportunity to encourage more lawful conduct in light of changing antidiscrimination laws, insurance field actors shift responsibility for fostering a safe and positive workplace away from employers by communicating how EPLI provides coverage for employers in the event that an employee is found liable for bullying: "Don't worry. EPLI has a catch all for these situations. Bullying claims fall within the definition of wrongful act in the policy—it is a wrongful workplace policy or procedure." *Id.*

68. *See generally* Vance v. Ball State Univ., 133 S. Ct. 2434 (2013).

69. *See id.* at 2439–46.

70. *See* Talesh, *supra* note 49, at 227.

71. *See id.*

72. *See id.*

73. TOM BAKER & SEAN J. GRIFFITH, ENSURING CORPORATE MISCONDUCT: HOW LIABILITY INSURANCE UNDERMINES SHAREHOLDER LITIGATION 109–27 (2010) (showing how in the directors' and officers' insurance context, insurers have an opportunity to engage in loss prevention but do not do so).

Risk-management and loss-prevention services allow insurers to not just shift risk off employers, but also to provide an opportunity for insurers to encourage managerialized responses and a formalization of policies and procedures in workplace settings. While my data suggest EPLI and the series of risk-management services offered with the insurance policy can potentially improve employment practices and compliance, they also suggest that EPLI risk-management services may at times shape compliance in a way that leans more toward making claims defensible rather than fostering a discrimination-free workplace.

Similar to prior new institutional research, my research reveals considerable deference to EPLI by public legal institutions. For example, federal, state, and municipal governments adopt the logics of EPLI insurers and encourage, and at times *require*, public organizations and governmental institutions to purchase EPLI. In 1997, the U.S. Department of Justice Executive Office for U.S. Trustees approved EPLI insurance as an "actual, necessary expense" of the trustee pursuant to her duties as trustee.[74] This was based on the perceived increased number of lawsuits being filed concerning employment practices and the need for trustees to avert and reduce risk to themselves.[75] Final approval of this policy resulted from a series of interactions and negotiations between representatives of the National Association of Chapter Thirteen Trustees (NACTT) and the United States Trustee Program (USTP) in which the NACTT emphasized the need to change USTP policy.[76] In particular, the USTP formed a subcommittee that listened to presentations from EPLI insurers and developed criteria for EPLI insurance.[77] The subcommittee provided the insurance field an opportunity to communicate its logic about the value of EPLI and risk management to government actors, who in turn afforded trustees the opportunity to purchase EPLI as a necessary expense. The official directive from the Department of Justice encouraged trustees to develop managerialized responses such as developing formal compensation policies, employee performance reviews, and other standard personnel management policies that would lower risk.[78] It also urged trustees to attend training and management programs administered by EPL insurers:

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74. *See* Memorandum from Jerry Patchan, Dir. of U.S. Dep't of Justice, Exec. Office for U.S. Trustees, to all U.S. Trustees (Dec. 12, 1997) (on file with the U.S. Dep't of Justice) (authorizing EPLI as an actual and necessary expense of the trustee in operation of the trustee's duties pursuant to 28 U.S.C. § 586(e)(1) (2012)).

75. *See id.* ("Given the increasing numbers of lawsuits being filed in the employment practices area, the lack of insurance protection afforded by current authorized policies, and the need to protect the trust, the Subcommittee recommended that EPL insurance be authorized as an actual, necessary expense of the trustee.").

76. *See id.* In particular, representatives of the NACTT, concerned with the risk of employment practices liability, approached the USTP. *See id.*

77. *See id.*

78. *See id.* The Director specifically noted in his memorandum that "premiums should decrease as the individual standing trustees institute formal compensation policies, formal employee performance reviews and other standard personnel management policies that lower the risk of lawsuits. Please work with the trustees in your regions to develop and institute these management practices." *See id.*

> [M]any EPL carriers offer loss control seminars; some may even make attendance at such a seminar mandatory. I urge you to encourage the trustees in your region to attend these free classes. Knowledge of employment law and the development of appropriate written policies and procedures concerning employment practices will help minimize the risk of improper actions.[79]

Thus, we see how the content and meaning of regulatory policy and compliance in this instance is bottom-up. The insurance field adopts a managerialized conception of employment law, which highlights the elaboration of employers' formal structures that demonstrate compliance and rational governance. The insurance industry sells this vision by highlighting the risk of not developing policies and procedures as well as providing a safety net for employers in the form of defense and indemnification insurance coverage. The government adopts this conception into its policies by authorizing trustees to purchase EPLI as a necessary expense and also urges trustees to attend employment practice training sponsored by insurers. Thus, this legal mandate from a governmental body such as the Department of Justice looks top-down, but it is really bottom-up and coming from the insurance field.

State governments also rely upon EPLI and simultaneously encourage other public entities to obtain such insurance. For example, the Minnesota Department of Commerce, the Mississippi Transportation Commission, and the California Attorney General's Guide for Charities advise and authorize public entities to purchase EPLI.[80] In addition, some county and city governments purchase EPLI.[81]

79. *See id.*

80. *See, e.g.*, CAL. GOV'T CODE § 990(c) (West 2014) ("[A] local public entity may: . . . Insure, contract or provide against the expense of defending a claim against the local public entity or its employee, whether or not liability exists on such claim . . . where such liability arose from an act or omission in the scope of his employment . . . ."); S.B. 2472, 2013 Leg., Reg. Sess. (Miss. 2013) ("The Mississippi Transportation Commission, in its discretion, may purchase employment practices liability insurance, and may purchase an excess policy to cover catastrophic losses incurred under the commission's self-insured workers' compensation program . . . ."); EDMUND G. BROWN, ATTORNEY GENERAL'S GUIDE FOR CHARITIES 13 (2005) (One of the answers to "Frequently Asked Questions" notes that "[i]f the corporation's employment force is large enough, it may be advisable for the corporation to obtain an employment practices liability ('EPLI') policy.").

81. For example, in California, Alameda and Los Angeles counties have risk management policies that include coverage for employment practices liability. *See* WILLIAM T. FUJIOKA, 2011–2012 L.A. CNTY. CHIEF EXEC. OFF., RISK MGMT. ANN. REP. 17–18; *see also Insurance Programs for the County*, ALAMEDA CNTY. RISK MGMT. UNIT (Feb. 3, 2015), http://www.acgov.org/cao/rmu/programs/insurance/county/index.htm [http://perma.cc/2FZF-SDCZ]. New York City's Housing Authority has Public Officials Liability Insurance, which includes EPLI. *Regular Meeting, July 30, 2014*, OFF. CORP. SECRETARY, N.Y. HOUS. AUTH., *available at* http://www.nyc.gov/html/nycha/downloads/pdf/board_meeting-calendar_summary_07302014.pdf [http://perma.cc/G67S-LNHM] ("Authorization is requested to award the Authority's $25M (million) Public Officials Liability Insurance Policy, including a $10M sublimit for Employment Practices Liability Coverage . . . commencing on August 1, 2014 and continuing through July 31, 2015."); *Regular Meeting*, July 3, 2012, OFF. CORP. SECRETARY, N.Y. HOUS. AUTH., *available at* http://www.nyc.gov/html/nycha/downloads/pdf/Final_Calendar_Summary_07032012_Board_Meeting.pdf [http://perma.cc/QC4G-KKEW] ("Authorization is requested to award the Authority's $25M (million) Public Officials Liability Insurance policy, including a $10M

Moreover, public secondary schools as well as public universities increasingly require EPLI.[82]

As EPLI becomes an institutionalized service offered by insurers and purchased by public and private organizations, courts follow suit by significantly expanding the coverage afforded insureds under EPLI when interpreting coverage questions.[83] The expansive interpretation of EPLI by courts adds legitimacy to

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sublimit for Employment Practices Liability coverage . . . commencing on August 1, 2012 and continuing through July 31, 2013.").

82. Charter schools in Nevada, as well as public schools that are a part of the Los Angeles Unified School District, are required to purchase EPLI. *See* NEV. ADMIN. CODE § 386.215 (2014); L.A. UNIFIED SCH. DIST., REQUIRED LANGUAGE FOR CHARTER PETITIONS—BOILERPLATE (2010), *available at* http://www.calcharters.org/Boilerplate_Language-Final_10-26-10.pdf [http://perma.cc/8SG3-UJA8]. Universities also have EPLI policies that protect the university against employment practice liability. For a sampling of some university practices that require EPLI, see, for example *General Liability*, RISK MGMT. & EVNTL. HEALTH & SAFETY, CAL. STATE FULLERTON, http://rmehs.fullerton.edu/riskmanagement/Insurance.asp [http://perma.cc/2U22-36HM] (follow "Types of Insurance Coverage" hyperlink; then follow "General Liability" hyperlink) (last published Apr. 29, 2014); *UA Employment Practices Liability*, SYS. OFF. RISK SERVICES, U. ALASKA, https://www.alaska.edu/risksafety/b_insurance/insurance-coverage/employment-practices-liab [https://perma.cc/365B-EVZB] (last updated July 23, 2008); *Insurance Programs*, BUS. & FIN. BULL., UNIV. CAL. (Oct. 1, 2010), *available at* http://policy.ucop.edu/doc/3520505/BFB-BUS-81 [http://perma.cc/68QH-HPFL]; *Individual and Organization Self-Insurance Plan Including Employment Practices Liability Coverage*, DEP'T. ENVTL. HEALTH & SAFETY, U.TEX.-PAN AM., *available at* https://portal.utpa.edu/utpa_main/dba_home/safety_home/EHS_FILES_pAGE/liability%20practices.pdf.pdf [https://perma.cc/Y27W-CMGY]; *Assessment Rates*, BUDGET OFFICE, U. CAL., IRVINE (last visited July 8, 2015), http://www.budgetoffice.uci.edu/ratesBO.html [http://perma.cc/5Y4P-R22B]; *File a Claim*, OFF. OF RISK MGMT., U. WASH., http://f2.washington.edu/risk/claim [http://perma.cc/ZU32-HAUU].

83. Courts have broadened the duty to defend by allowing for an unlimited right to insure under the duty to defend for intentional discrimination, even where the duty to indemnify has been limited. *See, e.g.*, Starkville Mun. Separate Sch. Dist. v. Cont'l Cas. Co., 772 F.2d 168, 170 (5th Cir. 1985) ("While punitive damages themselves may be uninsurable for reasons of public policy, that same public policy does not apply to costs and attorney's fees incurred in a defense against a plea for punitive damages, particularly where the defense is successful."); Marie Y. v. Gen. Star Indem. Co., 110 Cal. App. 4th 928, 959 (2003) ("[S]ection 533 precludes only *indemnification* of wilful conduct and not the *defense* of an action in which such conduct is alleged."); Melugin v. Zurich Can., 50 Cal. App. 4th 658, 669 (1996) ("The provisions of section 533 . . . do not relieve [insurer] of the broad duty to defend, even though it would have been entitled, in performing that duty, to reserve its right to contest its liability to indemnify"); Ohio Cas. Ins. Co. v. Hubbard, 162 Cal. App. 3d 939, 946–47 (1984) ("We, therefore, conclude that the public policy exclusion for the indemnification of punitive damages does not conclusively establish that an insurer has no duty to defend a suit in which the only remaining claim is for punitive damages.").

Courts have also expanded defense coverage of potentially nonindemnifiable acts, where it is unclear if such acts are nonindemnifiable at the pleading stage. For example, in *Wendel v. Travelers Cas. & Sur. Co. of Am.*, 472 F. App'x 620, 622 (9th Cir. 2012), the court held that an insurance company "was bound to provide a defense unless the complaint made it absolutely 'clear' that the policy did not cover the claim alleged in the complaint . . . ." The insurance company "was not permitted to decide unilaterally . . . that its interpretation of the law was likely to be adopted by the Washington Supreme Court and deny coverage on that basis." *Id.* The court also explained that any exceptions to this rule are aimed at benefitting the insured, not the insurer. *See id.*

While courts have consistently held that indemnification claims for discriminatory treatment are not covered under EPLI, courts have held that there is indemnification coverage for disparate impact claims where any discrimination was unintentional. *See* Save Mart Supermarkets v. Underwriters at Lloyd's London 843 F. Supp. 597, 606 (N.D. Cal. 1994) ("Unintentional discrimination may be

EPLI by authorizing, requiring, or encouraging public institutions to purchase such insurance and use the risk-management services that insurers offer.

In sum, a new institutional approach helps explain how the insurance industry influences the meaning of compliance with antidiscrimination laws. In response to civil rights laws, insurers created EPLI. This product spread among insurers and ultimately employers who ascribed to the uncertain legal risk and heightened litigation risk they faced as well as the need to take action to avert such risks. Through conferences, training programs, and loss-prevention manuals, EPL insurers translate and interpret the meaning of compliance in ways that build discretion into legal rules and recontextualize legal rules around a nonlegal risk logic that emphasizes averting risk and making discrimination claims more defensible. Whereas prior new institutional research highlighted how managerial values influence the way organizations understand law and compliance,[84] my research demonstrates how risk and managerial values work together in the context of drafting, marketing, and selling EPLI.

In turn, public legal institutions such as courts and legislatures appear to have adopted the logic of the insurance field as to the value of EPLI and the various risk-management services and encourage and, at times, require public and private organizations to purchase EPLI. Thus, it was not courts or legislatures that initially told employers to purchase EPLI. Rather, it was the insurance field that created and institutionalized a product and ultimately convinced employers to purchase this insurance, and it was the insurance field that motivated the legislature to require, authorize, and encourage such insurance in certain instances. The meaning of civil rights compliance has thus been constructed at least in part by the insurance field.

To the extent EPLI and the value-added services induce compliant behavior by private and public institutions, requiring organizations to purchase EPLI may lead to greater adherence to civil rights goals of workplace equality. However, my

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inherently harmful, but a plaintiff need not establish that the insured intended to commit a wrongful act in order to recover under such a theory."); W. Muzette Hill, *Employment Practices Liability: The* Other *Year 2000 Problem?*, *in* INSURANCE LAW: WHAT EVERY LAWYER AND BUSINESSPERSON NEEDS TO KNOW 293, 312 (1998). ("Many other states follow the New York paradigm in fashioning coverage for disparate impact claims and/or vicarious liability claims but either precluding coverage for disparate treatment or remaining silent on the issue."). Moreover, states that bar insurers from covering punitive damages indicate that insurers may be required to provide coverage in situations where the employer based wrongful conduct was triggered by lower-level employees (as opposed to officers' and directors' conduct) that the employer did not authorize or ratify. *See* Hill, *supra*, at 312–13.

Finally, while intentional acts of discrimination are prohibited from being covered by insurance, some states have redefined the intentional acts exclusion to require not just an intentional act but also deliberate wrongdoing. *See, e.g.*, Manganella v. Evanston Ins. Co., 746 F. Supp. 2d 338, 346–48 (D. Mass. 2010), *aff'd*, 700 F.3d 585, 594 (1st Cir. 2012) (for intentional act exclusion to apply in EPLI case, employee must have specific knowledge of the illegality of his or her actions or have knowledge of another duty). Thus, by allowing insurance coverage for activities that are not inherently harmful and by finding knowledge of workplace policies to be evidence of harmfulness, the courts are expanding coverage for businesses regardless of whether the businesses take steps to protect against discrimination or not.

84. *See supra* notes 29–38 and accompanying text.

empirical data suggest that at times there is a disconnect between the moral tones that legislators, judges, and lawyers use to discuss antidiscrimination law and the risk tones that insurers use that suggest that litigation is inevitable and must be managed.

B. How the Insurance Field Influences the Meaning of Legislation and Regulation Through Intermediary Organizations

The EPLI case study highlights how EPLI and the accompanying risk-management services are pathways through which the insurance field shapes the nature of civil rights compliance. Whereas conferences, training sessions, and loss-prevention manuals are locations where organizational values can influence law and compliance in the EPLI context, the following section highlights how the insurance field uses intermediary organizations such as the National Association of Insurance Commissioners (NAIC) and other insurance associations to influence legal rules. Consistent with new institutional theories, institutionalized logics and political mobilization explain how the insurance field influences the content and meaning of insurance legislation and regulation in the United States and foreign countries.

Insurance regulation in the United States is largely governed by the states.[85] State insurance departments often have broad, legislatively delegated powers to enforce state insurance laws, promulgate rules and regulations, and conduct hearings to resolve disputed matters. This decentered approach allows each state flexibility concerning issues relating to fair pricing of insurance, protecting against insurance company insolvency, preventing unfair practices by insurance companies, and ensuring availability of insurance coverage.[86] States have the discretion to approve insurance rates, conduct financial examinations of insurers, license companies, agents, and brokers, and monitor claims handling.[87] Each state has a chief insurance regulator often known as the commissioner, superintendent, or director of insurance who is responsible for regulating the insurance markets in a state and enforcing the state's regulatory laws.[88] Despite the existence of the state

85. *See* Kimball, *supra* note 1, at 473; *see also* Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*, 26 FLA. ST. U. L. REV. 625, 629 (1999).

86. *See* ROBERT H. JERRY II, UNDERSTANDING INSURANCE LAW 22, 95–98 (2d ed. 1996); *see also* Kimball, *supra* note 1, at 473 ("One can summarize the development of insurance regulation in the United States by saying that from an early date there were occasional regulatory efforts by the legislatures; that in the 1820s regulatory powers began to be concentrated in the hands of an existing state official, acting *ex officio*; that in the 1850s and 1860s many states concentrated insurance regulatory powers in the hands of a special board or an individual designated primarily to control insurance; and that ever since the creation of such an insurance department or agency, insurance supervision has been rather steadily extended and systematized.")

87. *See* Randall, *supra* note 85, at 629 (highlighting the various roles state insurance departments play).

88. Therese M. Vaughan, *The Economic Crisis and Lessons from (and for) U.S. Insurance Regulation*, J. INS. REG. 3, 8 (2009) ("Each state has a chief insurance regulator (variously known as the commissioner, superintendent, or director of insurance) charged with enforcing that state's regulatory laws."); *see also* Randall, *supra* note 85, at 629.

regulatory system, there has been a move toward centralization, uniformity, and cooperation in insurance regulation largely driven by the NAIC.

Formed in 1871, the NAIC is a voluntary association of insurance commissioners from each of the fifty states, the District of Columbia, and the United States territories.[89] The NAIC's stated goals are to ensure the solvency of insurers, protect policyholders, and preserve state regulation as well as the NAIC itself.[90] Because the NAIC centralizes and unifies insurance regulatory policy across states, insurers are not subject to various state laws that are ambiguous with respect to compliance and which vary from state to state.[91]

The history of the NAIC, therefore, reflects a somewhat contradictory focus on preservation of autonomous state regulation and uniformity of regulation. The NAIC has centralized many basic regulatory functions and operates as a quasi-federal agency by attempting to enforce national standards across states.[92] Similar to federal regulators in other industries, the NAIC performs centralized duties including setting forth requirements for standard forms for insurance companies' annual financial statements, coordinating financial examinations of insurance companies, rating non-U.S. insurers for the states, providing periodic review and accreditation of state insurance departments, and drafting model laws and regulations that are often adopted by state legislatures.[93] The NAIC, in fact, proved instrumental in securing state regulation over insurance. For example, as a result of the NAIC's Financial Regulation and Solvency Accreditation Program, state solvency regulation is essentially uniform across states and states undergo regular on-site reviews to increase the chance of proper implementation and compliance with regulatory rules.[94]

The NAIC, however, operates as a quasi-public and quasi-private institution. NAIC membership is composed of state officials who are accountable to the governors that appoint them or the general electorate. NAIC members also have regulatory powers and responsibilities in their states and also have influence in their own state's legislatures. While sometimes thought of as "a group of public officials

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89. *See* Randall, *supra* note 85, at 629–30; *see also* Vaughan, *supra* note 88, at 8.

90. *See also* NAT'L ALLIANCE OF AM. INSURERS, NAIC IN TRANSITION: A DISCUSSION PAPER ON ISSUES FACING THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS 1, 13–14 (1982).

91. In 1871, insurance commissioners and representatives from nineteen states met at the National Insurance Convention to discuss insurance policy. Randall, *supra* note 85, at 631–32. Representatives at the meeting emphasized the need for uniformity in insurance regulation:

> In a session "remarkable for its harmony," the commissioners are now "fully prepared to go before their various legislative committees with recommendations for a system of insurance law which shall be the same in all states—not reciprocal, but identical; not retaliatory, but uniform. That repeated consultation and future concert of action will eventuate in the removal of discriminating and oppressive statutes which now disgrace our codes, and that the companies and the public will both be largely benefited, we have no manner of doubt."

Id. at 632.

92. *See id.* at 634.

93. *See id.* at 634–35 (highlighting the various functions of the NAIC).

94. *See* Vaughan, *supra* note 88, at 9 (explaining some of the successful ventures that the NAIC has made toward increasing uniformity across states).

imbued with the public trust" or "an instrumentality of the states," the NAIC officially defined itself in 1995 as a private trade organization.[95] Thus, the NAIC has no power to compel the states or the industry to take action.[96] Moreover, because the NAIC is a self-governing entity, it is neither accountable to voters nor subject to government oversight.[97] Although the NAIC plays a central and national role in insurance regulatory policy, it has little power to sanction insurers or regulators and it is not subject to administrative rules such as the Administrative Procedure Act of 1966 and the Freedom of Information Act.[98]

As a result, the insurance field has been able to mediate the meaning of insurance regulation and policy through its involvement with the NAIC. First, the vast majority of the NAIC's budget comes from assessments of the insurance industry.[99] Legal analysts have highlighted how the financing of the NAIC allows the insurance industry greater influence:

> The industry directly funds the NAIC. Each year the NAIC assesses insurance companies a fee, based on premium volume, to file information in its centralized databases. In recent years, database fees account for approximately half of the NAIC's revenues. In contrast, state assessments account for less than five percent of revenues. As a result, members of the industry view the NAIC as part of the industry and accountable to the industry. Furthermore, much of the NAIC's work often appears to be in direct response to the industry.[100]

Second, the structure of the NAIC not only allows for substantial industry involvement in regulatory policy but provides an efficient and centralized mechanism for the adoption of policies and laws that the insurance field approves. It also provides a place for the insurance field to lobby against NAIC standards if committee negotiations prove unfruitful.

For example, the NAIC's establishment of accreditation standards for state insurance departments highlights how the insurance industry's institutionalized practices can influence legal regulations. After numerous insurer insolvencies in the

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95. *See* Randall, *supra* note 85, at 638 (highlighting the dual identity of the NAIC and the struggles of being thought of as an advocate for public and private interests).

96. *See id.* at 638–39 (noting the limited enforcement abilities of the NAIC).

97. *See id.*

98. *See* Scot J. Paltrow, *The Converted: How Insurance Firms Beat Back an Effort for Stricter Controls—State Regulators' Alliance Began Tackling Issues; Then, the Boycott Began—A Fateful Dinner in Chicago*, WALL ST. J., Feb. 5, 1998, at A1 (noting the lack of sanctionable power the NAIC has); *see also* Randall, *supra* note 85, at 638–39 (detailing the quasi-public and quasi-private role that the NAIC plays despite not having sanctionable power).

99. *See* Paltrow, *supra* note 98, at A10 ("The NAIC depended on fees paid by the industry for 90% of its $40 million budget. This not only gave the industry leverage; it also provided a rationale for insurers' argument that the regulators should be accountable to those they regulated.").

100. Randall, *supra* note 85, at 639–40. One commissioner explains the industry in the following manner: "'Money is influence,' he says, and the amount the NAIC receives from the industry it regulates 'is disproportionately high' compared with the banking association to which he belongs. 'Departments should be funding the majority of the budget.'" Charles E. Schmidt, Jr., *NAIC: Under Fire*, BEST'S REVIEW: PROP.-CAS. INS. EDITION, Jun. 1995, at 34.

1980s, the NAIC developed a new accreditation program for state insurance departments with the goal of improving solvency regulation and financial examinations by individual state regulators and creating consistency among the states.[101] The accreditation process initially consisted of a group of independent individuals knowledgeable about insurance evaluating and reviewing the laws, regulations, and standards, and then submitting its report to the NAIC which then votes on the state's accreditation.[102] Despite initial agreement among members of the NAIC regarding the need for market conduct regulation, the accreditation program also did not specify standards and guidelines for market conduct regulation.[103] Insurance industry officials and state commissioners criticized the ambiguity and lack of specificity of standards.[104] Moreover, the NAIC had no authority to force states to participate in the accreditation process or to monitor compliance with Financial Regulation Standards outside the accreditation and reaccreditation process.[105] In response to industry and state commissioners criticisms, the NAIC proposed a series of provisions to tighten standards, required establishment of a written policy to cooperate and share all information regarding companies with the NAIC and other state regulators, developed a scoring standard for accreditation, and threatened potential sanctions for nonaccreditation.[106] By establishing specific standards as a condition of accreditation, the NAIC attempted to bolster state insurance regulation and fend off calls for federal intervention.[107]

Ultimately, the NAIC reforms were not successful because the insurance industry was able to limit market conduct regulation and the scope of the NAIC's solvency regulation.[108] Aided by state legislators who had ties to the insurance industry, the insurance field weakened accreditation standards and avoided enhanced market conduct regulation through the accreditation program.[109] Similar to employers and manufacturers in the employment and consumer protection contexts, the insurance field successfully argued that market conduct regulation

101. *See* Randall, *supra* note 85, at 640–50 (chronicling the regulatory process).

102. *See id.* at 646 (highlighting the early stages of the accreditation process).

103. *See* 2A MELAHN, ET. AL., PROCEEDINGS OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, 1991, at 232 (NAIC report unanimously concludes that market conduct regulation was essential to ensure the solvency of insurance companies).

104. For example, the NAIC standards indicated that sufficient resources must be set aside to conduct financial examinations but did not specify what amount of resources would be sufficient.

105. *See* Randall, *supra* note 85, at 644–46 (noting the various approaches the NAIC tried to implement).

106. *See id.*

107. *Id.* at 640–41.

108. *Id.* at 641 ("[T]he NAIC, as a private, nongovernmental entity funded largely by the insurance industry, is highly susceptible to industry influence. The industry, through various means, circumscribed the NAIC's ability to accomplish significant reform, limiting the scope of solvency regulation and preventing essential market conduct regulation.").

109. Paltrow, *supra* note 98, at A1. Approximately one-third of the insurance commissioners appointed in 1995 had previously spent time in the insurance industry. Often, commissioners secure positions in the industry following their service with the state. It is also common for state legislators who have ties to the industry to sit on insurance committees, and only a few states prohibit such service. *See id.*

would inhibit their flexibility and discretion with respect to how to conduct business.[110] The insurance industry withheld paying fees and operating funds assessed by the NAIC against insurance companies, engaged in public criticism of the program, and lobbied the NAIC to achieve its objectives.[111] Many insurers boycotted paying the increased fees to the NAIC and argued that the fees were used inappropriately to subsidize market conduct activities not related to solvency regulation.[112] The insurer boycott of paying fees crippled the NAIC and forced the NAIC to negotiate with the industry and provide significant concessions.

Despite the NAIC's stated commitment to protecting consumers, its studies of market conduct initiatives, and its public acknowledgement of the intertwined relationship between market conduct and solvency, the NAIC deferred to the insurance industry's institutionalized notions of discretion and flexibility with respect to setting rates and failed to establish market conduct accreditation standards.[113] Consistent with new institutional theory, these institutionalized logics shaped what the insurance industry lobbied for. In turn, the insurance industry's political mobilization shaped NAIC policy concerning accreditation:

> The history of the NAIC and, in particular, its continuing failure to enhance market conduct regulation or adopt market conduct accreditation standards demonstrates that the industry has utilized its power jointly to influence and even direct the NAIC's actions . . . . Although federal regulation may not be necessary to guarantee effective regulation of the insurance industry, the history of the NAIC suggests . . . a systematic bias in favor of the industry.[114]

In return for ending the boycott over fees, the regulators agreed to use database fees only for solvency regulation.[115] The regulators also agreed to curb market conduct regulation, establish a liaison committee of industry representatives that meets with the regulators' executive committee on a quarterly basis, and hire a new executive vice president who was a former lobbyist of a major insurance company.[116] Moreover, the NAIC began holding annual hearings where industry officials would be able to question commissioners on each budgetary item.[117] Thus, institutional and political mechanisms shaped the nature of insurance regulation at key moments.

The insurance field also embeds itself within the NAIC's structure in a way that allows insurance field actors to influence the nature of legal rules. For example, the NAIC has subcommittees and working groups tasked with influencing

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110. Randall, *supra* note 85, at 655–62.

111. *Id.*

112. *Id.* at 656 (highlighting how the insurance industry responded to the NAIC's growing power).

113. For a comprehensive analysis of how the insurance field weakened accreditation standards, see Randall, *supra* note 85, at 658–60, 647–48.

114. Randall, *supra* note 85, at 669.

115. Paltrow, *supra* note 98, at A1.

116. *See id.*

117. *Id.*

legislation and regulation. These committees tackle a wide variety of issues, including drafting "white papers" and offering recommendations on the future of insurance regulation, insurance contacts, and financial instruments.[118] Moreover, they actively engage in lawmaking by offering amendments to existing laws such as the Standard Nonforfeiture Law for Life Insurance as well as make recommendations concerning health insurance, accreditation standards, and deferring tax assets.[119] Rarely are NAIC policies developed without approval from the insurance industry.[120] The industry advisory committees, resource groups, and liaisons for the NAIC provide a mechanism for the insurance field to influence the meaning of legal regulation: "At the very least, the structure of the NAIC facilitates industry participation in and potential control over the content of various regulations."[121] The American Alliance of Insurers (AAI), an insurance industry organization, conducted a study in 1982 that concluded that "the NAIC functioned primarily as an evaluator and reactor to the work product of the industry advisory committee [on the NAIC]."[122] By being actively involved in the NAIC, the insurance field gains direct influence over the content and meaning of insurance laws because the NAIC, as an intermediary, is charged with drafting model laws and regulations.[123] Moreover, the NAIC strongly encourages states to adopt their model standards and laws, including threatening to withdraw accreditation to states that do not adopt their recommendations.[124] Deference by the federal government to the NAIC masks the fact that the insurance industry influences the NAIC's proposals and recommendations at critical stages.

In particular, the industry's preference for managerial control and discretion

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118. *See generally NAIC 2012 Spring National Meeting*, NAIC MEETING NOTES (Global Ins. Indus. Grp., Ams., Washington, D.C.), Mar. 15, 2012 (highlighting the wide-ranging involvement the NAIC has in trying to impact law and regulations).

119. *See id.*

120. *See* Paltrow, *supra* note 98, at A1. "Founded in 1871 to help regulators from different states devise common approaches, the [NAIC] had long been closely entwined with the industry. Relying nearly exclusively on the industry itself for funding, the NAIC seldom did anything to which insurers objected. Nine of the past 11 NAIC presidents took industry jobs after they left the association." *Id.*

121. Randall, *supra* note 85, at 669 n.260.

122. NAT'L ALLIANCE OF AM. INSURERS, *supra* note 90, at 65. In particular, the AAI found the following:

> If a particular committee was charged with the responsibility to develop a model law or to conduct a study, a common response was to appoint an industry advisory committee to undertake the bulk of the work. . . . In other situations, the industry might initiate a particular project and seek the appointment of an NAIC committee to consider the work products or the appointment of an advisory committee to assist in carrying out the work.

Id.

123. *See* Randall, *supra* note 85, at 625, 629–34, 667–69; *see also* Sara Marley, *Insurers, Legislators Criticize NAIC's Practices*, BUS. INS., May 30, 1994, at 1.

> It is time we recognize the NAIC for what it is: a trade association of the state regulators, who are not elected nor responsible to anyone (in most cases) except the person who appointed them, but who have taken on the role of legislator, executive and judge. I support state regulation of our industry, but I think it is time the NAIC quit playing one-upmanship with the feds.

Marley, *supra*, at 1.

124. *See id.* at 2.

with respect to risk assessments and policies is afforded considerable deference. For example, as part of a solvency modernization initiative, the NAIC in the past few years proposed an "Own Risk and Solvency Assessment" (ORSA) process for U.S. insurance companies that emphasizes risk management and culminates in a comprehensive report of the company's risk and solvency status.[125] This model was based on a European proposal set to take effect in 2014.[126] While U.S. state regulators were very cautious about following a European proposal, the NAIC consistently supported focusing insurers on their risk management programs.[127] After receiving feedback from the insurance industry, the NAIC ultimately released an ORSA Guidance Manual Exposure Draft in October 2011.[128] Interestingly, the NAIC relaxed the standards after being convinced by the insurance industry to allow insurers the flexibility to emphasize their own policies and procedures in their own ORSA.[129] Although the ORSA process remained largely intact, the authority to order insurance companies to change their behavior or face penalties was removed.[130] Thus, consistent with new institutional studies, the insurance industry's institutionalized practices drove the NAIC's regulatory recommendations during the political process. Ultimately, the NAIC and state legislatures deferred to the insurance field's constructions of law and compliance.

These examples of the insurance field's involvement with the NAIC highlight how insurance law is more "bottom-up" than we think. The NAIC operates as a centralizing organization that permits the states to circumvent potential federal intervention in insurance regulation, and serves to concentrate power. In turn, the insurance industry wields considerable political influence over this centralizing and intermediary organization and impacts regulatory policy. In this instance, the content and meaning of law is being determined by insurance institutions.

This phenomenon is not limited to the United States. Similar to the NAIC context, through a combination of institutionalized logics emanating from the insurance field and political mobilization, there is some evidence that the insurance field uses intermediary organizations to shape the meaning of legislation and regulation in foreign countries.[131]

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125. *See* David Wicklund & George Christopher, *The New Rules of Risk: The NAIC Leans Toward Having Insurers Use Solvency II-Inspired ORSA Guidelines to Manage Capital*, BEST'S REV., Mar. 1, 2012, at 65–66.

126. In particular, the European Union's Solvency II capital framework was to set regulatory capital requirements that are consistent with the economic market. *See id.* at 65.

127. *See id.*

128. *See id.*

129. *See id.*

130. *See id.* Wicklund and Christopher's article notes: "While most of the key concepts from the initial proposal remained in the manual, many of the more prescriptive elements were removed to allow companies to emphasize their own policies and procedures in their ORSA." *Id.*

131. One major study of the Canadian insurance industry's influence noted: "As participants in state regulation of their activities, insurance companies are not passive recipients of top-down enforcement. Rather they actively shape the state and its form of legislation and regulation. Their governance of state governance transpires in the same contexts we have analysed with respect to state regulators." ERICSON, DOYLE & BARRY, *supra* note 4, at 146.

For example, in Canada, insurance associations bring together insurance field actors and act as a mechanism through which the insurance field mediates law's meaning. In these settings, the insurance industry communicates and institutionalizes a logic anchored around actuarialism, maintaining discretion, flexibility, and self-regulation. Similar to the NAIC, industry associations in Canada perform multiple roles such as providing a systematic means for developing rules, standards, rating criteria, and sanctions, and creating information systems about insurance consumers and insurable risks.[132] Most importantly, an insurance association sees its role as influencing the content and meaning of laws created by public legal institutions.[133] Industry associations have legal staff that monitor legislative policies, engage in close association with insurance companies and the legislative counsel, and monitor and interpret legal decisions, including intervening and appealing lower court decisions that affect the industry negatively.[134]

Working on behalf of the government, insurance directors and officers serve on industry associations and government committees that directly interact with state regulators concerning insurance matters.[135] In this capacity, the insurance industry conceptions of the proper degree, amount, and substantive language of legislation and regulation are adopted into law by public legal institutions.[136] Insurance industry involvement in the lawmaking process is so important that the states altered their lawmaking process to facilitate greater industry involvement:

> A state regulator . . . . [indicated] that his agency used to develop a position paper and send it out to the industry for response, but the practice changed to have industry associations participate in developing these papers from the outset. He said this approach is best because "if people are not

132. For a comprehensive explanation of the role that insurance associations play in insurance regulation in Canada, see *id.* at 147–48, 151–57.

133. *See id.* at 151 ("More and more, governments are seeking constructive partnerships with private industry, especially if industry speaks with one voice and in the broad public interest. Membership in [the Insurance Bureau of Canada] generally improves the odds that government will hear and understand industry positions when it counts, *before* laws are enacted and regulations drafted.").

134. *See id.* at 151–52. The industry associations act as a legislative or court "watch," or surveillance. "'Watch' has become the guiding trope expressing the need for vigilant surveillance. It addresses not only what is feared (in the present case, unwanted interference from governments), but also what might be a source of favour (in the present case, how governments might serve industry interests)." *Id.* at 151.

135. *See id.* at 146–47. Insurance industry involvement includes "cochair[ing] a government steering committee on a particular line of insurance with the head of the provincial government insurance regulation agency." *Id.* at 146.

136. One CEO noted that major legislation involved the insurance industry defining the problem and setting the parameters of the solution and even formal adoption of insurance industry language. *See id.* at 146–47. The political clout of the insurance industry is significant, with lobbyists actively negotiating with government officials, and insurance companies exerting a powerful force on the political economy. Moreover, industry-appointed councils that are sanctioned by the state have significant control over life-agent regulation. *See id.* at 204. "'In the prairie provinces, the regulator is a council and LUAC and CLHIA appoint the directors . . . Sure makes it a lot easier when the lobbyist becomes the regulator!'" *Id.* (ellipsis in original).

> prepared to comply with the standards, it's just like trying to enforce a speed limit on the highway, it just won't happen."[137]

Anchored around risk management and sound actuarial analysis, one piece of insurance legislation was adopted "90 per cent in accordance with the industry's framework."[138] Similar to my earlier research in the consumer protection context, the insurance field has at times even been able to privatize dispute resolution processes. Grievances raised by insureds are now processed by insurance company ombudspersons as opposed to neutral state ombudspersons.[139] Managerial values of maintaining control, discretion, and flexibility also influence the way the insurance industry influences the structure of regulation:

> A state regulator of insurance company solvency said in an interview that the move to more subjective assessments and self-regulation by insurance companies made his agency more dependent on those companies. While insurance companies were required to establish more internal governance mechanisms, and to disclose how those mechanisms were operating, *this in turn gave the companies an opportunity to shape the state regulatory agency to the point where one meaning of "self-regulation is reliance by entities like us on participants in the system*."[140]

Similar to the NAIC case study, insurance industry input into the legislative and regulatory policy is not merely the result of interest group politics. While the insurance lobby is clearly active in Canada, what the insurance field chooses to lobby for is shaped by concepts of risk, reliance on actuarial techniques, discretion, and flexibility, which are all institutionalized practices within the insurance field. In this instance, the insurance associations generate consensus and institutionalize insurance industry generated positions and responses to legal institutions. Thus, through a combination of institutionalized logics and political mobilization, institutionalized ideas about risk and insurance influence the way that public legal institutions understand insurance regulation.[141]

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137. *Id.* at 147.

138. *Id.*

139. One state agency in Canada established an insurance ombudsperson system to address consumer complaints. Although housed at the agency headquarters, the main function of the ombudsperson's office was to facilitate creating a system in which each insurance company created and operated its own consumer complaint system with its own internal ombudsperson. This program was put in place in large part to reduce the number of complaints with which the regulatory agency dealt. *See id.* at 205.

140. *Id.* at 147 (emphasis added). In addition, Canada's insurance industry has been active in reform movements that are aimed at reducing government restrictions by the government and in other circumstances, increasing restrictions when desired by the industry. For example, the Ontario Red Tape Commission received influence from the insurance industry and ultimately adopted much of the industry's logic concerning industry criteria of moral risk and responsibility. *See id.* at 147–50. The insurance industry essentially convinced the regulatory apparatus that stringent government regulation was not needed and that the insurance industry played a role in clearing out "unnecessary red tape from accumulating." *See id.* at 148.

141. Ericson, Doyle, and Barry describe the way that the insurance field penetrates the discourse among public legal institutions as follows:

C. How Competing Institutionalized Logics in the Insurance Field Shape the Nature of Property Insurance Regulation

New institutional theories help explain how insurance field actors influenced the meaning of property insurance regulation in the late nineteenth and early twentieth centuries in the United States. In particular, the politics of American property insurance regulation and what insurance institutions choose to lobby for when attempting to influence legislation were derived from *competing* and *evolving* field logics operating in the insurance field. I specifically explain how, during the 1950s, the American property insurance industry shifted from a system of associations that relied on shared governance to price-competitive markets and insurance companies that directly sold insurance to insureds. This shift fundamentally transformed property insurance, bringing a mass-market, large-firm system to a sector that had been a more decentralized mix of industry associations, bureau companies, independent distributors, and local insurers.

For much of its history, the property insurance industry institutionalized and embraced three logics: (1) companies distributed insurance via networks of independent agents; (2) companies and agents governed insurance cooperatively through private associations; and (3) states subjected associations to public oversight largely through rate-regulation laws passed between 1909 and 1928.[142] "These laws institutionalized the idea of 'regulated cooperation,'" where cooperative rate pricing (fixing) among insurers grounded in actuarial science and statistical analysis would tie rates to costs and protect consumers from insurer

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> A state solvency regulator said in interview that all significant policies evolve through industry associations. 'We're going to always do what the association says we should do . . . [.] The art and science and theory of consultation . . . [involves] power sharing, and sharing and development of policy.' In effect, this allocates controlling influence to the largest and most powerful insurance companies, because they dominate the associations and also have the biggest stake in issues being addressed. This interviewee made it clear that his regulatory agency was therefore also primarily governed by these powerful companies. He figures out the distribution of power among the insurance companies that control the association, and uses that power to achieve the regulatory outcome at issue. The key industry association players, in turn, use state power to achieve the regulation they want, which includes control of each other.

Id. at 152 (ellipses and second alteration in original).

142. *See* Schneiberg, *New Institutionalisms*, *supra* note 42, at 95–98 (highlighting the central logics operating in the late nineteenth and early twentieth century). Private associations have been integral to property insurance for over a century:

> Associations first appeared in the 1820s, as companies and agents organized local compacts or boards to control markets in a city or town. But in the post-Civil War decades, insurers supplemented and then incorporated local boards within state, regional and national bodies, forging a nationwide system of more than 1,000 associations. This system of associations was the central vehicle for governing the sector through 1950, regulating both final market transactions with consumers and intermediate market transactions between companies and agents. Associations set premium rates and policy forms, pooled loss data, formed inspection boards, created risk classifications, and bargained collectively with consumers and officials over the terms and standards of trade. They also governed distribution and the agency system: *companies* associated to license brokers and fix commissions, and *agents* formed boards to fix rules for representation and territory.

Id. at 96–97.

insolvency.[143] While this was an institutionalized and ultimately legally codified practice, this structure created problems for the insurance market. Insurance associations allowed insurers to engage in monopoly pricing and rate discrimination.[144] Moreover, states shielded insurers from competition and delegated public powers to private rating bureaus that regulated cooperation and "increased insurers' capacities for opportunistic collective action."[145] Price competition was limited, and vertical integration between insurers and insureds was virtually nonexistent.[146] In turn, insurance agents inflated prices, raised commissions, and passed bad risks to insurers.[147] Associations marginalized mutual insurers who were excluded from rating bureaus.[148] Not surprisingly, consumers, regulators, and marginalized insurers grew tired of associations abusing their monopoly.[149] These phenomena caused increased public scrutiny and calls for public intervention.[150]

As a result, both consumers and marginalized insurance companies were motivated to initiate a change.[151] While competitive pricing schemes and direct insurance writing by insurers instead of by agents would have been a natural solution, the institutionalized logic of the insurance industry association and "regulated cooperation" shaped the reforms that followed. The insurance industry defended the insurance association on the grounds that insurance was different than ordinary commercial transactions in terms of sophistication.[152] Accordingly, insurance organizations underwent "incremental changes that extended, rather than replaced, the logic of associations."[153] Rather than wholesale changes, these reforms sought to address the problem of monopoly cooperatively by using associations to link insurance prices to risks and to provide consumers with ways to lower rates by working within the existing system. The National Board and local inspection

143. *See id.* at 96–98, 105–07 (charting the history of regulated cooperation in American property insurance).

144. *Id.* at 110 ("Monopoly rates and discrimination were driving forces for controversy.").

145. *Id.* at 106.

146. *See id.* at 107–08 (highlighting the major role that agents played in selling insurance and limiting insurers' direct integration to insureds).

147. *Id.* at 108. As opposed to having insurers sell insurance directly to agents, insurance associations allowed insurance companies to rely on agents and brokers to solicit clients, assess risks, and sell insurance policies. Because it was hard to monitor agencies, "the system thus created a moral hazard: It induced and enabled agents to expand coverage, relax underwriting standards, and misrepresent claims to win consumer favor, increase volume, and generate commissions." *Id.* Insurers simply passed these costs on to consumers. *Id.*

148. *See id.* at 106 (noting how the associations marginalized mutual insurers and other groups in a way that laid the foundation for an opposition against regulated cooperation).

149. *See id.* at 106–10 (charting the strong response from stakeholders who were disadvantaged by regulated cooperation).

150. *See id.* at 110–11 ("Far from being taken for granted, associations and agents were repeatedly subject to controversy, public scrutiny, and hostile state interventions.").

151. *Id.* at 108–09.

152. *See id.* (noting that the insurance industry indicated that there was a difference between insurance and ordinary trades).

153. *Id.* at 111.

bureaus also extended the logic of associations through collective bargaining, pricing schemes, and prevention associations.[154] The National Board and local inspection bureaus adopted policies of inspecting facilities and communicating their findings to local officials.[155] This practice of "schedule rating" combined with promises of rate hikes and reductions contingent on inspections tried to address the monopoly problem cooperatively. By shielding insurers from competition and delegating public powers to private rating bureaus, regulated cooperation increased opportunities for opportunistic collective action.[156]

Public legal institutions ultimately deferred to the logic of associations permeating large insurers. From 1911 to 1928, thirty-three states adopted the logic of "association via regulated cooperation" into law and enacted cooperative rate regulation.[157] Even though there was renewed concern over insurer manipulation of rates in the 1920s and 1930s, legislators expanded the insurance commissioners' powers and required insurers to participate in insurer data-pooling programs.[158] Federal and state legislatures responded with a scheme that allowed significant deference to an association model. After aggressive political mobilization by insurers, Congress in 1945 passed the McCarran-Ferguson Act, which exempted insurance from federal antitrust law.[159] Moreover, in 1946 and 1947, the vast majority of states passed "All-Industry" laws that permitted and regulated associations nationwide.[160] Thus, the legislatures affirmed the model of scientifically regulated cooperation and afforded insurers considerable control over the manner in which rates would be established.

The property insurance case study both builds upon and refines new

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154. *See id.* at 112.

155. *See id.* at 111.

156. Schneiberg describes how insurers extended the logic of associations:

> [A]ssociations allowed insurers to engage in monopoly pricing and discrimination, particularly after they instituted private enforcement schemes in the 1880s. In response, consumers and commissioners worked to contain monopoly via regulation, licensing associations, rate orders, and disclosure rules. But in shielding firms from competition and delegating public powers to private rating bureaus, regulated cooperation increased insurers' capacities for opportunistic collective action, creating a context in which companies could learn how to manage the regulatory system. By the late 1920s and 1930s, companies could manipulate data and classification schemes, delay rate orders via litigation, and subvert safeguards against excessive rates, subjecting consumers to new risks of appropriation.

Id. at 106.

157. *See id.* at 112. *See generally* Marc Schneiberg & Tim Bartley, *Regulating American Industries: Markets, Politics and the Institutional Determinants of Fire Insurance Regulation*, 107 AM. J. SOC. 101 (2001) (highlighting the turn toward rate regulation).

158. *See* Schneiberg, *New Institutionalisms*, *supra* note 42, at 112. *See generally* Clarence W. Hobbs, *State Regulation of Insurance Rates, Part II: Regulation of Rates and Rating Organizations*, 28 PROC. CASUALTY ACTUARIAL SOC'Y 344 (1942), *available at* https://www.casact.org/pubs/proceed/proceed41/41344.pdf [https://perma.cc/FZ2H-DF5E].

159. *See* Schneiberg, *New Institutionalisms*, *supra* note 42, at 112 ("After Justice Department hearings and a Supreme Court decision to apply federal antitrust law to insurance in the 1940s, officials opted again to extend—and universalize—association. In 1945, Congress passed the McCarran-Ferguson Act, exempting insurance from federal antitrust law." (citation omitted)).

160. *Id.*

institutional studies. Rather than ambiguous law, it was market failures and controversies surrounding property insurance associations that stimulated a change in insurers' organizational environment. Despite calls for reform, property insurers responded by emphasizing the need for discretion and flexibility to control rate regulation and pricing through collective pricing schemes and scheduled rating. Moreover, they emphasized that regulation through associations was the taken-for-granted, well-settled industry approach within the property insurance field. Eventually, these logics were adopted into legislation in the form of cooperative rate regulation. In this instance, property insurance legislation in the form of rate regulation looks "top-down" but is actually "bottom-up," derived and generated by the very group—property insurers—that such laws were designed to regulate.

While fields maintain stability, fields also evolve as new logics take form. From the 1940s to the 1970s, property insurance underwent a slow shift away from reliance on associations to a logic anchored around price or market competition and direct insurance writing by large insurers as opposed to agents. In particular, state regulators and the insurance field began to introduce price competition that provided some leeway and flexibility by allowing individual insurers to issue their own rates and pressure bureaus to reduce rates.[161] Although the goal was not to displace associations, giving insurers flexibility on rates marginalized associations.[162] State regulators altered laws to help facilitate insurers selling insurance directly to consumers and relaxed cooperative rate-fixing.[163]

Just as associations were being marginalized, so were insurance agents. Vertically integrated insurers became more powerful as large insurers moved into distribution and began directly marketing and selling policies to insureds.[164] Agents became less valued as insurers realized they could expand profits while also cutting costs to insureds: "'Direct writing' eliminated the independent middleman—his commissions and hold over distribution—and subjected risk selection and claims to direct control, translating reduced commissions and claim costs into lower prices and increased market share."[165] While associations and agents were not eliminated from the field, large insurers' mass marketing abilities reshaped a market that previously consisted of associations, bureau companies, and local insurers.[166]

Ultimately, independent pricing and market competition replaced cooperative

161. *See id.* at 98 (charting the impact of price competition on the property insurance market and its impact on regulated cooperation).

162. *See id.*

163. Specifically, regulators in the 1950s began allowing limited independent pricing by insurers. Insurers increasingly sought to move directly into distribution. *See id.* at 118.

164. *See id.* at 99–108. "As direct [insurers] brought distribution 'inside' the firm, they subjected transactions to direct bureaucratic control, forcing associations almost completely out of this domain." *Id.* at 99.

165. *Id.* at 98. Vertical integration severely damaged agents' monopoly over distribution: "Lower commissions and claims let direct writers cut prices by 10–40%, capturing nearly half the homeowners' market and over 60% of private passenger automobile insurance." *Id.*

166. *See id.* at 97–98 (noting that while associations and agents still played a role, large insurers transformed the nature of property insurance).

rate fixing as central regulating principles as large insurers such as State Farm began relying on their own loss data, risk classifications, and inspection routines.[167] With the benefits being passed on to consumers, many states embraced the insurance field's affinity for price competition by deregulating its pricing practices and allowing insurers to compete with respect to rates.[168] The NAIC even adopted the evolving logic of the insurance field by altering its position and advocating for free market competition in its 1974 report, entitled *Monitoring Competition: A Means of Regulating the Property and Liability Insurance Business*.[169] As institutionalized logics within the insurance field evolved, property insurance regulation changed. Thus, once again, in the property context, while the legal regulations looked like they were coming from public legal institutions, the content and meaning of legal regulations were determined by insurance companies.

In sum, a new institutional framework that focuses on institutional logics and political mobilization best explains how the insurance field was able to impact property insurance regulation. In particular, the property insurance case highlights how fields have contested or competing logics that are mobilized by different groups who choose to form, combine, or transpose logics from other fields or build different coalitions. Power and politics are important factors that led to institutional change, but what the insurance field lobbied for was often institutionally determined by the logics operating in the insurance field.

CONCLUSION

This Article offers an alternative theoretical approach for understanding the relationship between insurance companies and legal regulation. Whereas most accounts discuss the forms and functions of insurance and analyze the conditions under which insurance companies impact society, I focus on the processes through which insurance institutions construct the meaning of law and compliance. Drawing upon new institutional organizational theory, I suggest that conceptions of law and compliance that evolve within the insurance field can shape judges', legislators', and regulators' understandings of compliance—and ultimately the meaning of insurance law.

Building on prior new institutional work, I reveal how insurance company

167. *See id.* at 97–99 (describing the rapid transformation that took place in the property insurance market).

168. *See id.* at 118 (noting that many states moved toward deregulation in order to facilitate market competition). New York's legislature illustrates the logic adopted by many states:

> Those who do not wish to compete in price have conjured many possible evils of open competition . . . . During the past 50 years, there has been no evidence in California [or any] other jurisdiction that rate competition leads to destructive rate wars. Their memory haunted the Merritt Committee a half-century ago, but our own experience and the findings of the most recent Congressional study should lay the spectre to rest.

Id. at 118–19 (alterations in original) (quoting N.Y. INS. DEP'T, THE PUBLIC INTEREST NOW IN PROPERTY AND LIABILITY INSURANCE: A REPORT TO GOVERNOR NELSON A. ROCKEFELLER 17–18 (1969)).

169. *See id.* at 119 (highlighting the NAIC's blending of insurance with market competition).

responses to law and compliance are a complex process that is shaped by institutional and political processes and by the flow of risk and managerial logics from the insurance field to the legal field. The case studies that I explore show that insurance companies are not just rational actors responding to top-down laws and regulations, but instead are involved in the social construction of legal meaning.[170] Through institutional and political processes, the insurance field's ideas about the meaning of insurance law and compliance flow into cases, legislation, and regulation, and reshape the meaning of law and compliance. In particular, the insurance field filters its understanding of law through risk principles and values that are well institutionalized among insurance actors. Whereas prior new institutional research focuses on managerial values, I show how risk-based values encourage organizations to engage in managerial responses. In such cases, risk and managerial values work in a complementary manner. Thus, my analysis extends new institutional theory analysis of organizational behavior and also refines the analysis to better address organizational responses in the insurance context.

While I do not contend that the insurance industry never responds rationally to top-down mandates, existing accounts of how the insurance industry impacts society that focus on insurance companies as rational actors miss a part of the role that the insurance field plays in influencing public law. Legislation, regulation, and even court decisions aimed at regulating the insurance industry are often vague, broad, and complex. As opposed to stating clear and coercive rules, laws motivate a process through which organizations collectively seek to construct legal meaning. As my case studies of EPLI, the NAIC, insurance associations, and property insurance demonstrate, these processes are filled with politics as insurance institutions and their employees, consumers, and competitors compete for constructions of law that favor their interests. However, this process is also influenced by institutionalized logics that slowly evolve through the everyday processes of insurance organizations as they develop policies and procedures not just for risk pooling and transfer, but also compliance. Insurance institutions, therefore, are social actors that both respond to and construct meaning within insurance fields. Conversely, legal actors such as legislators, judges, regulators, and lawyers exist within legal fields that overlap with the insurance field in a variety of ways. As insurance and legal actors interact, the meaning of law and compliance evolves slowly. Thus, my framework suggests the need to understand law as shaped through the processes of institutionalization and political mobilization that take place within, and at the intersection of, insurance and legal fields.

Although some of the examples offered in this Article involve insurance field responses to law and forms of compliance that favor insurers over insureds, I do not mean to suggest that insurance industry construction of the meaning of legal regulations and compliance are always harmful to insureds and other individuals

170. *See* BAKER, *supra* note 9, at 2–9 (noting that as society increasingly embraces risk, insurance institutions construct legal meaning).

who encounter law in organizational domains. Institutionalized risk-management principles and services and insurance industry construction of legal rules sometimes reflect best practices, benefit insureds, and lead to improved compliance. Moreover, these structures may infuse insurance institutions with greater awareness of legal values and principles. However, it is also important to recognize the process through which insurance institutions influence the meaning of legal regulation. Moreover, this process may foster forms of compliance that tend to be more symbolic than substantive and thus unable to adequately protect insureds, consumers, and the public at large. To the extent public legal institutions are going to defer to the insurance field's institutionalized policies, procedures, and practices, society needs to more closely interrogate the insurance field's policies, practices, and procedures.

Of course, these issues that I am raising are unresolved empirical questions. More research is needed that especially explores the relationship between insurance companies and legal regulation. While cost-benefit efficiency analysis that presupposes insurance actors as rational actors is important, scholars need to shine a light on the organizational behavior and culture of insurance institutions and investigate the various ways in which institutional and political mechanisms shape the meaning of law. As opposed to explaining "why" insurance companies respond to laws, we need more theoretically-informed empirical research that explores "how" insurance companies respond to laws. I encourage insurance scholars to turn their research agendas toward inquiries centered around insurance industry responses to law in ways that sometimes shape law's meaning. Shifting insurance research in this direction is especially important given the proliferation of public-private partnerships approved by legislatures and administrative agencies over the past twenty-five years that increasingly allow private actors to engage in public decision making in a wide variety of contexts.[171] At a minimum, my new institutional theory of insurance provides the first step because it sets forth a framework to understand *how* insurance company constructions of law influence public legal institutions. Hopefully, others will follow and expand upon this approach.

171. *See* Talesh, *supra* note 27, at 463, 491–92 (discussing the proliferation of public-private partnerships and the need for more empirical work concerning under what conditions such collaborative governance arrangements work well).