INTRODUCTION

Law's Allure: The Juridification of American Politics and Public Policy

THE MEMBERS OF THE U.S. SENATE assembled what they like to call the "world's greatest deliberative body" on a crisp November evening a few years ago for a debate that would last more than forty hours. This great gathering was not about public health or civil rights; it was not about individual liberty, or property, or prosperity. It did not focus on war or peace. Instead, these orators had assembled to filibuster against the filibusters that were blocking the confirmation of presidential nominees to serve as federal judges.

This effort was seen by many as a practice run for the struggle that would ensue when Supreme Court Justice Sandra Day O'Connor announced her retirement, an event triggering carefully rehearsed plans that "would rival a presidential campaign, complete with extensive television advertising, mass e-mails, special Internet sites, opposition research, public rallies and news conferences."[1] President George W. Bush's supporters pledged more than $18 million for the effort, and Democrats tapped into their own war chests, using veterans of the Clinton and Gore campaigns to mount an all-out battle.

Judicial and political power are inextricably linked in America, but by the time John Roberts and Samuel Alito joined the Supreme Court, that link seemed more significant and more pervasive than ever before. Efforts to regulate and even eliminate tobacco, to reform the criminal justice system, to protect privacy, and save the environment; efforts to define and defend a woman's right to choose an abortion; efforts to integrate

1 Peter Baker, "Parties Gear Up for High Court Battle," *Washington Post*, June 27, 2005, p A2. Mark Miller notes that what is most notable is not Senate concern with Supreme Court nominations, but rather with fights over lower federal judicial nominations. Mark C. Miller, "The View of the Courts from the Hill," in Mark C. Miller and Jeb Barnes (eds), *Making Policy, Making Law*. Washington, DC: Georgetown University Press, 2004, p 61, citing Colton Campbell and John Stack, *Congress Confronts the Court: The Struggle for Legitimacy and Authority in Lawmaking*, Lanham: Rowman & Littlefield, 2001, p 11. See also Keith Perine, "Both Parties Find Political Benefit from Battle over Judicial Nominees," *Congressional Quarterly Weekly Report*, Oct. 4, 2003, p 2431.

schools and reform prison systems; efforts to control and automate the federal budget, to define and limit the exercise of war powers, and contain and prosecute federal corruption – in each of these and more, the answer increasingly was a legalistic one: politicians and policy entrepreneurs turning to the courts and the adjudicative process as a substitute for the persuasion, negotiation, bargaining, and tradeoffs of political decision making. Even in their legislative efforts, there has been a growing reliance on judicial language, formal structures, and automated procedures. In some instances, the courts were seen as a substitute for the ordinary political process; in others, the courts were asked merely to ratify or ignore the reallocation of powers within the political system itself.

Sometimes the U.S. Supreme Court allows these innovations, and sometimes the Justices say no. And in some cases, judicial rulings are only the start of a complex iterated game, a game of leap-frog in which one decision serves as the jumping-off point for the next. These are games in which a judicial decision responds to legislative choices, and the next round of legislative choices is built on that legal ruling, leading to yet another round of legal rulings and legislative actions. Finally, there are instances in which legal language, legal forms, and legal frames shape and constrain political behavior, even when the courts play little or no direct role.[2] This process does not determine results, but shapes, frames, and constrains the choices that legislators and those they represent tend to most readily consider. The narrowing, formalizing, and hardening of the terms of debate add up to what might be called juridification – efforts to legalize, formalize, and proceduralize; efforts to strip out the ambiguity of politics and the U.S. Constitution and replace it with unambiguous rules and automated default procedures. Although these efforts have been part of the American system from the start, juridification is more frequent, more important, and more deeply embedded now than ever before. But why? And what sorts of risks or costs might these choices entail? Are there times when these risks are more or less tolerable for those making these choices? This book is an effort to draw a road map to help politicians, policy entrepreneurs, lawyers, judges, and those who study them understand how law shapes and frames, constrains, sometimes saves, and sometimes kills politics.

Law and politics cannot be disentangled in the United States. This has something to do with American political culture itself. Americans have never quite embraced politics. It is necessary. It is useful. It is unavoidable. It is to be tolerated and tamed. It can be great sport, but it can also be an

2 Frederick Schauer argues persuasively that a great deal of important political issues do not end up in Court. This does not mean that many of these issues are not still subject to juridification – merely that they are not determined by an explicit judicial ruling. See Frederick Schauer, "The Supreme Court 2005 Term, Foreword: The Court's Agenda – and the Nation's," 120 *Harvard Law Review* 4, 2006.

embarrassment and even (and often) a genuine danger. For Americans, law is different. Law suggests predictability, propriety, and fairness. We celebrate truth, *justice*, and the American way – not truth, *politics*, and the American way. Law, Judith Shklar writes, "aims at justice, while politics looks only to expediency. The former is neutral and objective, the latter the uncontrolled child of competing interests and ideologies. Justice is thus not only the policy of legalism, it is treated as a policy superior to and unlike any other."[3] Fear of the abuse of political power and concerns about corruption have long been met by demands for more law and less politics, for increasingly legalistic solutions to our problems, including what Lawrence Friedman calls a demand for "total justice."[4] These are among the driving forces behind the expansion and acceleration of juridification: efforts that include attempts to solve policy problems by judicial means, as well as efforts to formalize, proceduralize, and automate the political process itself.

North Carolina's Senator Sam Ervin once noted that we "have a national tendency when something happens that we think ought not to happen to demand that new laws be passed, regardless of the laws we already have on the books."[5] This inclination, this insistence, plays out not only in legalistic approaches to social policy, but also in demands for the formalization and depoliticization of the political process itself. Ours is a political culture in which "social problems increasingly are approached as problems to be solved through comprehensive legal strategies." When these comprehensive approaches fail to work, rather than questioning these legalistic efforts, the failure often "is attributed to poor drafting and not enough law; typically the solution is 'smarter' legal interventions."[6] As Karl Llewellyn reminds novice law students, in America there is "no cure for law but more law."[7]

The Juridification of American Politics

Terminology is tricky here. In a system in which law and politics are intimately related, it is difficult to craft a term that distinguishes what

3 Judith Shklar, *Legalism: Law, Morals, and Political Trials*, Cambridge: Harvard University Press, 1964, p 111.
4 Lawrence Friedman, *Total Justice*, New York: Russell Sage Foundation, 1995.
5 Senator Sam Ervin (D-NC), testifying in "Removing Politics from the Administration of Justice," hearings on S. 2803 and S. 2978 before the Subcommittee on Separation of Power of the Committee on the Judiciary of the United States Senate, 93rd Congress, 2nd session, March 28, 1974, p 155.
6 Frank Anechiarico and James Jacob, *The Pursuit of Absolute Integrity: How Corruption Control Makes Government Ineffective*, Chicago: University of Chicago Press, 1996, p 12 (Cited in Katy Harriger, *The Special Prosecutor in American Politics* (2nd ed.), Lawrence: University Press of Kansas, 2000, p 230.
7 Karl Llewellyn, *The Bramble Bush: On Our Law and its Study*, Dobbs Ferry: Oceana, 1960, pp 102–8.

might be called a traditional role of law, courts, and judicial reasoning in policy and politics from a world in which legalistic approaches to institutional and political and policy problems substitute for, displace, and even undermine or kill the ordinary political process. Judicialization captures just one part of the change – instances in which policymakers come to rely directly on the courts and on judicial decisions to advance their goals. Legalization captures another part of the story, but again only one part of the efforts to formalize, proceduralize, and regularize the political process itself. Because politicians mostly engage in writing laws and regulations, it is confusing to talk about the legalization of politics and the political process.

Therefore, the best term may be the least elegant – *juridification*. It is a term that is rarely used in the United States and only somewhat more commonly in Europe, where Jurgen Habermas and other social theorists use the word to describe the degree to which areas of social life once free of rules, laws, and statutes, are increasingly controlled by a profusion, an overgrowth of such things. This is close, but not precisely the American experience.[8] In the United States, it is not so much a question of a once unregulated and unrestrained arena of life now bound and tied and structured and ordered by law, but rather a question of the degree to which what had been *part* of a process – an essential tool or instrument or weapon – came to dominate, structure, frame, and constrain the debate and the product of that debate.

Juridification is not the product of an imperial judiciary imposing its will or of an abdicating legislature or weak executive. In some policy areas, the Supreme Court led, and in others, the Court followed; in some, the Court merely acquiesced or largely stood to one side. Juridification is, instead, the product of the *interaction* of these institutions, along with interest groups, parties, lobbyists, and policy entrepreneurs alike. To understand how law's allure shapes and constrains politics and the political process we have to go beyond the zero-sum, gladiatorial struggle for dominance that is the focus of much of the academic study of law and politics in America. Although there certainly are instances of direct struggles between the branches, an exclusive focus on these obscures another dimension of the juridification process – the *interaction* between and among these institutions. To understand law's

8 See Jurgen Habermas, "Law as Medium and Law as Institution," in Gunther Teubner (ed), *Dilemmas of Law in the Welfare State*, New York: Walter de Gruyter, 1986, pp 203–20. See also Lars Tragardh and Michael X. Delli Carpini, "The Juridification of Politics in the United States and Europe: Historical Roots, Contemporary Debates and Future Prospects," in Lars Tragardh (ed), *After National Democracy: Rights, Law and Power in America and the New Europe*, Portland: Hart Publishing, 2004; and Lars Chr. Blichner and Anders Molander, "What is Juridification?" University of Oslo, Centre for European Studies, Working Paper, no. 14, March 2005.

allure, its risks and its rewards, we need to think of the interaction of courts and legislators, of law and politics, not as a series of individual, one-off contests – something like individual hands of poker – and instead think about juridification as the end product of a long chain of interactions, more like a poker tournament. Juridification is the product of a dialogue of courts, legislators, policy entrepreneurs, opinion leaders, the general public, and individual litigants. Sometimes, this is a cooperative process; sometimes, it is antagonistic; and, at other times, parallel and coincidental.

Juridification – relying on legal process and legal arguments, using legal language, substituting or replacing ordinary politics with judicial decisions and legal formality – can shape and constrain the political and policy horizon. But when is that risk worth taking? When is it essential and when should it be tempered or avoided? These are questions that those who study politics and political institutions in isolation from the third branch of government sometimes miss, just as they are also missed by those who study law and judicial doctrine in isolation from the political process in which courts and judicial decisions play a prominent role. What is needed is a cross-institutional approach, one that actually incorporates and evaluates the role of ideas and the ways in which ideas and arguments shape and constrain policy and politics across, between, and among the branches of government.[9] This project is a first step in that direction. There are no comprehensive, cross-institutional theories about juridification. Before we can hope to build and test those theories, we have to understand and map out the problem itself.

A Road Map to the Road Map

Chapter 1 sets out a road map to help answer these questions, laid out along two primary dimensions: the motives and incentives that drive the choice to opt for legalistic solutions (or abandon traditional political means to achieve these solutions) and the various patterns (and therefore various risks) these choices tend to generate. Why one and not another? For those facing profound political and institutional barriers to their goals, a judicial or legalistic path might well be the only viable option, and their risk tolerance would and should be quite high. Others embrace and even choose juridification not because they must, but because they believe it to be more efficient, more effective, or even morally superior. Juridification poses risks for everyone involved, but before accepting,

9 Jeb Barnes, "Bringing the Courts Back In: Interbranch Perspectives on the Role of Courts in American Politics and Policy Making," 10 *Annual Review of Political Science*, pp 25–43 (2007); Mark C. Miller and Jeb Barnes, *Making Policy, Making Law: An Interbranch Perspective*, Washington, D.C.: Georgetown University Press, 2004.

embracing, or even choosing juridification, policy entrepreneurs and politicians alike ought to better understand the nature of this risk and better calculate the level they might be willing to tolerate.

Law's allure for Americans is not new – but something changed in America's recent past that allowed a significant expansion and acceleration of juridification. Chapter 2 strives to explain why these changes occurred. In a constitutional system of limited government, some one or some institution must define and interpret those limits. That an independent federal judiciary arose to fill this demand is hardly surprising. Before the 1960s, the Court's role largely was that of a traffic cop, saying what government could and could not do.[10] Because America's fragmented political system guarantees a struggle for power between the states and the national government – and among the branches of the national government itself – this blocking function became a source of great power. The Supreme Court effectively built on this power to say yes and no, playing a critical role in the nationalization of power and the expansion of the American economy and in policing everything from trade and commerce to labor law, territorial expansion, taxes, and the constitutionality of paper money. The Court's role was dramatic and powerful – but it was a particular sort of role. The blocking function meant the Court was the place to go to stop government action or to certify its legitimacy. The Court could be an important ally or an enemy. But for those seeking government action, those advocating new policy, those who wanted to get the government to act, it was necessary to rely on the ordinary political process of legislation and administrative rules arrived at through bargaining, negotiation, persuasion, and electoral and popular pressure. This continues to be the dominant avenue to policy goals, but within ten years of becoming Chief Justice in 1953, Earl Warren and the U.S. Supreme Court signaled that the Court might offer an additional, alternative path to political and policy goals by being willing to say not only what government could and could not do – but what it must do as well.

Brown v. Board of Education and its progeny eventually led the Court to tell local, state, and national governments that they *must* desegregate their schools. In 1962, the Court intervened in the allocation of political

10 Martin Shapiro identifies this role as something present in all societies in which two individuals or institutions have a dispute: They will turn to a third party to settle the fight. Shapiro refers to this as "triadic dispute resolution," articulated first in *Courts: A Comparative and Political Analysis*, Chicago: University of Chicago Press, 1981. That the federal courts would develop this role, though it is not explicitly spelled out in the U.S. Constitution, fits rather well with the assumptions made by Alexander Hamilton in the *Federalist #78*, in which he suggested that judicial review was a logical necessity in a federal system of limited government. That this has played out so powerfully in the American system is well explained by Robert A. Kagan, who develops the argument about the central importance of a fragmented system of government and power in the development of the American legal-political system in *Adversarial Legalism: The American Way of Law*, Cambridge: Harvard University Press, 2001.

power within the individual states in *Baker v. Carr*, telling the state of Tennessee that it was required to more closely assure that each voter was equally represented in the political process.[11] The Court also intervened and demanded that government do what few politicians could possibly advocate – expand and extend the rights of criminal defendants and even convicted felons.[12] This new command function would open a new path, an alternative path, for policy entrepreneurs. Policy goals that once had been achievable only through the legislative and political process, it was thought, might now be advanced in large part – and perhaps even exclusively – through judicial decisions and judicial orders.

The Supreme Court opened its doors in the early years of what some refer to as the "long-1960s" – a period when government shifted from being the solution to being seen as the problem; it was an era in which public trust in government was tested, eroded, and finally shattered.[13] From Cold War loyalty inquisitions to the assassination of key political figures, from the escalation of the war in Vietnam to the political meltdown of the Democrats' 1968 convention in Chicago, to the increasingly violent racial conflicts in America's inner cities, the long 1960s was an era in which the political system seemed to fail and one in which the formality, apparent transparency, predictability, and moral superiority of legal alternatives became increasingly attractive.[14] The judicial path

11 *Brown v. Board of Education*, 347 U.S. 483 (1954); *Baker v. Carr*, 369 U.S. 186 (1962).

12 *Mapp v. Ohio* 367 U.S. 643 (1961), *Miranda v. Arizona*, 378 U.S. 478 (1964). For a thorough examination of the court's role in reforming prisons, see the definitive book by Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons*, New York: Cambridge University Press, 1998.

13 Historian M. J. Heale suggests that Fredric Jameson was among the first to consider the problems of identifying the scope and boundaries of the 1960s. In "Periodizing the Sixties," (a chapter in Sohnia Sayres (ed), *The 60s without Apology*, Minneapolis: University of Minnesota Press, 1984), Jameson "began his analysis with the late 1950s and located an end 'in the general area of 1972–1974.'" It was Arthur Marwick, according to Heale, who was among the first to employ the term the "long 1960s" as encompassing "a cultural transformation between about 1958 and 1974" in four western countries, including the United States (see Arthur Marwick, *The Sixties*, New York: Oxford University Press, 1998). Theda Skocpol argues for a "long 1960s" that stretches "from the mid-1950s through the mid-1970s;" see Skocpol, "Advocates without Members: The Recent Transformation of Civic Life" in Skocpol and Morris Fiorina (eds), *Civic Engagement in American Democracy*, Washington, DC: Brookings Institution Press, 1999; and Skocpol, *Diminished Democracy*, Norman: University of Oklahoma Press, 2003. Heale notes that "there is also a case for a short 1960s. Jon Margolis in a recent book insists that the Sixties began in 1964. If we are to believe Bruce Schulman, the Sixties ended rather abruptly in 1968. That leaves us with a truncated era sometimes characterized as the 'high Sixties.'" Heale's article does an admirable job of laying out this debate; see M. J. Heale, "The Sixties as History: A Review of the Political Historiography," 2005 *Reviews in American History* 33, 133–52.

14 John F. Kennedy was assassinated in 1963, Martin Luther King in April 1968, and Robert F. Kennedy in June of that same year. Urban riots ripped through the West (the Watts neighborhood in Los Angeles in 1965), the Midwest (Detroit in 1967), and the East Coast (Newark, New Jersey in 1967); Washington, D.C., was one of many cities that burned in the wake of King's assassination in 1968.

seemed to offer a clean, efficient and alluring alternative to a discredited political system.

And then came Watergate, a parade of horribles that only served to reinforce the growing conviction that politicians (and politics) were venal and corrupt – whereas judges, lawyers, and journalists emerged as heroic saviors.[15] "Watergate made me a lawyer," one professor wrote. He wanted to be like his heroes: "Archibald Cox, Sam Ervin, Peter Rodino, Barbara Jordan." He wanted "to be like these people, wanted a part, however small, in the high drama of American public life."[16] Public opinion reflected this trend – and drove it.[17] Polls taken in the 1970s "reflected a steady decline in confidence in government that became marked during and following the Watergate crisis." Eighty-eight percent of those surveyed in a 1976 Harris poll said that "cleaning up corruption in government" was a very important goal for Congress, and making sure that "no more Watergates take place" was identified as "very important" by 78 percent of the respondents."[18] Framed as a struggle between "the rule of law" and "the abuse of power," the public clearly "aligned itself with the former."[19]

In the wake of the Watergate crisis, Congress passed a number of dramatic pieces of legislation designed to shift policy disputes out of the murky and discredited realm of politics and into what appeared to be the far more legitimate arena of law.[20] Each of these innovations – ranging from campaign finance reform to the formal allocation and proceduralization of the war powers to the creation of an independent office of special prosecutor to deal with political corruption – would raise serious constitutional and legal challenges, and each would end up in Court. Unlike the legalistic solutions to more traditional policy problems – such

15 It should be noted that many disgraced politicians – including Richard Nixon, Attorney General John Mitchell, John Ehrlichman, Charles Colson, and John Dean, to name just a few – were all trained lawyers.

16 Frank Bowman, "Falling Out of Love with America: The Clinton Impeachment and the Madisonian Constitution," 60 *Maryland Law Review* 5, 5–6 (2001). It is true, as Bowman points out, that nearly all the key players in Watergate – heroes and villains alike – were lawyers. But that only reinforced the shift, demonstrating that the real battlefield was on legal, not political, turf.

17 And it has been a dominant feature of public opinion ever since. See John R. Hibbing and Elizabeth Theiss-Morse, *Congress as Public Enemy: Public Attitudes toward American Political Institutions*, New York: Cambridge University Press, 1995; Arthur Miller, "Political Issues and Trust in Government, 1964–1970," 68 *American Political Science Review* 3, 951–72 (1974); Jack Citrin, "Comment: The Political Relevance of Trust in Government," 68 *American Political Science Review* 3, 973–988 (1974); Jack Citrin, Herbert McClosky, John Shanks, and Paul Sniderman, "Personal and Political Sources of Political Alienation," 5 *British Journal of Political Science* 1, 1–31 (1975).

18 Katy Harriger, *The Special Prosecutor in American Politics* (2nd ed.), Lawrence: University Press of Kansas, 2000, p 44, 46.

19 Harriger, *The Special Prosecutor*, p 209.

20 In one important example, Congress overrode President Nixon's veto and passed the War Powers Resolution in November 1973, attempting to codify and control by law what it had failed to control through the political process.

as environmental regulation – in these cases, Congress was explicitly attempting to adopt and emulate the approach, the precision, and what some thought and hoped was the clarity of law and achieve the equitable results that they came to believe could be accomplished by substituting procedural efficiency for the frustrating and prone-to-corruption gray of politics.[21]

The appeal of formal rules, formal procedures, and automated political decision making took on a life of its own. Even when law and formal procedure were inappropriate, the answer to one failed effort at a legalistic solution was another. But when these laws are passed and corruption continues, Frank Anechiarico and James Jacob note, the "failure is attributed to poor drafting and not enough law; typically the solution is 'smarter' legal interventions."[22]

As the 1960s gave way to the 1970s and 1980s, talented and public-spirited young people flocked into law schools and from there to a host of public interest litigation positions. Organizations such as Ralph Nader and Alan Morrison's Public Citizen Litigation Group (which opened its doors in February 1972) increasingly focused on law as an alternative – and preferred – route to social change in areas ranging from struggles to end poverty to battles for consumers' rights, from fights for environmental protection to demands for gender equity. The traditional tools of political change – bargaining, negotiation, and elections – increasingly were seen as "defeats for justice," leading many to embrace what Judith Shklar refers to as "the politics of legalism" in which the adjudicative process came to be seen as a more efficient, more effective, and more just model for government – and as a "substitute for politics."[23]

What difference does this shift toward juridification make? Does it really matter whether policy goals are pressed in courts or through legislation and administrative choices? And if it does, how and why? Chapter 3 sets out to answer these questions. Legal decisions may be political, but law nevertheless is different from politics. Judicial decision making follows different rules and is driven by different incentives, limited by different constraints, and addressed to different audiences in a different language than the political process. The way judges articulate, explain, and rationalize their choices and the way earlier decisions influence, shape, and constrain later judicial decisions are distinctly different from the patterns, practices, rhetoric, internal rules, and driving incentives that operate in the elected branches and among bureaucrats. Policy that is driven in large measure by litigation and judicial rulings may produce similar

21 Hibbing and Theiss-Morse, *Congress as Public Enemy*, pp 14–15.
22 Harriger, *The Special Prosecutor*, quoting Frank Anechiarico and James Jacob, *The Pursuit of Absolute Integrity: How Corruption Control Makes Government Ineffective*, Chicago: University of Chicago Press, 1996, p 12.
23 Shklar, *Legalism*, p 17.

results as that produced by the political process in the short term, but it can and often does limit, direct, shape, and constrain those policies in the longer run in ways quite different from what might have been expected by those who chose a judicial route in the first place.

Having provided a road map in Chapter 1, an explanation for how and when and why law's allure – always present in the American political system – expanded and accelerated so rapidly in the middle of the twentieth century in Chapter 2, and an argument about why law, legal decision making, and, therefore, the juridification of policy and politics can generate risks as well as rewards in Chapter 3, the book moves to a series of paradigmatic case studies to illustrate the patterns and process of juridification.

In Chapter 4, abortion and the move to use courts and the judicial process to fight poverty in America offer two very different patterns of juridification: one that asked the courts to say what government may not do (impose limits on abortion) and one that asked courts to tell the government what it must do (to end poverty). Chapter 5 explores a constructive pattern of juridification – the work of the courts together with the elected branches to advance and shape a dramatic change in America's environmental policy. A deconstructive pattern of juridification, illustrated by the struggles over campaign finance reform, is the subject of Chapter 6. Turning to the separation of powers, Chapter 7 explores two different patterns – (1) where the Court says yes and allows the elected branches to experiment with creating an independent prosecutor's office to pursue charges of political corruption and illegal activity and (2) where the Court says no, blocking efforts to automate the budget-cutting process and to delegate to the president the power to impose line-item vetoes. Chapter 8 looks at war and emergency powers to consider the risks of juridification when the Court is relatively silent or reluctant to intervene.

In Chapter 9, the final case study looks at tobacco. Here is a textbook example of how law can save politics – and yet, ultimately, a textbook example of how law kills politics. Here we see in one case both the promise and peril of law's allure. Facing profound political and institutional barriers – effective and committed political support for tobacco from key Senators and members of Congress, a public unwilling to punish tobacco companies for the health consequences of those who generally were expected to have known and understood the risks their habit entailed, and the deep pockets of a very profitable industry – lawsuits, and the threat of more lawsuits, actually brought these companies to the table, willing to accept a political settlement that had previously been unimaginable. This success added luster to law's allure. If law and legal process could bring the large tobacco makers to their knees, those who had battled tobacco for decades reasoned, then why not rely on this same force to vanquish and destroy them? Justice could be done, and