LAW’S ALLURE

How Law Shapes, Constrains, Saves, and Kills Politics

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 important, more significant, and more pervasive than ever before. From war powers to abortion, from tobacco to integration, from the environment to campaign finance, Americans increasingly turn away from the political tools of negotiating, bargaining, and persuading to embrace what they have come to believe is a more effective, more efficient, and even more just world of formal rules, automated procedures, litigation, and judicial decision making.

Using more than ten controversial policy case studies, Law’s Allure: How Law Shapes, Constrains, Saves, and Kills Politics draws a road map to help politicians, litigators, judges, policy advocates, and those who study them understand the motives and incentives that encourage efforts to legalize, formalize, and judicialize the political process and American public policy, as well as the risks and rewards these choices can generate.

Gordon Silverstein is assistant professor of political science at the University of California, Berkeley. A former journalist with a PhD from Harvard University, Professor Silverstein also has taught at Rice University, Dartmouth College, Lewis & Clark College, and the University of Minnesota. Professor Silverstein has written a number of articles and book chapters on American politics, the separation of powers, and judicial power in comparative perspective and is the author of Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy (1996).
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Gordon Silverstein

University of California, Berkeley
For

Nelson W. Polsby
and our students,
past, present, and future
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This book started as a paper about precedent – what it is, why it matters, and how it has come to play such a central role in American politics, turning judicial nominations into one of the central arenas for political debate in the United States. That paper was meant to be a chapter or two in a book about how and why judicial review emerges and is tolerated, invited, and even embraced in various political systems around the world. That book is next. It turns out that the American case is far more interesting and requires a good deal more thought than I originally imagined. In fact, it required a book of its own.

I owe a great number of people my deepest thanks – those who have helped me with this project both directly and indirectly. Although the book began before I arrived at Berkeley, it would likely never have been completed without the support and inspiration of Nelson W. Polsby and our students, past, present, and future, to whom this book is dedicated.

I had the great good fortune to arrive at Berkeley in time to be one of Nelson W. Polsby’s colleagues – which means, of course, one of his students as well. Nelson was a resource, a model, a friend, and an inspiration. Nelson offered a living demonstration of what it means to search for truth and how that search actually can be a lot of fun. The search for knowledge, for answers, and for understanding was the object, the predicate, the purpose, and the motivation for his work and his approach: asking questions, studying those who actually engage in the political process, testing propositions, and debunking conventional wisdom – and then, just as importantly, communicating these findings and his method in clear, concise, and compelling ways in print, in the lecture hall, and in his famously (and literally) open-door office. In a 1968 article defending the work of his own mentor, Robert Dahl, Nelson wrote that Dahl’s work was “ambitious, artful, intelligent, persuasive, and on the whole, impressively successful.” Those words could just as accurately be written today by any one of Nelson’s own legion of devoted students about their mentor, my colleague, and our teacher, Nelson Polsby.
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This book is also dedicated to our students – past, present, and future. Although Nelson died in 2007, his intellectual influence lives on in his students, many of whom are now, and will for a long time, be teaching generations of teachers, scholars, politicians, journalists, lawyers, judges, and those who observe, study, and comment on them. As I am sure Nelson would agree, most of us who teach do so for selfish reasons – we learn from our students. They provide the opportunity to explore new ideas and rediscover older ones. They challenge us, inspire us, amaze us, and make it possible for us to do the impossible – stay in school forever. The insights gained in the undergraduate classroom and in working directly with graduate students on their own original research projects are among the greatest rewards this profession has to offer.

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Berkeley has long been a special place for me. Before starting graduate school at Harvard, I was a professional journalist, working for the Wall Street Journal in New York and Hong Kong and for the San Francisco Chronicle. When I was trying to decide whether to head off to graduate school, it was the Chronicle’s assistant managing editor, Jack Breibart, who encouraged me to go, and it was Breibart who offered to hire me back for four summers during which I worked as an editor at night but researched and wrote much of my doctoral dissertation in the Berkeley libraries during the day. I never imagined that I might someday have a
chance to return to the Bay Area as a member of the Berkeley faculty, but I was in the right place at the right time to be able to be a part of one of the very best institutions of higher education in the world. Berkeley is an extraordinary place, a public institution that draws the very finest students and faculty from across the nation and around the world, one that encourages interdisciplinary work and has the resources to make it happen. I have had the rare privilege of being a part of this institution and have benefited enormously from working with and learning from an incredible group of genuine colleagues. I am particularly indebted to my colleagues in the Department of Political Science, who are (incredibly) too many to list here. I do want to mention Wendy Brown, Beppe Di Palma, Paul Pierson, Eric Schickler, and Shannon Stimson, however, all of whom provided valuable comments on this manuscript at various points. I am also very much indebted to Jack Citrin, director of the Institute of Governmental Studies at Berkeley who has supported me – and my work – when it was most needed and most welcome. I also want to thank Judy Gruber, the department chair when I was hired, who died shortly after I arrived. It was Judy who told me that Berkeley was a place that encouraged, that embraced big ideas. One would think this is true of all universities, but sadly it is not. It is, however, true of Berkeley, and it is part of what makes this such a special place. Outside of the department, I have been very fortunate to have colleagues and friends such as Dan Farber, Malcolm Feeley, Kathy Frydl, Anya Grant, Rosann Greenspan, David Kirp, Linda Polsby, Emily Polsby, and Martin Shapiro, all of whom have greatly enriched my experience here.

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In an interview with Berkeley’s Harry Kreisler some years ago, Nelson Polsby said that there is “a very large array of possible ways of going about social science,” and Nelson believed that each of his students had to find his or her own path. “The most important thing in the world,” Nelson insisted, “is to have a mind of your own.” It is a conviction that Bob Kagan obviously shares. I am a better teacher, a better student, a better writer, and a better person for having had a chance to work with Bob Kagan and Nelson Polsby, and I thank them profoundly for that opportunity.

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