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978-0-521-89647-4 - Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics

Gordon Silverstein

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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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University of California, Berkeley



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Frontmatter

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For

Nelson W. Polsby

and our students,

past, present, and future

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Frontmatter

[More information](#)

CONTENTS

<i>Acknowledgments</i>	<i>page ix</i>
Introduction: Law's Allure: The Juridification of American Politics and Public Policy	I
PART I. LAW'S ALLURE: WHY, WHY NOW, AND WHY IT MATTERS	
1. Motives, Incentives, Patterns, and Process	15
2. Why Now? From May and May Not – To Must	42
3. Law Is Different: The Power of Precedent	63
PART II. LAW'S ALLURE: PATTERNS, PROCESS, AND CAUTIONARY TALES	
4. Poverty and Abortion: The Risks and Rewards of a Judicial Strategy	95
5. Environmental Regulation: A Constructive Pattern	128
6. Campaign Finance: A Deconstructive Pattern	152
7. The Separation of Powers: When the Court Says Yes – and No	175
8. War Powers and Precedent: When the Court Is Reluctant to Intervene	209
PART III. LAW'S ALLURE: COSTS AND CONSEQUENCES	
9. Tobacco: How Law Saves – and Kills Politics	245
Conclusion: The Promise and Peril of Law's Allure	266
<i>Bibliography</i>	287
<i>Index</i>	307
	vii

Cambridge University Press

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Frontmatter

[More information](#)

ACKNOWLEDGMENTS

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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Frontmatter

[More information](#)

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, impress 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.

Many students helped make this book possible – and worth the effort. I have been unusually fortunate to have had a chance to teach (and learn from) some of the finest students in the United States, and I thank them all for giving me this opportunity – for listening, for challenging, for questioning, for pushing, and forcing me to hone my arguments, open my mind, and learn how to express my ideas in ways that just might challenge, inspire, and inform them. Although I thank every one of them, a few have made particularly important contributions to this project, and I want to acknowledge that effort. At the University of Minnesota, Dion Farganis quickly shifted from graduate student and teaching assistant to collaborator and colleague. He worked closely with me on a conference paper that grew into the foundation for this work, as well as working with me in my courses on American constitutional law, which also were instrumental in shaping the questions and arguments in this book. At Berkeley, Bruce Huber and John Hanley helped out as the manuscript moved into its final stages. I also want to offer my sincere thanks to the extraordinary group of graduate students who have helped me teach courses on the Supreme Court and American constitutional law at Minnesota and Berkeley – the courses that built the foundation for this work: Melissa Cully Anderson, Sara Chatfield, Andra Crull, Brendan Doherty, Dion Farganis, Alison Gash, Rebecca Hamlin, Peter Hanson, Jill Hargis, James Harney, Amanda Hollis-Brusky, Bruce Huber, Ben Krupicka, Manoj Mate, and Mike Salamone. I want also to thank the more than 2,000 undergraduates who have taken these courses over the years, but particularly I want to acknowledge Kinsey Kiriakos, Kyle Maurer, Fabian Ronisky, and David Wasserman, whose research assistance directly contributed in important ways to this project.

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Gordon Silverstein

Frontmatter

[More information](#)*Acknowledgments*

xi

As are so many who study the separation of powers and the interaction of law and politics, I owe a real debt to Mark Graber, a prolific, original, and provocative scholar, teacher, and friend. For years, he has sponsored one of the most intellectually stimulating annual gatherings of a wide range of people who share these interests – gatherings at which I have tested a number of the arguments in this book. Mark Graber also has earned my deep appreciation for having been an encouraging reader of many parts of this manuscript in its early phases and a tremendously helpful reader of the full manuscript as it came into the home stretch.

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Some of the ideas for this book began to take shape in Washington, D.C., at the New America Foundation, an innovative new think tank that brings together young writers, policy experts, and journalists from a wide ideological spectrum to think, write, argue, and advance original ideas and invigorate a policy community in Washington that seemed increasingly moribund, divided, and anything but productive. I benefited greatly from my time there as the director of the Fellows Program, and I thank New America's founder and president, Ted Halstead, as well as Steve Clemons, Debra Dickerson, James Forman, Michael Lind, Maya MacGuineas, Jedediah Purdy, Sherle Schwenninger, Margaret Talbot, and especially Gregory Rodriguez for their thoughts, ideas, arguments, and inspiration.

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

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Frontmatter

[More information](#)

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.

I turn now to Robert A. Kagan, a scholar, teacher, and friend who has redefined the meaning of colleague and who, by his example, sets standards that – although I might hope to emulate – I can never possibly meet or exceed. Bob Kagan has been a source of support and encouragement; he has challenged me to be better, to reach higher; he has pressed me, urged me, and goaded me to fortify, deepen, and broaden my vision, arguments, and evidence. He has taught me new ways to teach and, in teaching with him, new ways to learn from teaching. His own work has been inspirational and of central utility in this project. Look in the dictionary for the proper definition of what a colleague is or should be, and I have no doubt you will find a picture of Bob Kagan. Here is an extraordinarily accomplished scholar with unbelievable demands on his time who nevertheless found the time and energy to comment on draft after draft after draft of this manuscript; who eagerly replies to any question; and who unquestioningly responds to any request for his time or expertise. Bob redefines above and beyond. He saw things in my work that I did not know were there. Bob helped me see and understand that this was, in fact, a far more ambitious project than I had initially imagined, and he helped me, pushed me, pulled me, and

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Frontmatter

[More information](#)*Acknowledgments*

xiii

pressed me to make it better, stronger, and more rigorous. Although Bob and I inhabit different corners of the world of people who study public law, he never pressed me to adopt his methods, or his questions, or his approach. Instead, he welcomed and encouraged me to pursue my thoughts, my arguments, and my research agenda. It was always clear that his objective was to help me achieve my own objectives and more effectively express my own ideas. This is a vastly better book than it would have been had I not had a chance to work with him, and I cannot begin to adequately express my appreciation and admiration. The best I can do is to try, in a small way, to follow his example.

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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