CHAPTER ONE

Introduction

The Problem of Judicial Policy Making

Courts perform three interrelated but distinguishable functions: they determine facts, they interpret authoritative legal texts, and they make new public policy. The first two functions are familiar, but the third is freighted with the force of blasphemy. In our traditional view of government, courts are not supposed to act as policy makers, and the assertion that they do is generally treated as either harsh realism or a predicate to condemnation.

Political scientists, who work in an essentially descriptive mode, originally tended to adopt the harshly realistic stance toward judicial policy making. Their claims that courts are policy makers – indeed, that courts can be empirically proved to be policy makers – were offered as an antidote to the naive, traditional belief that judicial decisions are determined by "applying" existing law. One notable feature of this stance is that the term *policy* is often used as a synonym for "important" or even for "judicial decision making" in general, with no effort to distinguish policy making from other modes of judicial behavior. Even more notably, the term is used as a synonym for "unprincipled"; political scientists generally ascribe the content of judicial policy making to the political or social predilections of the judge, and regard the legal doctrine that is used to express and justify the decision as epiphenomenal, or part of the superstructure, or window dressing, or a Potemkin village, or any other image by which scholars dismiss the accounts that their subjects give for their own actions.[1]

Legal scholars, whose work tends to be more prescriptive, often regard judicial policy making as an abberation to be regretted or condemned.

For some, policy making is a legal error, a miasma judges stumble into when they fail to follow proper interpretive principles.[2] It remains an error when judges use it even for the delimited purpose of managing their own case loads.[3] Others recognize policy making as a universal element of judicial action, but treat this acknowledged reality as an indictment of the entire process. Fact-finding and interpretation, they say, are indeterminate, and thus no better than judicial policy making.[4]

Faced with these condemnations, and unwilling to accept the invitation to declare themselves to be mere politicians, judges' principal response has been to insist that they simply do not engage in policy making. They are willing to acknowledge that they use social policy to inform interpretation, but usually insist that their interpretation, whatever its sources, constitutes the most valid reading of the text.[5] Any tendency toward increased candor is likely to be quashed by the lawyers, litigants, and politicians they confront, who are quick to invoke the traditional doctrine, whatever its coherence, to support their own position. This process reaches its apogee during Senate confirmation hearings, when hard questioning invariably compels the nominee for one of our nation's most important policy-making positions to declare that he or she will do nothing more than interpret the law, and would never dream of exercising the very function that renders the position so desirable and the nominee so anxious to obtain approval.[6]

In recent years, more modulated analyses have tried to come to terms with this all-too-evident component of judicial decision making, while maintaining the distinction between it and other modes of judicial action. Some political scientists have argued that explanations anchored exclusively in extralegal factors are insufficient, and have sought a broader model of judicial decision making that incorporates existing legal doctrine. This claim can be limited to ordinary cases, where the judge engages in "routine norm enforcement,"[7] but it can also be extended to the kinds of leading cases that serve as the best evidence of judicial policy making. For example, Lee Epstein and Joseph Kobylka argue that in the death penalty and abortion cases, "it is the law and legal arguments as framed by legal actors that most clearly influence the content and direction of legal change."[8] Similarly, the legal mobilization literature demonstrates how judges make policy by rephrasing the litigants' dispute in legal terms.[9] Public policy literature on agenda setting sometimes treats courts as one participant in the complex process by which ideas are transformed into governmental priorities for policy initiation and implementation.[10]

Legal scholars have also developed a variety of approaches to assimilate judicial policy making into a more complex and less condemnatory account of the judicial process. One approach is to acknowledge policy considerations as a valid guide to interpretation. The courts should treat the

statute or the Constitution as meaning one thing, and not another, because the first comports with current social policy, whereas the second contravenes it.[11] Another approach is that policy making is justified when used to formulate a remedy for legal violations that have been established by interpretive means.[12] Next, there is the view that courts, generally the U.S. Supreme Court, may legitimately make policy at times of high political debate or crisis; the implication, however, is that in doing so, the Court abandons its judicial role and enters the lists as a purely political combatant.[13] A fourth position is that judges inevitably inhabit the realm of political decision making and that simply nothing can be done but recognize that they sometimes, or always, reach decisions that are essentially equivalent to those reached by other agencies of government.[14]

These contemporary approaches are illuminating but they tend to treat judicial policy making as something to be explained away as an activist version of interpretation, or to be quarantined within a delimited range. They tell us what judicial policy making does, not what judicial policy making is. Quite often, the process is treated as being hidden in the black box of the judge's mind, or descending, like a deus ex machina, to produce its results by external and undefinable sorcery. It is often described by reference to grand but unelaborated concepts such as experience,[15] reason,[16] religion,[17] or maturity.[18]

This book adopts a different and, in some sense, more mundane approach. It treats judicial policy making as a separate judicial function with its own rules, its own methods, and its own criteria for measuring success or failure. In addition, it moves beyond description to argue that this function is legitimate because it emerges naturally from the institutional role of modern courts and does not violate any of our operative political principles. The normative argument is secondary, however; the mere description of the subject matter is far more important, since it is generally useful to know what something is before deciding whether one approves or disapproves of it. Moreover, if the thing will continue to exist despite one's disapproval – and judicial policy making belongs securely in that category – the mere description of it will serve a valuable purpose. That purpose is to demonstrate how the judge's policy-making function conforms to well-accepted, if little-understood, ideas about the nature of law and adjudication in a modern administrative state. In other words, we intend to rethink the forms and limits of adjudication.

But the book does not attempt to describe judicial policy making by offering a comprehensive account. That is too large a task, and its generality precludes much insight into the detailed operation of the process. In addition, if one restricts oneself to generalities, it is too easy to shift, or to be perceived as shifting, back into the familiar debates about the desirability of the process. One need not subscribe to the postmodernist

position that situated description is always more reliable than general theory,[19] in order to regard it as a safer place to start, particularly when venturing into uncharted territory. Consequently, this book begins with an example and constructs a theory of judicial policy making from a single set of decisions – the prison reform cases decided by the federal judiciary between 1965 and the present. These decisions not only illustrate the policy-making process, but also illuminate important features of our legal system that define the contours of this process and establish its significance.

Of course, it would be possible to follow the custom of many other books about judicial decision making and discuss a number of different examples, rather than just one.[20] Apart from prison reform, judicial policy making produced the constitutional right of privacy decisions such as *Griswold v. Connecticut* and *Roe v. Wade*,[21] the common law right of privacy and publicity decisions,[22] the free speech decisions,[23] the mental hospital reform decisions,[24] many federal antitrust decisions,[25] and the decisions creating implied warranties for consumer products.[26] Such an approach would avoid, or at least decrease, the dangers inherent in generalizing from a single case. The difficulty is that all these examples are complex, and consideration of them would tend to inundate a study of any reasonable length with vast quantities of legal detail. The only way to avoid this would be to present the examples in brutally summarized form, and to sandwich the theoretical discussion in among the case studies, with its systematic development consigned to a few concluding chapters. This study adopts a different approach. It presents one example in detail and then pursues what may be called a microanalysis of that example, building a theory of judicial policy making from the different, complex features that the example offers.

The Nature of Judicial Policy Making

Before proceeding, however, it is necessary to provide at least a preliminary definition of judicial policy making and to distinguish it from the more familiar category of interpretation. Judicial policy making, to put the matter most simply, is policy making by a judge. A judge is an adjudicator of particularized disputes belonging to a governmental institution whose primary task is adjudication. In America's federal court system, most judges are authorized under Article III of the Constitution, which means that they have life tenure and salary protection. However, some officials who would generally be described as judges, such as the members of the District of Columbia courts,[27] other territorial courts,[28] and courts martial[29] are Article I officials, and to the extent that they are part of a separate institution, they are included in this study. There are also a num-

ber of adjudicators belonging to administrative institutions and some of these, such as the administrative law judges, have a rather formalized, judgelike status.[30] This study is not intended to apply to these officials; the relationship between adjudication and policy making within an administrative agency is a complex subject that we do not address.

Policy making, by a judge or anyone else, is the process by which officials exercise power on the basis of their judgment that their actions will produce socially desirable results. This definition follows Ronald Dworkin.[31] Since Dworkin is a confirmed opponent of judicial policy making, which he regards as lawless, the use of a definition derived from his work provides reassurance that the concept is not being sugar-coated with conciliatory verbiage to facilitate its easier acceptance.

Policy making may be contrasted with interpretation, which is the process by which public officials exercise power on the basis of a preexisting legal source that they regard as authoritative. This does not mean that policy making is entirely disconnected from any established source of law. American constitutionalism, at both the federal and state level, requires that policy making, by a legislator or administrator as well as a judge, must be based upon the authority granted in some legal text. But policy making is distinguished from interpretation because it treats the text as a source of jurisdiction, not a guide to decision. When judges engage in interpretation, they invoke the applicable legal text to determine the content of the decision, whether by examining the words of that text, the structure of the text, the intent of its drafters, or the inherent purpose that informs it. But when judges engage in policy making, they invoke the text to establish their control over the subject matter, and then rely on nonauthoritative sources, and their own judgment, to generate a decision that is predominantly guided by the perceived desirability of its results.

Various methods of policy making have been discussed with respect to legislatures, executive agencies, private businesses, and other organizations for which policy making is regarded as a legitimate activity. The classic analytic method involves five discrete steps: define the problem, identify a goal, generate a range of alternatives for achieving that goal, select the alternative that seems most promising, and implement the selected alternative.[32] Each of these steps possesses its own subsidiary methodologies. In recent years, for example, cost–benefit analysis has become a particularly popular approach for choosing among a range of alternatives. Generating alternatives is the most mysterious step in the process, but has recently become the focus of attention from those interested in human creativity and cognitive psychology.

As might be expected, the aroma – some might say the stench – of scientific analysis that the five-step method carries has made it seem unrealistic or oppressive to many contemporary scholars. Perhaps the best-

known and most starkly contrasting alternative is incremental, intuitive decision making, often described in Charles Lindblom's ironic phrase, as "the science of muddling through."[33] A somewhat more analytic approach is the hermeneutic circle, derived originally from the study of textual interpretation,[34] but applied to social science by Hans-Georg Gadamer.[35] In its initial form, the hermeneutic circle is an interpretive technique in which the meaning of any portion of the text can only be discerned from considering the text as a whole, but the meaning of the text as a whole can only be discerned from considering its component parts; as a result, understanding emerges from an interactive process that moves back and forth from part to whole to part. Gadamer argues that the social sciences should not be modeled on the natural sciences, but on humanities or aesthetic theory, including the hermeneutic circle. Anthony Giddens[36] and Charles Fox and Hugh Miller[37] have applied this approach to policy analysis.

Although this study argues that policy making is a normal and legitimate activity of the judiciary, it makes no effort to choose among these various policy-making approaches. This may seem like an omission in a theory of judicial policy making, but it stems from the generality of our theme. We are not attempting to instruct judges about the optimal way to make public policy; rather, we are arguing that policy making should be recognized – by judges and by observers of judges – as an ordinary and a legitimate mode of action. There is no agreed-upon strategy for policy making by a legislature, but very few people argue that legislatures should not make policy for lack of such a theory. There is no agreed-upon theory for the interpretation of legal texts, either; indeed, the disagreements on this subject constitute the biggest single issue in contemporary legal scholarship. Yet the belief that interpreting texts is a legitimate part of the judicial role is absolutely universal in our legal culture.* Both policy making and interpretation are part of what many observers call the "practice" of judicial decision making, but they are separate parts.[38]

With respect to constitutional interpretation, Philip Bobbitt has transformed the lack of agreement about a theory of interpretation into a theory of its own. Bobbitt argues, in effect, that each rival theory constitutes an element of our legal discourse, a modality of judicial decision making.[39] The modalities he identifies are historical (the intent of the framers), textual, structural, doctrinal, ethical, and prudential (cost–ben-

* There has been an ongoing debate about whether the Supreme Court should invalidate legislative enactments on the basis of its interpretation of the Constitution. But no American legal scholar doubts that courts may legitimately interpret statutory enactments; indeed, it is difficult to imagine how our government would function in the absence of this power.

efit analysis). A valid interpretation is simply one that uses these modalities in the manner that they are supposed to be used within our legal culture. This theory has been attacked as less than nourishing, because it does not tell us whether a particular decision is correct, or preferable to some other decision, nor does it resolve conflicts between the various modalities.[40] But it certainly does describe the practice of constitutional interpretation, and it indicates that this practice contains a variety of differing approaches. If that is not deemed a significant achievement, the reason is that the existence of this practice is not open to question, and the legitimacy of the practice is no longer a primary source of controversy.

This study advances the same claim for judicial policy making as Bobbitt advances for constitutional interpretation – that it is a standard method of judicial action, displaying a series of distinct modalities. These modalities include muddling through, hermeneutics, and the classic analytic method, plus its sidekick, cost–benefit analysis. When judges use these modalities, they are making public policy in the standard manner that our prevailing legal culture establishes – they are "talking the talk." The difference between the cases of constitutional interpretation and judicial policy making, however, is that the existence of the latter remains open to debate, and its legitimacy is generally rejected by both sides in this debate. Our claim is that there exists, just below the flimsiest fig leaf of judicial denials, a vast realm of judicial policy making, and that this realm represents a standard, legitimate mode of judicial action. Precisely which mode of policy making is preferable, or optional, is a subject for a subsequent discussion.

Policy Making as a Distinct Category

A second definitional question about judicial policy making is whether the distinction between selection of a desirable result and interpretation of an authoritative text really makes a difference. Judges, after all, regularly rely on social policy when interpreting texts, and they regularly invoke texts even in their most result-oriented moods. In fact, there is a substantial overlap between policy making and interpretation, and judges often engage in both modes of decision making within the same opinion. This would be fatal to any theory of judicial decision making that demanded that each decision be unambiguously assigned to separate categories. But theories of this sort belong to physics, not the human sciences. When we study judicial decision making, the primary goal is to understand the essence of that process, the way it feels to the decision maker and is perceived by those who are affected by it. In other words, the goal is to grasp the phenomenology of judicial action. Interpretation and policy making are different experiences for the judge and are perceived differ-

ently by others, no matter how extensively they overlap. A theory of judicial decision making is not complete unless it can capture the different nature of those two experiences. The mere fact that there is no bright line between them does not defeat the assertion that policy making is a distinct judicial function.

The tendency to conflate policy making with interpretation does not stem solely from the fuzziness of the boundary between the two, but also from affirmative beliefs about the judicial process. There are at least four such beliefs, based, in succession, on interpretive theory, political theory, legal epistemology, and flat denial. The first belief emerges from the important philosophic insight that all thought is interpretive.[41] At one level this is persuasive, but its relevance to judicial decision making rests on something akin to a pun. The interpretive structure of all human thought, sometimes described as "the social construction of reality,"[42] does nothing to refute the claim that interpreting texts and making public policy mean different things within that generally interpretive framework. All our understandings are based on interpretations that give meaning to the world around us, and that precede and generate our ability for conscious thought. According to Heidegger, picking up a hammer and driving in a nail is an interpretive act.[43] The culturally embedded distinction between policy making and text interpretation is simply one of those understandings. Its "social construction" only means that the distinction is a product of our culture, not an aspect of external or objective reality. Consequently, we cannot be confident that the distinction will exist among intelligent beings from other planets, but that does not detract from its importance here in North America.

A second belief, somewhat homologous with the first, emerges from the equally important social science insight that all judicial action is political.[44] This insight flourished in response to the assertion, proclaimed by the formalists and refurbished by the legal process school, that judges apply neutral principles in reaching their decisions.[45] By now, the idea of neutral principles has become the phlogiston theory of legal scholarship, and few observers would deny that there is at least an element of political judgment in judicial action. But recognizing the inevitability of politics, like recognizing the inevitability of interpretation, does nothing to conflate policy making and interpretation. Legislators are acting politically when they campaign in their home districts and they are also acting politically when they pass legislation, but that does not make campaigning and legislating identical activities. Similarly, while judicial policy making is obviously political, the fact that interpretation is also political does not rob it of its separate, interpretive character. It is political because any action by a government official is political, but it is interpretation nonetheless, and not the same as policy making.

The argument about the political nature of judicial action can be taken one step further, however, by arguing that all judicial action is so political that it is a pure act of will, with no relation to the text at all. This is the argument from legal epistemology, and its central claim is that all legal rules are indeterminate.[46] There is some strong evidence supporting it, but it has an exaggerated quality, as if our excessive expectations for interpretation, once disappointed, have produced the reaction of excessive condemnation or despair. In this study, however, we take no position on the interesting but belabored question of judicial indeterminacy. Regardless of one's position on this issue, indeterminacy does not efface the distinction between interpretation and policy making. To begin with, the claim that it does is excessively positivist; it characterizes judicial actions based upon an external observer's ability to predict the result, rather than upon the participants' construction of meaning. The experience of interpreting a text is different from the experience of declaring social policy, even though an external observer might not be able to predict the outcomes of the interpretive process from her own examination of that text. Perhaps this lack of predictability means that the interpretive process is a failure, but to try and fail at a particular task will still be experienced as part of that task, not as equivalent to a conceptually different task.

Even more importantly, the argument from indeterminacy emerges from an exclusive focus on interpretation; it treats policy making as nothing more than a failure of the interpretive process. This assumes in advance the very point challenged by a theory of judicial policy making: that there are no rules to govern its performance. In other words, the argument that policy making and interpretation are equivalent because texts are indeterminate assumes that only texts can guide the judicial decision-making process, and that there are no separate norms. If there are such norms, however, then policy making cannot be subsumed into some generic stew of indeterminate judicial decision making. This argument also functions in reverse. If judicial policy making occurs, but we fail to recognize it because we lack a theory for it, we will tend to exaggerate the level of indeterminacy in judicial decisions. We will point to certain decisions as evidence that legal texts do not govern the result when the judge was not interpreting a legal text at all, but declaring public policy based on a textual grant of jurisdiction.

The final belief about interpretation that conflates it with policy making is the judges' own argument, the one that the Senate hears from Supreme Court nominees: "It would be wrong for judges to make policy and we don't do it. All we do is interpret the law. Of course, some judges misbehave, as is inevitable with any group of people, but those judges are in error and their opinions, if reviewed by other judges, will be overruled. To describe policy making as a category of judicial thought is like describ-

ing bribery as a category of legislative action."[47] At one level, this seems like little more than a logical mistake; saying that a practice could not possibly exist because its existence would violate a publicly promulgated norm is not particularly persuasive. But the argument becomes somewhat more convincing when advanced by those who are carrying out the supposedly forbidden practice. If judges think policy making is wrong, they may actually desist from doing it.

The most obvious alternative, however, is that they may do it but disguise their actions in some other form. In fact, judges seem to have adopted the latter strategy, and they have done so by describing policy making as interpretation. Our classic arena of judicial action is the common law, and common law – undeniably a form of public policy – is created predominantly by judges.[48] The fiction that judges developed to avoid acknowledging that they were making public policy is that general principles are embedded in the common law, and that the creation of new doctrine is nothing more than the application of those principles to novel situations.[49] In other words, judicial policy making was disguised as the interpretation of an unseen text.

Precisely why the judiciary adopted this approach is a question for legal history to answer. It was probably not derived from the concern that judicial policy making is antidemocratic, since England's common-law process antedates its commitment to democracy by many centuries.[50] More likely, the assimilation of policy making to interpretation sprang from the ongoing effort by common-law courts to assert their authority against other courts[51] and against the king.[52] By declaring that they were merely interpreting legal principles that sprang from the immemorial practices and beliefs of the English people, common-law courts could claim superiority over any other governmental institution. Clearly, such a claim relies heavily on the respect accorded to tradition. In a world that regarded innovation with suspicion and legitimated present actions on the basis of their pedigree, it was natural that judges would cast their policy-making efforts as the interpretation of established principles.

Since the Enlightenment, tradition has lost much of its appeal, but the very process that displaced tradition enthroned democracy as the source of political legitimacy and provided judges with a new reason to describe their policy-making efforts as interpretation. Perhaps there was a hiatus in this process of substituting a different motivation for the same result. Nineteenth-century judges, more comfortable with innovation and not yet troubled by their unelected status, were often willing to acknowledge a policy-making role.[53] The development of the modern administrative state, however, engendered the view that policy making is the particular preserve of state's politically accountable branches.[54] This belief is false, since a great deal of public policy is generated by independent agencies, or by