Introduction to Law's Allure Symposium: Law and Politics—An Old Distinction, New Problems

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The law/politics distinction is being reformed and revived. The grand constitutional theorist of the twentieth century sought to demonstrate that a realm of law existed or should exist entirely distinct from politics. By the turn of the twenty-first century, that project and distinction between law and politics had collapsed. Most law professors and political scientists agreed that judicial decisions were based at least partly on the same values that other political actors used when making policy choices. Judicial power was largely politically constructed. Rather than seeing law as a device to constrain power, political scientists (Whittington 2007) and law professors (Powe 2009; Balkin and Levinson 2001) detailed how presidents and prominent politicians supported a strong judiciary as a means for serving their partisan ends.

Immersed in this history and scholarship, Gordon Silverstein (2009), whose book, Law's Allure: How Law Shapes, Constraints, Saves, and Kills Politics is the focus of this symposium, begins by observing, "Law and politics cannot be disentangled in the United States" (2). Nevertheless, Silverstein insists that a different perspective on the law/politics relationship can cast vital light on the workings of the American constitutional regime. Rather than seeing "neutral principles of constitutional law" as the distinctive element of the judicial process

(Wechsler 1959), Silverstein (2009) details a policy-making process in which all participants, "relying on legal process and legal arguments, us(e) legal language, [and] substitut[e] or replac[e] ordinary politics with judicial decisions and legal formality" (5). He describes this practice as "juridification." Law's Allure then contrasts juridification with the more political –and increasingly, in his view, lost—arts of persuasion, negotiation, and bargaining. As the commentary below demonstrates, this novel reinterpretation of a long-standing distinction generates fascinating and controversial insights into the relationship between courts and other governing institutions and, as important, into the different political consequences of using legal as opposed to policy methods of analysis.

This distinction between law/juridification and politics/bargaining undermines the traditional challenge judicial policy making presented to a democratic society. Alexander Bickel (1962) established the central terms of discourse for the old distinction between law and politics when he stated that judicial review presented a "counter-majoritarian" problem. "When the Supreme Court declares unconstitutional a legislative act or the action of an elected executive," Bickel famously asserted, "it thwarts the will of the representatives of the actual people of the here and now" (16-17). This countermajoritarian problem does not accurately describe the relationship between courts and the elected branches of the national government at the turn of the twenty-first century. Silverstein points out that juridification takes place because most representatives of the people of the here and now choose to have policies by legal processes, legal arguments, or legal formalities. Bickel justified judicial review in light of the distinctive judicial capacity to make decision on principle. Silverstein finds no

distinctive institutional form of reasoning in the American constitutional universe. Several of the most fascinating case studies in Law's Allure detail congressional preferences for juridification, even when judicial review is unlikely.

Law's Allure suggests that a "coherence problem" has replaced the countermajoritarian problem. One characteristic of a juridified polity is that policy tends to be a consequence of decisions made by numerous institutions. Sometimes, one institution builds on a foundation established by another institution. Silverstein (2009, 10) refers to such instances as "constructive patterns" of juridification. Often, public policy in a regime where every governing institution "wants to get into the act" results in what Silverstein refers to as a "deconstructive pattern" (38). Public policy in these instances reflects an amalgam of different principles and purposes, "something neither [courts nor Congress] would recognize or likely choose had it been left to them alone."

Juridification also presents an "evaluation problem." When all governing institutions are policy makers, little basis may exist for judgment other than whether the commentator approves the policy made. In his contribution to the symposium, R. Shep Melnick (2010) complains that Silverstein "usually adopts the point of view of liberal public interest groups" (1054) when evaluating legislation, judicial outputs, or some combination of the two. More generally, he questions whether Law's Allure provides "a convincing argument…for how we are to distinguish constructive from deconstructive forms of juridification."In his contribution to this symposium, Jeb Barnes raises similar concerns. "Constructive versus deconstructive juridification," he writes, seems a distinction without a difference" (2010, 1036). Both

have the effect of "narrow[ing] policy discourse to technical matters and limit[ing] options for reform by diverting resources to litigation" (1036). More generally, in his contribution Epp (2010) notes that being a problem, juridification may bring much needed diversity to policy making. Juridified policies may be more creative and less entrenced than their nonjuridifed counterparts," he declares, "precisely because they encompass competing logics from different fields" (1049).

Naomi Murakawa's (2010) contribution suggests that juridification presents a chastisement problem (see Tushnet 1999). Where Silverstein sees constructive dialogues between courts and other governing institutions, she sees elite agreements to follow the policy path of least resistance in the pursuit of largely symbolic change. Murakawa (2010) contends that Silverstein's "constructive patterns" of juridufication "are likely [only] when reform is modest and slackly enforced and does not threaten powerful political interests or social groups" (1069). Justices, legislatures, and executives cooperate to provide environmental agencies with strong antipollution mandates, but not the resources to achieve those ends (1070).

Juridification may also present an "institutional identity" problem. Conventional analysis regards the federal judiciary as "the forum of principle" (Dworkin 1985, 33), while political parties and legislatures are sites for political compromises and bargaining (Wechsler 1959; Downs 1957). Over the past decades, a role reversal has taken place. Consider abortion. The Democratic Party currenty takes a principled stand against almost all restrictions on reproductive rights. The Republican Party takes a principled stand against almost all efforts to terminate pregnancies. These sharp partisan disputes explain why almost no bargaining or compromising on reproductive policy tends to take place

in either Congress or state legislatures. The US Supreme Court, by comparison, has taken what might seem the less principled or rule-bound position that abortion must be legal but can be heavily regulated. One could provide similar accounts for affirmative action, capital punishment, and numerous other constitutional issues (see Perry and Powe 2004). In each policy area, political parties have taken the principled position thought to be the province of the judiciary, while the Supreme Court has taken a compromise position thought to be the province of Congress. This trend suggests that juridification, understood as a commitment to "legalistic approaches to social policy" (Silverstein 2009, 3) is as, if not more, vibrant in political party conventions and the elected branches of the national government as on the federal bench.

If Silverstein's fundamental insight is correct, he has successfully underminded more than a half century of judicial criticism. The root cause of a juridified regime, his analysis suggests, is the American antipathy for politics (27) and not an imperial judiciary. The challenge for constitutional analysis after Law's Allure is to develop those incentives that might promote greater appreciation for compromise, bargaining, and persuasion throughout the entire American political regime. Silverstein and the other essays to follow have begun the vital task of restoring political to the American political order.

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