Book Review

Gordon Silverstein, *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics*. New York: Cambridge University Press, 2009, pp. xiii + 316, $23.99.

Reviewed by Paul Horwitz

In important respects, Gordon Silverstein's book *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics* offers a new, or at least more nuanced, answer to a very old question. Late in the book, Silverstein serves up the obligatory quote on the subject he is addressing—Alexis de Tocqueville's observation that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question" (267). Unlike most of us who have quoted that chestnut, however, Silverstein allows Tocqueville to continue: "Hence, all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings." And Tocqueville adds that as politicians, who often enough are lawyers, "introduce the customs and technicalities of their profession into the management of public affairs," the law and its language seep into all the levels of our society, until "at last the whole people contract the habits and the tastes of the judicial magistrate" (267-68).

That excerpt from Tocqueville gives something of the flavor of the phenomenon that Silverstein is concerned with here. He labels this tendency "juridification." Silverstein offers up a number of definitions of this term—too many, in fact; it would have helped if he had answered the definitional question once and firmly rather than taking several cuts at it. Most succinctly, he defines juridification as the process of "relying on legal process and legal arguments, using legal language, substituting or replacing ordinary politics with judicial decisions and legal formality" (5).

So juridification certainly involves the first and most famous part of the quote from Tocqueville: the American tendency to use the courts to argue and resolve pressing political questions rather than, or in addition to, the political process itself. But it also involves a crucial tendency addressed by the rest of Tocqueville's quote: the tendency to seek in the political process a more "lawlike" approach to public policy, one in which political language is narrowed into legalistic language and we see efforts to "formaliz[e], proceduraliz[e], and

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automat[e] the political process as [a] substitute[ ] or replacement[ ] for the traditional methods of politics—organizing, electioneering, negotiating, and bargaining" (15).

Silverstein's concern is not to argue for or against juridification, any more than one would argue for or against the weather. He is not on the side of those who would use the courts as a forum for the solution of *any* social problem, or on the side of those who think the courts should *never* serve as such a vehicle. Those positions don't do justice to the myriad permutations and complications inherent in juridification. Rather, he wants to think about the causes and consequences of juridification: how and why it occurs and what its costs and benefits are.

In Silverstein's account, juridification may be prompted by a variety of motives and incentives. In some cases, it is, or appears to be, the best possible option, because institutional or political barriers make it difficult to achieve public policy changes through the political process. Prison reform, for example, took a judicial route because of the difficulty of achieving modernization of the prison system through politics when there was much political cost and little immediate benefit to politicians in attaching their political reputations to it (19–20). More generally, as Sanford Levinson, most prominently, would agree,[1] "an eighteenth-century Constitution" produces "significant barriers to the governance needs of a twentieth- and now twenty-first-century superpower" (20). The difficulty of achieving political change in the face of an exquisitely complex system of vertically and horizontally divided power, along with both constitutional and institutional super-majority voting mechanisms such as the filibuster, means both that some advocates may turn to the courts, and that legislators themselves may engage in "legalistic effort[s] to correct the political process itself," as in the case of the independent counsel statute (20). Public interest groups also may turn to the courts to gain political and organizing benefits, such as "facilitating political organizing efforts, unifying political movements, or energizing individuals and policy entrepreneurs" (23).

Finally, and intriguingly, Silverstein argues that juridification may appeal to those for whom law seems to offer "a morally superior path," one that is unblemished by the need for compromise (25). Drawing on the work of Samuel Huntington,[2] he suggests that our society moves through periods of "creedal passion and creedal passivity"—periods in which there is a gap "between institutions and practices that simply cannot deliver the policies [that American political] ideals seem to demand" (27). Americans thus crave "the purity, clarity, and efficiency of judicial rulings and barely tolerat[e] the gray ambiguity and frustrating inefficiency of the political process" (27). In our culture, "Law has a luster, a power, an appeal, an allure" (25).

1. *See* Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It) (Oxford University Press 2006).

2. *See* Samuel P. Huntington, American Politics: The Promise of Disharmony (Harvard University Press 1981).

That is the motivation behind juridification. But how does it occur? The answer, unsurprisingly, is complicated. Juridification may follow a variety of patterns. It is not a one-shot affair, Silverstein argues, but "a long, iterated chain, in which policies and decisions spiral from Court to elected branches, to administrative agencies, and back into Court—each decision at each step shaped by those that came before and, in turn, shaping and constraining those that will follow" (30). Nor, to be sure, is it driven solely by courts or litigants. Because juridification can enable politicians to sidestep the costs, politically and in resources expended, of direct action, politicians themselves will often "facilitate, request, and plead for judicial intervention, happy to surrender responsibility (and blame) for tough choices" (33).

It will be no surprise that juridification can work more or less well as a strategy. Silverstein argues that its relative success or failure depends largely on whether government and the courts are working together, building on each other's actions in a constructive pattern, or whether they are locked into a pattern in which each branch makes decisions that conflict with the other, leaving law complicated and messy and making it less likely that coherent policy goals will be achieved. Juridification also is subject to the law of unintended consequences, and that becomes especially powerful when the players in this game are unduly optimistic about the possibility of one-shot interventions.

Silverstein limns the risks and rewards of juridification through a series of extended studies of public policy controversies and their resolution (or undoing) through different forms of juridification. His case studies include the failure to litigate poverty reform in the 1960s and 1970s (95–109), the "constructive" use of legislation and litigation to effect environmental reform (128–51), and the "deconstructive" pattern of campaign finance reform, in which efforts to shape a solution to political corruption were ultimately constrained by the particular legal frame in which those efforts took place (152–74). He offers a particularly powerful example of the phenomenon of unintended consequences, and the importance of recognizing the iterated nature of public policy in an age of juridification, in his discussion of efforts to litigate an end to the death penalty. Those efforts resulted in a brief period of triumph when the Court issued a sweeping ruling holding that the then-current death penalty laws were unconstitutional.[3] But the triumph collapsed when state legislators and the Court built on the ruins of the earlier laws to construct and affirm new death penalty statutes that were far more immune to challenge.[4] The death penalty's opponents thus "failed to imagine that the very ruling that would end the death penalty would…ultimately provide a far more stable platform for its revival and entrenchment" (37–38).

3. *See* Furman v. Georgia, 408 U.S. 238 (1972).

4. *See* Gregg v. Georgia, 428 U.S. 153 (1976).

Silverstein's basic theory of juridification, and his exemplary use of case studies to explore that process and its mixed costs and benefits, provides fertile ground for discussion, both positive and critical. One area that certainly deserves, and happily has received, increased attention is the central and potentially problematic role played by policy entrepreneurs, whether individuals or groups, in the process of juridification. Silverstein observes that the move to the courts to resolve public policy issues was accompanied by the influx of "talented and public-spirited young people" into public interest litigation in and around the Watergate era. The "Nader's Raiders" and other public interest lawyers often treated litigation as a preferred means of achieving social change, and the common tools of political reform, involving "bargaining, negotiation, and elections," as "defeats for justice" (9).

By focusing, quite reasonably, on these groups' normative preference for the purity of law over politics, Silverstein, however, may give inadequate attention to the degree to which money—contingency fees, attorneys' fees and fund-raising success—also motivated them and continues to do so, for both liberal and progressive groups alike; he also may be overlooking the extent to which these groups, once established, are motivated simply by the wish to continue in existence. One also should note the rise of a new form of policy entrepreneur: the class action plaintiffs' lawyers, who describe their actions in terms of routing around a broken political process but also are plainly working the system for potentially major financial gains.[5] Silverstein devotes a chapter to the course of the tobacco litigation, which he argues both saved politics, in the sense that it offered a route toward reform that had been foreclosed by the political process, and killed it, in the sense that the collapse of the deal "actually allowed tobacco not only to survive, but also to thrive as a beacon of profitability in a sea of losses on Wall Street" (11). Still, more could have been said here about the rise of policy entrepreneurs whose interest in either politics *or* litigation is largely strategic and incidental to the market incentives that drive them.

One also could expand on Silverstein's brief quotation from an early argument for public interest litigation as an alternative to the political process, which observed that the "case and controversy focus of legal activity can provide one possible alternative to middle class forms of organization and protest"[6] (98). This passage is pregnant with potential areas for exploration. What does it say about the possibility that public interest litigation, whether

5. *See, e.g.*, Nathaniel S. Shapo, In the Eye of the Storm: A Regulator's Perspective on Managed Care Organization Liability, 30 J. Leg. Stud. 669, 681 (2001) (describing then-plaintiffs' lawyer Richard Scruggs as telling the district court judge in the consolidated litigation against managed care companies that the lawsuits were motivated by Congress's failure to pass a patients' bill of rights, and adding, "Congress is not going to fix [the health care system]. They are counting on this court now fixing it."). The litigation ultimately resulted in relatively minimal patient-centered gains in managed care policy, and major legal fees for the lawyers on both sides.

6. Edgar Cahn & Jean Cahn, The War on Poverty: A Civilian Perspective, 73 Yale L.J. 1317, 1335 (1964).

spearheaded by liberal or conservative groups, is fundamentally a class-specific activity and one that is bound to reflect the priorities and preferences of those who engage in it? What does it say if the preference for juridification because of law's supposed moral purity is simply a middle-class or professional-class "taste" for law over politics, which can be a far more bruising activity and puts the professional's *amour propre* at greater risk than simply writing briefs and standing up in court? And what happens when the priorities of different groups clash, or when it turns out that "the allocation of public interest law resources to majoritarian, middle-class, white concerns is contrary to the [broader] public interest?"[7] (107).

One finally might add on this general point that, in keeping with Silverstein's account of juridification as an iterated rather than a one-shot process, the rise of public interest lawyering arguably had two unintended consequences. First, those who thought of it solely as a "progressive" activity failed to anticipate the rise of conservative public interest groups that could use the same mechanisms to achieve their own goals before increasingly sympathetic courts.[8] Second, as with death-penalty litigation, in which the increasingly sophisticated efforts of public interest groups and pro bono lawyers at white-shoe firms to overturn convictions and sentences at the federal *habeas* level resulted in the passage of the Antiterrorism and Effective Death Penalty Act of 1996,[9] the rise of public interest lawyering occasioned a host of laws and judicial rulings designed to tighten standing requirements, reduce attorneys' fees, narrow the scope of federally funded litigation groups, and otherwise defang public interest law. Public interest groups that put excessive energy in litigation would find that they had to retool and rediscover the use of interest-group politics if they were not to become a vestigial presence. It is perhaps emblematic of this new era that the current occupant of the White House is a lawyer whose primary vehicles for legal reform were in community organizing and the messy political process, not conventional public interest litigation.

Another question that begs for further investigation involves the nature and number of the players in what Silverstein dubs the "constructive" model of juridification. His primary example is environmental law and policy, which he describes as a process of courts and legislators working more or less in lockstep, each building on the previous actions taken by the other. But, as he notes, although one of the first moves in this iterated game was the Nixon White House's temporary interest in environmental reform, the White House

7. Edgar Cahn & Jean Cahn, Power to the People or the Profession? The Public Interest in Public Interest Law, 79 Yale L.J. 1005, 1005 (1970).

8. *See, e.g.*, Ann Southworth, Lawyers of the Right: Professionalizing the Conservative Coalition (University of Chicago Press 2008); Steven M. Teles, The Rise of the Conservative Legal Movement: The Battle for Control of the Law (Princeton University Press 2008). Silverstein acknowledges the rise of conservative public interest litigation in a footnote, but the main text itself focuses more on liberal public interest groups (11 n.24).

9. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in sections of 28 U.S.C. §§ 2244-2267).

lost interest when it became apparent that it would realize minimal political gains for doing so. Yet, because Congress and the courts continued to push on this front, Silverstein describes it as a process in which "[t]he branches were working *together with* each other" rather than at odds with each other (139, emphasis in original). This raises the question of whether "working together" is just a two-branch affair, particularly involving Congress and the courts. Once those two branches have cooperated to set in motion an enforcement mechanism whose primary actors are private, what role is there for the enforcement branch of the national government? What role *should* there be? And what are the consequences, either for actual legal reform on that particular issue or for future issues, of such an approach? Privatizing enforcement may have its gains: it may render enforcement more responsive and efficient. It also may have its costs, as the executive branch responds by nominating judges who take an increasingly stringent view of the impropriety of private rather than public enforcement.[10] My point here, with Silverstein, is not to argue for or against a particular outcome. But any approach to public policy that focuses single-mindedly, as legal scholars often do, on the relationship between Congress and the courts, ultimately will have to account fully for the costs, benefits, and complexities of the actions not of two branches of government but three branches or even four if one includes the states.

Perhaps a broader question, but one that should be of great interest to readers of Silverstein's book, is the extent to which law's allure is not just a matter of, or a response to, iterated steps in a game among repeat players but instead draws on still deeper impulses. Juridification is not simply a matter of strategy, or a "product of the interaction of [political] institutions" (4, emphasis omitted). It ultimately speaks to a broader faith in and focus on law that is a key feature of our social fabric. As Silverstein observes, "Law's allure is deeply embedded in a[n] American political system in which an intentionally fragmented government interacts with a political culture deeply suspicious of politics and imbued with a language of rights and rules, liberty and equity" (245).

Even this passage privileges somewhat the "political system," rather than seeing the "political culture" as prior and primary. Elsewhere, Silverstein takes a somewhat different approach, describing law's allure as having "something to do with American political culture itself"—with an American ambivalence toward politics and attraction toward the seeming "predictability, propriety, and fairness" of law itself (2–3). Thus, politicians and citizens do not simply use juridical language because they have been forced onto this ground by some overhanging judicial decision. They do so voluntarily—and, in a deeper sense, involuntarily—because the language of the law is a quintessential part of the American social and political culture.

10. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (Scalia, J.); *see generally* Jack M. Balkin & Sanford Levinson, The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State, 75 Fordham L. Rev. 489 (2006).

Huntington's observations about the waxing and waning of American "creedal passions" seem especially pertinent here. It is no accident that the rise of public interest litigation coincided with Watergate. As Silverstein notes, law's allure is closely tied to the "steady erosion of Americans' faith in their political process," well represented by the cataclysmic events of the 1960s (44). But as he also notes, it goes beyond disaffection with politics and speaks to a broader, almost theologically inflected faith in the moral purity of law, a faith that has long been part of the American landscape. This sensibility is richly apparent in Senator Jacob Javits' remarks about the independent counsel statute, whose enactment Silverstein describes as part of juridification's attraction to "legalistic solution[s] to…political problem[s]" (181). In words that read like a technocrat's impression of Witherspoon or the Mathers, Javits said of the statute, "For the first time, Congress is making an effort to institutionalize an instrument of self-purification" (181). So politics is reconceived as law, and law is reconceived as religion.[11] In short, it may be that a full understanding of juridification and its implications must embrace not only the language of political science, but that of sociology, and perhaps theology, as well.

A final question to be asked is whether juridification is a problem in search of a solution, or simply, as I think Silverstein would have it, an inevitable feature of the American political landscape. Silverstein conceives of juridification in part as a response to the problem of governing a twenty-first century landscape with an eighteenth-century document, one that embedded obstacles to political change in its very DNA.[12] So we could imagine reforms—perhaps minor reforms, like further cutting back on standing to sue in federal court, or perhaps major ones, like the constitutional reforms proposed by Sanford Levinson[13]—designed to curb the appeal of juridification and bring some life back to the political process itself. We could seek to reduce law's allure by returning to a more Madisonian vision of government in which the interests of those in government are "connected with the constitutional rights of the place."[14] We could, in short, imagine reforms that do not seek to re-create

11. *Cf.* Steven D. Smith, Law's Quandary (Harvard University Press 2004).

12. Silverstein also argues that the pace of juridification quickened when the Warren Court altered the role of the Supreme Court from that of the nation's "traffic cop," which simply said "what government could and could not do," to one in which the Court was "willing to say not only what government could and could not do—but what it must do as well" (6). Although the Warren Court surely ushered in new features of juridification and made it a more attractive option to some of the players in the public policy process, I think he places too much weight on this distinction. It is not always easy to distinguish between the different remedial roles played by the Court, before or after the Warren era. In any event, as Silverstein notes, juridification did not arrive on the scene with Earl Warren, but has long been a feature of the American political landscape (22).

13. *See* Levinson, *supra* note 1.

14. Federalist No. 51. Whether Madison's vision was ever true in practice, and whether it could possible be made true today, are questions that are superbly explored by Daryl Levinson and Richard Pildes. *See* Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2311 (2006); Daryl J. Levinson, Empire-Building Government in Constitutional Law, 118 Harv. L. Rev. 915 (2005).

politics in law's image, but to revivify politics itself. But those reforms seem unlikely to get off the ground; in any event, as long as law's allure is immanent not only in our institutions but in our selves and our social fabric, it is unlikely that any institutional or constitutional reforms could completely dispel the urge toward juridification.

That, in turn, suggests two points. First, that is not necessarily always a bad thing. Silverstein suggests that juridification may be "most problematic when it dilutes or deflects the ordinary political process that might have been quite capable, not only of accomplishing the desired goals, but also of doing so through means and methods of political persuasion and bargaining," as in Congress's attempts to legislate a way out of spiraling budgets (29). But if juridification can provide a precommitment process that offers political actors a means of self-restraint (and that is a big if, as the budget process itself suggests), perhaps we should not be too quick to reject this approach, even if it has some diminishing effects on politics.

Second, and somewhat conversely, the inevitability of juridification suggests a tension as to whether the difficulty of achieving public policy goals is a bug in the current constitutional system or a feature. Silverstein writes that juridification "seems to be the most defensible and least costly in those cases where the courts offer the only viable path to get around fundamental institutional barriers posed by federalism, the separation of powers, or institutional rules like the filibuster" (29). But if, as he suggests elsewhere, those constitutional and institutional barriers were put in place precisely to slow the pace of political change (266), then whether juridification is "most defensible" in these circumstances, or whether it is instead less defensible, will depend on our underlying view of the merits of a constitutional system that is resistant to change absent substantial consensus among the levels and layers of government.

There is an exquisite irony here, however. Many of those who oppose juridification do so because they do not believe there should be a way to work around the safeguards built into the constitutional system as it was originally designed. But it is precisely those safeguards and difficulties that make juridification an inevitable part of the public policy process. Plaintiffs' lawyers, public interest groups and all the rest of the most devoted advocates of juridification are not so much a perversion of our conservative Constitution as they are its inevitable by-product.

Still, whatever questions may be left at the end of *Law's Allure*, this book is a valuable place to start for those who want to think about these questions. Silverstein ends his book by observing that the failure to fully recognize and understand the phenomenon of juridification and its consequences is in part a product of the "artificial divide that has grown up between those who study

law and those who study government and politics"[15] (283). He argues that this divide has narrowed, but the two schools are still running on parallel tracks rather than working together to understand "how law and politics interact, shape, and frame each other" (284). *Law's Allure* does a fine job of bridging the gap between the two. It is not, as Silverstein rightly observes, "meant to be the last word on the subject" of juridification (285). And as Tocqueville's words illustrate, it is not the first word on the subject either. But it is a valuable addition to the conversation.

15. *See e.g.*, Frank B. Cross, Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance, 92 Nw. U. L. Rev. 251 (1997); Gerald N. Rosenberg, Across the Great Divide (Between Law and Political Science), 3 Green Bag 2d 267 (2000); Barry Friedman, The Politics of Judicial Review, 84 Tex. L. Rev. 257 (2005).