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Juridicalization of Politics in the United States

MARTIN SHAPIRO

ABSTRACT. The United States is the home of judicialization or, perhaps more accurately in this case, the juridicalization of politics. American politics has been Constitution-centered from the very beginning, and lawyers play a disproportionate role in political life. This article analyzes the causes, development, and effects of these features. One main theme is, of course, traditional judicial review, but we will also examine the role of the courts as implementers in public affairs. Further administrative judicial review is described and evaluated.

American Legal Culture

If any nation is the peculiar home of juridicalization, it is the United States. The phenomenon is so massive and multifaceted that it is probably the result of multiple, interactive causes. The American Revolution, with its natural law/social contract ideology, was particularly legalistic. Lawyers had played a major part in the preceding English revolutions. The colonies themselves were organized under Royal charters that were viewed as legally binding contracts. The revolution was not expressed as an assault on the existing system of law and courts but as an assertion of the legal and constitutional rights of Englishmen against an overbearing Parliament.

Subsequently, American politics have been notably Constitution-centered. The American two-party system emerged in the fight over adoption of the Constitution, with one party as its champion and the other its opponent. Because the Constitution established three separate and equal branches, two elected and one not, it was natural that the party experiencing electoral losses would attempt to preserve an enclave of power in the judiciary. The Federalists did so with the appointment of John Marshall at the time of the Jeffersonians' sweep of Congress and the Presidency in 1800. In a federal constitutional system, the Supreme Court almost inevitably became the referee of many of the most controversial political issues that would arise—that is, issues about the boundaries between the state and national governments. Subsequent to the initial assertion of judicial power in *Marbury v. Madison* (1 Cranch, 137: 1803), most of the great Marshall Court decisions were

about federalism. The Court served as one of the principal instruments in building a strong central government.

It has been early and widely noted that lawyers play a disproportionate role in American politics (Eulau and Sprague, 1964). This phenomenon is in part probably both a cause and an effect of the highly constitutionalized politics of the US. In part, too, it is probably the result of deeper socio-economic causes, such as the absence of a hereditary aristocracy, the prevalence of small, market-oriented agricultural land holdings, and the rapid economic development experienced through competitive corporate capitalism. Entry into the legal profession was particularly easy, and legal and political activity enjoyed a kind of natural synergy. The great number of self-employed and under-employed lawyers offered skills obviously relevant to legislation and public administration, and had the time to engage in democratic grass-roots politicking, while the political activity itself was a means of enhancing their private law practices.

The distinctive American mode of selecting judges from this broadly recruited, highly politicized, and overwhelmingly private practice bar may be the crucial cause of judicialization. Judges in many countries theoretically are granted as great a power of judicial supervision over government as those in the United States, at least in certain spheres. For instance, the administrative law competence of United States, British, and French judges really looks about the same on paper. The markedly higher propensity of American judges to interject themselves into major administrative decision making must be more a function of the nature of the judges than of the nature of the law.

Continental judges are recruited right after their initial legal education and spend their lives in a government service that itself is closely brigaded with the rest of government service and neatly segregated from private practice. The British judiciary is recruited from a relatively closed and elite subclass of lawyers who are rather isolated from direct involvement in business enterprise and who take their briefs indifferently from both government and its opponents. The American judiciary is recruited very largely from among middle-aged, successful private practitioners who have been deeply and directly involved in private enterprise, who typically have little or no experience in government, and who typically have built some substantial portion of their success on representing interests heavily regulated by government. The American judge usually comes to the bench after a life of deep and direct involvement in the private sector, generally representing private clients against government rather than vice versa. American judges thus bring to the bench a wealth of knowledge of the everyday affairs of the private sector that their continental counterparts certainly do not have and their English counterparts have in far less abundance. In addition, they bring the perspectives of the governed rather than those of the governors. Thus they have both the knowledge and the inclination to intervene in affairs of state to a far greater degree than do European judges.

The Growth of Judicial Review

Undoubtedly the constitutional judicial review powers of the Supreme Court, with the usual chicken and egg caveat, is the central engine of American judicialization. We have already noted that the Supreme Court almost inevitably played a major role in the issue of federalism that dominated American politics before the Civil War. Because of federalism, the moral issue of slavery tended to be transposed heavily into legal arenas. Citizens in northern states could not use direct electoral

politics to address slavery in southern states, and so slavery necessarily became a constitutional question.

The Populist and Progressive era in the decades just before and after the turn of the century set the stage for contemporary juridicalization. These movements, which dominated a number of state legislatures and occasionally Congress, called for a stronger, more technically expert, more regulatory government that could deal more adequately with the growing corporations and problems of industrialization and urbanization. These movements were reinforced by the concerns of labor unions and other groups for better working conditions and general amelioration of the lives of the poor. The result was a spate of regulatory laws, most notably railroad regulation and antitrust legislation, as well as new labor and welfare laws, such as those governing wages, hours, and industrial safety.

The United States Supreme Court responded to constitutional challenges to these laws quite frequently between the 1880s and the 1930s, striking down some and upholding others, but generally asserting its ultimate authority to strike down economic legislation that violated sound economic principles or trespassed upon the proper state/national boundaries of federalism. The Court frequently portrayed itself as the protector of individual rights—in this instance property rights—against the occasional aberrations of democratically controlled legislatures. It is in this period that Americans come to assume that every major piece of legislation will somehow or other reach state and/or federal supreme courts for constitutional testing, and that they all involved rights (McCloskey, 1960).

The great upheavals of the New Deal are usually portrayed so as to emphasize the disjunction between the old and the new Court and the contrast between property rights on the one hand and civil rights and liberties on the other. In terms of juridicalization, continuities are more significant than contrasts. The judicial power and legitimacy that the Court had built up as the protector of property rights was not destroyed by the New Deal. That power was preserved and transferred from “property rights” to “civil rights and liberties,” that is from the constitutionally expressed interests of Republicans to the constitutionally expressed interests of Democrats. The Court did not stop declaring laws unconstitutional. It only changed its targets (Shapiro, 1986).

The judicial review powers of the Court have never gone uncontested. Marshall’s assertions were opposed by the Jeffersonian-Jacksonian Democrats. The abolitionists attacked the Supreme Court’s pro-slavery decisions. The elaborate doctrines of judicial self-restraint based on the conflict between review and democracy were first spelled out by academic spokesmen for the Populists and Progressives when the Court threatened the new regulatory and welfare laws of the 1880s and 1890s. Exactly the same arguments were taken up by New Deal commentators in the early 1930s. When the New Dealers captured the Court in 1937, some New Dealers persisted in judicial self-restraint themes. They died out in liberal circles with the liberal successes of the Warren Court. By the 1960s the same arguments were being arrayed by conservatives against the Warren Court. In the slightly different language of “strict construction,” they appear again in Republican attempts to curb the Court in the 1980s.

Brown v. Board of Education

In spite of these countercurrents, juridicalization in the United States, and perhaps even world-wide, is essentially associated today with the great movement toward

judicial protection of human rights initiated, or at least most dramatically signalled, by the landmark desegregation decision *Brown v. Board of Education* in 1954 (374 US 483 1954). That event provided a paradigm of mythic proportions. An interest group employs a concerted campaign of individual rights litigation to persuade a court to undertake a major change in public policy that legislatures and executives have refused. The judicial process is developed as an alternative to the more explicitly political processes of partisan electoral politics and interest group lobbying. A non-elected, "independent" and "neutral" court steps in to correct a "failure" or "pathology" of the democratic process. The substitution of judicial policy making for legislative/executive policy making is legitimated in part by the invocation of minority rights against majority will and in part by the argument that in certain rare instances democracy is not self-correcting without judicial intervention. Finally, *Brown* represents the intervention of a national court to achieve uniform national norms. These norms are supported, albeit perhaps at low intensity levels, by a national majority. They have, however, been thwarted by local norms, often held with high intensity, by local majorities or local elites (Kluger, 1977).

Brown becomes a model for a long series of major policy changes initiated by the Warren and Burger courts at the behest of groups conducting conscious litigational campaigns. Through case-by-case law-making, the Warren Court introduced a nationally uniform and reformed set of police procedures for dealing with the accused, a new national law of obscenity, profound reform of the system of electing state and federal legislators, and new libel laws more protective of criticism of public officials. The Burger Court continued this juridicalization by attempting, with somewhat less success, the enactment of national standards for prison conditions, as well as death penalty and abortion laws, while consolidating most of the Warren Court "advances" and cutting back on a few of them (see any American constitutional law case book, e.g., Fisher, 1990).

Supreme Courts and Politics

This juridicalization generated both political struggle and political awareness. The legitimacy of the US Supreme Court had suffered a major crisis in the 1930s but had survived, in part by tapping long built-up reserves of public support and in part by a timely shift in policy and personnel. In the 1950s the Court generated a powerful opposing coalition of Southern Democrats and Northern Republicans as it coupled desegregation decisions with decisions seemingly providing constitutional protection to Communist "subversives." The Court broke up this coalition by continuing its desegregation policies while retreating from its protection of leftists. After the crisis had subsided, the Court returned to partially rebuild protection for unpopular speakers. More and more interest groups were instructed by events to lobby courts as well as legislatures and bureaucracies. The general public learned that a significant consideration when voting for President was presidential choice of Supreme Court justices. Most notably in relation to the growth of crime and crime control as a public issue, and the Warren Court's multiplication of protection for those accused of crime, the Court had become a normal partisan issue in presidential elections. There has been growing public attention to and controversy over the advice and consent of the Senate to Supreme Court appointments. The great national controversy over the justices' abortion decisions has brought the Court to center stage politically, and has subjected it

to the single-issue politics and “divided government” (one major party controlling Congress, the other the presidency) that are central features of contemporary American politics.

Finally, the deep American ambivalence about racial policy also continues to bring the Court to the center of political life. Affirmative action is a major party issue of congressional/presidential politics. Judicially-ordered bussing and other coercive pupil assignment schemes are less a national political issue than they were a few years ago, but they remain very potent in local politics.

Moreover as the Burger and Rehnquist courts have proven less welcoming of rights initiatives than their predecessor, rights groups have shifted their litigation to the state supreme courts—many of which are, or were until very recently, controlled by liberals. State supreme courts, invoking state constitutions, may extend constitutional protection further than does the United States Supreme Court. In a number of states, radical changes in the funding of schools, and the provision of housing for the poor and minorities, as well as more limited initiatives on rights of accused and freedom of speech, have occurred through state court action when the federal courts have refused to act. A number of supreme courts in states whose constitutions and/or laws authorize the death penalty have fought long-term delaying actions against capital punishment verging on judicial lawlessness. In many American states judges are subject to popular election, or at least deselection. In at least one state, California, the voters have turned state supreme court justices out of office over the death penalty and other crime issues.

Institutional Remedies

So far, in dealing with constitutional judicial review, the law-declaring aspects of juridicalization have been central. Courts, however, have also become more and more active in public affairs as law implementers, typically of constitutional law itself created by courts. The desegregation decisions of the Supreme Court called for the dismantling of local dual school systems “with all deliberate speed.” In practice that meant separate lawsuits for hundreds of school districts filed in dozens of federal district courts scattered all over the South and later over the whole country (Peltason, 1961). Where violation of the equal protection clause was found, the district courts, in a further “remedy” stage of negotiation and/or litigation with and by the parties, often constructed elaborate, detailed, time-staged, long-term plans for desegregation. These plans often covered every aspect of school administration, from teacher assignment to curriculum and spending for equipment. They included such devices as voluntary and/or compelled bussing, “magnet” (specially up-graded) schools, altered school attendance boundaries, school closures, and new construction. The remedial court order typically remains in place indefinitely until desegregation is achieved. The parties, typically the local school board and a local NAACP chapter or other black or Hispanic group or groups, may keep coming back to court with requests for modification of the order as circumstances change. Many such initial orders have been followed by so much white flight from the district that there are fewer and fewer white students to integrate. American school districts pass through frequent budget crises. So all sorts of circumstances change often, suddenly and radically. The judicial ordering of implementation and modification of these plans falls under the “equitable remedies” power of federal courts, and so is almost unlimited by statute or even Supreme Court doctrine. It lies almost entirely at the discretion of federal district court judges who are appointed for life.

Thus a sort of judicial constitutional dictator has been in charge, often for years at a time, of fundamentally reshaping a basic, local public institution.

Here again school desegregation served as an instructional model for other political actions. Judicial “institutional remedies” have also been widely employed in employment discrimination suits either brought under the equal protection clause itself or under civil rights statutes. Such orders often involve the courts in continuous supervision of the hiring, promotion, assignment, testing, and evaluation practices of large public organizations such as police forces and fire departments. Occasionally they have even included court orders directing chief executives and legislatures to provide additional budget. Many courts that have issued such orders feel compelled to appoint “special masters” to administer them because the judge has neither the time, expertise, nor staff resources to participate in the detailed, continuous administration they require. Under the cruel and unusual punishment clause, courts have similarly involved themselves in prison administration, sometimes to the point of determining the water temperature of showers and the weekly rate of intake and release of prisoners. Cases involving racial discrimination in public housing also generate these kinds of institutional remedies (Cooper, 1988).

Such institutional remedies represent a very deep involvement of the courts in politics along a number of dimensions. Judges become active and continuous administrative decision-makers in major public affairs. They become enmeshed in the internal politics of large organizations where, like any other “top” executive, they must invent all sorts of carrots and sticks to overcome resistance and inertia among organizational subordinates. Without being electorally responsible, they make decisions with major budgetary and, therefore, tax consequences for local and state governments. And if they are to achieve the goals they themselves have defined, they must shape their policies not only in the light of the predicted behavior of the particular parties to the lawsuit, but also in the light of the behavior of large political institutions and masses of citizens. There is a lively debate over whether institutional remedies have been effective in achieving the large social reforms at which they have been directed. There is little doubt, however, that they have plunged the judges issuing them deeply into public affairs.

Administrative Judicial Review

In dealing with American juridicalization, it is natural to concentrate, as we have done so far, on constitutional judicial review, and thus on the US Supreme Court, and on the federal district courts carrying out Supreme Court constitutional mandates. There is, however, quite a different realm in which juridicalization has accelerated dramatically in the United States—that of judicial supervision of administrative action. Most of this supervision occurs as a matter of administrative rather than constitutional law. The governing law is the Administrative Procedures Act, and the host of procedural and review provisions in hundreds of federal statutes.

In the 1950s, federal courts almost invariably deferred to the “expertise” of federal administrative agencies. By the 1980s nearly every significant decision of a federal regulatory agency was litigated in the federal courts. And, while their batting averages varied over time, federal agencies had come to expend enormous efforts to defend themselves against adverse court review. As a result of judicial intervention, the whole behavior of federal agencies in making rules and regulations has

fundamentally changed. And the policy-making process in Washington has changed from the iron triangle of Congressional committee, interest groups, and administrative agency to the iron rectangle of those three plus the courts. American regulatory politics today is justly characterized as living in a culture of “adversarial legalism” (Kagan, 1991).

The vehicle for these changes has been a large body of new, judge-made administrative law generated by the Court of Appeals for the District of Columbia and the other federal courts of appeal, with only occasional intervention by the US Supreme Court, but with substantial, sporadic assistance from Congress.

In the modern regulatory, welfare, administrative state, administrative agencies wield enormous power, especially in the enactment of the myriad rules and regulations needed to supplement and implement statutes. In theory this administrative law-making is held democratically accountable through legislative oversight and the election of the chief executive, be it cabinet or president, which controls its administrative subordinates. A second mode of accountability is the law itself, or rather mechanisms to insure that the agencies obey the laws enacted by the legislature. A third mode is transparency, a set of devices for insuring that the citizenry may know how and why agencies reached the decisions they did. And finally, there is the general, substantive norm that the agencies must act reasonably rather than arbitrarily, capriciously, or abusively. In United States statutes authorizing supplementary rule-making by agencies, judicial review is almost always authorized to provide these supra-electoral controls. It is also provided by a general Administrative Procedures Act (APA).

In the 1940s and '50s, federal judges routinely assumed that the agencies had established the facts necessary to support their rules, and deferred to agency interpretations of the statutes that their rules were designed to implement. The language of the APA called for only the most rudimentary procedures for rule-making, did not require any substantial record of rule-making proceedings, and provided the most lenient standard of judicial review. Most factual and legal issues were left to the agencies, which could easily satisfy the few and pro forma procedural requirements. Any rule that they adopted that was not clearly insane passed judicial review muster. By the 1980s, with no changes in the language of the APA at all, although with much new language in the regulatory statutes of the '60s and '70s, courts demanded extremely elaborate agency procedures, including an exhaustive record to demonstrate that the agency had invited participation by all interested groups, had responded to every point raised by those groups, had given good reasons for every choice it made, had considered every possible issue, and had arrived at the best possible rule. Judges had declared that they would take a hard look at everything the agencies did, that they, not the agencies, were the final authority on statutory meaning, and that they were in “partnership” with the agencies in rule-making. Nearly every significant agency-made rule was challenged in court. And given the number the judges struck down, there was no doubt who the senior partner was. Agencies spent more and more time and resources during the rule-making process in insuring that rules, once enacted, would survive the inevitable litigation.

The result was an enormous increase in the transparency of government action and in public participation, and an enormous increase in the care that agencies took to get straight both the science and the law on which their rules depended. Because Congress had enacted a sweeping new health, safety, and environmental regulatory regime that required thousands of new rules, these great changes in

rule-making processes were especially significant. Yet judicial review not only improved the transparency, responsiveness, rationality, and law abidingness of agency rule-making, it also came to demand a rule-making process that was extremely slow, cumbersome, and uncertain. It took years to write a rule, and then often years more after the first and perhaps even the second and third version failed to survive review. The system often simply failed to provide the timely flow of rules needed by the new sweeping regulatory regime. Although part of this failure undoubtedly stemmed from anti-regulatory Republican forces that often controlled the White House even as Congress pushed new regulation, there was a widespread belief that hyperactive and super-perfectionist judicial review was also a major culprit.

The Supreme Court weighed in occasionally with opinions warning the Courts of Appeal not to simply substitute their policy judgments for those of the agencies, and not to demand impossible perfect procedures. On the whole, however, the Supreme Court accepted the new administrative law jurisprudence. Various means of avoiding the confrontational and litigation-oriented style of rule-making have been proposed and occasionally pursued, such as environmental mediation. There are also attempts to substitute market and other incentive methods for detailed command and control regulations. Such methods do not eliminate the need for rule-making but may work with fewer rules and a less continuous stream of them. Moreover, as reviewing courts have demanded more and more of agencies, the agencies have learned to armor themselves in thicker and more technically complex rule-making records, which more and more survive litigation. Thus, to a certain degree, super activist judicial review is self-limiting over time. Eventually judges receive records so large, running to thousands of pages, and so packed with technical data obviously beyond their capacity to comprehend, that they must return to deference to administrative judgment.

During the crucial periods of the '60s, '70s, and '80s, when major new legislation required massive new bodies of rules and when the agencies had not yet perfected their armor, the courts certainly became major participants in health, safety, and environmental policy and politics in the United States, as well as fundamentally reshaping both the teams and the rules of the regulatory game. Judicial policy-making may now be decreasing, in part because of agency self-protection and in part because of voluntary judicial withdrawal. The new rule-making regime, very transparent, highly participatory, laden with extraordinarily complete fact-finding and policy analyses, highly adversarial, highly litigation-oriented, and consequently extremely cumbersome and slow and excessively confrontational, is quite firmly in place. It is unlikely to change much, unless there is a new revolution in Washington politics. This new regime is in part a product of the new congressional regulatory statutes. They were replete with "technology forcing" and "agency forcing provisions," highly aspirational goals stated as legal rights and special procedural provisions. All of these measures encouraged very vigorous enforcement, as also did very vigorous interest group pressures on the agencies for more enforcement, and equally vigorous resistance on the part of the regulated. In part the new regime is the product of a public that wants the government to fix everything at the same time that it hates big government, thus generating regulatory and counter-regulatory waves at the same time, as well as conflict between Democratic statutes and Republican presidents. In large part, however, the current rule-making regime is a product of direct, self-initiated, and extremely self-confident judicial intervention in the regulatory process (Shapiro, 1988).

Litigation as Pluralist Politics

American political science literature quite early recognized that the pluralist political theory of interest groups gaining access to government decision-makers, in order to attain policy goals, applied to courts as well as to the rest of government. Litigation as lobbying is a long-established theme.

Taking the NAACP's long litigational campaign against segregation as a model, a number of sets of litigators have mounted campaigns designed to persuade the Supreme Court to employ its constitutional judicial review powers to achieve major policy changes refused by other segments of government. Often such campaigns were not actually mounted by cohesive interest groups employing lawyers, but rather by loose affiliations of lawyers seeking to transpose into constitutional rights interests that had not actually coalesced. The lawyers created the clients as often as the clients created the lawyers. The long litigational campaigns to get Supreme Court-made law protecting accused persons, improving prison conditions, and banning the death penalty involved such shadow clients. The abortion rights campaign, on the other hand, began with organized birth control interest groups and later was largely supported by feminist organizations. Legislative districting litigation was usually sponsored by whichever of the two major political parties was disadvantaged by the state electoral arrangements being challenged. Yet the role of organized interest groups in pushing juridicalization through constitutional judicial review should not be overstated. Many of the Court's major constitutional interventions were initiated by individual clients and/or individual lawyers.

Juridicalization by interest group is at its peak in administrative judicial review. There, a mutually supporting interaction exists between interest groups and courts. The courts have intervened decisively to require the agencies to afford exhaustive access to the regulation-making process for any group that wants to participate. The courts have also opened their own doors wide to interest group litigation against the agencies. The interest groups have litigated nearly every important administrative rule announced, and thus pushed the judges toward more and more intervention in agency policy-making. The impression is often left that it is largely "public interest" groups, such as environmental organizations, that have benefited from this mutual support arrangement. But business interests have also been major players. And the government agencies themselves sometimes use litigation as a vehicle to acquire amendments to their governing laws by judicial statutory interpretation that they cannot get out of Congress by requesting formal amendment.

All the players in the game of juridicalizing administrative regulation are likely to move freely among congressional, executive and judicial branches, constantly active in all three and content to enjoy success wherever they can find it. Juridicalization does not substitute judicial policy-making for legislative or administrative policy-making, or even provide judges with the last word in the policy process. It simply adds judges as another category in the broad and multifaceted array of policy-makers.

Justifications of Juridicalization

One way to look at juridicalization in the US then is as a sort of logical and pragmatic extension of American pluralist, interest-group, single-issue politics

from legislatures and executives on to courts. Courts are, after all, one of the three independent and equal branches of American government. Why shouldn't they be as pluralist as the other two? Growing out of the felt need to legitimate judicial review in a democratic state, another perspective is that courts intervene if and only if the electoral process experiences some massive failure in its normally self-correcting mechanisms. If racism among majority whites keeps blacks from voting or forming the coalitions with whites that would bring some political victories, then the electoral mechanism cannot fix itself. It cannot achieve fairness to blacks in the electoral process. Then the Supreme Court is justified in engaging in judicial intervention to increase black political capacities enough so that black interests can be represented in the normal electoral and representative political process. Legislators who owe their seats to malapportioned or gerrymandered electoral districts cannot be expected to vote themselves out of office by voting for new fair electoral districting. So courts may legitimately intervene to redraw district boundaries. Or it may be argued that certain widely held values or interests, such as freedom of speech, are too diffuse to be reflected in voting and so are never adequately represented in elected legislatures. Courts should protect those values. This "correcting the failures of democracy" rationale is the narrowest democratic justification for a rather narrow judicialization (Ely, 1980; Shapiro, 1966).

The broadest justification for the broadest judicialization is the assertion that the Constitution or the universal human rights tradition contains a set of certain and knowable rights and that judicial review is supposed to defend those rights from infringement by the majority. The judge is portrayed not as exercising policy discretion but simply as enforcing preexisting legal rights (Dworkin, 1977). This position is reoffered and rebutted in every generation and moves from the mouths of political conservatives to those of political liberals and back again, depending upon whose legislative will the Court is thwarting at any given moment.

Another justification rests on the special institutional capacity of courts. Granting that Congress and the president also are responsible for enforcing the Constitution, the Court is more capable of focusing on long-term constitutional values than are legislatures and executives pressed to meet immediate problems with immediate solutions (Perry, 1982). Moreover, the litigation process is one in which equal attention is paid to both parties no matter what the disparities in their political resources, and special respect is paid to systematic and responsive argument. Thus the litigation process provides a quality of policy deliberation unavailable elsewhere in government (Fiss, 1979). Finally, the judges are neither technical specialists nor program operators. So they bring a generalist or lay perspective to a policy-making process otherwise badly distorted by the narrowed perspectives of the various specialists who are the real authors of most legislation and regulation (Shapiro, 1968). Thus the courts are actually in a better position to recognize the real public interest, among the various special interests masquerading as the public interest, than are legislatures or executives (Sunstein, 1990). Indeed in a contemporary government it is the judge's mind that most closely mirrors that of the demos, as the rest of government is more and more fragmented into the various specializations needed to cope with an increasingly complex environment.

Ultimately this justification comes down to the proposition that judges should wield political authority because lawyers, or at least lawyers once they mount the bench, think more clearly and are more dedicated to the commonweal than the rest of us. This argument is probably more persuasive within the community of

scholars who write about law and the courts than in the more general community.

Perhaps the best argument for juridicalization is grounded in the virtues of redundancy. It is not really true that governing power can be divided between three great branches, one of which legislates and legislates only, one of which administers and administers only, and one of which judges and judges only. Segments of government can only check and balance one another if they share the same powers, not if they wield different ones. In all governments that divide powers, each branch legislates, administers, and judges. Thus the presidential veto power in the US is clearly a legislative power, as is the Supreme Court's constitutional veto. And the Court's "interpretations" of statutes or "findings" of law are inevitably and unavoidably a species of law-making, just as are the same activities when conducted by administrators. Ultimately all legislative judgments must be made the same way. Whether made by legislators, administrators, or judges, they always constitute a set of prudential guesses made under conditions of great uncertainty. The judge deciding whether a statute is constitutional or a rule lawful necessarily replays the same analysis of facts, values, policy alternatives, and predicted outcomes that was earlier undertaken by the statute and rule writers (Shapiro, 1968). If the legislative analysis has been done already, why should judges do it again? Perhaps because three heads are better than two. High levels of redundancy are a standard and sensible design response for systems that must handle high-risk, high-uncertainty, high-value situations (Landau, 1969). Judges may not be better than other governors, but they are different. Allowing them some of the power to govern gives us more governors of more sorts and more reiterations of crucial policy calculations. The case for some measured level of juridicalization ultimately may rest on nothing more. How much or how little juridicalization is best will depend upon a cost-benefit analysis of whatever level of redundancy is proposed. Americans appear to prefer high levels of redundancy.

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