

**Law, politics, and the creation of public policy: How the two can come together and create better public policy**

by

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## ABSTRACT

Public policy is so much more than just the passage of laws and legislation; public policy is the government. The creation of public policy is a very long and complicated process. Public policies that start in the Legislature have to go through a complex process of which many lawyers do not understand how the legislative process works. The Executive takes the law and refines it through executive agencies which then create rules and regulations of the public policy. The Executive agencies' process of creating public policies has led to a complex web of relevant rules and regulations that are necessary to create public policy. The law is fully formed under the Judicial Branch. As a result, courts wield significant power in determining how policy affects the public.

Political science studies public policy to see how the policies are created, and how different variables will influence the policies, and have developed elaborate theories on how public policy is made. Often these theories and the discussion that they raise are frequently detached from the real world implications of public policy. While a primary objective of legal education is to learn the fundamental nature of law; it seeks to identify the core elements of law and legal doctrines. Lawyers left in a position to be able to interpret the courts' decisions. The legal field can also give political science a different methodical approach on how policies and laws affect people.

There must be more cross-disciplinary communication so that there is an understanding of both areas to help the fields of study further evolve. It is inherent that law and politics are related. Unfortunately, the separation between the law and political science has prevented

communication between the two fields. Both law and politics create and influence public policy; they must work together so that there can be better public policies that affect the people.

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## AUDIENCE

The target audience for this thesis is the following:

Legal Field: Public Policy Attorneys, Legislative Law Attorneys, Administrative Law Attorneys, Law School administrators, Lobbyist

Political Science: Public Policy theorist, Public Administration theorist, Public Law, Political Science administrators, Political Law

## CHAPTER I

### INTRODUCTION: LAW, POLITICS AND THE CREATION OF PUBLIC POLICY

How are law, political science, and public policy linked? Is there an inherent interrelationship between these fields of study? These three fields are inherently linked even though they are very different. Law and politics cannot be separated. Law governs politics, and the law is the product of the political process. Politics is the product of negotiation, bargaining, persuasion, and ultimately majority preference, which is expressed through the ballot box. Judges and justices interpret and apply laws, and in doing so, they invariably shape and limit political and public policy. Despite this interrelationship, the fields of law and politics operate in different ways—they use different languages and are limited by different goals. When studying public policy, it is very difficult to separate the fields of law and politics and their influence on public policy. The literature of the two fields overlap. One may view the literature of the two fields at different levels of aggregation or with different points of emphasis to accomplish varying goals.

Each day there are thousands of new policy memos, new administrative rules, ordinances, bills, laws, court opinions, advisory documents and many other communications that are created by the government, and they are all public policies. These legally binding documents all have an impact on the public.

In the study of law, very much like in the field of political science, there are different branches of study. In particular, in the study of how public policy is created, one branch of law, Administrative Law, has direct impacts on the creation of public policy. This legal field of study

analyzes how the government creates policies through Congress, the Executive branch, and its agencies; which are often referred to as the “fourth branch of government.” These agencies are where a majority of public policy is created. Congress is a very cautious branch of government because it writes vaguely worded legislation to pass it, and keep voters happy.<sup>1</sup> This leaves their statutory language up to the interpretation of the Executive branch and the executive agencies underneath to fully decide how to carry out Congress’s intent of the law. Many such executive agency decisions are challenged through litigation. As a result, courts wield significant power in determining how policy affects the public. These challenges have resulted in many doctrines which were created to help better define how executive agencies should shape the public policies. These court decisions, Congressional bills, and executive agencies’ process of creating public policies has led to a complex web of relevant rules and regulations that are necessary to be able to create public policy.

James Wilson, an early American jurist, determined that law is the “great sinew of government,” and this “sinew” is the creation public policies for the public.<sup>2</sup> To make the “great sinew of government” stronger, there need to be communications between law and politics (and their respected academic fields); this communication will, in turn, lead to better public policies. In law school, the law is taught in a vacuum, where only the particular facts apply to the rule of law and the direct decisions of the court. Because the law is taught in a vacuum, the classroom and the courts use and interpret the language contained in law in a manner separated from context. These laws were political deals made between the members of the legislature. As a result, laws become politicized. In political science, there are complex theories of how the

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<sup>1</sup> See legislative section and the Non-delegation doctrine

<sup>2</sup> Wilson, J., Hall, K. L., & Hall, M. D. (2007). *Collected works of James Wilson*. Indianapolis, IN: Liberty Fund.

governmental policies are created. However, these theories are created without any regard to the prior existing law or the legal structures that are already in place to create the public policy.

Often these theories and the discussions that they raise are frequently detached from the real world implications of public policy, or they reduce people to numbers and then cross-reference these numeric values across space, time, and borders to become super-generalized.

## CHAPTER II

### DEFINITIONS

Definitions are needed because, political science and law, these fields do not have the same implicit definition of similar words and phrases. In political science, the law is often seen as just what is passed by the legislative body. The legislative law is a tiny part of what the entire body of law is, in contrast to what political scientist see. Public policy is a combination of both law and politics. In creating more collaboration between these two fields, there must be standard definitions of the terms that they share. In the world of law, definitions are often at the center point of contention in litigation, even down to common everyday words.<sup>3</sup> So, to remove any more confusion about the meaning of words and or definitions, it is an obligation for an attorney to spell out what the words are going to mean. For the most part, words unless explicitly defined either in this section or elsewhere, are to hold standard language definitions, and they should not be interpreted outside of their common definition. The definitions are from Black's Law Dictionary.<sup>4</sup>

**Law: 1.** The regime that orders human activities and relations through systematic application of the force of politically organized society, or through social pressure, backed by force, in such a society; the legal system. **2.** The aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action; esp., the body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them. **3.** The set of rules or principles dealing with a specific area of a legal system. **4.** The judicial and administrative process; legal action and proceedings. **5.** A statute<sup>5</sup>

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<sup>3</sup> See Nix v. Hedden, 149 U.S. 304, 13 S. Ct. 881 (1893), a case where the Supreme Court debated if a tomato is a fruit or a vegetable.

See also: President Clintons quote, "It depends on what the meaning of the word 'is' is." 145 Cong Rec S 1671

<sup>4</sup> Garner, B. A. (2014). Black's Law Dictionary, 10th Edition. USA: West.

<sup>5</sup> Id. at 1015

**Common law 1.** The body of law derived from judicial decisions, rather than from statutes or constitutions; [CASELAW](#) <federal common law>. “Historically, [the common law] is made quite differently from the Continental code. The code precedes judgments; the common law follows them. The code articulates in chapters, sections, and paragraphs the rules in accordance with which judgments are given. The common law on the other hand is inarticulate until it is expressed in a judgment. Where the code governs, it is the judge's duty to ascertain the law from the words which the code uses. Where the common law governs, the judge, in what is now the forgotten past, decided the case in accordance with morality and custom and later judges followed his decision. They did not do so by construing the words of his judgment. They looked for the reason which had made him decide the case the way he did, the *ratio decidendi* as it came to be called. Thus it was the principle of the case, not the words, which went into the common law. So historically the common law is much less fettering than a code.” Patrick Devlin, *The Judge* 177 (1979).<sup>6</sup>

- **federal common law** (1855) The body of decisional law derived from federal courts when adjudicating federal questions and other matters of federal concern, such as disputes between the states and foreign relations, but excluding all cases governed by state law. • An example is the nonstatutory law applying to interstate streams of commerce.<sup>7</sup>

- **general federal common law** (1890) *Hist.* In the period before [Erie v. Tompkins](#) (304 U.S. 64, 58 S.Ct. 817 (1938)), the judge-made law developed by federal courts in deciding disputes in diversity-of-citizenship cases. • Since *Erie*, a federal court has been bound to apply the substantive law of the state in which it sits. So even though there is a “federal common law,” there is no longer a *general* federal common law applicable to all disputes heard in federal court.

**2.** The body of law based on the English legal system, as distinct from a civil-law system; the general Anglo-American system of legal concepts, together with the techniques of applying them, that form the basis of the law in jurisdictions where the system applies (all states except Louisiana have the common law as their legal system)

- **American common law** (1824) **1.** The body of English law that was adopted as the law of the American colonies and supplemented with local enactments and judgments. **2.** The body of judge-made law that developed during and after the United States' colonial period, esp. since independence. **3.** General law common to a country as a whole, as opposed to special law that has only local application. **4.** The body of law deriving from law courts as opposed to those sitting in equity. The common law of England was one of the three main historical sources of English law. The other two were legislation and equity. The common law evolved from custom and was the body of law created by and administered by the king's courts. Equity developed to overcome the occasional rigidity and

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<sup>6</sup> Id. at 334

<sup>7</sup> Id. at 334

unfairness of the common law. Originally the king himself granted or denied petitions in equity; later the task fell to the chancellor, and later still to the Court of Chancery.<sup>8</sup>

**Statutory/ legislative law:** The body of law derived from statutes rather than from constitutions or judicial decisions. — Also termed *statute law*; *legislative law*; *ordinary law*.<sup>9</sup>

**Politics:** **1.** The science of the organization and administration of the state. **2.** The activity or profession of engaging in political affairs.<sup>10</sup>

**Public Policy:** **1.** The collective rules, principles, or approaches to problems that affect the commonwealth or (esp.) promote the general good; specif., principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society <against public policy>. • Courts sometimes use the term to justify their decisions, as when declaring a contract void because it is “contrary to public policy.” Also termed *policy of the law*. **2.** More narrowly, the principle that a person should not be allowed to do anything that would tend to injure the public at large.<sup>11</sup>

**Administrative law (1896)** **1.** The law governing the organization and operation of administrative agencies (including executive and independent agencies) and the relations of administrative agencies with the legislature, the executive, the judiciary, and the public. • Administrative law is divided into three parts: (1) the statutes endowing agencies with powers and establishing rules of substantive law relating to those powers; (2) the body of agency-made law, consisting of administrative rules, regulations, reports, or opinions containing findings of fact, and orders; and (3) the legal principles governing the acts of public agents when those acts conflict with private rights.<sup>12</sup>

**Administrative Procedure Act 1.** A federal statute establishing practices and procedures to be followed in rulemaking and adjudication. • The Act was designed to give citizens basic due-process protections such as the right to present evidence and to be heard by an independent hearing officer. **2.** A similar state statute. — Abbr. APA.<sup>13</sup>

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<sup>8</sup> Id. at 334

<sup>9</sup> Id. at 1638

<sup>10</sup> Id. at 1345

<sup>11</sup> Id. at 1426

<sup>12</sup> Id. at 53

<sup>13</sup> Id. at 54

## CHAPTER III

### ORIGINS OF LAW AND POLITICS

In the United States, our laws can be traced back to the English Common law. There are many tenets of English common law that are still applicable today, such as many of the tort doctrines. However, since 1789, the United States has operated under our current Constitution. The American Constitution is a short document, with fewer than 7,500 words. If it were to be typed out, it would be about 12 pages.<sup>14</sup> In that short document, the Founders separated the powers of the government. The Constitution grants legislative power to the Legislative Branch, the power to enforce laws to the Executive Branch, and the power to interpret laws to the Judicial Branch.<sup>15</sup> This separation leads to an inherent linkage between the branches of government, but each branch looks at the law very differently.

The Constitution states that “(a)ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”<sup>16</sup> The Constitution does not state how the Legislative Branch should create the law. In the end, the Legislative Branch sees the laws that they pass as their final product. A product that got hammered and beaten, so much, that it rarely looks the same as it did in the beginning. Politics is a process of negotiation, bargaining, persuasion, and ultimately majority preferences expressed through elections.<sup>17</sup>

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<sup>14</sup> Symposium on Silverstein's Law's Allure: Law's Allure in American Politics and Policy: What It Is, What It Is Not, and What It Might Yet Be, 35 Law & Soc. Inquiry 1077.

<sup>15</sup> U.S. Const. Art. I-III.

<sup>16</sup> U.S. Const. Art. I § 1

<sup>17</sup> Symposium on Silverstein's Law's Allure: Law's Allure in American Politics and Policy: What It Is, What It Is Not, and What It Might Yet Be, 35 Law & Soc. Inquiry 1077.

The executive takes legislation as it is written and refines it and passes it down, through agencies which create rules and regulations that will govern. The Judicial branch will look at the “newly minted” legislation differently than the Legislative Branch because the Legislative Branch will see the law as it is written in code and not take into consideration the politics used to pass it. The courts, when in a legal challenge if what the law means, will disregard the politics behind the law unless there was a prior case in the courts that would have changed the law.

As previously stated, the law is not created by the legislature in a vacuum. Law is first is created in the political documents, activities (political declarations, party programs, activist field work, etc.), as well as through legal acts (by adopting the constitution, laws, decrees, codes of rules, etc.).<sup>18</sup> In hammering out the details and the language, political trades happen. The political process is a long and complicated process, where many provisions of legislation changes, whether be it in a new section, different phrasing, or an entirely new bill through the amending process. All these changes and potential modifications create the legislative history of the bill, along with comments that are made during the floor debate and committee reports. A piece of legislation creates a lot of paperwork, and the judicial branch may look at the legislative history of a bill. This paper trail is the officially public record of the bill.<sup>19</sup> There is much more history of the bill than what is officially written on paper. There are many conversations in back hallways in the Capitol and over phones dealing with legislation. These conversations are where the legislative process truly takes shape, and the real politicking happens. The Courts do not take these records into account when deciding cases. While this is a necessity for the courts to

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<sup>18</sup> The Relationship between Law and Politics, 15 Ann. Surv. Int'l & Comp. L. 19

<sup>19</sup> It is required with the legislation to have all this paper work, the rules of the House of Representatives and the Senate, both require these papers and documentation on the legislation. This means that the majority of the actions that are made on the legislation will be recorded.

overlook portions of the history of law, the court needs to remember that laws are born out of a political process. Law and politics are inherently linked to creating public policy.

Law is fully formed under the watchful eye of the Judicial Branch.<sup>20</sup> The Judicial Branch has the fewest enumerated duties, established by Article III of the Constitution, and is the shortest governing section in the Constitution.<sup>21</sup> The principal powers and obligations are that “(t)he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”<sup>22</sup> The Court and founding fathers debated on what the duties of the Supreme Court were for a period. In *Marbury v. Madison*, the Supreme Court’s duties were finally fleshed out.<sup>23</sup>

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.<sup>24</sup>

This legal duty now applies to the nation’s courts. As politicians craft the legislation, they will need the blessing of constitutionality to justify their actions.<sup>25</sup> Both lawyers and politicians are familiar with courts’ willingness to strike down laws that intentionally harm a group of

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<sup>20</sup> THE RELATIONSHIP BETWEEN LAW AND POLITICS, 15 Ann. Surv. Int’l & Comp. L. 19

<sup>21</sup> U.S. Const. Art. I-III.

<sup>22</sup> U.S. Const. Art. III, § 1

<sup>23</sup> Madison, J., Hamilton, A., & Jay, J. (1987). *Federalist Papers*: 78. Harmondsworth: Penguin.

<sup>24</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)

<sup>25</sup> Whittington, K. E., Kelemen, R. D., & Caldeira, G. A. (2008). *The Oxford Handbook of Law and Politics*. "Reflections about Judicial Politics". Spaeth H,

people. As the saying goes, “Bad politics creates bad laws.”<sup>26</sup> At times, politicians, having passed harmful legislation, must be told that such legislation is discriminatory. “The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have discretion.”<sup>27</sup> The courts are a check on the Legislative branch on outdated laws.<sup>28</sup> When a law is outdated, courts must understand the politics of law and the politics that created the law. “Whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.”<sup>29</sup> These are what the roles of the courts should be, looking through the facts both behind the laws and in the particular case.

As argued in the Federalist Papers, the United States was to have a divided government. These divisions in the government’s branches and within the legislatures were intended to protect liberty and promote freedoms. In the Federalist Paper 78, Alexander Hamilton stated that that judicial branch was the branch that was there only for judgment and that in this sole power of review of the laws would not be able to overcome the powers that were given to the other two branches. In the words of Hamilton describing these separations, “that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.”<sup>30</sup> The Judiciary is the branch where statutes and legislators needed to make sure their reasoning is firm, because “where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared

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<sup>26</sup> This is especially true with strict scrutiny cases, where the Courts will look at the legislative intent and potentially disregard some of the legislative history that was used to create the legislation. If the Supreme Court in a strict scrutiny case believes that there was discriminatory intent, even the slightest, they could strike down the law

<sup>27</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>28</sup> Whittington, K. E., Kelemen, R. D., & Caldeira, G. A. (2008). *The Oxford Handbook of Law and Politics*. "Courts and the Politics of Partisan Coalitions" Gillman, H.

<sup>29</sup> Madison, J., Hamilton, A., & Jay, J. (1987). *Federalist Papers*: 78. Harmondsworth: Penguin.

<sup>30</sup> Madison, J., Hamilton, A., & Jay, J. (1987). *Federalist Papers*: 78. Harmondsworth: Penguin.

in the Constitution, the judges ought to be governed by the latter rather than the former.<sup>31</sup> They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental...”<sup>32</sup>

Aristotle said, “man is, by nature, a political animal.”<sup>33</sup> America is a nation of politics. National politics are as old as the nation itself. There will always be a political argument over legislation. The neutral courts have a significant role in balancing the augments of the two parties, and balance of power in the United States, in the form of court decisions about law politics and public policy. While the standard notion of the divided government is in a triangle, instead it needs to be reimagined as a “T” with the political branches at the top and the judicial branch being the balancing branch. “The courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.”<sup>34</sup> Although, the courts should stay out of the political process and should be a neutral party in the decision of cases. They should still understand that there are significant amounts of partisan and politics within the decisions about the legislation as well as within their rulings. Simply, the knowledge of politics and how they interact with the law is essential. When one branch overtakes the other and goes too far in divided politics, the court must rule and bring balance back to the process. Just because the courts should not use politics and political means within their decisions, however, it does not mean that they should ignore politics altogether.

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<sup>31</sup> *Id.*

<sup>32</sup> Interesting Federalist 78 is one of the most cited Federalist paper in court opinions.

[http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1001&context=fac\\_pm](http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1001&context=fac_pm)

<sup>33</sup> Aristotle, *Politics*. (n.d.). Retrieved April 11, 2016, from

<http://www.perseus.tufts.edu/hopper/text?doc=Perseus:abo:tlg,0086,035:1:1253a>

<sup>34</sup> Madison, J., Hamilton, A., & Jay, J. (1987). *Federalist Papers: 78*. Harmondsworth: Penguin.

In the Legislative branch where various interests, values, and points of view can be exchanged and discussed,<sup>35</sup> where the influence of politics on law is the strongest because politics gives law its driving force and substance.<sup>36</sup> It is in the very nature of our government and our society that there will be politics, especially divided politics. The law is never purely political because it will be judged in the Judiciary branch, which routinely restrict politically motivated actions of the legislative and executive branches.<sup>37</sup> Politics cannot exist without the law since the law forms it and keeps it within certain limits as set by the Courts.<sup>38</sup> As the fields of political science and law have developed over the past century and a half, this inherent link between political science and law is gone.<sup>39</sup> There needs to be a balance between the law and politics in their given fields. Politicians need to understand that, as they write laws, there is a great deal of process that goes into reviewing legislation. Lawyers and judges need to remember that laws that are passed are a political beast, and are crafted by partisan means.

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<sup>35</sup> Magnussen, A., & Banasiak, A. (2013). *Juridification: Disrupting the Relationship between Law and Politics?*. European Law Journal, 19(3), 325-339. doi:10.1111/eulj.12026

<sup>36</sup> The Relationship between Law and Politics, 15 Ann. Surv. Int'l & Comp. L. 19

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

## CHAPTER IV:

### HOW IS LAW MADE: THE LEGISLATIVE PROCESS

Both laws and politics are about governing the public, and the way that you govern is through public policies. However, the creation of public policies is a very complicated system. Any government documents that is to promote the general good of the nation passed by the legislature or interpreted by the courts that affect the citizens could be considered public policy. There are new public policies created every day. Countless public policies are read into the record, published in the annuals and reviews and then promptly forgotten. There are a few more that as they are debated them in the full eye of the public in the legislatures. These pieces of legislation that receive a significant amount of press are the public policy decisions that could have the most impact on people. The legislation is public policy that has been debated in the “open” to pass legislation, lots of legislative history made, and compromises made out of the public eye. To understand how public policy is created within the legislative bodies you have to realize how bills are passed through the system. In this following section, “legislation,” and “bill,” can be interchanged with the words “public policy.”

To make public policy, we have to make laws and to make laws we have to make legislation. Students of both political science and law have inevitably had a professor show School House Rock:

I'm just a bill.  
 Yes, I'm only a bill.  
 And I'm sitting here on Capitol Hill.  
 Well, it's a long, long journey  
 To the capital city.  
 It's a long, long wait  
 While I'm sitting in committee,  
 But I know I'll be a law someday  
 At least, I hope and pray that I will,  
 But today I am still just a bill.<sup>40</sup>

This is an incredibly simplistic representation of a very complicated process of how to create legislation, and thus how to create a law the creation of law is a massive give and take of political will and give and take on the legislators. However, the way in which bills are drafted, and legislation is approved is not as simple as School House Rock makes it seem. Bills and legislation depend on the political climate and the individual members of the legislature. In the political world, the greatest ideas can die in the legislature if the political climate is not right, or if there is not enough support in the chambers. The right people and the right attitudes have to be in the legislature for the legislation to be passed.

The creation of public policy is a constant give and take between both parties and with the party members; it is done in back hallway conversations or a bar over a beer with the framework of the public policy written on a napkin. This politicking means that a bill will change from its original version. In some people's eyes it will change for the better, and in other people's eyes, it will change for the worse. Though a relatively divided and fragmented

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<sup>40</sup> I'm Just a Bill (Schoolhouse Rock!). (n.d.). Retrieved March 21, 2016, from

<https://www.youtube.com/watch?v=tyeJ55o3EI0>

For those who don't remember ever seeing it: <https://www.youtube.com/watch?v=tyeJ55o3EI0>

I actually truly despise this song and all things that the video is, however it is a great message for students under 10. However, it is way too simplistic for professors in both College and Law school to play in front of their classes. In an aside the Bill that is in the School House Rock is actually a public policy bill.

governing structure also contributes to a fairly divided and fragmented sphere of politicking, which can lead to gridlock. That is the power of bills, to create a balanced rule of law that does not burden one group over the other. By not pleasing every legislator, the legislation has “irked” the right number of people and kept the balance within the law itself.

In law schools, some of the legal opinions that have segments of contested laws are read without a legislative history or legislative context. Granted, in some instances there will be a case that has a discussion of the legislative history,<sup>41</sup> but this is a limited synopsis of the full legal history of the legislation. Again, laws are not created in a vacuum. Laws are a reflection of their exact moment in the political landscape. The choice of words and phrasing in the legislation can, and often does, show this notion. Laws are shaped out of the politics of the day, not because they are “good” or “bad” laws but, because the language is what was able to be passed by both chambers and signed into law.<sup>42</sup>

Legislation should not be overly liberal or too conservative. In legislatures, it is a necessity to build bipartisan support to pass legislation. Broad bipartisanship contributes to generality and ambiguity in legislation, which generates ongoing litigation over the statutory language in both the adjudication and judicial processes.<sup>43</sup> Laws will be balanced because to get it through one chamber it has to be moderately written. This balance then acts as another check and balance in the government itself. Having a reasonable rule of law also has another advantage

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<sup>41</sup> *NFIB vs. Sibelius* is a perfect example of how and when the Supreme Court of the United States goes into the details of the legislative history and the legislative intent of a legislation, however, this was partial because of the challenge that was brought forth in the suit)

<sup>42</sup> Epp, C. (2009-09-02). Law as an Instrument of Social Reform. *Oxford Handbooks Online*. Retrieved 15 Mar. 2016, from <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199208425.001.0001/oxfordhb-9780199208425-e-34>.

<sup>43</sup> *Id.*

over the highly divisive law, it creates a minimum legal threshold where everyone is content, and there is a minimum threshold to achieve.

Politics and the creation of legislation and public policy is not a black box where politics is a mystery, and you shake the box and out pops public policy, nor is it a simple input/output methodology, where you input public opinion, and the output is new politics.<sup>44</sup> Politics is a complex interaction of people between people who disagree on creating public policy. This disagreement leads to a legislator trying to change the public policy. The changing of law and public policy is done through a long and complicated legislative process. Legislation that is brought before a Congressional or state legislative chamber is a paper form of the interaction in and between legislators trying to craft it.

Even at its most rudimentary level, the process of creating legislation is a very complicated process.<sup>45</sup> There are thousands of governmental bodies in the United States, each having different rules and regulations that govern how the legislation is created, this includes every state legislature and Congress as well.<sup>46</sup> There is a common first step in this long process: there has to be an idea for the legislation. The idea has to be eventually written in “legislative language.” Translating an idea into code language is a difficult process because code language is

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<sup>44</sup> As what some public policies theories would have you believe.

<sup>45</sup> Each one of these governmental units has different procedures on how it would adopt the legislation brought before it.

<sup>46</sup> The Federal government has the most case law and the clearest laws on how the public policy should be created. If analysis of the creation of public policy was to be done in the states, it would quickly become a patchwork of different laws and approaches on how public policy should be created.

Also according to the 2012 Census, the report found that in 2012 there were **89,055** official government units in the country. Official government units include federal, state, county, city, town, school district or special-purpose districts.

Newsroom Archive. (2012, August 30). Retrieved March 16, 2016, from <https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html>

not the vernacular of the day.<sup>47</sup> Translating an idea into code requires a specialist with the legislative services to write and draft the legislation along with the legislator to create the legislation. The written idea is now legislation ready to be introduced.<sup>48</sup>

Once the legislation is written and submitted,<sup>49</sup> it will be given a number, and considered officially introduced.<sup>50</sup><sup>51</sup> This number allows for the tracking of the legislation, easy distribution of the legislation to different members of the legislatures and all the interested parties. Once the bill has been officially introduced, the legislation is assigned to a committee. There may be a great deal of politicking and deal making to get the legislation assigned to the correct committee. It may seem logical that the topic of a piece legislation is fairly well set. However, legislation often has cross-jurisdiction within the different legislative committees. For example, if the bill has any revenue or taxing mechanisms contained within, then it goes to the Ways and Means Committee of the House of Representatives. The different political and personal makeups of the various committees' results in differing outcomes of legislation considered.<sup>52</sup> One of the biggest factors of where legislation will be placed is the preference of the committee members. Instead

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<sup>47</sup> "The activity of codification complicates the vocabulary of legislation. Codification is distinguished from law revisions because it always involves substantive change in the law and because it not only reworks the jurisdiction's statutory law but also puts into the statutes relevant rules of law derived for judicial precedent. A code is a systematic and comprehensive statement of all the principal rule of law in a particular field what statement is then adopted as an act of the legislature." Davies, J. (1986). *Legislative Law and Process in a Nutshell* (3rd ed.). St. Paul, MN: West. 212-213.

<sup>48</sup> See Chapter 3 in Davies, J. (1986). *Legislative Law and Process in a Nutshell* (3rd ed.). St. Paul, MN: West., Dove, R. B. Enactment of a Law. Retrieved March 16, 2016, from <http://thomas.loc.gov/home/enactment/enactlaw.pdf>

Sullivan, J. V. (2007, July 24). HOW OUR LAWS ARE MADE. Retrieved March 16, 2016, from <https://www.gpo.gov/fdsys/pkg/CDOC-110hdoc49/pdf/CDOC-110hdoc49.pdf>

<sup>49</sup> See Chapter 6 in Davies, J. (1986). *Legislative Law and Process in a Nutshell* (3rd ed.). St. Paul, MN: West.,

<sup>50</sup> See Chapter 3 in Davies, J. (1986). *Legislative Law and Process in a Nutshell* (3rd ed.). St. Paul, MN: West., Dove, R. B. Enactment of a Law. Retrieved March 16, 2016, from <http://thomas.loc.gov/home/enactment/enactlaw.pdf>

Sullivan, J. V. (2007, July 24). HOW OUR LAWS ARE MADE. Retrieved March 16, 2016, from <https://www.gpo.gov/fdsys/pkg/CDOC-110hdoc49/pdf/CDOC-110hdoc49.pdf> *Id.*

<sup>51</sup> Depending on the type of bill, in Congress, revenue/taxation bills can only start in the House of Representatives.

<sup>52</sup> *Id.*

of getting pigeon-holed, the legislation may become a pet project of the committee chairperson.<sup>53</sup> All these factors are important to the legislation, and its survival.

Once assigned to a committee, the committee process takes a great deal of time.<sup>54</sup> The committee chairperson must then decide if the committee will consider the legislation. Again, more politicking occurs at this stage of the legislative process, to determine if the legislation will be considered by the full committee, and assigned to a subcommittee. At this point, the chairperson has a great deal of power over what legislation will be heard because he or she can easily not assign the bill to a subcommittee.<sup>55</sup> If the chairperson does not assign the bill to a subcommittee, there are some mechanisms to get the bill out to the entire committee, but these are very difficult to do.<sup>56</sup> Subcommittees are different in Congress, subcommittees are on a semi-permanent basis, unlike in some states where subcommittees are on an ad hoc basis.<sup>57</sup> If the subcommittee is on an ad hoc basis, the chairperson will assign it to a member of the committee for further consideration, and there will be a great deal of politicking for who is and who is not on the subcommittee.<sup>58</sup> The subcommittee is where in the process the most people can comment on the legislation.<sup>59</sup> The subcommittee solicits opinions on the legislation from the people who are affected by the bill, and the common citizens can voice their thoughts on the legislation. While in subcommittee some legislators, lobbyists, and citizens can change the potential legislation the most, by making their comments be heard about the legislation, and offering their support or dissent on the proposed bill.<sup>60</sup> The subcommittee can call for further investigation on

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> If the state legislature has a subcommittee system.

<sup>58</sup> This is not an option in Congress as subcommittees are predetermined.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

the legislation, and this may lead to hearings and further investigation concerning the bill. The subcommittee is the vehicle for the process of fully vetting the legislation. In the end, if the subcommittee does vote for passage of the legislation, it can move on to the full committee.<sup>61</sup>

In the full committee, the entire process starts over again. The committee can again, hold hearings and solicitation of more public opinion on the legislation.<sup>62, 63</sup> This means that legislation is subject to another round of modifications and amendments, and input from lobbyists, citizens and the legislators themselves.<sup>64</sup> If the legislation does not get pigeonholed in the process by the chairperson, it can come up for full consideration in front of the committee. The committee then votes on the passage of the legislation, and during the committee debating of the bill, there are opportunities to amend the legislation.<sup>65</sup>

If the legislation passes the committee, it then goes back to the chamber floor. There the legislation can go down a couple of paths; it can be reassigned to a different committee, (such as what is the standard procedure for apportionment bills, and bills that have concurring jurisdiction) and the legislation goes through the entire process again, or it can be placed on the debate calendar and brought up for consideration on the floor.<sup>66</sup> However, even if the bill is placed on the debate calendar, it does not mean that the full chamber will debate it. The Majority leader in the Senate or the Speaker of the House has the power to kill legislation. Within the background of all these committee meetings, there are clocks “ticking” for the passage of the

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> In the *Enactment of a Law* and *How Our Laws are Made*, it was quite interesting to read the committee process because in those specific sections it was committee or subcommittee. This means that the procedures are the same for both sub and regular committees.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* There are also a number of Calendars. For example the Senate only has two calendars, while the House has four different calendars that each dictate different schedules.

legislation.<sup>67</sup> In some state legislatures, these clocks are the “funnel deadlines” that will automatically kill bills if there has been no action on the legislation.<sup>68</sup> At the national level, legislation that Congress has not passed will “die” if the next legislative session follows an election year. Leaving legislation on the debate calendar and not brought up for debate is a convenient way to kill legislation.<sup>69</sup>

If the bill has survived all these steps and is called-up for floor debate, it can all still be disrupted. This disruption of the legislation is because once on the floor, the legislation can still be amended, pulled from the floor, and also killed on the floor with a “down vote.” The chamber floor is where the bill gets the most media and political coverage, because of the debate that happens on the legislation.<sup>70</sup> On the floor, legislators have to vote “yes” or “no” (or abstain from voting, which is allowed in some state legislatures) on the legislation.<sup>71</sup> This is where the majority of the legislative history is created by legislators debating the bill, and flushing out the details of the legislation from the “back and forth” of the debate.<sup>72</sup> These details which are created by the floor debate, are often what the courts look to this record as their legislative history of the legislation that is brought before them.<sup>73</sup> This can be a very exciting time to watch the legislators debate the bill, a true opportunity for a bill to become fully flushed out and see the

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* Though there are ways to force bills from the calendar onto the floor, these are hard to do but possible.

<sup>70</sup> *Id.*

<sup>71</sup> In an aside, the U.S. Senate has the powerful filibuster. This is when a Senator will try to kill a bill by talking it to death. A filibuster can be ended if there is a cloture vote with a 2/3’s majority.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

politicking at work. In the end, it comes down to a majority vote, and the legislation needs to have a majority (or a constitutional majority in some state legislatures) to pass.<sup>7475</sup>

If a chamber passes the legislation, it then moves to the other chamber for consideration.<sup>76</sup> This is where the entire process starts over again, and the bill will be assigned to a committee and work its way through the process again.<sup>77</sup> Throughout the legislative process, the legislation is often amended as passed by the opposite chamber, and if the leadership wants the bill to pass the legislation can go to a conference committee where the members from the two chambers iron out any differences between their two bills.<sup>78</sup>

### Public policy after the vote

Writing purposely vague legislation is a common theme of this thesis. Out of this vagueness, the Courts have created a framework for both Congress and the agencies to create the public policies. This framework is quite extensive and allows for the public to make comments on public policies that will affect them. In *J.W. Hampton, Jr. & Co. v. United States*<sup>79</sup> the Supreme Court stated created the non-delegation doctrine states that Congress can't detail every facet and fact of federal activity, but that they must lay down an intelligible principle for the administrative agencies to follow. These intelligible principles should establish standards; need to be published to inform the public, and ensure that there is no corruption.<sup>80</sup> More importantly in *Whitman v. American Trucking Associations, Inc.*<sup>81</sup> the Supreme Court of the United States

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<sup>74</sup> *Id.*

<sup>75</sup> While in US Senate, it does take a simple majority to pass the legislation from the floor, due to the high partisanship, many pieces of legislation will not be brought to the floor for a vote unless there is 60 votes for the passage of the legislation. This is to help pass the legislation passed the filibuster.

<sup>76</sup> *Id.* Except for Nebraska, which has a unicameral legislature.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 48 S.Ct. 348 (1928)

<sup>80</sup> *Sun Ray Drive-In Dairy, Inc. v. Or. Liquor Control Com.*, 16 Or. App. 63, 517 P.2d 289 (1973)

<sup>81</sup> *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 121 S.Ct. 903 (2001)

stated that the intelligible principle must have banks of the canal in the way of assessing whether the agency followed the legislative mandate. Congress must give the agencies a direction when trying to decide what the policies will be.<sup>82</sup>

Still another way of understanding a bill's history is the use of a Presidential signing statement. This is a document that states why the legislation was signed or vetoed, and this statement starts the process of how the executive will interpret the legislation.<sup>83</sup> However, the signing statement is not required and is not a part of every piece of legislation that is passed.<sup>84</sup> It is just an extra document of the legislative history that may be included in the history of the bill and can help direct the creation of the public policy.<sup>85</sup>

As soon as the executive agencies receive the public policy, Congress cannot directly dictate how the administration will interpret and then would carry out the legislation and the creation of the public policy.<sup>86</sup> This means that once Congress has passed a piece of legislation, it is up to the administration to fully say what the public policy is.<sup>87</sup>

The legislative processes can lead to many public records being produced and to show the legislative history of a bill in Congress.<sup>88</sup> A bill can create hundreds of pages of official history and can help shape the framing of the legislation.<sup>89</sup> These documents can show more about the bill than the actual wording of the legislation, and that the Court needs to look more rigorously at

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<sup>82</sup> Until the policies are challenged in the Courts. Then the court will have a role in shaping how the public policy would be made.

<sup>83</sup> *Presidential Signing Statements*. Library of Congress, (2015, September 09). Retrieved March 17, 2016, from <https://www.loc.gov/law/help/statements.php>

<sup>84</sup> *Id.*

<sup>85</sup> With the signing statements many of these it is to voice the Presidents disapproval of certain sections of the bill that they believe would be unconstitutional.

<sup>86</sup> *Bowsher v. Synar*, 475 U.S. 1009, 106 S.Ct. 1181 (1986)

<sup>87</sup> If Congress did have the power to dictate the administrative actions in carrying out the public policy, it has effectively created a legislative veto as laid out in *Bowsher v. Synar* (1986).

<sup>88</sup> This is especially true in Congress where the committee meetings are entirely document. Often times, in states, the notes in the legislative history are just minutes, and recording of people who spoke.

<sup>89</sup> These documents are the only official documents. If the unofficial legislative history was also to be documented there would be a great deal more information on how the legislation was shaped.

the legislative history of legislation. The legislative history of bills needs to be discussed more during the teaching process,<sup>90</sup> because it gives the context of the written law. Where extensive legislative history exists, it can be used in academia to demonstrate that there is more than one way to understand public policies.

Even after a bill become law, there still is a long process before the law can have the full force of the government and public policy, especially if the legislation was written vaguely.<sup>91</sup> After the executive signs the legislation into law, the administration will need to assign it to a particular agency for interpretation and implementation.<sup>92</sup> The legislation will be stripped down to the “bare bones” and have the agencies interpret what the Legislature wanted with the public policy.<sup>93</sup> The legislature’s intentional vagueness not only allows for the ease of passage but allows their agencies, who have specific knowledge of their area of expertise to flush fully out the details of the law that otherwise are not there.<sup>94</sup>

At the Federal level, administrative rulemaking is defined as when agencies are allowed to make the rules for public policy. There are two types of rulemaking; formal rulemaking, and informal rulemaking.

Formal rulemaking happens at a public hearing. This type of rulemaking rarely happens today because it is too cumbersome and takes a great deal of time. Various parties must be given

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<sup>90</sup> Both in law schools and in political science departments.

<sup>91</sup> See: Symposium on Silverstein's Law's Allure: Law's Allure in American Politics and Policy: What It Is, What It Is Not, and What It Might Yet Be, 35 Law & Soc. Inquiry 1077.

But see: ARTICLE: Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-Chevron Era?, 13 J. L. & Politics 105

<sup>92</sup> *Id.*

Davies, J. (1986). *Legislative Law and Process in a Nutshell* (3rd ed.). St. Paul, MN: West. 295-300

See: Whittington, K. E., Kelemen, R. D., & Caldeira, G. A. (2008). *The Oxford Handbook of Law and Politics. Law and Regulation* Oxford: Oxford University Press. 576-581

<sup>93</sup> Whittington, K. E., Kelemen, R. D., & Caldeira, G. A. (2008). *The Oxford Handbook of Law and Politics. Law and Regulation* Oxford: Oxford University Press. 576-581

<sup>94</sup> *Id.* @ 583-586

time to have their comment be heard.<sup>95</sup> This is because the formal rulemaking process takes simply too long for the rules to be made. Once the rulemaking process starts, it is not possible to stop, make changes, and or corrections during the process.<sup>96</sup>

The second type of rulemaking is Informal rulemaking. The Administrative Procedure Act § 553 specifies that there must be a Notice of Proposed Rulemaking.<sup>97</sup> This is a statement which includes time, place, and nature of the proceedings; reference to legal authority (the bill that the executive signed without major Congressional direction) under which rules are proposed; and the terms or substance of proposed rules or description of subjects and issues involved.<sup>98</sup> The rulemaking process leads agencies to look to experts in the field and areas that will be impacted by the new rules to help create these new public policies that will eventually govern them. The informal rulemaking process does allow the agencies to do advanced notice of proposed rulemaking.<sup>99</sup> This is allowed if the agency needs to know more before issuing a proposed rule. The agencies can exactly do what they should do in gathering the most information that they can before a creation of rules that will dictate the legislation.<sup>100</sup> These “comment periods” give people the opportunity to participate in the rulemaking process through submission of written data, view or arguments with or without opportunity for oral presentations.<sup>101</sup> This form of rulemaking allows for the greatest participation in the creation of the rules and regulations that come out of the legislature’s passage of vague bills.

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<sup>95</sup> Whittington, K. E., Kelemen, R. D., & Caldeira, G. A. (2008). *The Oxford Handbook of Law and Politics. Law and Regulation* Oxford: Oxford University Press.

Davies, J. (1986). *Legislative Law and Process in a Nutshell* (3rd ed.). St. Paul, MN: West. 295-300

<sup>96</sup> Whittington, K. E., Kelemen, R. D., & Caldeira, G. A. (2008). *The Oxford Handbook of Law and Politics. Law and Regulation* Oxford: Oxford University Press.

Davies, J. (1986). *Legislative Law and Process in a Nutshell* (3rd ed.). St. Paul, MN: West. 295-300

<sup>97</sup> 5 USCS § 553

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

In the end, the issuance of final rules must be published in the Federal Register not less than 30 days before the effective date. The rules must have a preamble explaining the rules, and information from the comment period. These documents will be codified yearly in the Code of Federal Regulations (CFR). This leads the agencies to adopt a concise general statement of basis and purpose of the rules and regulations. This entire process of the rulemaking creates, even more, documents about the legislation and the final rulemaking process.

In all, this is a prudent way to create the rules and regulations that are created by the long and complicated legislative process.<sup>102</sup> However, the Courts do not want to deal with the substance of rules and regulations. Instead, the Courts would rather focus on the procedure followed to get there. The Courts believe that the procedure is followed properly, the substance of the laws and regulations will be accurate.<sup>103</sup> This is a flawed belief because there are many opportunities for corruption within the legislation and rulemaking process.<sup>104</sup> Simply following the correct producers does not mean that there will be the proper laws and regulations that govern our society.

The creation of public policy is a long and complicated process from a simple idea by a legislator to the publication of written law. This lengthy process means that there are many

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<sup>102</sup> If taken in the whole there is a great deal of discussion on the creation of law both praising and discouraging different parts of the entire process. Unfortunately both political science and the legal fields have yet (possibly little motivation) to reform the way that laws are written and the legal history is taken down. See Davies, J. (1986). *Legislative Law and Process in a Nutshell* (3rd ed.). St. Paul, MN: West. 316-322  
Also see ARTICLE: Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-Chevron Era?, 13 J. L. & Politics 105.

While I do not fully agree with the two articles above, especially with the Post- Chevron article, they do point out exactly what I am trying to say about the two fields, if law training incorporated more political science into their training, then there might not be the abuse as the articles stated.

<sup>103</sup> *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984)

<sup>104</sup> See: Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-Chevron Era?, 13 J. L. & Politics 105. The legislative history has allowed minority factions, and specific interest groups to achieve legislative victories by crafty politicking of the legislative history. These “victories” could not have succeeded if they had to pass their own legislation.

legislative and administrative steps where a person or group could impact a law and its rules once implemented. There are many problems that can arise in the process. These problems could impede legislation from their implementation, or leave legislation from having different results than what the legislators were intending. There is also a good chance for the legislation and its rules to be brought before the courts. Additionally, people who believe that they were harmed by the legislation, will bring these laws before the Court. They will argue that there were violations in the procedural process in the creation of the rules and regulation of the law. These suits often slow and may halt the full implementation of the legislation and the new public policies that they create.<sup>105</sup>

This is a very long time for the rules, regulations, and the full implementation of the laws to have an effect on the daily lives of people. The legislative process is not an easy process to work through. There are many ways and process that can corrupt the original intent of the law. Whether it be the committee processes where amendments are attached to legislation; or on the floor; where poison pill amendments can be attached to the legislation. More drastically the bill can be left on the debate calendar and never be brought up. The executive branch can change many parts of the legislation via a signing statement and the rulemaking process. What seems like a simple process of passing a bill, quickly becomes a complicated and lengthy endeavor where there are many actors who all have some say in the passage of legislation.

In the grand scheme of all the laws, many laws are not passed by a legislative body. These are the judge made law; a law that has been evolving out of the common core of legal standards and beliefs for hundreds of years. Common law is a law that comes out of judicial

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<sup>105</sup> Whittington, K. E., Kelemen, R. D., & Caldeira, G. A. (2008). *The Oxford Handbook of Law and Politics. Law and Regulation* Oxford: Oxford University Press. 576-581  
Even though there are thousands of suits filled each year, many of them settle out of court.

decisions that help clarify the ambiguity that often arises out of the legislated law.<sup>106</sup> Common law does lots of work because it helps shape and mold legislation and allows statutory ambiguity to be more reflective of the current state of the nation and of the body of the law itself.

Historically, [the common law] is made quite differently from the Continental code. The code precedes judgments; the common law follows them. The code articulates in chapters, sections, and paragraphs the rules in accordance with which judgments are given. The common law on the other hand is inarticulate until it is expressed in a judgment. Where the code governs, it is the judge's duty to ascertain the law from the words which the code uses. Where the common law governs, the judge, in what is now the forgotten past, decided the case in accordance with morality and custom and later judges followed his decision. They did not do so by construing the words of his judgment. They looked for the reason which had made him decide the case the way he did, the *ratio decidendi* as it came to be called. Thus it was the principle of the case, not the words, which went into the common law. So historically the common law is much less fettering than a code. Patrick Devlin, *The Judge*<sup>107</sup>

Even if common law was not legislated, people could still influence common law because it is a body of decisional law derived from the courts and the suits that are brought before the court. If a potential litigant does not like how the law has been drafted or implemented, and he has to stand, then he may consider bringing suit to challenge the specifics of the law.<sup>108</sup> The recent cases in which the Supreme Court considered the Affordable Care Act and gay marriage are cases in which the Supreme Court acted as a sober second thought on legislation.<sup>109</sup> These suits were brought by people who were being harmed by the law and were not able to get the laws changed. However, since *Erie Railroad v. Tomkins*, federal courts have been bound to apply the substantive law of the state in which they sit. So even though there is a “federal common

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<sup>106</sup> See: Common Law definition in the definition section.

<sup>107</sup> Devlin, P. (1979). *The Judge*. Oxford: Oxford University Press. 177

<sup>108</sup> See: *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009). These line of cases means that they must state a plausible claim for relief can be sought.

<sup>109</sup> H.F. Stone, “Common law In the United States,” 50 Harvard Law Review 4, 25 (1936)

law,” there is no longer a *general* federal common law applicable to all disputes heard in federal court.<sup>110,111,112</sup>

Common law is still the law. Even though it is more malleable than legislative law, it is critical. Common law acts as the filler points of the statutory law and offers more interpretations of the law than anything else. “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”<sup>113</sup> It is the law that is for the people and created by the people when they bring suits challenging the statutory laws. Even though it is not necessarily a democratically passed law, it is the law of the citizens and has a crucial part of our legal system. Common law is the law that evolves the most rapidly to reflect what the people are wanting and needing within the law.

The creation of law is a long and complicated process. It can take years for laws that were originally an idea to become productive and have an impact on the people. The legislative process creates copious amounts of documentation on what the law is supposed to be and the language considerations that were taken into account. So when lawyers, judges and justices look at legislation, they should look at the entire process of the law. There is so much information that is created by the legislative process. The law is inherently created out of politics, but when the

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<sup>110</sup> Erie Railroad Co. v. Tompkins, 304 U.S.64 (1938)

<sup>111</sup> H.F. Stone, “Common law In the United States,” 50 Harvard Law Review 4, 25 (1936) @ 334.

<sup>112</sup> “Litigation can serve as a powerful battering ram that can break through profound institutional barriers (such as a Senate filibuster) or profound political barriers (such as majoritarian prejudice against discrete and insular minorities).”

Symposium on Silverstein's Law's Allure: Law's Allure in American Politics and Policy: What It Is, What It Is Not, and What It Might Yet Be, 35 Law & Soc. Inquiry 1077, 1092

<sup>113</sup> Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)

courts do not adequately consider the language and the paper trails that were created in the public record and the legal field there is a problem.

Experts tend to specialize in either politics or law. Rarely both. But if law and politics are inherently linked, why is there not more cross-communication between these two fields? There needs to be more communication between both of these areas. As both the courts have ruled on relevant legislation, they are going deeper into the political aspects of the law. This is demonstrated in the *NFIB v. Sebelius*, where the Supreme Court spent lots of discussion on what the meaning and purpose of the legislation was supposed to be.<sup>114</sup> The Judiciary branch is expected to be the sober second thought on legislation.<sup>115</sup> They need to be this sober second thought because the underlying divisions that had made early U.S. politics so divided remained, reappearing or popping up in new forms.<sup>116</sup>

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<sup>114</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012)

<sup>115</sup> H.F. Stone, "Common law In the United States," 50 Harvard Law Review 4, 25 (1936)

<sup>116</sup> THE SUPREME COURT 2000 TERM: FOREWORD: WE THE COURT, 115 Harv. L. Rev. 4, 12

## CHAPTER V

### CREATION OF PUBLIC POLICY THEORIES IN LAW AND POLITICAL SCIENCE

In both law and politics, both must try to pursue the answers to the questions that are posed in our nation. Political science studies public policy to see how the policies are created, and how different variables will influence the policies. They have created many different theories that help explain how laws and public policies are created. The field of law, studies how public policy is created and processed through the courts and the administrations. Instead of looking at different public policy theories, the courts turn to previous rulings and various laws that have been passed by the government to see how public policy should be made. The process of studying both the creation of law and the opinions of the courts can be both “messy” and complicated. Otto Von Bismarck is credited with saying, “Laws are like sausages, it is better not to see them being made.”<sup>117</sup> However, this should not be the case. Law and public policy should be something that everyone can easily see and understand. Both fields of political science and law, have said, “We are going to look at policy making in only this way,” and this has created a disconnection of the two fields, because when there is the lack of communication and a disengagement between law and politics leads to the creation of “sausage.”

So what does this mean for the fields as a whole? The answer is that they need to communicate with each other, and have a cross-disciplinary exchange. Law and public policies are not created in a vacuum, (which has become a common theme in this paper) nor are they a mere byproduct of legislators passing a detailed law. Accordingly, legal scholars need to

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<sup>117</sup> This quote is attributed to Otto von Bismarck.

understand that there are politics that are involved with the creation of the laws and policies. The political scientist needs to know that there is the previous case law that has stated how policy should be created, and court rulings that affect how the policies and laws are crafted.<sup>118</sup> If the two fields were able to come together and better understand each other, then the thorough studies and different laws will be better, and they will have a greater impact on the people of the nation.

So what are public policy theories and why do we have them? The field of political science has attempted to create and understand the process of establishing law and how the people themselves influence the politics. These policy theories are created to explain better how and the difference between the policy developments. Public policy theories are the decisions of a government's authority; these include the commonly known rules that structure public service.<sup>119</sup> For the government to govern the people, the government needs to create different policies. Accordingly, the government has created many various agencies to help administer their specific areas, and these various agencies then construct these policies that they will eventually enforce.<sup>120</sup> Public policy and these theories all take in different areas of perception of the creation of public policy, and if combined, offer a better and more comprehensive view of how public comments and influence are used to create public policy. However, in all these theories, they all lack the substance of the law, and how the courts have interpreted legislation that has passed by Congress which creates public policy.<sup>121</sup>

Political scientists have created many different theories on how public policy is made without looking at the law to see how the courts and the various agencies will create public

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<sup>118</sup> See The Creation of legislation section of this Thesis.

<sup>119</sup> Garner, B. A. (2014). Black's Law Dictionary, 10th Edition. USA: West., 1345

<sup>120</sup> A-Z Index of U.S. Government Departments and Agencies. (n.d.). Retrieved February 16, 2016, from <https://www.usa.gov/federal-agencies>.

<sup>121</sup> See Legislation section of this thesis.

policy, and how the Administrative law affects public policy. One such theory, the Policy Feedback Theory, suggests that policy restructures subsequent political processes and that feedback from the public ends up reshaping discussions on what policies should be.<sup>122</sup> To put it simply, new policies that are created end up creating a new politics from their interactions with the people who are affected by the policies. Out of these new political discussions, newer policies are then designed to reflect these new politics. This feedback leads to new and better policies and better studies on the effects of the law and order within the population. This policy theory tries to create an open discussion of the policies and then these debates can end up snowballing into the change that the government wants with the policies.<sup>123</sup>

The Policy Feedback Theory requires a public engaged in the law and policies created by the government. The citizenry component of the theory of Policy Feedback is quite important. The citizens must be truly engaged with the government, and that government also is willing to listen to the citizens of the nation. An additional requirement that must be taken into account with the Policy Feedback theory is that the power of groups can potentially influence the policy to one way or the other.<sup>124</sup> However, the Policy Feedback theory has some drawbacks; primarily it is a tough topic to study fully in its broadest terms. More times than not, these studies are based on small case studies and not an overall review of the process. This means that the theory has a limited data pool.<sup>125</sup>

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<sup>122</sup> Garner, B. A. (2014). Black's Law Dictionary, 10th Edition. USA: West., 1345

<sup>123</sup> Mettler, S., & Sorelle, M. (2014). Policy Feedback Theory. In *Theories of the policy process* (3rd ed., pp. 151-181). Boulder, CO: Westview Press.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

The Advocacy Coalition Framework is similar to the Policy Feedback theory, because the processes and stages the theory backfills upon itself.<sup>126</sup> The Advocacy Coalition Framework came out of two professors working on the same problem, but coming from very different viewpoints. Out of this, they created the original framework of the Advocacy Coalition Framework.<sup>127</sup> This theory already has many assumptions built into the theory model. These assumptions are there to help build in the different factors that all the public policy theories must incorporate.<sup>128</sup> The beauty of the Advocacy Coalition Framework is that it is a very flexible approach for political scientist and public policy theorist.<sup>129</sup> It allows for short and long term considerations and builds on the natural political process within the policy subsystems.<sup>130</sup> The Advocacy Coalition Framework, however, does not fully enclose the administration system, because it is hard for the original feedback to grow. Once there is a decision, then it only goes back to the short term phase, and does not re-evaluate the entire system as a whole again.<sup>131</sup>

The Narrative Policy Framework is a public policy theory that explains the differences that occur within the creation of public policies.<sup>132</sup> The strengths of this public policy theory can be analyzed at different levels; everything from the local level all the way to the global level. This means that the theory can adjust itself for the various jurisdictions without changing the entire theory.<sup>133</sup> Unlike the other theories discussed, the Narrative Policy Framework has

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<sup>126</sup> Mettler, S., & Sorelle, M. (2014). Policy Feedback Theory. In *Theories of the policy process* (3rd ed., pp. 151-181). Boulder, CO: Westview Press.

<sup>127</sup> Jenkins-Smith, H., Nohrstedt, D., Weibler, C., & Sabatier, P., (2014). The Advocacy Coalition Framework: Foundations Evolution, and Ongoing Research. In *Theories of the policy process* (3rd ed., pp. 183-223). Boulder, CO: Westview Press.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> McBeth, M., Jones, M., & Shanahan, E., (2014). The Narrative Policy Framework: Foundations Evolution, and Ongoing Research. In *Theories of the policy process* (3rd ed., pp. 225-266). Boulder, CO: Westview Press.

<sup>133</sup> *Id.*

constraints already built into the theory.<sup>134</sup> The Narrative Policy Framework takes the setting of the policies into account, which contains the legal restrictions that are imposed by the administrative law considerations.<sup>135</sup> However, the Narrative Policy Framework lacks the feedback of the previous two theories discussed.<sup>136</sup> This means that it's hard to see how the policies change throughout time, and how these policies evolve.<sup>137</sup>

The Institutional Analysis and Development framework is another public policy framework with the extensive history behind it.<sup>138</sup> This Institutional Analysis and Development framework starts like many of the other feedback theories, and, for the most part, looks very similar to the Policy Feedback theory. Though in the policy theories one could consider the Institutional Analysis and Development framework as the “Swiss army knife” of public policy theories.<sup>139</sup> Within the framework, there can be multiple levels of analysis, from one analysis of public policy. Then the analysis can be broken down into other sub-topics based on different subsystems in the analysis.<sup>140</sup> This may seem like a good idea to bring together multiple analysis into one, however, because it has the potential for so many analyses within it, the overall intent of the public policy can and does get overlooked.<sup>141</sup>

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Ostrom, E., Cox, M., & Schlager, E., (2014). An Assessment of the Institutional Analysis and Development Framework and Introduction of the Social-Ecological System Framework: Foundations Evolution, and Ongoing Research. In *Theories of the Policy Process* (3rd ed., pp. 267-306). Boulder, CO: Westview Press.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

Public policy theories have their place. They are needed to show how policies change throughout time. These theories are just that: theories for the political scientists. This means that they often leave out the real world implications and the channels that policies must go through.

The world of law is a very complicated area. There are the “ins and outs” of law, and it takes experts years to figure out. Administrative law is not different. These theories are useful. However, it does run into the problem Congress does not make very specific laws. In the field of administrative law, it has been widely known (and previously discussed in this paper) that Congress purposefully writes very vague statutes. Out of this vagueness, the Courts have created a framework for both Congress and the agencies to create said policies. This framework is quite extensive and allows for the public to make comments on public policies that will affect them.

The non-delegation doctrine allows Congress a flexibility in creating public policy by not having every detail of the public policy in the wording of the legislation. The Supreme Court has ruled that Congress must give the agencies a “banks to the canal,” and if there is a way to address whether or not agency followed a legislative mandate.<sup>142</sup> It is impossible for Congress to create every detail of public policy, but they can lay down a framework that the executive agencies can fill in the rulemaking process.<sup>143</sup> This framework for the public policy establish ideals and these ideals need to be published to inform the public about the public policy, and ensure that the public policy is what Congress and the people want.<sup>144</sup>

In the theories of public policy that were discussed above, many of these theories left the final decision “blank.” When Congress did not specifically put in a directive, and it was an

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<sup>142</sup> *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 121 S.Ct. 903 (2001)

<sup>143</sup> *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 48 S.Ct. 348 (1928)

<sup>144</sup> *Sun Ray Drive--In Dairy, Inc. v. Or. Liquor Control Com.*, 16 Or. App. 63, 517 P.2d 289 (1973)

agency policy that was created within the executive branch; this policy has to go through the Office of Information and Regulatory Affairs (OIRA) which is a part of the Office of Management and Budget. Accordingly, all regulations of executive branch agencies must be approved by OIRA. This acts as a way for the President to know and control or, at least, influence what agencies are doing. This policy making is not adequately represented in the public policy theories. One person in the federal agency system can directly affect the public policies that get implemented. However, it must be stated that Independent agencies (SEC, FCC, etc.) don't send public policies through OIRA. What further complicates the public policy process is that Congress can say in legislation that agency shall not send rules to OMB. This also works conversely. OMB cannot prevent an agency, by its review, from fulfilling a congressional mandate.<sup>145</sup>

With the role of agencies dramatically growing during WWII, Congress passed The Administrative Procedure Act (APA).<sup>146</sup> This is the United States federal statute that governs the way in which administrative agencies of the federal government may propose and establish regulations. This law gave the agencies the ability to make the public policies. The agencies have now a couple of different ways to make the rules and public policies. These are formal rulemaking: which happens at a formal hearing, this form of rule machining rarely happens now because it is too cumbersome.<sup>147</sup> The most widely used ways to create public policy is the informal rulemaking process. This means that the agencies have to have issuing notice, taking a comment and issuing a final policy.<sup>148</sup> This has led to a very different approach to policy making than what the public policy theories indicated. In *National Petroleum Refiners Association v.*

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<sup>145</sup> *Env'tl. Def. Fund v. Thomas*, 870 F.2d 892 (2d Cir. 1989)

<sup>146</sup> 79 P.L. 404, 60 Stat. 237, 79 Cong. Ch. 324

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

*FTC (1973)* <sup>149</sup>the courts sided with the APA rulemaking because it allows for more input from all parties affected, versus on a case-by-case basis. This has allowed for the agencies to better create more flexible public policies because the agencies do not have to find authority in explicit language because with crafting the public policies, the agencies will encounter unforeseen problems and need flexibility in creating public policies. If the agencies go too far in the creation of public policies, then the Congress can change or repeal public policies that the agency has created.

However, the creation of public policies is not as easy as it would seem to be. This is because a public policy could be brought into court before it can be implemented. There are two types of challenges for the public policies: substantive challenges where the rule is not, and procedural challenges where the public policy may be okay, but in the creation of the policy it didn't follow appropriate procedure.<sup>150</sup> In the process of challenging different public policies and rules, the Courts do not want to deal with the substance of the rules.<sup>151</sup> Instead, the Courts want to focus on procedures followed to get the public policy. The Courts believe that if the procedure is followed correctly, it will end up with the correct substance of the public policy.<sup>152</sup>

More importantly, the Courts want rationales occurring with rulemaking. This is to show that the agencies have adequately considered everything during the process of creating the public policies. This means that the Courts do not want to see post hoc rules and public policy. This makes sure that the public policies are more explicit in justifying choices in the policy making process, thus guarding against unknown influences. This is further cemented in *Motor Vehicle*

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<sup>149</sup> *Nat'l Petroleum Refiners Asso. v. FTC*, 482 F.2d 672 (D.C. Cir. 1973)

<sup>150</sup> 79 P.L. 404, 60 Stat. 237, 79 Cong. Ch. 324

<sup>151</sup> *Id.*

<sup>152</sup> This is why the legislative history of a piece of legislation must have as many details as it can, because the courts will look at the history, and the procedures of the creation of the public policy one in the hands of the agencies.

*Manufacturers v. State Farm (1983)*<sup>153</sup>. The Courts said that there must be “rational connection between the facts found and choices made.” This created the hard look doctrine. The hard look doctrine stated that agencies can’t just say we have a different philosophy about the public policy and that they must say why rejected commenters’ complaints or concerns about the public policy.<sup>154</sup> However, the hard look doctrine would be arbitrary and capricious if the agency relies on factors Congress did not intend it to consider, failed to consider an important aspect of the problem, and or offered an explanation that runs counter to the evidence before an agency or an explanation so implausible it can’t be due just to difference in view or agency expertise.

The public policy theories also have a problem with the creation of public policy because both Congress and the agencies can create the policies. In the decision *American Mining Congress v. Mine Safety & Health Administration (DC 1993)*,<sup>155</sup> the courts have imposed more boundaries on the policy making. First without rule, a statute that was passed by Congress would be impossible to enforce because the language was too broad, the agencies must “fill in the blanks” in the creation of the public policy, that the agency published policy in CFR, Rule actually amends, repeals or conflicts with a prior legislative rule, intends rule to be binding. These boundaries were supposed to help build the framework that the agencies follow in the creation of the policy. Another restriction that has been placed on the agencies in the creation of policy is if there’s a longstanding interpretation of policy, the agency must go through notice and comment rulemaking to change the interpretation.

As with many of the public policy theories, there are sections that allow for Notice and Opportunity for Comment on the public policies. This is in line with the Court decisions. The

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<sup>153</sup> Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 103 S.Ct. 2856 (1983)

<sup>154</sup> *Id.*

<sup>155</sup> Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106 (D.C. Cir. 1993)

courts have ruled that there must be a logical outgrowth of the final policy. This means that the Notice and Opportunity for Comment can influence the public policies and allow it to be different than what initially asked for by Congress or the agency themselves. The only issues that it has to be the same issue and that it is a logical outgrowth of the original policy.

Again taking into consideration different public policy theories, the Congress did not intend rulemaking to be unaffected by political influence. The Congress and the Agencies understand the creation of the public policies are a quasi-legislative process so there will be political influence just as there is in the regular legislative process, and that's within their power to do so.<sup>156</sup> This means that the public policy theories that had politics as a variable are in line with the decisions of the Court.

Even though agencies often are willing to create the public policies they often have to do obligatory rulemaking. These agencies then may decide that general rule is impossible because of varied possibilities of application; or that it first needs some experience to see how the courts will interpret the policy.<sup>157</sup> The agencies must also state what the policies are; and they must be made public. Policies that are: (1) in an agency manual; (2) were not made public; (3) did not go through the notice and comment period; and (4) had no reason that the process was not made in public; must then be made published and made public. *Morton v. Ruiz* (1974).<sup>158</sup> Accordingly, this means that public policies created by agencies of government must be “out in the open”. The public policy theories never addressed this issue and often assumed that they were going to be in the eye of the public. However, these policies do not take into consideration one of the most common documents that are produced by agencies, which are Guidance Documents. These are

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<sup>156</sup> *Sierra Club v. Costle*, 211 U.S. App. D.C. 336, 657 F.2d 298 (1981)

<sup>157</sup> *SEC v. Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575 (1947)

<sup>158</sup> *Morton v. Ruiz*, 415 U.S. 199, 94 S.Ct. 1055 (1974)

documents where an Agency is explaining what it thinks a policy or statute means. The problem with these reports is that people do not have input into the creation of these very documents. The public policy theories just do not address any of these documents that are created daily and by every agency that has a direct effect on public policies.

The APA has an immediate impact on the public policies because adjudication can completely change how the public policy could be implemented. APA § 701<sup>159</sup> allows for judicial review unless a statute that created the public policy precludes it; or that the agency action is committed to agency discretion by law. APA § 702 establishes the right of review.<sup>160</sup> This means that for the public policy to be adjudicated, there must be a personal suffering “legal wrong,” which is restrictive to tort, contract or statutory suits. Another way that the public policy could be brought into court would be a public policy would adversely affect or aggrieved an issue. This is a very broad threshold and allows for public interest groups to petition for review. Another issue that could influence the public policy is that an agency may postpone the effective date of action taken pending judicial review if justice requires. This could significantly slow down the implementation of the public policy, and this delay is not reflected in the public policy theories.<sup>161</sup>

Once the public policy has been brought into court, there are more issues that the public policy will have to contend with before it would be able to be fully implemented. In the APA, § 706 is the scope of review, that the courts should have examined the public policy.<sup>162</sup> The reviewing court shall compel agency action to avoid unlawfully withheld or unreasonably

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<sup>159</sup> 79 P.L. 404, 60 Stat. 237, 79 Cong. Ch. 324

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

delayed the documents in the court case. If the courts find that the public policy was unlawful and set aside the agency action, the courts have only a few options for concluding that the public policy violated the law: (1) Arbitrary, capricious, abuse of discretion; (2) otherwise not in accordance with law (pretty broad; this is default review court will undertake); (3) that the public policy violates constitution; (4) that the public policy was in excess of statutory jurisdiction; (5) authority, limitations; (6) that the public policy was without observance of procedure required by law; (7) unsupported by substantial evidence if the public policy was created out of formal rulemaking or adjudication; or (8) finally that the public policy was unwarranted by the facts.<sup>163</sup> This means that even if the public policy was implemented, it could be bogged down by litigation before it would go into effect. This also means that the public policy theories are needed to reflect this litigation as well because the public policies could be altered by the courts before they are fully implemented.

Even with all these procedures with the APA, the Courts have limited themselves to the scope of review of public policies. *Citizens to Preserve Overton Park, Inc. v. Volpe* (1971) established a presumption of for agency actions in regards to the creation of public policy.<sup>164</sup> Furthermore, if the statute gives that sets the public policy, gives the agency very broad discretion in creating the law and order to the point where the agency gets to make the entire public policy. The APA shows each authority of government is subject to unless the statutory prohibition or “committed to agency discretion.”

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<sup>163</sup> *Id.*

<sup>164</sup> *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S.Ct. 814 (1971).

The courts have slightly pulled back the agencies' powers to interpret the public policy as whatever they want. This pull back is known as the *Chevron Doctrine*.<sup>165</sup> However, this control over the public policy has had a long history. The Courts first started to ask how much deference courts should give to agency interpretations of statutes in *Skidmore v. Swift (1944)*.<sup>166</sup> In this ruling, agency interpretation of statutes that granted them the authority to create public policy was not controlling on the courts. The case stated that the Courts would look to agency interpretation for guidance, and weight of deference given to administrative interpretation depends on thoroughness in its consideration, the validity of its reasoning, consistency with earlier and later pronouncements, and if all those factors which give it the power to persuade if lacking the ability to control. Accordingly, if the public policy failed these factors, then the interpretation is an only persuasive authority, not binding on the court. Then in 1984, the Courts revisited the debate on how much deference the courts should give to the agencies that create the public policy in *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc. (1984)*.<sup>167</sup> The Court reasoned that they did not want judges second-guessing the wisdom or policy determinations of agencies. The Court thought that it was better to have politically accountable legislative or executive branches through the intent of the legislation, making those policy decisions, and out of consideration, the Courts said that Congress delegated interpretive authority to the executive branch, not to the judiciary for the creation of public policy. The core of the *Chevron* case and the doctrine is that not all agencies interpretations of what the public policy should be interpreted in that way. However, if the public policy was reasonable, and that it is within the scope of the legislative intent of Congress, then the courts should defer to agency's

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<sup>165</sup> *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984)

<sup>166</sup> *Skidmore v. Swift & Co.*, 136 F.2d 112 (5th Cir. 1943)

<sup>167</sup> *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984)

interpretation of the statute. The Court has narrowed the *Chevron* doctrine since. In *United States v. Mead Corp.* (2001),<sup>168</sup> the Court further narrowed the *Chevron* doctrine by stating that the difference was only when Congress delegated to the agency the authority to make rules carrying the force of law, and there was a formal process of rulemaking or adjudication.

All of this means that the two fields must foster better interdisciplinary communication. Law and political science are responsible for creating the laws and policies that end up directing the nation. The two fields need to have consistent theories that are interchangeable with the respected fields. This means that we as political scientists need to keep up with the courts and attorneys must understand the politics behind the different political decisions that affect public policy.

### A new mutual theory

So, with all these provisions of the judicial side of public policy, where does this leave us in the creation of law and public policy? It leaves us with the “sausage” not matching what the “casing” can hold. When agencies create public policy, they have extensive power in the formation of the public policy because Congress has been lazy and ended up allowing the agencies to create their public policies. What this all means, is that we as a field, need to re-do the public policy theories. First of all, many of these public policy theories can be combined, though with substantial modification for both political scientist and lawyers to understand the entire process of creating both laws and public policies.

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<sup>168</sup> *United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164 (2001)

First, the redefined theory would need to have feedback from the public. This ends up reshaping the discussions on what the policies should be. That way the new policies are created end up creating new politics from their interactions with the people, who are affected by the policies. Then out of these new political discussions, there are more and newer policies, which then are created to reflect these new politics. This theory would fall in line with the public feedback that is required by the APA and the rulemaking process for administrative law. The next major issue that the new policy theory needs would be a selection path on how much deference Congress gave the agencies to create the public policies. Additionally, the indication of what how the public policy is being created the theory must have a deviation from the informal vs. formal rulemaking and brings in the politicking that happens in Congress. This is a critical difference because of the Administrative Procedure Act, and how the public policy is then adjudicated in the future.

To have both political scientists and lawyers understand how public policy is created the new theory must have the flexibility that is similar to the Advocacy Coalition Framework. This theory allows for short and long term considerations and builds on the natural political process within the policy subsystems. This flexibility would be able to account for much of the changes that happen in the policies creation such as the guidance documents that agencies create, and the exact wording or lack thereof wording from Congress and the legislative history of the legislation; the different APA adjudication processes; and other factors that have been discussed above. However, to overcome the shortcomings in the Advocacy Coalition Framework, the feedback methods need to be fully implemented so that the overall growth and change in the policy-making process can be seen, this then accounts for all the changes above and bureaucratic steps that the public policy has to get through to be created. The new public policy would also

need the Narrative Policy Framework because it takes the setting of the policies into account, which contains the legal constraints that are imposed by the administrative law considerations. This general background that the Narrative Policy Framework has means that it can be analyzed at different levels, from everything at the local level to all the way to the global scale for policies.

## CHAPTER VI

## THE NEED FOR MORE CROSS-CLASSES AND A CROSS-CULTURE

The law is one of the principal products of politics and “great sinew of government.”<sup>169</sup> It is unreasonable to divide up the field of law and politics because their works of literature overlap, and it is possible to read these pieces of literature with a different focus to showcase their commonalities or differences.<sup>170</sup> However, law and politics are what Gabriel Almond describes as “separate tables.” These the two fields are having different conversations and missing some of the productive exchanging of ideas and theories that can make both fields better as a whole.<sup>171</sup> Since the two fields sit at separate tables, the question that must be asked is how the two respected fields can better facilitate communication and collaboration between each other in the creation of law and politics.<sup>172</sup> Changing how the two fields interact and conduct themselves will be difficult. However, as the demand for interdisciplinary professionals grows, and the political landscape changes, there will be a need for students, and professionals who understand both fields. There will need to be a shift in the education of both.

Engaging in communication would be the easiest way to modify the current interaction between the two fields. Bringing the tables together would need more cross-disciplinary classes, conferences, research, and journal articles. As the fields communicate more in articles and journals, there would be more acceptance in both fields and those who are teaching in them as

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<sup>169</sup> Whittington, K. E., Kelemen, R. D., & Caldeira, G. A. (2008). *The Oxford handbook of law and politics*. Oxford: Oxford University Press.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Almond, G. A. (1990). *A discipline divided: Schools and sects in political science*. Newbury Park, CA: Sage Publications.

well. Communication is key to any change, from revolutions to elections,<sup>173</sup> and the evolving of a field of academic study is no exemption. Both fields of study have long histories, and both are continuing to evolve.<sup>174</sup>

A primary objective of legal education is to answer the question: What is law?<sup>175</sup> In many college campuses across the nation, there are legal theory classes.<sup>176</sup> These classes try to teach basic legal theories. However, these classes are not always taught by legal professionals. They are taught by academics who have earned their PhDs in Political Science, not necessarily Juris Doctorates.<sup>177</sup> This is not a problem if the professor that teaches the class has knowledge in the legal field, or is focusing their research in public law, but there is a distinct difference between the academics of a law school and that of a political science department. To help the fields evolve further, there must be more cross-disciplinary professors who have an understanding of both fields.<sup>178</sup>

Legal academia teaches the fundamental nature of law; it seeks to identify the core elements of law; distinguishing the realm of law from studies.<sup>179</sup> Law school education is different. If a person holds a JD, they can become a professor in law school.<sup>180</sup> There are many potential law professors out in the real world, who have practical experience working in the

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<sup>173</sup> Martin, A. & Hazelton, M. (2012). What Political Science Can Contribute to the Study of Law. *Review of Law & Economics*, 8(2), pp. 511-529. Retrieved 15 Mar. 2016, from doi:10.1515/1555-5879.1581

<sup>174</sup> Whittington, K. E., Kelemen, R. D., & Caldeira, G. A. (2008). *The Oxford handbook of law and politics*. Oxford: Oxford University Press.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> 2015-2016 ABA standards and rules of procedure for approval of law schools. (2015). Chicago, IL: American Bar Association, Section of Legal Education and Admissions to the Bar.

<sup>178</sup> Whittington, K. E., Kelemen, R. D., & Caldeira, G. A. (2008). *The Oxford handbook of law and politics*. Oxford: Oxford University Press.

<sup>179</sup> *Id.*

<sup>180</sup> 2015-2016 ABA standards and rules of procedure for approval of law schools. (2015). Chicago, IL: American Bar Association, Section of Legal Education and Admissions to the Bar.

political field, and are not teaching the pertinent political based law class.<sup>181</sup> Very few of these potential law professors come back to teach politically based law classes such as legislation.<sup>182</sup>

There is very little political science taught in law courses. The finer intricacies of how and why legislation is passed get lost. From the viewpoint of law schools and legal education, they are neutral, and politics has no place. However, in crafting legislation, politics is needed because politics shapes the legislation.<sup>183</sup> There is a need to understand how a legislator would craft legislation to get the most political gains. Law and politics are inherently linked to each other, and this needs to be illustrated in the classrooms as well. There is a shift beginning in legal education to bringing both the tables together. Law schools are starting to offer courses on methodologies that are traditionally not part of the legal education. These classes are typically instruction on applied statistics, decision theory, game theory, and accounting.<sup>184</sup> These classes will help bring the tables closer together. Unfortunately, traditional law school curriculum is lacking in an understanding of political science and the impact on the decisions that judges make and, accordingly, the law.<sup>185</sup> The legislation is a central (and frequently overlooked) tenet of law. Often, lawyers are asked to interpret and defend interpretations of legislation. In legal academics, there is a debate on how to interpret legislation and legislative history on a bill.<sup>186</sup> In this debate, it is essential to know how “legislative sausage” is made. The field of political science has many studies regarding different aspects of the legislative process.<sup>187</sup>

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<sup>181</sup> Such as the number of lawyers who are in the elected into the legislatures.

<sup>182</sup> Martin, A. & Hazelton, M. (2012). What Political Science Can Contribute to the Study of Law. *Review of Law & Economics*, 8(2), pp. 511-529. Retrieved 15 Mar. 2016, from doi:10.1515/1555-5879.1581

<sup>183</sup> *Id.*

<sup>184</sup> Martin, A. & Hazelton, M. (2012). What Political Science Can Contribute to the Study of Law. *Review of Law & Economics*, 8(2), pp. 511-529. Retrieved 15 Mar. 2016, from doi:10.1515/1555-5879.1581

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* (internal cites omitted)

An additional way that the two fields can come together to create better law and public policy is to have mutual theories on how law and politics influence each other. With both law and political science trying to create and influence public policy, many theories are completely out of touch with the reality of how policy is truly created. This is not to say that legal scholars have ignored political institutions. Many legal scholars are working on politics within the law, especially within administrative law.<sup>188</sup> Even some political science topics have made it into the legal casebooks and class materials that law students read.<sup>189</sup> Every day there are new court cases, and these cases help shape the legal thinking of the day, which lead to new doctrines being created, new journal articles being written and most importantly, new ideas being formed. All of these affect the overall process by shaping and changing the way that policies are created. New court opinions and journal articles are always in print. Political scientists need to understand that these changes in laws and policies are necessary and that having one all-encompassing theory to explain everything is inaccurate. There are simply too many precedents and legal doctrines to “sweep under a rug” for a theory that tries to encapsulate the public policy process. Again, to better facilitate the changes that are needed in these two fields it is a necessity to bring these two respected fields together to the same table. Lawyers and the legal field must ask questions about the political process and how that will influence the outcomes of the law. The political scientist needs to look to the legal doctrines that the Supreme Court has created regarding the creation of public policies because these doctrines are the way that the court will decide cases. Communication and asking questions about how policy is created is key to improving both the legal and political science fields.

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

It is inherent that law and politics are related, so why are the fields not related? This must change so that there can be better public policies and better public politics. If these two fields continue not communicating and not recognizing the different theories that are in the fields, there will continue to struggle in the understanding of the public policies that are created.

### The need for more cross academia

Unfortunately, the separation between the legal studies and political science has prevented communication between the two fields. Bringing the fields of political science and legal fields together at the same table would further advance this base of knowledge for both areas of study. This is only possible if we teach students in their respective fields how to read and understand the comparative literature from the other field.<sup>190</sup>

The law can contribute to political science many ideas and concepts that are not considered in political science. Legal studies define how the courts work and how policies are made through different doctrines that are created by the courts. In legal education, the logic of how to unpack these doctrines are drilled into the minds of students. In law, many students end up memorizing and reciting different factors and tests that will decide legal outcomes. However, these tests and factors are often created and interpreted by the courts, meaning they do not consider the politics that created the legislation. Lawyers are in the position to be able to interpret and unpack the courts decisions. The legal field can also give political science a different methodical approach on how policies and laws affect people.<sup>191</sup> This can be seen in all the different tests and factors that are created by the courts in their decisions. Lawyers can reason

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<sup>190</sup> Martin, A. & Hazelton, M. (2012). What Political Science Can Contribute to the Study of Law. *Review of Law & Economics*, 8(2), pp. 511-529. Retrieved 15 Mar. 2016, from doi:10.1515/1555-5879.1581

<sup>191</sup> *Id.*

these decisions and further build on them with different facts and hypotheticals. The creation of law is no longer a “black box” where an input creates an output, but a complex interaction between people, the law, and the courts.

Law school is a place to provide irreplaceable knowledge regarding the theory and practice of law.<sup>192</sup> There are many required classes that all students have to take. One thing that students do not learn in depth is how the law is created within the political system, nor do they learn the possible political influences from the judges and justices.<sup>193, 194</sup> The political process of creation of laws is often glossed over in a beginning class. In the stacks of any law library, there is an amount of law, case law and volumes, dedicated to how the law is created.

Lawyers must be zealous advocates for clients.<sup>195</sup> This not only requires knowledge of law and regulation but it requires lawyers to advise their clients with the best decisions possible. Having political scientists help train lawyers will also lead to another benefit in the education of lawyers. Lawyers would be able to bring forth better arguments against different policies that were created out of different agencies. Lawyers would soon be able to recognize the different political and policy arguments that political scientists routinely see and understand due to their training. Most executive agencies and the legislation that has been delegated to them have a political motive behind them.<sup>196</sup> Often the non-delegation of legislation is a political conglomerate, and not necessarily have a sound legal reasoning. These delegated laws and

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<sup>192</sup> Martin, A. & Hazelton, M. (2012). What Political Science Can Contribute to the Study of Law. *Review of Law & Economics*, 8(2), pp. 511-529. Retrieved 15 Mar. 2016, from doi:10.1515/1555-5879.1581

<sup>193</sup> *Id.*

<sup>194</sup> Okay, now some of the contemporary Supreme Court Justices, law students obviously know that they are political, such as the late Justice Scalia. However, with the older decisions, law students often times do not know the full story behind the law, nor do they know the political leanings of these earlier judges and justices.

<sup>195</sup> *Model rules of professional conduct*. (2013). Chicago, IL: American Bar Association, Center for Professional Responsibility.

<sup>196</sup> See, Martin, A. & Hazelton, M. (2012). What Political Science Can Contribute to the Study of Law. *Review of Law & Economics*, 8(2), pp. 511-529. Retrieved 15 Mar. 2016, from doi:10.1515/1555-5879.1581

policies will take years to be refined by the courts because of their complexity. A lawyer who has been trained in political science can understand the political issues that are in policies and can make better arguments in the court. Then, a savvy lawyer, armed with evidence from political analysis, would be able to consider these political factors when making important decisions.<sup>197</sup> Also, these lawyers would understand that outside factors impact court decisions. Knowing that there is biased judicial decision making, they could help refine their knowledge before the bench. This knowledge could help predict outcomes and make better strategic decisions for their clients.<sup>198</sup> This all boils down to another important point: if these lawyers were to challenge these policies in court, it would not take years for the courts to flush out the details of the laws and public policies because the lawyers will be able to point these arguments out to the Court.

At the end of the day, all regulations and policies that are created will be codified, and printed in the CFR.<sup>199</sup> These codified regulations will be interpreted by the courts. A legal education is to teach future lawyers what the law is. As previously stated, the curriculum of law schools is starting to change. New classes are starting to touch on the politics that can influence laws and legal decisions of the court. Eventually, the courts will have to rule on the politicking of the legislature's creation. The recognition of how politics influences the legislative process and how politics influences the law will lead to the courts understanding.<sup>200</sup> This is because the courts are comprised of lawyers, and if their legal education changes, it means that eventually the courts will better appreciate the political process. It would be better to have judges and justices

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<sup>197</sup> Martin, A. & Hazelton, M. (2012). What Political Science Can Contribute to the Study of Law. *Review of Law & Economics*, 8(2), pp. 511-529. Retrieved 15 Mar. 2016, from doi:10.1515/1555-5879.1581

<sup>198</sup> *Id.*

<sup>199</sup> The annual collection of executive-agency regulations published in the daily Federal Register, combined with previously issued regulations that are still in effect. — Abbr. CFR. CODE OF FEDERAL REGULATIONS, Black's Law Dictionary (10th ed. 2014).

<sup>200</sup> Martin, A. & Hazelton, M. (2012). What Political Science Can Contribute to the Study of Law. *Review of Law & Economics*, 8(2), pp. 511-529. Retrieved 15 Mar. 2016, from doi:10.1515/1555-5879.1581

understand the political process because of the valuable insights that political science can offer.<sup>201</sup>

Having lawyers become well-educated in decision making, and analysis that is seen in political science would lead to having better-trained lawyers. These lawyers would have a diverse background in their education, which would have similarities with political science training.<sup>202</sup> This would lead to a better-functioning court that understands the political process.<sup>203</sup> The courts interpret the laws and policies, and these interpretations will change the laws and public policies.<sup>204</sup> If judges can better understand and appreciate the political process, judges and justices would develop better reasoning behind the laws.

The fields of law and politics are a varied and multidisciplinary enterprise. Political scientists are growing in numbers and can be found offering their knowledge to lawyers, judges, legislators, and legal academics.<sup>205</sup> Political scientists bring a diverse base of knowledge to the table, and the legal field cannot outright reject political science. As some political scientists who study administrative rulemaking within the executive branch is often hard to distinguish from the work of their counterparts in the legal academy.<sup>206</sup> Political science can offer help to the courts addressing legal questions that are political, as well as identifying the most effective ways to achieve the legislative intent.<sup>207</sup> To pass any legislation or any policy issue, there will always be

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> Litigation take a great deal of time to commence. Once started it could take years for the litigation of a case to come to the end.

<sup>204</sup> Martin, A. & Hazelton, M. (2012). What Political Science Can Contribute to the Study of Law. *Review of Law & Economics*, 8(2), pp. 511-529. Retrieved 15 Mar. 2016, from doi:10.1515/1555-5879.1581

<sup>205</sup> ELECTION LAW AS ITS OWN FIELD OF STUDY: STOP ME BEFORE I QUANTIFY AGAIN:THE ROLE OF POLITICAL SCIENCE IN THE STUDY OF ELECTION LAW, 32 Loy. L.A. L. Rev. 1141, 1155-1156

<sup>206</sup> *Id.*

<sup>207</sup> ELECTION LAW AS ITS OWN FIELD OF STUDY:STOP ME BEFORE I QUANTIFY AGAIN:THE ROLE OF POLITICAL SCIENCE IN THE STUDY OF ELECTION LAW, 32 Loy. L.A. L. Rev. 1141, 1155-1156

a need for politics and politicking to build consensus to pass legislation. Political science can help the legal field understand that the political reasons why a law says “may” versus “shall,” and it is within these small differences are what helps get legislation passed. Although there is a fissure between law and political science, the strengths of each field matches the other field’s weakness, creating a useful partnership. The law creates the norms of the nation and then describes those terms while political science investigates the expression of these norms.<sup>208</sup>

Where does legislative wheeling and dealing happen? Deals are made in caucus meetings, in the back hallways, and in the bars where bar napkins are used as legal pads. These places are where politicians use their political capital to move a piece of legislation forward. While these deals are not always like an episode of *House of Cards*, there are often the backdoor political deals and the expensing of political capital. These deals are never part of the full discussion in the judgments of the courts, even though they can help paint the whole picture of what the legislation is (though there are cases where the courts do give a nod to parts of the history of the legislation). Again, laws are not created in a vacuum. They are created by legislators who cut deals in and out of the Legislature.

Also, the field of political science can also help the legal field by expanding on the described behaviors of the individual legislators, as well as the behaviors of different judges and courts.<sup>209 210</sup> This behavioral information can explain some of the behavior of legislators who are

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<sup>208</sup> *Id.*

<sup>209</sup> ELECTION LAW AS ITS OWN FIELD OF STUDY: STOP ME BEFORE I QUANTIFY AGAIN: THE ROLE OF POLITICAL SCIENCE IN THE STUDY OF ELECTION LAW, 32 Loy. L.A. L. Rev. 1141

Martin, A. & Hazelton, M. (2012). What Political Science Can Contribute to the Study of Law. *Review of Law & Economics*, 8(2), pp. 511-529. Retrieved 15 Mar. 2016, from doi:10.1515/1555-5879.1581

<sup>210</sup> There is a major branch of Political science that is now based on behaviorism. This branch can give a great deal of information to the legal field.

in swing districts and why they craft the legislation in particular ways.<sup>211</sup> In regards to judges and the courts, political scientists can help the legal field understand the behavior of the different judges and the different courts.<sup>212</sup> This information can help with the understanding of how and why judges' rule in certain courts versus other judges in other courts. This behavior can lead to lawyers to venue selection for their cases that will be filed in the suits.<sup>213</sup> Now, while venue shopping is not always the most courteous thing a lawyer can do, it does allow for a potentially larger jury pool (the difference between state court and federal court). Jurisdiction selection could allow for a better outcome for the different lawsuits that a lawyer will file with many jurisdictions that would cover the suit.<sup>214</sup>

There is always one thing on the mind of every elected representative: the next election.<sup>215</sup> Because of this, Legislators are always at the beck and call of the constituents. Voters call at night during dinner, email at every hour of the day, and hope that the legislator will solve all their problems, and if you cannot help them, it could turn into an election issue.<sup>216</sup> A great number of the ideas that are brought in front of the legislature are the ideas from these constituents.<sup>217</sup> These ideas not fully vetted, and often these are the bills that become

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<sup>211</sup> ELECTION LAW AS ITS OWN FIELD OF STUDY: STOP ME BEFORE I QUANTIFY AGAIN: THE ROLE OF POLITICAL SCIENCE IN THE STUDY OF ELECTION LAW, 32 Loy. L.A. L. Rev. 1141

Martin, A. & Hazelton, M. (2012). What Political Science Can Contribute to the Study of Law. *Review of Law & Economics*, 8(2), pp. 511-529. Retrieved 15 Mar. 2016, from doi:10.1515/1555-5879.1581

<sup>212</sup> ELECTION LAW AS ITS OWN FIELD OF STUDY: STOP ME BEFORE I QUANTIFY AGAIN: THE ROLE OF POLITICAL SCIENCE IN THE STUDY OF ELECTION LAW, 32 Loy. L.A. L. Rev. 1141

Martin, A. & Hazelton, M. (2012). What Political Science Can Contribute to the Study of Law. *Review of Law & Economics*, 8(2), pp. 511-529. Retrieved 15 Mar. 2016, from doi:10.1515/1555-5879.1581

<sup>213</sup> ELECTION LAW AS ITS OWN FIELD OF STUDY: STOP ME BEFORE I QUANTIFY AGAIN: THE ROLE OF POLITICAL SCIENCE IN THE STUDY OF ELECTION LAW, 32 Loy. L.A. L. Rev. 1141

Martin, A. & Hazelton, M. (2012). What Political Science Can Contribute to the Study of Law. *Review of Law & Economics*, 8(2), pp. 511-529. Retrieved 15 Mar. 2016, from doi:10.1515/1555-5879.1581

<sup>214</sup> There are many court cases that are based on the jurisdiction selection. This is a major part of Civil of Civil Procedure, a class that all law students take.

<sup>215</sup> USCS Const. Art. I, § 2

<sup>216</sup> Davies, J. (1986). *Legislative Law and Process in a Nutshell* (3rd ed.). St. Paul, MN: West. 243-263

<sup>217</sup> *Id.*

pigeonholed in the process. However, there is still that pressure from constituents to move certain pieces of legislation and the need to keep the constituent happy. When legislators introduce legislation, they initially craft it in ways to keep those constituents content and is often a large motivator in the formation of the legislation.<sup>218</sup> This is an additional area where the legislators need to make sure that there is a paper trail with their legislation. The legislative history and paperwork that would help track the changes in the legislation can be used to prove that they are trying to make legislation pleasing their constituents. These papers will also help the courts determine the legislative intent of the legislation.

Elections drive many issues and the calendar in legislatures.<sup>219</sup> Ever Senator and Representative knows there is an election “right around the corner.” Legislators are always trying to raise more money or get more support from their constituents. Legislators will try not to rock the boat too much out of fear of not being re-elected. (Unless they know that they are in a “safe” district.).<sup>220</sup> Elections drive the legislative agenda. It is the barometer of how far the chambers are willing to push the envelope with legislation. So if given a choice of writing a large, complex, and divisive legislation, the legislation will often be written vaguely.<sup>221</sup> The legislators will leave legislation purposefully vague, as a strategy to protect themselves from the electorate. When laws are then interpreted by the agencies and the administration, the legislators can run against the legislation that they passed.<sup>222</sup> This offers a legislator a way to vote for a piece of legislation that they were not committed to, without having to vote on legislation that was specific and detailed. This non-delegation allows legislators to get what they might have partially

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<sup>218</sup> *Id.*

<sup>219</sup> Davies, J. (1986). *Legislative Law and Process in a Nutshell* (3rd ed.). St. Paul, MN: West. 295-300

<sup>220</sup> *Id.*

<sup>221</sup> Whittington, K. E., Kelemen, R. D., & Caldeira, G. A. (2008). *The Oxford Handbook of Law and Politics. Law and Regulation* Oxford: Oxford University Press. 576-581

<sup>222</sup> *Id.*

wanted or do not wanted in the legislation, and leave it to the administration to promulgate the rules that will govern the policy. Political scientists know that elections and constituents affect legislation, and there are studies of these effects on legislators, and the elections.<sup>223</sup> Lawyers, on the other hand, do not know how many elections have an effect on the legislative agenda and the legislation itself. They know about their existence, but do not truly appreciate the impact that they could have on the legislation that will become law. Lawyers should always be more mindful of elections because of their effect on the legislative process.

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<sup>223</sup> ELECTION LAW AS ITS OWN FIELD OF STUDY: STOP ME BEFORE I QUANTIFY AGAIN: THE ROLE OF POLITICAL SCIENCE IN THE STUDY OF ELECTION LAW, 32 Loy. L.A. L. Rev. 1141.

## CHAPTER VII

### CONCLUSION

Public policy is so much more than just the passing of laws and legislation; public policy is what the government does. Public policy is political. Therefore, it is the, “who gets what, when, and where.” Both law and politics are about the creation of public policy. Public policy is a major study of both fields of law and politics. There is no single way to divide these two fields. Their literature overlaps and the two fields of study can understand the research through different lenses and emphasis.<sup>224</sup> However, currently there needs to be communication between the fields of law and politics, and this communication will intern lead to better public policies.

However, looking at the creation of public policy through just one of these viewpoints obscures a significant amount of information that is in public policy. It is a very long and complicated process to create public policy. Public policies that start in the Legislature have to go through a complicated process that many lawyers do not know. Throughout the legislative process, the wording of the potential public policy product gets hammered and beaten, so much, that it rarely looks the same as it did in the beginning.<sup>225</sup> Often the legislation is vaguely worded so the bill will pass, and keep their voters happy for the next election.

If the Executive signs the bill, it then becomes law, but the public policy may indeed be changed. The executive takes the law, refines it through agencies, which create rules and regulations of the public policy. The executive agencies’ process of creating public policies has

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<sup>224</sup> Symposium on Silverstein's Law's Allure: Law's Allure in American Politics and Policy: What It Is, What It Is Not, and What It Might Yet Be, 35 Law & Soc. Inquiry 1077

<sup>225</sup> *Id.*

led to a complex web of relevant rules and regulations that are necessary to be able to create public policy. The process of rulemaking is a long process in itself.

Law is fully formed under the watchful eye of the Judicial Branch.<sup>226</sup> As a result, courts wield significant power in determining how policy affects the public. In the challenges of the executive rulemaking, the courts have led to many doctrines which help to define better how administrative agencies should shape the public policies. The courts then will use this current framework to help craft the policies in the future.

Political science studies public policy to see how the policies are created, and how different variables will influence these policies. Specifically, public policy theorists have developed elaborate theories on how public policy is made without looking at the framework that the legal community has constructed. Often these theories and the discussion they raise, are frequently detached from the real world implications of public policy; or they reduce people to numbers and then cross-reference these numeric values across space, time, and borders. The purpose of political science is to understand who gets “what when and where”, and the reasoning behind these factors.

A primary objective of law school is to teach the fundamental nature of law, and the education seeks to identify the core elements of law and legal doctrines.<sup>227</sup> Legal education aims to teach the logic of fundamental principles of law, and how to interpret courts’ decisions. This education leaves lawyers in a position to be able to interpret the courts’ decisions. The legal field can also give political science a different methodical approach on how policies and laws affect

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<sup>226</sup> THE RELATIONSHIP BETWEEN LAW AND POLITICS, 15 Ann. Surv. Int’l & Comp. L. 19

<sup>227</sup> *Id.*

people.<sup>228</sup> Once through law school, Lawyers must be zealous advocates for clients, and this requires knowledge of law and regulation, but it requires lawyers to advise their clients with the best decisions possible.<sup>229</sup>

There must be more cross-disciplinary professionals who have an understanding of both fields of study to help both disciplines further evolve.<sup>230</sup> This shift is starting to begin in legal education. Law schools are starting to offer courses on methodologies that are traditionally not part of the legal education. These classes are typically instruction on applied statistics, decision theory, game theory, and accounting.<sup>231</sup> This instruction, in turn, leads to better arguments against different policies that were created out of the various agencies. Most executive agencies and the legislation that has been delegated to them have a political motive behind them, and lawyers will have the potential to recognize the political rationale behind them.<sup>232</sup>

It is inherent that law and politics are related. The creation of public policy is not a “black box” where an input creates an output, but a complex interaction between people, the current law, and the courts. Both law and politics must work together so that there can be better public policies and government. With both law and political science trying to create and influence public policy, many theories are completely out of touch with the reality of how policy is created.

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<sup>228</sup> Martin, A. & Hazelton, M. (2012). What Political Science Can Contribute to the Study of Law. *Review of Law & Economics*, 8(2), pp. 511-529. Retrieved 15 Mar. 2016, from doi:10.1515/1555-5879.1581

<sup>229</sup> *Model rules of professional conduct*. (2013). Chicago, IL: American Bar Association, Center for Professional Responsibility.

<sup>230</sup> Whittington, K. E., Kelemen, R. D., & Caldeira, G. A. (2008). *The Oxford handbook of law and politics*. Oxford: Oxford University Press.

<sup>231</sup> Martin, A. & Hazelton, M. (2012). What Political Science Can Contribute to the Study of Law. *Review of Law & Economics*, 8(2), pp. 511-529. Retrieved 15 Mar. 2016, from doi:10.1515/1555-5879.1581

<sup>232</sup> See, Martin, A. & Hazelton, M. (2012). What Political Science Can Contribute to the Study of Law. *Review of Law & Economics*, 8(2), pp. 511-529. Retrieved 15 Mar. 2016, from doi:10.1515/1555-5879.1581

As put forth throughout this thesis, law and politics cannot be separated. Law governs politics, and the law is the product of the political process, which is done through the product of negotiation, bargaining, and persuasion.<sup>233</sup> It is the role of the courts, Judges and Justices to say what the law is. To turn to previous rulings and various laws that have been passed to see how public policy should be made. The courts will use and interpret the language of law separated from context. However, these laws were passed via politics. As a result, laws are inherently political, and the courts must recognize this.

Public policy is “sausage.” The creation of it means that there are lots of grinding, and stuffing, and it is both “messy” and complicated. However, this should not be the case.<sup>234</sup> Law and public policy should be something that everyone can easily see and understand. Political science and law are at different “tables” eating the sausage. These two fields are inherently linked. They should be able to communicate with each other, and mutually understand the basics of the other field.

Unfortunately, the separation between the legal studies and political science has prevented communication between the two fields. If these two academic fields were able to come together and better understand each other, they would have a greater impact on the people of the nation. Law and public policies are not created in a vacuum, nor are they a mere byproduct of legislators passing a law. Public policies are a complex interaction of all three branches of the government.

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<sup>233</sup> The Study of Law and Politics, *The Oxford Handbook of Law and Politics* Keith Whittington - R. Kelemen - Gregory Caldeira - Oxford University Press - 2008

<sup>234</sup> No pun intended.

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## LIMITATIONS AND FUTURE RESEARCH

This thesis was written in a viewpoint of judges and justices taking a liberal viewpoint of reading the statutory text. A potential research project would be to examine how a strict constructivist would interpret the legislative law and how a strict constructivist court would then implement these changes. Also, one item that can be further research is what would be the proper role for the judicial interpretation with this new mindset and legal education. The different mindsets of justices would be an interesting study in the relationship.

In all, this thesis advocates for a broader judicial discretion, by encouraging judges to look at the legislative history of law. However, this can quickly become a proverbial rabbit hole. How many “bar napkins” should the judiciary look at for the legislative history? It could be inferred that every piece of legislative history on a bill would be able to be judged by the court. While this is not what I was advocating, I do appreciate this critique. Judicial discretion is a very serious part of this thesis. In the future, it would be interesting to hear what a judge and justice would say on these issues.

This thesis also advocates for a change in both political science and the legal academic fields. These would have repercussions far outside the schools and campuses where these topics are taught. They would have real world implications. It could potentially change how the courts approach their role in the government structure.

There ended up being more questions than answers about the potential for people to abuse the courts than I originally anticipated. Judicial discretion is a problem that I did not consider while writing this thesis. Additionally, I found myself asking, “How would the courts react to this change in legal education.” I believe that there is a great deal of future research on

the interplay and relationship of interpretation from the courts of legislative history, the interaction of political scientist, and the potential “new lawyer” who has more of a political eye. I also believe that there is a research possibility in looking at how different legal philosophies would look to the legislative interpretations and the judicial discretion that the courts have.