The Impact of Supreme Court Decisions

Second Edition

Edited by
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Malcolm M. Feeley

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EMPIRICAL STUDIES

SECOND EDITION

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"Does anybody know . . . where we can go to find light on what the practical consequences of these decisions have been?"

FELIX FRANKFURTER

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Preface to the Second Edition

Becker first imagined this volume while teaching at New York University in the summer of 1967. At that time, "impact analysis" was only occasionally discussed by a few political scientists, but the ever increasing number of studies made it obvious that it was an idea whose time had come. So it was clear that there was room for a book assembling the best examples of this type of research. Since that time (and we like to believe it was partly due to the publication of the first edition of this volume) impact analysis has gained a wide audience and has developed into an attractive sub-field within the area of public law. This trend represents a continued interest in an empirically based jurisprudence.

Because of the great and rapid changes in this field we felt the need for a number of changes in this second edition. The most important addition, one that we feel reflects the growing significance of impace analysis, is the introduction of an entirely new section: Toward a Theory of Impact. The three articles included therein demonstrate that interest in impact has matured and gone beyond the descriptive stages to a concern with the development of generalizations and "theory." While the actual results of "theory building" are considerably less impressive than the rhetoric about "theory building" these articles nevertheless reflect the latest controversies and problems posed by the growth of impact analysis.

Other changes have been made in order to illustrate the wide variety of types of "impact" that can occur. Now included are ex-

amples and analyses of the attempts of two Presidents to disturb directly the very nature of the Court, an example of the "self-correcting" mechanisms possessed by the Court itself, and a discussion of the over-all effectiveness of the Court in resisting popular majorities. Finally, this second edition represents our attempts to present the best of the more recent work in this area.

The task of putting a reader together has been known to have its bad days. Most of the lonelier moments in preparing this second edition were experienced by one Joel Rubin. However, we will wait to analyze the impact upon him. This is just, as he must be held at least partially accountable for any errors of judgment our colleagues discover in using this volume. Such are the consequences of contemporary acknowledgments, as irresponsibility is the advantage of modern-day obscurity—even for the powerless.

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Editors' Introduction

There are at least two major reasons for pursuing impact analysis of the Supreme Court's decisions. First, the United States Supreme Court occupies a unique and paradoxical position in a society claiming to be democratic. The American high court has at its command tremendous powers, unparalleled by any other court in history, yet it is not subject to the same type and degree of public pressure and scrutiny as are the other popularly elected branches of the national government. The esoteric language of law and the shrouds of secrecy and formality that cloak the Court's decisions tend to isolate all but the most important decisions of this "least dangerous branch." Few know and fewer care. But what is worse is that even fewer think about *consequences* flowing from such decisions. Since the Court makes extremely important decisions, should we assume that they are self-executing? We know they are not—yet we do not know the kinds of effects these decisions have on our government and society. After all, this is a society pledged to the "rule of law" is it not? And the Court's decisions are "law." However, to the degree that the Court's mandate is disregarded, in one way or another, we have the "rule of men." The degree and the circumstances of this "impact" are the sort of information about the government that all Americans have the right to know, and the sort of problem that should attract social science research.

Additionally, as Professor Arthur S. Miller has reminded us, jus tices themselves are frequently forced to make decisions despite their

abiding ignorance of the past and likely future impact of their actions. A "jurisprudence of consequences," as he terms it, would provide judges—as well as other policy-makers—with valuable information by which to evaluate the results of their behavior and, perhaps, to guide future decisions. After all, we can assume that the Court cares about who listens and who does not, about who evades and defies and under what conditions, and about what (and the degree of) political consequences they can expect from certain types of decisions. We believe the Court should be receptive to such studies. We would also hate to think that the Justices adhere to some outmoded notions, that they act in a political vacuum. We doubt that they do, particularly those on the Warren and Nixon courts.

In addition to the politically relevant reason for the study of the impact of Supreme Court decisions, there are valid academic reasons. Political science is interested in developing a general theory about political behavior. Certainly, then, research into "the law"—whether the source be the Court, the legislature, or the executive—must be a key undertaking in any such theory. Because of this, one area of the development of political science research is called "policy analysis," i.e. the study of the effects of policies. Clearly, the study of the impact of Supreme Court decisions falls comfortably within "policy analysis."

Within the tangle of recent conceptual discussions on public policy analysis, Randall Ripley's thinking and discussion appeal to us as perhaps the most explicit and the simplest. He suggests that policy analysis should examine three areas: (1) the statement of *goals*; (2) the *action* taken to *implement* these goals; and (3) the social *outcomes* or *consequences* of implementing these actions.

Ripley defines a *policy statement* to be "a declaration of intent on the part of the government to do something." But, he warns, "all too often students and scholars who have declared an interest in policy have stopped with the policy statements and assumed that it is the whole of policy." This warning is right on target for students of public law, who all too often—as Justice Holmes said time and time again—have wallowed contentedly in the policy statements (that is, the Court's opinions) and assumed that they could understand political realities from them and them alone.

Policy action, according to Ripley, is the actual manifestation of

policy, i.e. the actual governmental actions, "what the government does, as distinguished from what it has said it is going to do." Among other aspects, it entails the mechanisms of policy-statement evasion even within lower, or co-ordinate, or the same branches of government. And *policy outcomes* include "the consequences that accrue to society as a result, either direct or indirect, of the government's actions or inaction. The impact of the government on society, either intended or unintended, is an outcome."

What is most beneficial in relying on these concepts is that they present an analysis of *consequences for society* as a whole as the primary and ultimate intellectual goal for analysis. Many people in our society are questioning the social value of even our most hallowed (and isolated) institutions, which include the courts and the universities. So, it is appropriate that social scientists should examine the complex interrelationships between the people and the government. It is important work—self-justifying and needed.

What the Supreme Court says is one thing. What other echelons of government do about it is more directly related to the citizenry, and it is this latter interaction that characterizes the substance of many of the empirically based studies included in this volume—although they may not explicitly base their analysis on Ripley's framework, or they may ignore the jargon of public policy analysis completely. Many of them begin by examining the formal statements of purpose found in specific Court decisions and then contrast them with the subsequent behavior of the various actors required to carry out the Court's ruling. But what is more, many of them go on to examine, in a broader context, the impact of the Court on society, both directly and indirectly. As with all American governmental policies, one suspects there may be a rather wide gap between what the Court says *ought* to be done and what in fact *is* actually done. And this is borne out to a large extent by the representative studies we have included.

Unfortunately, though, no contemporary selection of readings could add up to a *comprehensive* assessment of the high Court's impact on mid-twentieth-century American life. The reason for this is simple enough: too little research has been undertaken and too little is known. For example, although political scientists have recently spent considerable effort examining the Court's major civil liberties

decisions and their consequences, virtually no systematic attention has been paid to some less politically glamorous areas in which the Court also makes policy. Even such weighty topics as the consequences and potential consequences of the Court's rulings in the economic realm, and anti-trust policy in particular, have received virtually no attention from contemporary political scientists, despite their obvious importance for American society. Nevertheless, the studies reprinted in this volume *do* represent a cross section of the best empirical research to date on the Court's impact, and they can profitably be used as models for extending the analysis of the Court's impact into other areas.

Finally, we would like to explain why we have organized this book the way we have. The reader will quickly see that the sections in this volume correspond to various political locales in American government, e.g. Congress, other courts, state and local governments, the public, etc. This is so largely because the research itself rarely includes more than one specific political location of action. Most of the articles concern themselves with only one arena of the governmental process. So we are not subtly pushing any pet theory by our classification.

As a matter of fact, it is much too early in the development of the field to classify the available research through degree of compliance or types of evasion or defiance. Further, it would be equally too early to classify the literature according to what the researchers themselves believed are the chief extragovernmental factors (e.g. attitudes, social backgrounds, region, etc.) that might account for variations in impact. Thus, mainly out of necessity and deference to the authors, the sections of this volume continue to reflect the political locus of the effect of the Court's decisions, since it is a convenient and theoretically neutral way to put these studies together. As for "theory-building," we have saved that for a special section with which to conclude this volume.

One last word. While we would like to think that impact analysis plays some role in effecting desirable social change, being familiar with the nature of government, we are not terribly optimistic.

1 *The Effect on the President and Congress*

The Supreme Court is one of three constitutionally co-equal branches of the federal government. Still it was only owing to the political guile of Chief Justice John Marshall in 1803 that the Court managed to get and keep the vital power to declare acts of the President and laws of Congress unconstitutional. The vehicle for this judicial *coup* was the famous case of *Marbury v. Madison.* Since then, the ensuing political equilibrium that constitutes our legal "check and balance system" has been a delicate one, and it has been disturbed seriously and often throughout the years.

The long history of friction between the Court and the President endured well into the twentieth century.[1] It has been dramatized by classic quotations and by tragicomic proposals. One statement that has weathered the years is tough, old Andrew Jackson's "John Marshall has made his decision, now let him enforce it." One of the more prominent suggestions for changing the Court's very fiber was FDR's abortive Court-packing proposal of the late 1930's, proposed after much of his major New Deal economic legislation was ruled unconstitutional by a laissez-faire oriented Court. FDR's speech in which he presented his plan to the nation is reprinted in this section.

This struggle between the President and the high court has resurfaced in the 1960's and early 1970's as a consequence of an

1. See Glendon Schubert, *The Presidency in the Courts* (Minneapolis: University of Minnesota Press, 1957).

activist court. This time, however, the issues were not economic policies, but the civil libertarian decisions of the Warren Court. The 1964, and particularly the 1968, Republican presidential campaigns raised the Court's decisions as major political issues. Furthermore, as the election and subsequent actions of Richard M. Nixon have demonstrated, the controversy has penetrated more deeply than most campaign rhetoric. Nixon, beholden to the South in general and Senator Strom Thurmond (R., South Carolina) in particular for his nomination in 1968, has attempted to make good his debt by continuing to attack the Court. But the Court has suffered more than verbal abuse from the President: he has systematically set about to alter past decisions and remake the Court. The tactics: unprecedented public pronouncements criticizing the Court, directives to the federal bureaucracy to ignore certain rules pursuant to the enforcement of federal court rulings, the attempt to appoint—subsequently thwarted by the Senate's refusal to confirm—two lower court judges well known for their segregationist stances and decisions; the eventual appointment of four new Justices (at the time of this writing); and, because of the intransigence of some lower court judges, the recommendation to Congress that the federal courts' jurisdiction be restricted so that they could not decide certain types of issues. This last proposal—in the form of a nationally televised speech—is reprinted in this section. The eventual impact of these actions by the President can only be guessed at by contemporary historians.

Throughout history Congress also has exhibited profound reactions to the Court, continues to do so today, and promises to do much the same tomorrow. This is probably the reason why it still draws the undivided attention of many political scientists interested in studying the Court's effect: There is abundant sound and fury, and it signifies *something*.

Congress receives the impact of a Supreme Court decision directly and indirectly. The direct effect of a decision is experienced when the Court rebuffs a federal statute as being unconstitutional or construes a statute so far beyond what Congress wanted that it becomes apparent the Court felt the measure to be unwise or unreasonable. The indirect effect is experienced subsequent to a direct consequence on some state constituency; that is, when a state or local action has

been declared unconstitutional. The Congressman himself may be offended (being "just plain homefolks" too); there may be widespread local indignation; some powerful interests might be hurt, and they are not loath or slow to convey their anguish to The Hill.

When a Supreme Court decision irks Congress directly or indirectly, Congress has ample power to retaliate. The weaponry it can field against the Court is impressive. Among the heavier artillery, Congress can initiate the constitutional amending process to undo a Court decision or to curtail the Court's power. In the medium range, it can redo a law that the Court has knocked down, or pare Court jurisdiction by statute. Sometimes the retribution could be classified as harassment or terrorism. For instance, Congress can direct darts and arrows at the place where it stings the most: The Pocketbook. Witness, for example, the House of Representatives frustrating a proposed pay increase for the Justices in 1965. As the reader plainly can see, Congress can really play it tough and rough. As the reader will see, it does.

The materials in this section cover a wide range of problems dealing with the Court's relationships with its co-equal branches. In his article, Stuart Nagel systematically classifies and analyzes extensive historical data in order to find out what factors contribute to Congressional effectiveness in curbing the Court by legislation. This historical survey is followed by a carefully constructed and detailed case study by William Beaney and Edward Beiser which focuses on one particular Court-curbing and intimidating effort within the Congress. Their essay contains much information on the sources of the Court's political strength in the face of a frontal assault on its institutional power. Following these social scientists' analyses, we let the politicians speak for themselves and in so doing point to at least one common bond—the attempt to alter *directly* the nature and functions of the Court—between two otherwise dissimilar Presidents, Franklin Roosevelt and Richard Nixon.

The last essay in this section focuses on the shared powers in United States national government, and the nature of Presidential-Congressional reaction to the Supreme Court. It is axiomatic that in a system of shared power, such as the United States national government, victors in conflict are likely to be a temporary coalition. This general principle certainly holds true for conflicts among the

three branches of government, as is demonstrated in Robert Dahl's article, "The Supreme Court and Judicial Review: Performance," reprinted here. His central conclusion, which should comfort all advocates of popular democracy, is that the Court has never been able successfully to defend itself against the will of a determined majority, as indicated by the combined opposition of Congress and the President.

STUART S. NAGEL

Court-Curbing Periods in American History

Due to its unavoidable involvement in the political process, the Supreme Court has often been an object of congressional attack. Excellent descriptive studies have been made of certain periods of conflict between Congress and the Court,[1] but there is a lack of writing which systematically analyzes relations between Congress and the Court throughout American history. It is the purpose of this paper to analyze in a partially quantitative manner some of the factors which seem to account for the occurrence or nonoccurrence and for the success or failure of congressional attempts to curb the Court.

I. RESEARCH DESIGN

One hundred and sixty-five instances of bills designed to curb the Supreme Court were compiled along with information concerning their content, sponsor, and fate from a perusal of *The Congressional Record* and its forerunners and also from the previous literature in the field.[2] In order to keep the data within manageable limits, reso-

1. Walter F. Murphy concentrates on the problems of the Warren Court in his book, CONGRESS AND THE COURT (1962) as does PRITCHETT, CONGRESS VERSUS THE COURT (1960). Robert Jackson concentrates on the 1937 Court-packing plan in THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS (1941). . . .

2. *Ibid.* See also Culp, *A Survey of Proposals to Limit or Destroy the Power of Judicial Review by the Supreme Court of the United States,* 4 IND. L.J. 386,

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lutions and constitutional amendments were not included although they are introduced frequently and often contain proposals which would substantially reduce the powers of the Court.[3] Relatively narrow bills designed to reverse a single decision were also excluded. Relying on the distribution of bills as well as the consensus of historians, seven time periods as shown in Table 1 were labeled high-frequency Court-curbing periods. This identification is both quantitative and qualitative. For example, the first period covering the years from 1802 to 1804, had only two instances of overt congressional attempts to curb the Court, one of which was the unsuccessful impeachment of Justice Chase. While it may well be a quantitatively marginal period, most writers agree that this was a time of high friction between the Federalists on the bench and the Jeffersonians in Congress and the Administration.

Table 1

HIGH AND LOW FREQUENCY PERIODS OF COURT-CURBING IN AMERICAN HISTORY

High-Frequency				*Low-Frequency*			
	Years	# of Bills	% of 165		Years	# of Bills	% of 165
1.	1802–1804	2	1%	1.	1789–1801	0	0%
2.	1823–1831	12	7	2.	1805–1822	0	0
3.	1858–1869	22	13	3.	1832–1857	1	1
4.	1893–1897	9	5	4.	1870–1892	8	5
5.	1922–1924	11	7	5.	1898–1921	6	4
6.	1935–1937	37	22	6.	1925–1934	2	1
7.	1955–1957	53	32	7.	1939–1954	2	1
	Total:	146	87%			19	12%

474 (1929); Warren, *The Early History of the Supreme Court of the United States in Connection with Modern Attacks on the Judiciary*, 8 MASS. L.Q. 1 (1922).

3. Twenty-five joint resolutions were proposed in 1937 while thirty-three constitutional amendments were introduced during the two year period from 1935 to 1937. Several attempts have been made, for example in 1867 and 1871, to establish via Constitutional amendment a new court representing all the states which would have jurisdiction over constitutional questions. A joint resolution in 1861 demanded the abolition of the federal judicial system.