JUDICIAL POLICIES

IMPLEMENTATION AND IMPACT

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To my father, Robert A. Canon, who first interested me in law and politics

—B. C. C.

To my parents, Forrest and Marie Johnson, for their boundless encouragement

—C. A. J.

PREFACE

In the wake of desegregation, expanded defendants' rights, legalized abortion, and other controversial court decisions, political scientists, legal scholars, and other researchers have begun paying considerable attention to the implementation and impact of judicial policies. Impact papers are presented at academic meetings and appear in scholarly journals; a few case studies are available in book form. Even magazines and newspapers sometimes follow up on the impact of a judicial decision. But few people have stopped to take general stock of our knowledge about what goes on after a court renders a decision. Some textbooks that focus on the Supreme Court, on the judicial process, or even on constitutional law devote their final chapter to implementation and impact, but such coverage is illustrative rather than broadly structured and comprehensive. The fact is that in recent years no one has really synthesized existing material on the impact and implementation of judicial policies. The last such effort was published in 1970 and is now out of print.

The absence of any comprehensive treatment of this literature was quite frustrating in our teaching and research endeavors. We often had to "wing it" in undergraduate classes for those periods devoted to judicial impact. In graduate seminars our reading assignments inadequately conveyed the breadth, scope, and approaches of judicial impact research. Our research was hampered by the lack of a book-length treatment of the literature that could link the findings together. Conversations with colleagues indicated that we were not alone in this frustration. As both of us are active in conducting implementation and impact research, we decided to fill the void in the judicial process literature and alleviate our frustration by writing this book.

We have organized the synthesis according to a heuristic model of populations and responses. We posit four categories of persons, each of which stands in a particular relationship to a judicial policy;

these are the interpreting, implementing, consumer, and secondary populations. At the same time we posit two responses that affected persons must make when reacting to a judicial policy: the acceptance decision and the behavioral response decision. This model has the advantage of comprehensiveness. All reactions and all stages in the implementation and impact process are covered; no research is left out or included awkwardly. This organizational scheme links together in the same chapter the literature on people whose functions in the process are similar regardless of which judicial policy is involved and which theory, if any, is used.

Chapter 1 introduces the heuristic model—the populations and response sequences. Chapters 2 through 5 discuss the interpreting, implementing, consumer, and secondary populations in turn. In Chapter 6 we turn to theory development, focusing on nine theories—some formal, some not so formal—that have been offered to explain implementation and impact patterns; we look at the extent to which each has been verified by research. We then integrate the theories with the heuristic model and discuss the applicability of each theory to each population. In Chapter 7, our final chapter, we develop an overall assessment of the impact of judicial policies on American society. In this chapter we take two approaches. First we look at courts as entities within the political system and we examine research that assesses the abilities of particular courts to initiate or maintain major policies, especially in opposition to other political institutions. Then we focus on four major policy areas in American politics: freedom of expression, political and social equality, criminal justice, and economic policy; we offer a rough longitudinal assessment of the influence the judiciary has had in the formulation of public policy in each area.

Another goal for this book is to stimulate more research about the judicial implementation and impact process. There are numerous research opportunities awaiting the application of inexpensive efforts as well as more sophisticated designs. Judicial impact research was a burgeoning enterprise in the late 1960s and early 1970s but now seems to have lost momentum. We hope an overview mapping out what we do and do not know about judicial impact will foster greater attention to the field and perhaps suggest some specific research projects. This resurgence would be particularly appropriate now because of the increasing attention given in political science and public administration to the analysis of the implementation and impact of public policy, which is for the most part focused on legislation and executive decisions. Judicial policy *is* public policy. It should not be ignored or viewed as a fundamentally different area of

research. We hope this overview will make an integration of judicial impact studies with other public policy studies easier and encourage public policy researchers to include court decisions in the ambit of their activities.

Finally, we want to emphasize two things in conjunction with our goals of filling a need and encouraging greater impact research. First, we believe that too much attention has been given to following up dramatic U.S. Supreme Court decisions such as *Brown v. Board of Education, Miranda v. Arizona,* and *Roe v. Wade.* A disproportionate amount of our impact knowledge comes from investigating the aftermath of just six or eight Supreme Court decisions. In part, perhaps, the loss of impact research momentum reflects the absence of Supreme Court decisions of the first rank during the last decade. But such decisions by their nature are exceptional. In focusing on the extraordinary, we have forgotten the ordinary. We believe a complete understanding of the processes in the implementation and impact of judicial policies must also include data about cases less heralded but nonetheless still important. Thus, where existing research or reasonable speculation permits, we make an effort in this book to focus on less dramatic Court decisions and on routine judicial areas such as antitrust law and product liability.

Second, we emphasize that not all judicial policy is made by the U.S. Supreme Court. Impact researchers are affected by the "upper court" myth as much as anyone. With a few notable exceptions, all their efforts are concentrated on the Supreme Court. There are more than 80 other appellate courts in the United States, as well as innumerable trial courts. They make policy too. We see no good theoretical or pragmatic reason to differentiate the study of their policies from that of Supreme Court policies. Thus, as far as possible we draw examples from other courts.

Many people contributed their time and energy to helping us turn a mass of undetailed ideas into pieces of manuscript and then put them together into what we hope is a complete and coherent book. We are particularly grateful to Robert L. Peabody of Johns Hopkins University, Lawrence Baum of Ohio State University, and Sheldon Goldman of the University of Massachusetts, who read a first draft of the manuscript. They saved us from several embarrassing errors and, even more important, made a number of valuable suggestions for organizing topics and illustrating points. Thanks go to Micheal Giles, now at Emory University, who read a first draft of Chapter 4. Jean Woy provided both general encouragement and specific guidance in the early stages of the book. At CQ Press Joanne Daniels maintained her valuable support and interest as we finished the book; Nola Healy

Lynch served as a thoroughly professional editor, whose advice and comments added much to the clarity and organization of this book. Carolyn England, Kim Hayden, and Betty Pasley typed drafts of various chapters at the University of Kentucky. At Texas A&M University Edna Lumpkin, Lisa Grubbs, Tammy Orth, and B. Wylbur typed chapter drafts. At both schools this was done with speed and efficiency. Thanks also go to our respective departments for the support that was necessary for long-distance coauthorship. Last but hardly least, we thank our wives, Rose Canon and Barbara Johnson, who kept cool heads during a process that lasted longer than either we or they anticipated.

Bradley C. Canon
Charles A. Johnson

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CHAPTER ONE

Responses to Judicial Policies

John Marshall has made his decision, now let him enforce it.

—attributed to President Andrew Jackson

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

—Justice Felix Frankfurter

Constitutional rights . . . are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature.

—U.S. Supreme Court, *Cooper v. Aaron* (1958)

President Jackson's remark reveals an important insight—that judicial policies rarely implement themselves. Justice Frankfurter's comment also underscores the fact that once a judicial policy is announced a court may have little control over what the policy's consequences are. Finally, the Supreme Court's decision in *Cooper v. Aaron,* which overturned moves by Arkansas's governor and legislature to block school desegregation, illustrates the frequently political nature of the events that follow judicial decisions.

The basic premise of this book stems from observations such as those quoted above: judicial policies are not self-implementing, and implementing judicial policies is a political process. In virtually all instances, the courts that formulate policies must rely on other courts or on nonjudicial actors to translate those policies into action. Inevitably, just as making judicial policies is a political process, so too is the implementation of the policies—the issues are essentially political, and the actors are subject to political pressures.

STUDYING RESPONSES TO JUDICIAL POLICIES

This book examines the implementation and impact of judicial policies. There are important substantive and theoretical reasons for studying what may at first appear to be a very narrow part of the judicial process and for studying it as a political process instead of as a legal process. From the substantive perspective, few areas of the American political system remain untouched by judicial decision making. In our litigious society many disputes that have public policy ramifications are decided by the judiciary. Although they differ from legislative actions and executive orders in their origin, judicial policies are also public policies: they too must be implemented before disputes or problems are resolved, and they have an impact on the public. Racial segregation, for example, did not end with the announcement of *Brown v. Board of Education* in 1954. Ten years after the Supreme Court decided that separate but equal is inherently unequal, a great majority of the South's black students continued to attend overwhelmingly black schools. The Court's policy was given meaning only after considerable efforts by lower courts, the Department of Justice, the Department of Health, Education and Welfare, the Congress, and civil rights groups. Our knowledge about desegregation and the judiciary would be quite incomplete if we limited our analysis to the *Brown* decision. Knowing the events leading to a judicial decision and the substance of the decision gives us only a partial picture of the judicial process.

Studying the reaction to judicial policies is also important from a theoretical perspective. To a certain degree, evaluting the implementation of judicial policies is in the mainstream of the emerging field of policy analysis. Important theoretical questions in this field may be answered by studying the aftermath of judicial decisions: Why are some policies implemented while others are not? Why do some organizations change policies while others do not? Why do some policies have the intended impact while others fail to do so or have

unintended consequences? The varied outcomes of judicial policies provide ample opportunities to examine the impact of public policies.

Responses to some court decisions have been immediate and implementation almost complete. For example, in the years following the Supreme Court's 1973 abortion decision in *Roe v. Wade,* several million women ended their pregnancies with legal abortions and new pro- and antiabortion groups emerged as powerful forces in our political system. By contrast, the events following *Brown v. Board of Education* demonstrate that the implementation of other decisions may be prolonged. And the Supreme Court's decision in *Abington School District v. Schempp* (1963), declaring prayers in public schools unconstitutional, is an example of a decision that has been implemented in varying degrees across the nation. Almost two decades after the decision, prayers continue as a daily practice in some of the nation's schools, while other school systems have dropped all religious activities. The aftermaths of these decisions and others raise important questions about the ability of the judiciary to make public policy effectively and about how individual citizens and political institutions relate to the judiciary. Moreover, studying the implementation of judicial decisions may shed some light on such longstanding issues as the relationship between law and human behavior and the role of the judiciary in our political system.

If studying the implementation of judicial policies is important, then we must study it as a political process. In a general sense, the implementation of *any* public policy is a political process. The ill-conceived notion that the administration of policy is apolitical has long since been discarded (if it was ever in vogue). Political scientist Michael Lipsky remarks on how postdecision factors may enter the implementation process: "There are many contexts in which the latitude of those charged with carrying out a policy is so substantial that studies of policy implementation should be turned on their heads. In these cases, policy is effectively 'made' by the people who implement it." [1]

As we will see in later chapters, many judicial decisions carry a great deal of latitude for interpretation and implementation. Political actors and institutions who follow through on these decisions make the judicial policy. Certainly, the judges who enforced desegregation in southern school districts or busing decisions anywhere were subject to political pressures from a variety of sources. Similar pressures affected school board decisions regarding the role of religion in schools. Even presidential politics may become intertwined with judicial policies, as did Richard Nixon's 1968 "law and order" presidential campaign criticizing the Supreme Court's criminal

justice decisions or the explosive issue of abortion in the 1980 presidential election. Like the Congress, the Supreme Court and lower courts must rely on others to translate policy into action. And like the processes of formulating legislative, executive, and judicial policies, the process of translating those decisions into action is often a political one subject to a variety of pressures from a variety of political actors in the system.

ROE V. WADE: A CASE STUDY OF JUDICIAL IMPACT

The best way to illustrate the political nature of the events that follow a judicial decision is to review the implementation and impact of a recent decision that remains controversial. We will use the Supreme Court's 1973 abortion decision in *Roe v. Wade* to show what may happen after a judicial policy is announced. Later in this chapter we will suggest a conceptual scheme by which the events following any judicial decision may be effectively organized and compared with the events following other judicial decisions.

The Decision

On Monday, January 22, 1973, Associate Justice Harry Blackmun announced the decision of the Court in two cases concerning the rights of women to end unwanted pregnancies with legal abortions, *Roe v. Wade* and *Doe v. Bolton.* According to Bob Woodward and Scott Armstrong's revealing account in *The Brethren,* this decision was the result of considerable conflict and compromise within the Court.[2] The decision came after almost a full year of research by Justice Blackmun, and the justices fully expected a public outcry after the decision was announced. They were not disappointed.

The cases before the Court challenged the laws prohibiting abortion in Texas and Georgia. The Court decided in favor of the plaintiffs in both cases—women who were identified only as Jane Roe and Mary Doe. The direct effect of the decision was to void the antiabortion laws in Texas and Georgia. Indirectly, of course, the Court also voided laws in every state that prohibited or limited abortion. The results and policy options for the states were summarized in the concluding parts of the majority opinion in *Roe:*

> 1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a *lifesaving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other

> interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.
> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
> (b) For the stage subsequent to approximately the end of the first trimester, the state, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
> (c) For the stage subsequent to viability, the state in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[3]

In effect, the Supreme Court had given women the right to abortion on demand during the first two trimesters of pregnancy and had allowed the state to regulate abortions only to protect the mother's health during these two trimesters. The Court held that during the third trimester the state could regulate or even prohibit abortions, except where the life or the health of the mother was endangered.

Immediate Responses

On the day the Court announced the abortion decision, former president Lyndon B. Johnson died of a heart attack, and a few days before the Court's announcement, President Richard Nixon had announced the end of American military participation in the Vietnam War. These two events diminished the newsworthiness of the Court's decision in *Roe* and *Doe*. Instead of being the lead story in the weekly news magazines, the abortion decision received only limited coverage.[4] Nevertheless, the reactions from several corners of the political system were immediate, and they were mostly negative.

A few reactions were aimed directly at the justices. Woodward and Armstrong recount some of the reactions by noting that

> thousands of letters poured into the Court. The guards had to set up a special sorting area in the basement with a huge box for each Justice. The most mail came to Blackmun, the decision's author, and to Brennan, the Court's only Catholic. Some letters compared the Justices to the Butchers of Dachau, child killers, immoral beasts, and Communists. A special ring of hell would be reserved for the Justices. Whole classes from Catholic schools wrote to denounce the Justices as murderers. "I really don't want to write this letter but my teacher made me," one child said. Minnesota Lutherans

> zeroed in on Blackmun. New Jersey Catholics called for Brennan's excommunication. Southern Baptists and other groups sent over a thousand bitter letters to Justice Hugo Black, who had died sixteen months earlier. Some letters and calls were death threats.[5]

But not all reactions were negative. The president of Planned Parenthood, Alan F. Guttmacher, called the decision a "courageous stroke for right to privacy and for the protection of a woman's physical and emotional health." A similar reaction came from women attorneys at the Center for Constitutional Rights, who cited the decision as a "victory for [the] women's liberation movement." [6] A more direct and personal reaction to the decision is reported in *The Brethren.* Several months after the abortion decision Justice Blackmun gave a speech at Emory University Law School, in Atlanta, Georgia, where a woman embraced him after his speech, saying, "I'll never be able to thank you for what you have done. I'll say no more. Thank you." Unknown to Blackmun at the time, this rare positive response came from "Mary Doe," the woman from Texas who had challenged the Texas abortion law.[7]

Reactions also came from members of Congress. A week after the Supreme Court's decision, Rep. Lawrence J. Hogan, R-Md., introduced the first of several "right to life" amendments to the U.S. Constitution. By November 1973 over two dozen resolutions to overturn some aspect of the Court's decision were introduced in Congress. Two of the proposals eventually enacted into law were added to the Health Programs Extension Act of 1973, which was amended to permit institutions receiving federal funds to refuse to perform abortions, and the 1973 Foreign Assistance Act, which was amended to prohibit the use of U.S. funds to pay for abortions overseas.[8]

Response was also immediate from women who sought abortions. In the first three months of 1973, 181,140 abortions were performed in the United States; and during the first year following the Supreme Court's decision a total of 742,460 abortions were performed nationwide. The overwhelming majority of abortions occurred in metropolitan areas, and 41 percent occurred in Middle Atlantic states. The variation in the number of abortions from state to state was considerable; the greatest number of abortions was performed in New York, a state that had previously liberalized its abortion law, while two states—Louisiana and North Dakota—reported no abortions during 1973.[9] Data from the first year of nationwide legal abortions suggest that almost one of every five pregnancies was terminated with an abortion.[10]

Whether a woman secured an abortion depended heavily on whether there was a physician or medical facility willing to provide abortion services. A study by Jon R. Bond and Charles A. Johnson found that fewer than half of the hospitals in their national sample changed abortion policies after *Roe*.[11] Indeed, for many hospitals in the sample (85.6 percent), the abortion issue was not a subject of heated staff or board discussions. The data seem to indicate that whether hospitals provided abortion services depended heavily on whether the hospital staff was in favor of abortions; factors such as community need or demand for abortion services and the hospital's financial situation were largely unrelated to the hospitals' decisions.

A national survey by the research division of Planned Parenthood, the Alan Guttmacher Institute, in 1973 revealed that less than one-third (30.1 percent) of the non-Catholic short-term general hospitals in the United States provided abortion services. Another survey revealed that 75 percent of the hospitals providing abortion services were privately controlled, rather than publicly controlled or government operated. In the year following the abortion decision, a relatively small number of nonhospital clinics provided abortion services (178 nationwide), and only a few physicians reported performing abortions in their offices (168 nationwide). Nonetheless, in the first year after the decision, the largest percentage of abortions occurred in clinics (44.5 percent), and most of the remaining abortions (41.1 percent) were performed in private hospitals.[12]

The Alan Guttmacher Institute concluded that in the 12 months following the Supreme Court's abortion decision, "the response of health institutions in many areas to the legalization of abortion in 1973 was so limited as to be tantamount to no response at all."[13] This widespread nonresponse had a considerable effect on *Roe v. Wade*'s impact—after being granted the *constitutional* right to an abortion, many women could not exercise that right because medical facilities in their communities refused to provide the services necessary to secure an abortion.

Later Responses

One year after the Supreme Court's announcement of the abortion decision, the first annual "March for Life" was held in Washington, D.C., to protest that decision. The demonstration gave direct evidence of political divisions created by the abortion decision. Battle lines were drawn by proponents and opponents of the Court's policy in several political arenas.