DESIGNING JUDICIAL REVIEW

Interest Groups, Congress, and Communications Policy

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CHAPTER 1

Introduction: Judicial Review as a Political Variable

Political actors are well aware that current choices constrain future choices and greatly affect future outcomes. Therefore, when passing laws, goal-oriented actors pay a great deal of attention to the "details" of legislation, including the structural and procedural details. Examples of battles over these types of details abound, especially regarding the use of structures and procedures to plan and account for bureaucratic actions. Debates during the creation of the Interstate Commerce Commission represent a paradigmatic example of such a battle (Skowronek 1982; Fiorina 1986). Similarly, Moe (1989) has outlined the disputes over structure during the creation of the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Product Safety Commission. And McCubbins, Noll, and Weingast (1989) have described the primacy of procedural details in the 1977 amendments to the Clean Air Act.[1] At the root of all these battles is the awareness that structures and procedures matter.

In this study I provide a detailed look at another way procedures matter by examining how political actors attempt to plan for court involvement in policy decisions. More specifically, I focus on the use of judicial review provisions in regulatory legislation as a means of gaining political advantage. At the same time, by focusing on the politics surrounding the inclusion in legislation of specific provisions for judicial review, I also seek to add to our understanding of the role that courts play in policy-making.

Courts in the Political System

While courts have always been an integral part of the political process, they have not always been viewed as being *political.* A major exception to

1. See also West's 1985 investigation of the introduction of rule-making procedures into the Federal Trade Commission's decision-making process and Owen and Braeutigam's 1978 analysis of the strategic use of process. On the general theme of political actors having preferences over institutions, see Knott and Miller 1987.

this perspective comes from the field of judicial behavior, where the courts have received an explicitly political foundation from the attitudinal model.[2] This model, which holds that judges have policy preferences and vote according to these preferences, has been used to explore a variety of topics, such as the granting of certiorari and opinion assignments within the Supreme Court.[3]

Viewing the courts as political actors is no longer the sole province of the attitudinal model. Students of political institutions increasingly have begun to incorporate courts into their models and explanations of political events. Several studies, for example, explicitly have addressed the political role played by the courts in the formation of public policy.[4] Positive theorists also have turned their attention to the courts with increasing regularity in recent years, modeling the interaction between courts and other political institutions.[5] And a few studies of specific policy areas have even inspected the debates over the inclusion of specific provisions for judicial review.[6]

While many studies have begun to examine the interaction between courts and other political actors and institutions, several aspects of the courts' role remain underexamined. For example, why are the courts reviewing agency actions in the first place? Once the courts are involved, what types of actions can they take? Do they have free reign to alter policy in any manner they desire? Or are their decisions and actions circumscribed? To what extent, and under what conditions, do other actors try to limit (or expand) the role the courts play? What influences are significant in determining the answers to these other questions?

There are at least two ways one can approach these questions. The first can be labeled the *traditional* model.[7] In this model, judicial review is

2. Another major exception, of course, is the line of work spawned by Dahl (1957).

3. A comprehensive statement and investigation of the attitudinal model can be found in Segal and Spaeth 1993. See also Pritchett 1948; Schubert 1965; Rohde and Spaeth 1976; and Segal and Cover 1989.

4. Some of the best examples include Melnick 1983, 1994; Katzmann 1986; Shapiro 1988; and Rosenberg 1991. See also Thernstrom 1987, but note the stinging review by Karlan and McCrary (1988).

5. This literature is growing rapidly. Early studies include Marks 1988; Ferejohn and Shipan 1988, 1990; Ferejohn and Weingast 1992; Gely and Spiller 1990; and Spiller and Gely 1992. Several legal scholars have also turned their attention to this area, including Eskridge (1991a, 1991b), Eskridge and Ferejohn (1992), Farber and Frickey (1988, 1991), Mashaw (1990), and Spitzer (1990). Studies that merge the attitudinal model and positive theory include Cameron, Cover, and Segal 1990 and Segal, Cameron, and Cover 1992.

6. Most notably, see Light's 1992 informative description of review provisions regarding actions of the Veterans Administration, and Melnick 1983, esp. 7–8 and 373–79; 1994.

7. This model corresponds to what Mashaw (1990) labels "judicial idealism" and is also related to what Segal and Spaeth denote the "legal model." See also the informative

almost a given. Debate generally focuses on normative issues—for example, whether court action is appropriate, what actions or decisions courts should require of bureaucracies, and what factors and ideals should underlie court decisions. A typical question is whether it is *proper* for courts to act; that they can act if they so choose is rarely, if ever, questioned.

A closely related focus of studies in this vein is on what the purpose of courts should be. A representative example is provided by Choper (1980), who, in his insightful analysis of the function of the Supreme Court, contends that the essential role of judicial review is to protect fundamental rights.[8] Stewart's 1975 critical review of the development of administrative law strikes a similar chord—the traditional model, he points out, argues that the primary goals of the courts are the protection of private autonomy and the provision of additional assurance that agencies do not exceed their authorized powers. Another related argument is made by Ely (1980), who advances the normative contention that the role of the courts is to ensure the proper functioning of the democratic system. Yet another view is proffered by Rose-Ackerman (1992), who argues that courts should improve the democratic accountability of agency policy-making by requiring agencies to take into account the costs and benefits of a policy action on all citizens.[9]

Implicit in this approach is a stylized view of the judiciary's role in the political process. First, Congress delegates policy-making responsibility to an agency; second, the agency chooses a policy; and finally, the courts review the policy choice, seeking to make sure administrative action was appropriate. Most notably, in this model the stages, especially the first and third stages, are regarded as distinct from each other. Congress decides whether or not to delegate decision-making authority; the agency then decides, within certain boundaries, what action to take; and finally, the courts make sure the agency action falls within the proper bounds. As far as the courts are concerned, the main focus is on issues like justice, fairness, liberty, and protection from the state. While Congress may be concerned with setting proper boundaries and broad policy goals for the

discussion in Cass 1986 about dominant strands of thought that run through writings on administrative law. For a comparison of the legal model with models that incorporate more political factors, see Segal and Spaeth 1993 and T. George and L. Epstein 1992.

8. Like many scholars who work in this vein, Choper focuses on constitutional rather than statutory issues. This tendency was observed by Russell: "To an English common law lawyer judicial review refers primarily to judicial review of administrative actions. . . . Nowadays when political scientists and constitutional lawyers talk about judicial review it is not this older, more generic use of the term that they have in mind" (1991, 116).

9. A discussion of some of these approaches can be found in Clinton 1989, which, along with Wolfe 1994 and Lasser 1988, reevaluates the foundations and development of judicial review.

agency, at the same time Congress pays little attention to what will happen once the courts enter the process.[10]

An alternative view—a more *political* model—presents a quite different list of considerations. This view follows from developments in positive theory that accentuate the significance of procedure and structure as means to garnering and securing political advantage (McCubbins, Noll, and Weingast 1987, 1989; Moe 1989, 1990a, 1990b; Horn and Shepsle 1989; Macey 1992a, 1992b; Shepsle 1992). In these accounts, actors realize that they are involved a sequential game. In other words, they are forward-looking and they consider the future benefits that derive from each current action. Provisions chosen during the writing of laws, such as those concerning judicial review, are not "merely" procedural, as these provisions will likely affect the potential range of actions available to actors in the future. Such consideration of provisions occurs not only with the bureaucracy, as the aforementioned studies have demonstrated, but also with the judiciary. Because of this recognition of the future importance of current procedural choices, the phases of the policy-making process no longer can be viewed as distinct. Instead, politics is introduced into judicial review by virtue of consideration of review provisions in the first stage.

These two views yield dissimilar hypotheses about how political actors behave. In the first account, court action is something that happens "later"—no attention is paid to the possibility that actors will expect and try to plan ahead for court action. Therefore, actors simply will view the courts as adding another layer of insurance against improper or unfair agency actions. Arguments generally will not take place over the exact specification of judicial review provisions, and those that do will be concerned with procedural ways of ensuring fidelity to these values and others, such as individual liberty and private autonomy.[11]

The alternative view presents a considerably different picture of what happens in the first stage, or what I call the *front end,* of the policy process. Interest groups and members of Congress know that details of procedure and structure are important—to paraphrase Moe (1990a), procedural pol-

10. This approach is common to public-administration scholars as well as legal scholars. Even so astute an observer of administration as Robert Cushman (1941) devoted very little space in his magisterial account of regulatory agencies to the legislative specification of review provisions. More recently, in their excellent administrative law textbook, Carter and Harrington have written, "As a practical matter Congress usually says nothing about reviewability of administrative decisions in authorizing legislation. The statutory language that does exist often reiterates APA language and/or *Abbott Labs's* presumption of reviewability" (1991, 355).

11. These types of arguments are examples of deliberation, not interest-group politics. For an elaboration of the role of deliberation in administrative law, see Shapiro 1988 and Eskridge 1991b.

itics is interest-group politics.[12] In this view, political battles over these arcane details of legislation are common and hard fought, as interest groups and legislators recognize that the structures and procedures specified in the current time period will greatly affect the range of actions and outcomes possible in the future. Because of this realization, actors treat the courts as endogenous and, to an extent, malleable. Normative principles, such as fairness and justice, are undoubtedly important. But interest groups will realize which types of provisions are most likely to help them achieve their goals and will pressure members of Congress to write such provisions into law.

Are such provisions foolproof? Certainly not. First of all, as will be discussed in later chapters, there is a great amount of uncertainty surrounding all of these actions. In addition, at times courts will establish their own rules of procedure, and some of these may be in opposition to what members of Congress would prefer. Specifying review provisions in legislation, however, increases the likelihood that courts will act in certain ways and not in others. And concrete legislative directives present a high hurdle for any court seeking to act in a contrary manner. By specifying certain review provisions, political actors are not looking for a foolproof way of achieving some specific policy objective, but rather are attempting to increase the probability of beneficial outcomes.

Research Questions

Two questions become central at this point. The first question is whether or not actors truly behave this way when creating legislation. Do they attempt to structure judicial review in such a way as to secure political advantage in the future? The second and related question concerns when, and under what conditions, Congress and members of interest groups will seek to expose an agency's decisions to judicial review. At the extreme, if the courts' role is simply that of a guardian to protect against administrative overreaches, we generally would not expect to see interest groups or other members of the enacting coalition lobbying for favorable judicial review provisions. And if such lobbying does occur, we would not expect it to be rooted in self-interest or to be successful. If, on the other hand, interest-group politics reaches this far into procedural details and manages to affect the legislation, then we have support for the alternative proposition. Similarly, we would expect to see that political actors will support provisions that are more likely to enhance the probability that their policy goals will be reached.

12. The interest groups and members of Congress can be thought of as members of an "enacting coalition." For a discussion and elaboration of this concept, see McNollgast 1992.

Several other hypotheses emerge from this perspective. Take, for example, the strategic situation faced by an interest group. To the extent that this group feels that the administrative agency is (or will be) sympathetic to its interests, it will be more likely to push for provisions that limit or even preclude judicial review. Similarly, a group that feels it will be disadvantaged by administrative actions will seek to make the bureaucratic process as open to review as possible. In addition, we might expect that local interest groups would prefer to have review centered in local courts, as these courts are likely to be more sympathetic, and less costly, to a local group.

As a group decides which types of provisions to support and promote, however, it does so with the awareness that it cannot easily single itself out for the privileges of judicial review while simultaneously shutting out its opponents. That is, if a group, for whatever reason, favors an easily triggered role for the courts, it must be aware that its opponents also may benefit from such a standard. In other words, the group must consider the overall effects of different review provisions.

This is not to imply that a group will oppose some provision merely because inclusion of the provision may benefit an opposing group. Rather, the group will be careful to look at whether the inclusion of a provision could redound to its detriment if used by an opposing group. In such a case, the benefits a group may accrue from the inclusion of such a provision might be outweighed by the costs of having the provision used against it.

Related Studies

The types of questions addressed by this study are directly analogous to those that have been asked about the relationship between Congress and the bureaucracy. In briefly reviewing this literature, again it is useful to think in terms of a three-stage stylized model of the policy process in which the Congress is the principal and the bureaucracy is the agent. In the final stage, the principal has the opportunity and option to react to the agent's decisions. In the penultimate stage, the agent makes decisions about policy choices. And in the first stage, the principal creates the procedures and structures within which the agents make decisions.

Until recently, studies of this relationship generally focused on the final stage and Congress's willingness and ability to actively oversee the bureaucracy. Most studies concluded that Congress has little incentive to oversee the bureaucracy and, in many cases, has weak control over agencies. A later set of studies challenged this conventional wisdom, however, arguing that subtler mechanisms of control are at work, that in actuality

bureaucrats are finely attuned to congressional preferences, and that agencies' outputs reflect these preferences.[13]

Recently, however, a new strain of research has emerged, one that looks at the first stage, or what I earlier referred to as the front end, of the policy-making process. Studies of this type examine how political principals attempt to limit the discretion of agents; how they attempt to reduce (or at least plan for) uncertainty; and how they attempt to do these things a priori.[14] The general thrust of this research is that the second and third stages of the process are not the only chances for the principal to affect the agency's decision; the initial stage also presents such an opportunity.

There are numerous reasons why rational political actors need to take account of the likely consequences of their current choices. One reason is made explicit by McCubbins, Noll, and Weingast (1989) in their examination of the Clean Air Act Amendments of 1977. These authors use a spatial model to demonstrate that once a policy is changed, it may be impossible for the coalition that enacted the original policy to move the policy back to the initial location, even if the preferences of the coalition remain unchanged. This principle is true regardless of whether the change is due to an action taken by the bureaucracy or a decision made by a court. The explanation for this inability to return to the original policy is straightforward—the new policy may be preferred to the original policy by some set of actors, and this set of actors may be able to stop the passage of legislation that would be needed to reenact the original policy.

To counter this possibility, according to these authors, the enacting coalition has an incentive to create structures and procedures that constrain potential future actions undertaken by an agency.[15] The central problem, as they conceive of it, is one of bureaucratic drift. Because of the slack inherent in any principal-agent relationship, agencies may not implement the policy desired by the enacting coalition. To prevent this drift, political actors—Congress, the president, the interested groups—will seek to limit the amount of drift that can take place.

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13. One of the first attempts to measure such subtle influence was Weingast and Moran 1983. Aberbach (1990) demonstrates that the use of "traditional" oversight has increased dramatically since the 1970s.

14. An interesting, albeit heretofore unacknowledged, parallel exists between this literature and some of Herbert Simon's classic work in organization theory. In particular, the concept that political actors attempt to use procedures and structures to help ensure certain types of outcomes is very similar to Simon's notion that organizational leaders structure the value and factual premises on which other members of the organization make decisions (1957, 45–56).

15. For an extension of this model, see Macey 1992a. On the other hand, criticisms of the concept of the enacting coalition can be found in G. Robinson 1989b; Moe 1990b; and Hill and Brazier 1991.

This problem of bureaucratic drift is, in essence, a form of uncertainty. It reflects the principal's uncertainty about the future course of the agent's actions. That is, once members of Congress delegate policy-making responsibility to an agency, they cannot know with certainty what actions the agency will take. In addition, they are uncertain about which policy issues and questions will arise in the future. As the enacting coalition knows, new and unexpected questions and issues are bound to arise, and while these cannot be known in advance, the coalition can attempt to create structures and procedures that will help the bureaucracy reach an outcome in line with what the current coalition would prefer.

While these types of uncertainty are undoubtedly important, there are other causes of uncertainty that may have as great an effect on the calculations of the original actors. Not only are actors worried about bureaucratic drift and about the unknown decisions that are likely to come up in the future, they also are concerned about the possibility that while they possess political power now, they might not in the future.[16] This concern is central to McCubbins, Noll, and Weingast's concept of "autopilot," which they argue is a way to set an agency's decision making to ensure future policy success and also to protect against the possibility of losing power in the future.

This point is emphasized even more strongly by Moe in a series of articles (1989, 1990a, 1990b), and it, along with the argument that groups must compromise in order to get legislation passed, leads him to reach different conclusions than do McCubbins, Noll, and Weingast.[17] Moe contends that "political uncertainty" is likely to cause actors to favor structures and procedures that they would not favor on technical grounds alone. One result of this uncertainty, he argues, is that actors who are involved in creating agencies may try to place these agencies out of the reach of *all* political actors—themselves included. The reason for such action is the fear that other actors may gain political power and then take control of the agency and use it in a different manner.

Despite the differences in the approaches and conclusions of these studies, their similarities are strong. In particular, they share a common link in emphasizing the strong political incentives to specify procedural

16. This type of uncertainty is addressed most explicitly by Moe (1989, 1990a), Horn and Shepsle (1989), and Horn (1995). See also Ferejohn and Weingast's 1992 discussion of how the current Congress, uncertain about the future composition of Congress, attempts to constrain future Congresses.

17. In essence, Moe argues that because legislation is so hard to pass, compromise must take place. That generally means bringing the "opposing group" into the legislative decision-making process, and these other actors will, according to Moe, do whatever they can to cripple the agency. Left unclear, however, is why the winning group would stand for passage of an act that yields a crippled agency.

and structural details in the front end of the policy process. And they explicitly view current choices as a way to structure future decisions and outcomes.

Moving to the Courts

A similar logic can be applied to the courts. What it demonstrates is that political actors arguably have some influence over judicial actions in the second and third stages of the policy process. However, because the ability to influence the courts at these points of the process is limited, the incentives of political actors to design control mechanisms ex ante are heightened.

In the final stage of the policy process, political actors may attempt to overcome court actions—for example, Congress may write a law that overturns a court decision. However, members of Congress will not want to rely on such actions as the only means of dealing with the courts. To begin with, Congress is not always successful in its attempts to overturn court decisions.[18] Part of any lack of success undoubtedly stems from the inherent difficulties involved in passing legislation. For example, even when a majority in Congress prefers to overturn a court decision, this majority may be so hampered by institutional features of Congress that it is unable to achieve its goals (Marks 1988). Another contributing factor is that members of Congress often defer to judicial judgments. This norm of congressional deference to the courts is especially strong for the Judiciary Committee (Miller 1990, 1992). An additional factor is that most members of Congress are often just plain unaware of court decisions, especially if the decision was issued by a lower court (Katzmann 1988, 1992).

One other factor looms large in the decision calculus of political actors. Even if Congress and the president do manage to pass a law in reaction to a court decision, it is likely that the new policy will be different from the status quo ante.[19] There may be a new president, for example, or there may be a different distribution of preferences in Congress, leading to a different policy outcome. To ensure fidelity to their goals, members of the original coalition thus will prefer using constraints on the courts to opening the Pandora's box of new legislation.

How much influence do political actors have over courts in the second

18. The most complete and impressive canvassing of congressional reactions to Supreme Court decisions can be found in an article by William Eskridge (1991b). In this article, Eskridge reports that since 1967, Congress has overturned an average of five Supreme Court statutory-interpretation decisions per year. For statistical evaluations of such override attempts, see Ignagni and Meernik 1994 and Bawn and Shipan 1993.

19. On this point, again see McCubbins, Noll and Weingast 1989.