THE STUDY OF PUBLIC LAW

alter F. Murphy and Joseph Tanenhaus

PUBLIC LAW

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To ROBERT E. CUSHMAN, 1889–1969, and C. HERMAN PRITCHETT

It was you that broke the new wood,
Now is a time for carving.

—EZRA POUND

Preface

This book has its origins in a seminar we conducted during the summer of 1963 for the Inter-University Consortium for Political Research. The participants in that program may find that the long gestation has removed any resemblance between the working papers we prepared for those sessions and the contents of this book. In this instance, we suspect that the shock of nonrecognition is preferable to that of recognition.

This is the first volume in what we plan as a trilogy. The second will focus on a cluster of problems of public policy that judges in a number of countries have faced—such as federalism, political rights, and criminal justice—and its core will consist of cases and materials bearing on those problems. The third volume will present a more systematic, more detailed, and, we hope, a more sophisticated analysis of the roles of courts and judges

in modern democratic nations. It will be based not only on the more extensive research into comparative politics that is now in progress but also on a series of opinion surveys of national samples and elite groups. We want to be able to show not only how courts and judges can function, do function, and should function, but also how the people who have to live with judicial rulings see courts as functioning and want courts to function.

A word about the title of this volume: One noted scholar* has said that the study of judicial behavior is replacing the study of public law. Although we chose the older characterization for descriptive rather than ideological reasons, we think that political scientists who study courts and judges are concerned with much more than how judges vote and write opinions or how they make up their minds. We believe that most of our colleagues who call themselves behavioralists would agree with that judgment. In our view the study of judicial behavior is only one segment, although a major segment, of the larger study of public law.

Any book so long in gestation must have depended for nourishment on many people other than its putative authors. Our wives and children put up with all the inconveniences and annoyances of research with their usual good grace. We are also grateful to Dr. Warren E. Miller, organizer and sometime Director of the Inter-University Consortium for Political Research, for inviting us to come to Ann Arbor in 1963; to his wife, Kip, for her warm hospitality; and to his most able assistant, Miss Ann Robinson, for taking care of such basic arrangements as salary. The National Science Foundation financed the surveys of public opinion to which we refer at scattered places throughout the book. We shall soon publish a monograph based on more systematic analyses of these survey data than we could present here. During the final stages of manuscript preparation, the Center of International Studies of Princeton University provided much needed financial support. We are obliged to several teams of computer specialists who worked so hard to program and process the data we required: Mrs. Shirley Gilbert of the Office of Survey Research and Statistical Studies, Princeton University, Mr. Gary Soverow of the Princeton Class of 1968, Mr. Lawrence Kegeles of the Princeton Class of 1969, Mr. Daniel L. Kastner of the Princeton Class of 1973; Professor Alonzo Mackelprang of American University, Professor Harrell R. Rodgers of the University of Georgia, Professor Kenneth A. Wagner of Los Angeles State College; Mr. Steven Roth of the Class of 1970 of the State University of New York at Stony Brook, and Mr. Gauri Srivastava of the State University of New York at Stony Brook. For services above and beyond the call of duty in editing, typing, and reproducing the manuscript we are indebted to Mrs. Judith Anderson, Mrs. Rosalie Bergen, and Mr. Fred Gordon, all of the State

* Glendon A. Schubert, "Introduction: From Public Law to Judicial Behavior," in his *Judicial Decision-Making* (New York: Free Press, 1963).

University of New York at Stony Brook; Mrs. Janet Bloor, Mrs. Lynn Waters, Mrs. Jane G. McDowall, Mrs. Mary Merrick, and Mrs. Meri Lea Scott, all of Princeton University; Mrs. Margaret Trott of Charlotte, N. C.; and Mrs. Mary June Forsythe of Atlanta, Georgia.

Miss Anne Dyer Murphy first persuaded us to undertake this book; her successor at Random House, Mr. Barry Rossinoff, succeeded in prying the manuscript out of our filing cabinets. At the moment we are inclined to be grateful to them, at least for their friendship and encouragement. Miss Jane Cullen and Mrs. Stefanie Gold performed yeoman service in translating our writings into English. All readers should share our appreciation.

We begged, bribed, or blackmailed a host of colleagues into reading all or portions of the manuscript in various draft forms. In alphabetical order our victims were:

David W. Adamany, Wesleyan University
David J. Danelski, Cornell University
Irving Faber, Colgate University
Rosalie Feltenstein, Ronda, Málaga
George H. Gadbois, Jr., University of Kentucky
Gerald Garvey, Princeton University
Takeo Hayakawa, University of Kobe
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W. Duane Lockard, Princeton University
Alpheus T. Mason, Princeton University
Charles A. Miller, Princeton University
Edward R. Tufte, Princeton University
Rudolph Wildenmann, State University of New York at Stony Brook and University of Mannheim

We thank these people for their help and want to say publicly that we forgive them for causing us many headaches of rethinking, rewriting, and reediting. If any errors remain after all these careful analyses, we must, of course, take full blame. We shall do so, however, with sullen reluctance and shall forever hold it against whoever among our friends was supposed to protect us from those particular aspects of our incompetence.

Princeton, N.J.
Stony Brook, N.Y.

March 17, 1971

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The Study of Public Law

Introduction

For many years the study of public law was central to the discipline of political science in the United States. In the 1950s and early 1960s, however, it seemed to many observers that public law had drifted out of the mainstream of American political science.[1] As do many of our professional colleagues, we find public law to be an exciting and important area of political inquiry, and we sense that a renaissance of interest in the judicial field is under way. Thus we believe that the time is ripe for a reiteration of the reasons—if not for formulation of new reasons—why political scientists should concern themselves with courts, judges, lawyers, and that nebulous concept, the law.

In this book we concentrate on the work of American scholars, but not on American courts. Many of the intellectual justifications for judicial review were known in Europe before the Revolution of 1775, but it was in

the United States that the process matured in a viable government setting. The American Supreme Court was the first major national tribunal to function as a constitutional court,* that is, as a court exercising authority to declare acts of the national legislature and executive invalid. And that tribunal is still the most important constitutional court. Yet it is no longer a unique institution. It has been frequently imitated and its analogues grafted onto more than thirty different political systems.[2] In part because of this widespread imitation, in part because American scholars have been broadening their jurisdiction to study courts and judges outside the United States, and in part because of the intrinsic interest of the material, we have drawn illustrations about the functions of constitutional courts from a number of countries. Frequently we cite practices in Australia, Canada, India, Ireland, Japan, and West Germany, although the U.S. Supreme Court remains the central reference point.

Our decision to operate along such a broad spectrum has carried a pair of expensive price tags. First, we have had to neglect the work of trial courts and of intermediate appellate courts. We attempt to bring some discussion of these important tribunals into the text, but we look at them mainly from the perspective of a nation's highest constitutional court. Without a doubt, one could gain many insights by viewing a political system and its judicial subsystem from the perspective of lower courts, and we hope that other scholars will quickly repair our omission.[3]

A second cost has been equally high. The study of public law in the United States has been heavily interdisciplinary. The greatest American scholar in the field, Edward S. Corwin, was trained as a historian, taught in a department of political science, and in writing about constitutional law brought to bear self-taught technical legal knowledge as well as massive learning in history and politics. Both before and after Corwin, anthropologists, economists, historians, journalists, lawyers, philosophers, political scientists, psychologists, and sociologists have contributed to understanding the work of courts and judges. And like Corwin, these writers have themselves often been educated in several intellectual disciplines. In the chapters that follow we concentrate on the interests and writings of political scientists, without, we hope, obscuring either the quality or quantity of scholarship developed by people in other fields.

Our rationalization for paying these high costs is that in a book of this size there are close limits even to what two foolhardy authors can accom-

* In discussing federal courts in the United States, analysts have often made a distinction between "constitutional courts," that is, courts established by Congress under Article III, Section 1 of the Constitution, and "legislative courts," tribunals established by Congress under Article I, Section 8. In the context of cross-national research "constitutional court" has taken on a broader meaning to refer to a tribunal possessing the authority to review the legitimacy of acts of coordinate branches of the government, and it is in this broader sense that we use the term throughout this book.

plish. Assigning priorities was imperative, and we chose four objectives, none of them modest: (1) to indicate the relationship of the study of public law to the larger discipline of political science; (2) to suggest some of the basic problems to which political scientists interested in courts and judges orient their research; (3) to explore some—but only some—of that research; and (4) to assess the utility of various approaches and methods in developing answers to important questions. Because of the long, acrid, and sterile methodological debates between "behavioralists" and "traditionalists," we attack the last goal with considerable trepidation. We think the value of any research method or mode of analysis lies in its capacity to help provide answers to interesting questions; and it is on this basis that we look at the writings of traditionalists, behavioralists, and those who identify with neither faction.

In the first chapter we sketch a brief outline of the reasons why social scientists in general and political scientists in particular study public law, how that field has developed in American political science over the past few generations, and what sorts of questions political scientists have been trying to answer. In chapters 2 through 6 we take up some of the more important of these areas of concern: the political consequences of judicial decisions, access to and influence on courts, the selection and training of judges, and the individual and collective processes of judicial decision making.

Chapter 7 is in many ways quite different. It was also quite difficult to write and for many people may be quite difficult to read. There we examine several of the techniques of quantitative analysis used by scholars in public law. We try to explain those techniques in at least an intuitive way and to assess their utility in helping to find solutions to significant problems. It may well be that some readers will want only to sample the subsections of that chapter, which are intended to serve as brief introductions and not as substitutes for a textbook or a course in statistics. Especially in chapter 7 but also in chapters 5 and 6, we used for illustrative purposes data drawn from the work of other scholars. We tried to present material that was already published, so that the reader could easily go to the source and see for himself the context of this scholarship.

Chapter 8 returns to the format of chapters 2 through 6 and examines one set of problems that political scientists have tended to evade: the set concerned with the ends of law and the larger purposes of the judicial process. That chapter also attempts to plot what seems to us to be the future course of the study of public law in its latest reincarnation as an integral and prominent part of political science.

NOTES

1. See Glendon A. Schubert, *Quantitative Analysis of Judicial Behavior* (New York: Free Press, 1959), chap. 1; Schubert, "The Future of Public Law," 34 *George Washington Law Review* 593 (1966); and Albert Somit and Joseph Tanenhaus, *American Political Science: Profile of a Discipline* (New York: Atherton, 1964), chap. 6.

2. For general surveys of the work of constitutional courts, see Julius J. Marke and John G. Lexa (eds.), *International Seminar on Constitutional Review* (New York: New York University School of Law, mimeographed, 1963); Edward McWhinney, *Judicial Review* 4th ed. (Toronto: University of Toronto Press, 1969); Glendon A. Schubert and David J. Danelski (eds.), *Comparative Judicial Behavior* (New York: Oxford University Press, 1969); Thomas M. Franck (ed.), *Comparative Constitutional Process: Cases and Materials* (New York: Praeger, 1968); and Henry J. Abraham, *The Judicial Process* 2d ed. (New York: Oxford University Press, 1968).

3. Although political scientists have tended to give far less attention to trial and intermediate appellate courts than those tribunals deserve, there is a substantial body of literature available. See, for example, Rodney Mott, "Judicial Influence," 30 *American Political Science Review* 295 (1936); Herbert Jacob, *Justice in America: Courts, Lawyers, and the Judicial Process* (Boston: Little, Brown, 1965); Jacob, *Debtors in Court: The Consumption of Government Services* (Chicago: Rand McNally, 1969); Jacob, "The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges," 13 *Journal of Public Law* 104 (1964); Jacob and Kenneth N. Vines, *Studies in Judicial Politics* (New Orleans: Tulane Studies in Political Science, 1963); Vines, "The Judicial Role in the American States," in Joel Grossman and Joseph Tanenhaus (eds.), *Frontiers of Judicial Research* (New York: Wiley, 1969); Kenneth M. Dolbeare, *Trial Courts in Urban Politics* (New York: Wiley, 1967); Dolbeare, "The Federal District Courts and Urban Public Policy," in Grossman and Tanenhaus; Marvin Schick, *Learned Hand's Court* (Baltimore: The Johns Hopkins Press, 1970); Daryl R. Fair, "An Experimental Application of Scalogram Analysis to State Supreme Court Decisions," 1967 *Wisconsin Law Review* 449; Henry R. Glick, "Judicial Decision-Making and Group Dynamics: A Study of Role Perceptions and Group Behavior on Four State Supreme Courts," a paper presented at the Northeastern Political Science Association Meetings (1969); Walter F. Murphy, "Lower Court Checks on Supreme Court Power," 53 *American Political Science Review* 640 (1959); Murphy, "Chief Justice Taft and the Lower Court Bureaucracy," 24 *Journal of Politics* 453 (1962); Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964), chap. 4; Jack W. Peltason, *58 Lonely Men: Southern Federal Judges and School Desegregation* (New York: Harcourt, Brace & World, 1961); and Sheldon Goldman and Thomas P. Jahnige, *The Federal Courts as a Political System* (New York: Harper & Row, 1971). See also the literature cited in the sections of chapters 2, 4, and 5 dealing with the impact of court rulings, the relationships between social background and decision making, and judicial role perceptions.

1

The Development of the Study of Public Law

Perhaps the question most frequently asked of any social scientist interested in public law is, What are you doing studying law? Unlike the attorney, the social scientist must constantly justify his research in the legal processes, and he often envies his colleagues in the law schools who can do their own thing without having to reiterate its relevance or their own competence. Yet this need for justification is not an unmixed evil, since it serves to remind the social scientist that he is not a lay lawyer but a professional with special interests of his own.[1]

The historic functions of the lawyer in civil and common law countries have been to know the content of that corpus of rules formulated by various governmental bodies to control human behavior and to advise clients of their rights and duties under those rules. The attorney takes a set of legal rules as a starting point and tries to justify his client's conduct under, or to

shape his client's conduct to conform to, those rules. Of course, the lawyer's role in the modern world can be much broader. At his best, he is a professional problem solver, and the problems on which he works may go far beyond those involving legal technicalities. He is frequently asked to help resolve basic social, economic, and political difficulties, which is one reason why good lawyers are so often recruited for important positions in business and government.

To a considerable extent, a lawyer's problem solving for his clients is based on his prediction of what a given court—that is, a judge, a judge and jury, or a group of judges—will do if presented with certain kinds of controversy. He predicts what a court will decide are the facts, what rules it will apply, and what judgments will follow. This is a very complex process. First, the facts are usually in dispute. Second, there are, typically, several, and perhaps contradictory, sets of rules that appear more or less equally relevant. Third, because few judges and jurymen reason as dispassionately as computers, a formula like Facts × Rules = Decision will not suffice as an explanation of the adjudicatory process. Emotional and ideological elements can affect what judges and jurors will perceive to be the "facts" of a case as readily as they can influence choice among competing rules.[2] Further complicating matters, an attorney's predictions, if forcefully and eloquently presented, may persuade judges and jurors—and thus, the law—to take one possible direction rather than another.[3]

With his role sanctioned by tradition and often by constitutional prescription, the lawyer has no difficulty in justifying his study of the law. That is his field of special competence, and many lawyers tend to view all other people, whether laymen or social scientists, who proclaim an interest in law as poachers on a private hunting preserve. Yet many people other than lawyers have a valid interest in the law. The layman, after all, is the man at whom most legal rules are aimed. Aristotle's dictum that the diner is a better judge of a feast than the cook[4] is particularly appropriate here.

Similarly, the practicing politician has a stake in the study of public law and in the actions of judicial officials. Because court decisions can vitally affect his right to hold office, the powers of his office, and the policies he wants effected, the politician has to know how judges are apt to act. In addition, he may want to affect the way they will act. To be sure, with his time and energy limited, the government official, party officer, interest-group leader, or even the politically active citizen may rely on his attorney for guidance. Nevertheless, in most democratic polities no serious political actor whose views are not unanimously shared by his fellow citizens can afford to ignore the courts in planning his program. His justification for studying the law—and this is an additional reason why in Western nations so many political leaders have been first trained as lawyers[5]—is an instru-

mental one. He must concern himself with judicial action to achieve his ambition, whether it be the selfish one of merely getting ahead or the more grandiose one of molding a great society.

Social Scientists and the Study of Law

The social scientist finds himself in a more difficult position than that of the lawyer. He cannot claim the right to advise clients, because lawyers have a legal monopoly on this function and are quick to harass anyone who practices law without a license. Nor is the social scientist's stake as a social scientist as evident as that of the professional politician or as it would be in his role as ordinary citizen concerned with the practical consequences of legal decisions. Yet like the lawyer, the layman, and the politician, the social scientist may be concerned with understanding, predicting, and perhaps even shaping the development of law. Insofar as he is influenced by the last objective his concern may be as pragmatic as that of a practicing politician or as detached as that of a closet philosopher.

Even when the social scientist restricts himself to the scholarly objectives of understanding the judicial process and explaining it to a public audience he, like the philosophically reflective lawyer or judge, faces a serious obstacle. Over the years some lawyers and judges—sometimes with the passive and sometimes with the active cooperation of other groups in society—have surrounded the judiciary with a series of myths. The most important for our purposes is that of mechanical jurisprudence: Judges only discover "the law"; they neither create legal rules nor do they make public policy. This myth is powerful not because it is a deliberate sham—for most assuredly it is not—but because judges themselves have often believed that it is a valid explanation of their work. They have confused a normative prescription with a factual description. As Chief Justice John Marshall put it:

> Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing.... Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or in other words, to the will of the law.[6]

American judges inherited this myth; they share it with their brethren in other countries. In 1952 Chief Justice Sir Owen Dixon of Australia explained the judicial role in simple, mechanistic terms: "The Court's sole function is to interpret a constitutional description of power or restraint upon power, and say whether a given measure falls on one side of a line