

Spring 1971

The Impact of The United States Supreme Court: Some Perspectives, by Stephen L. Wasby

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Recommended Citation

Rieselbach, Leroy N. (1971) "The Impact of The United States Supreme Court: Some Perspectives, by Stephen L. Wasby," *Indiana Law Journal*: Vol. 46 : Iss. 3 , Article 11.

Available at: <https://www.repository.law.indiana.edu/ilj/vol46/iss3/11>

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THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES. By Stephen L. Wasby, Homewood, Ill.: Dorsey Press, 1970. Pp. 305. Paper: \$5.65.

In recent years, political scientists have come in increasing numbers to view courts in general, and the Supreme Court in particular, not only as legal institutions but also as important political decision-making bodies. Teachers of politics have not abandoned the more traditional constitutional law approach—that is, the study of the evolution of judicial doctrine under specific clauses of the Federal Constitution or on specific substantive topics—as a look at almost any undergraduate curriculum will reveal. But many have also insisted on treating the judicial system as an integral part of a broader political system that includes executives, legislatures, interest groups, and concerned segments of the public. It is undeniably clear, as the segregation, reapportionment, and public school prayer cases illustrate, that courts can and do establish policy guidelines in situations where the so-called “political” branches are empowered to act but, for lack of will or ability, choose to remain inactive.

If it is true, as this perspective suggests, that judges make law rather than simply discover it, then judicial decision-making appears to differ little—in degree, perhaps, but not in kind—from policy choice in executive and legislative branches. Given this premise, the focus for research becomes the effort to comprehend the forces that impel or influence judicial behavior. Thus, scholars have explored the politics of judicial selection, seeing the maneuvering surrounding presidential nomination and senatorial confirmation as reflecting the desire of contending forces to see men of “sound” philosophy seated on the bench. The recent Haynsworth and Carswell controversies illustrate the nature of selection politics in an abnormally clear fashion. Scholars have also examined the roots of judicial ideology, at least insofar as voting on cases reflects that ideology, finding relationships between partisan affiliation, prior political socialization, and earlier political careers, *inter alia*, and judges’ views on varying subject matter areas. Efforts to influence the contents of court decisions have also been investigated; group “lobbying” of courts via instigating test cases, filing *amicus curiae* briefs, and creating climates of legal and political opinion has been noted.

Moreover, viewing the courts as elements in the overall political system has led to the re-examination of the conception of the Supreme Court as the “final arbiter” of judicial conflict. The struggle over policy need not end once the court has rendered judgment; rather, depending

on the effects—the impact—of the decision, the contest may well move into a variety of other political arenas. Wasby's book is an effort, at once sweeping and preliminary, to chart the way toward a clearer understanding of the ramifications, implications, and resulting occurrences that flow from judicial decisions. Impact may take a number of forms; most dramatic, of course, is outright refusal to comply, typified by "massive resistance" or stands in school house doorways, but other modes of response, ranging from quiet evasion to various forms of political activity designed to reverse the decision, to subtle changes of attitude toward particular subjects or toward the Court itself, on to rather complete compliance, are not uncommon.

The essential strength of the book lies in the author's careful specification of the dimensions of the impact problem. First of all, he sets forth in chapter two the relevant factors that seem likely to have an effect on reaction to Supreme Court rulings. The characteristics of the case itself (the vote, the clarity of the opinion announcing the decision, the grounds on which the decision rests, and the relation of the case to other decisions); the "existing *political, economic, and social situation* into which the decision is injected" (political party, interest group, and public sentiments; economic conditions; and the readiness of the federal government to enforce a decision); and "the relative power and position of . . . responding" individuals (the "political cultures" of local communities; their history, size, relative homogeneity, and dominant interests; the belief systems of public officials and local citizens; and the general outlook of the residents toward the Court and the world at large)—all these influence the kind of reception that a Court decision receives.

Moreover, Wasby has provided alternative frames of reference within which impact can be analyzed. The more traditional legal perspective directs attention to the specifics of the holding of the Court, the application of the ruling to specific classes of people beyond the parties to the case at hand, the reaction of lower courts to Supreme Court utterances and the degree to which a Court formulates its decision in anticipation of its impact. Seeing the Court as a political decision-maker points to the reaction of group interests to judicial determinations. Groups may "appeal" adverse decisions to legislatures or executive agencies as well as continue to work through the courts; they may alter their perceptions and evaluations of the court system. Internal organization and political arrangements will, in all likelihood, influence what action the group takes in the wake of court pronouncements. Finally, enunciation of decisions may be seen as a communications process linking

judges with involved and interested parties; the focus here is on the character of the decision, the perceptions and preferences of those who receive the message, and the process of communication by which the message is sent, directly or through intermediaries, from court to those concerned. In short, Wasby has pointed to the factors that shape impact and, thus, need to be considered, and to three ways that the impact phenomenon may be conceptualized. In so doing, he has provided a most valuable map of an important but uncharted feature of the political terrain.

In moving beyond this preliminary mapping, however, Wasby's explorations are less satisfying. This is not entirely his fault; his is a pioneering work and, as such, can draw on very few prior forays into the wilderness. Nor is this to suggest that impact is not worth investigating; on the contrary, Wasby has made a compelling case for research in the area. Nonetheless, his series of chapters on "the substance of impact" in specific issue-areas (*e.g.*, economic regulation, reapportionment, and criminal procedure) and in political arenas (*e.g.*, the lower courts, Congress, and the executive branch) seem unsatisfying, seldom able to rise above mere speculation. Using materials not collected to enlighten on impact, Wasby can only guess about the links between Court decisions and the reactions of "significant others." Even where there have been some studies, as with respect to the effects of the *Gideon v. Wainwright*,¹ *Escobedo v. Illinois*,² and *Miranda v. Arizona*,³ cases on the right to counsel of those accused of serious crimes, it remains difficult, if not impossible, to generalize about what the Supreme Court's ruling "causes." In other areas, seldom studied, little or nothing precise can be advanced. The conclusions of this volume remain tentative and often unpersuasive.

The author, of course, is well aware of these problems and, recognizing the "primitive state of our theory-development," devotes the final chapter to stating hypotheses about impact. The list is extensive, and while some of the propositions are trivial, others are important; the list suggests a large number of questions, the answers to which will enable us to grasp more clearly the relations between the courts and the other institutions of the political process. The problem here is in the admittedly "soft" character of the hypotheses. To be tested meaningfully, the hypotheses must be cast in terms of operationalizable variables, that is, they must be stated in a fashion which permits each element to be measured precisely. Thus, to test the hypothesis that "the broader the decision, the

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1. 372 U.S. 335 (1963).
 2. 378 U.S. 478 (1963).
 3. 384 U.S. 436 (1966).

greater the impact and the broader the noncompliance,"⁴ one needs standards to rank decisions as to breadth and to measure impact and non-compliance. Unless we can classify cases into categories of "broad" and "narrow", at the very least, and impact and compliance into categories of "high" and "low", we can never tell whether the hypothesis holds or is disconfirmed. As Wasby realizes, the measurement problems are acute, but he chooses to remain above the battle, largely ignoring the complex and difficult empirical operations.

Nonetheless, despite these criticisms, Wasby's work may prove to be important. Linking the Court to the broader political process of which it is a part, he has made clear the relevance of impact for any understanding of policy-making. Moreover, he has pointed to a variety of ways to think about impact, a set of factors possibly associated with it, and an explicit set of hypotheses about impact. Thus, writing at a very early stage in political scientists' thinking about impact, Wasby has revealed how far we have to go in tracing the phenomenon and has challenged us to begin to work. If analysts of law, politics, and policy making take up the challenge, *THE IMPACT OF THE UNITED STATES SUPREME COURT* may prove to be the stimulus to an increased understanding of the place of the judicial system in the larger political process.

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