The Supreme Court's Impact

Some Problems of Conceptualization and Measurement

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The impact of what judges decide is a crucial part of what is studied by those sharing a political rather than only a legal perspective on the United States Supreme Court. It has become important as we have shifted our attention from "output, which is the decision of the Court including its orders and statement of policy" to consideration of "outcome, which is the final results or impact of output" (Barth, 1968: 315, note). This development is much more recent than the beginnings of the political perspective on the courts. Explicit attention to impact, backed by studies of impacts of particular decisions, is less than twenty years old, dating from the aftermath of Brown v. Board of Education (1954), which made political scientists aware that compliance with decisions of the Supreme Court was neither automatic, immediate, nor uniform. As Krislov (1963: 7) has remarked, from the standpoint of Court process, the decision in Brown v. Board of Education has had its greatest effect in educating "students as to the limits and operations of the court system generally."

Existing Studies of Impact

The plethora of existing studies which has given rise to the current issue of this journal and a recent collection of readings (Becker, 1969) shows that inattention has changed to attention. One reason for the change, in addition to the shock of recognition caused by Brown v. Board, is a more general emphasis in the social sciences on the effects of legal decisions of any sort. "In recent years, a growing call has been heard for emphasis on the empirical consequences

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of legal decisions–not merely on the theoretical and logical aspects of a self-contained legal system, but also on the impact of the system on a broader society" (Krislov, 1968: 165). Thus there is a relationship between studies of the impact of Supreme Court decisions and studies of the effect of statutes and regulations, within the rubric of the sociology of law (see Jones, 1966; Massell, 1968; Nagel, forthcoming).

The emphasis of political scientists who have become involved in this endeavor has been limited largely to examination of impacts of the United States Supreme Court and, to a far smaller degree, of state supreme courts. While our look at impact shows that the "upper-court myth" has lessened its hold because it is no longer presumed that the only place to look for "the law" is in the doctrine of Supreme Court decisions, the concentration on high appellate bodies indicates that the myth has retained its hold on us; we are not concentrating on the decisions of lower courts where the bulk of cases is decided. Moreover, the appellate court emphasis has brought criticism, such as that "most impact analysis has been conducted as a 'top-down approach' which relies excessively on a hierarchical view of courts" (Barth, 1968: 316). As an alternative, we are told that our focus should be on development of policy at the local level, "with Supreme Court decisions considered as one factor among many in that development" (Barth, 1968: 316), and that "only when we appreciate more fully the totality of the forces impinging on individuals at the level of implementation can we account for the varying responses made to Supreme Court policy and thus see this decisional structure in greater perspective" (Johnson, 1967: 16).[1] In addition to attention to the impact of high appellate courts, or perhaps in part because of that emphasis, we have not studied impact with respect to a large range of law. The concentration has been on what Jacob has called "policy-making" rather than on "norm enforcement," on large public policy issues rather than perhaps more numerous private law controversies, on impacts involving relationships between government agencies or between government agencies and individuals rather than between individuals and individuals (see Wells and Grossman, 1966: 290).

Some Limitations on Impact Study

In their initial work, those studying the effect of the Court's decisions tended to deal with compliance, or rather, with noncompliance. Their initial attention was turned in this direction because they had assumed automatic compliance with the Court's decisions. To the extent the law is thought to be found and declared rather than the product of a political process, one gets the feeling that obedience should be forthcoming; after all, it is "the law" one is obeying, not nine men on the Supreme Court. If, however, one views the Court as part and parcel of the political process, one would be more likely to discount what the

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judges say. Work on noncompliance was a reflection of, and was reinforced by, values–values embodied, or thought to be embodied, in the American legal system, as well as the values of those conducting the research. According to the "rule of law" supposedly prevailing in America, those affected by decisions of the courts, but most particularly by the decisions of the U.S. Supreme Court as the highest court of the land, are supposed to follow the Court's decisions even if they are unhappy with those decisions. They are, in other words, to comply at least until efforts have been made within other political arenas, like the legislature, to reverse the decision, or within the judiciary itself to bring about reversal. That some individuals, including government officials, made no effort to comply with decisions even while seeking reversal through recognized channels brought attention to the matter of compliance and noncompliance. Because the decisions involved, like the school desegregation cases, were often liberal in thrust, and the values of those studying the court to a large extent were parallel, while the values of the noncompliers were clearly different, the researchers' values reinforced concern with noncompliance.

Their concern with noncompliance led to the study of areas where the phenomenon seemed greatest. Those areas were ones, such as school desegregation, involving much social change, affecting large proportions of public officials–e.g., police procedure–or directly involving important symbolic values, like school prayer. As Barth (1968: 313) has noted, "The opposition generated by unpopular decisions involving symbolic values. . .is usually more diffuse and latent than the opposition generated by unpopular economic decisions like those of the 1930s." Researchers thus probably found more, and more diffuse, noncompliance than if a fuller range of subject-matter areas, including economic policy, had been examined. However, attention to areas of greater noncompliance allowed more ready identification of factors affecting impact, even if providing an incomplete picture of their relative weights.

Another limitation to what we have thus far done in impact analysis is our concentration on the effects of decisions without relating the results to the process by which they occur–even though one might classify impact studies as part of a "process approach" to public law matters. Thus, as Wells and Grossman (1966: 287) comment, "The major emphasis [of impact studies] was upon the problem of implementation, rather than upon relating the process with the resultant policy." In short, although process is recognized in that it is known that what the court does is followed by action elsewhere or that what the courts do follows action in other political arenas, we have concentrated on what comes out of the pipeline rather than dealing in addition with what goes on in the pipeline or how the pipeline affects the product.

Material on impact, explicit and implicit, needs to be pulled together and integrated. Much of what exists is based on case studies of the effect of particular decisions in individual jurisdictions. Although we have been warned to

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concentrate on the process by which impact occurs and not just on the final result, we still need more case studies. But we need them concerning a wide range of subjects and a variety of affected areas. We particularly need before-and-after studies; the fact that most impact studies have been carried out "after the fact" has contributed to our lack of understanding. If we could conduct before-and-after impact studies, we might be able to obtain a picture of change (or nonchange) less contaminated by reaction to a decision that is possible with after-only studies. Difficulties in carrying out before-and-after studies arise because one is not likely to know a priori where impact will take place, so that one could conduct a survey for the "before" part of a study. If one could find an area where it was not known what the Supreme Court was considering, and if one could determine that people in that area would react to the decision, one might be able to overcome this. Otherwise, some reconstruction is possible from newspapers or from studies undertaken for other reasons, such as the American Bar Foundation studies of police practices (LaFave, 1965; Newman, 1966), community power structures studies, or even constitutional history.[2]

Although some volumes utilizing designs of vastly increased sophistication have recently appeared (for example, Johnson, 1967; Muir, 1967), we are not generally ready for studies based on elaborate, methodologically advanced research designs. The methodological difficulties confronting us are substantial. Before we become too pleased with ourselves for having come this far, we should seriously note Krislov's (1968: 166) warning:

> Impact studies present grave problems in research and require vast resources seldom available. Even conceptually, the problem of impact measurement presents grave difficulties hardly resolved by the usual efforts at studying the immediate aftermath of some dramatic event or decision. (Even the most careful study cannot establish whether alleged changes were not merely coincidentally but actually consequentially related.)...Normal approaches [such as public opinion surveys], though excellent research strategies, not only provide limited information, but also require extensive and expensive efforts from researchers.

Keeping this in mind, we should seek to improve the quality of our impact studies. But that goal exists primarily as a step toward another more important one–the building of theory concerning the judicial process and the role of courts and law in the political system.

With this history and these strictures in mind, we can proceed to the principal portion of this paper where we deal with conceptualization and measurement problems connected with the study of impact. The intention is to be suggestive of the types of problems which have been encountered; certainly the presentation is not exhaustive, in part because it is expected that many more problems will be encountered as we move beyond our present relatively elementary state and as further studies are carried out.

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Problems of Conceptualization and Measurement

"Impact," "compliance," "effect," "aftermath," "evasion"—all are words one hears in discussing the Supreme Court. Despite the number of "impact studies" which have now been carried out, there has been insufficient grappling with the meaning of concepts like compliance and impact. This lack of attention leads directly to confusion and disagreement about the Supreme Court's place in the American political system.

When we begin to talk about what happens after the Supreme Court decides a case, we are initially talking about aftermath—that is, events which occur after the decision. However, we do not wish to examine the entire aftermath of Supreme Court decisions; many constitutional historians have already written about this material, and their work need not be repeated. When we talk about aftermath, we are not necessarily talking about events affected by the decision, although we may leave the incorrect impression that the Supreme Court is in some way a cause of that aftermath, thus committing the fallacy of post hoc ergo propter hoc. We do not want to fall into the trap of claiming that because B follows A, A causes B. For example, after ex parte Bakelite Corp. (1929), in which the Court declared that the Court of Customs Appeals was a legislative rather than a constitutional court, Congress declared it and other legislative courts to be constitutional courts (an action subsequently confirmed by the Supreme Court in Glidden v. Zdanok [1962]). From that bare statement of facts alone, one could *not* assert that it was *because* of Bakelite that Congress so acted, even though that might seem a likely inference. We need more evidence before aftermath becomes impact. For example, the lapse of time (more than twenty years) between Bakelite and congressional action would tend to negate our "likely inference."

If the term aftermath is too broad, what then? Impact and compliance are the two terms most important for our work; evasion is a special term subsidiary to the others. We may begin by asserting that there is a difference between *impact* and *compliance.* Political scientists' concern has been largely with the latter. Perhaps this was in part because some types of compliance, and particularly noncompliance, could be easily seen. However, to separate the impact or effect of a Supreme Court decision from other factors in the political milieu producing the same phenomena was a matter of considerable difficulty. By comparison with impact, compliance narrows our focus, restricting us to finding out to what degree a specific decision is obeyed. ("Decision" might mean the mandate of the Court with respect to specific named individuals, or it might mean the Court's holding in a case.) If we are interested in complaince, we would want to know, for instance, whether the University of Florida Law School ever admitted Virgil Hawkins (Florida ex rel Hawkins v. Board of Control, 1954),[3] or whether schools were desegregated after Brown or legislatures reapportioned on the basis

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of one man-one vote after Reynolds v. Sims (1964). In dealing with "complaince," we are clearly interested in something narrower than the total impact of the decision, and to use one where we mean the other will not assist our work.

> Supreme Court rulings . . . may invoke a range of responses. To use the term "compliance" to characterize this process is rather unfortunate, for this seems to suggest a single approved response to a court ruling. In certain instances, to be sure, such a view would be entirely satisfactory. [Johnson, 1967: 23]

Compliance brings a narrower focus than does impact, but is not separate from it; compliance is a subset of impact. Using compliance does not, however, provide much relief from the measurement problems which afflict the determination of impact which we shall discuss later. If, as Petrick (1968: 7) argues, "The problem of noncompliance arises from the fact that human groups find it difficult to carry out effectively acts for which they have no underlying beliefs," then attitudes and beliefs, and particularly the matter of intent, must be taken into account in our examination of what happens with Court decisions after their issuance. In talking about impact, we can say that a decision had such-and-such an impact or effect, even on people who had no knowledge of or feeling about the decision; we can try to make judgments about impact on the basis of people's observable behavior. With compliance, however, we need to know whether or not they knew about the case and their intent with respect to it. "Whether the actions of other participants in the political process represent compliance with or evasion of Court decisions can only be determined after it is established that they were cognizant of the judicial policy" (Barth, 1968: 315).

A person's behavior may be congruent with what the Court has ordered, but it may be he is operating parallel to the court's line of action, rather than operating *in order to carry out* that order. Perhaps he was going to do anyway what the Court ordered. In these instances, the behavior is what the Court requires, but it is not carried out because the Court required it. Compliance requires the latter, and implies a feeling that one ought to obey a decision. "An individual may sense that a law is just but violate it nonetheless (i.e., one should not confuse violation of a law with a 'rejection' of it); and individuals may conform to a law even though they view the law as unjust" (Gibbs, 1968: 436-437). Or, as Feest (1968: 448) argues with respect to other types of legal regulations:

> Compliance . . . is more than outward conformity with a regulation. Behavior which externally (objectively) conforms with a certain regulation may not coincide with internal (subjective) intention to conform. . . . The concept of compliance has . . . three essential elements: (a) norm-awareness, (b) intention to conform, and (c) conforming behavior.

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Compliance may thus exist even when disrespect for the law or the Court is being expressed, as was the case with most begrudging obedience with Brown v. Board of Education. In fact, the existence of complaints (except insofar as they are a cover-up) coupled with behavior fitting the prescriptions of the Court might be taken as a clear indication that compliance is occurring. We might, however, want to give a specific title to situations where people obey a ruling while trying to change or reverse it. "Reversal behavior" might be an appropriate label.

Supreme Court Authority

Why people comply raises the question of the Court's *authority,* the basis on which people accept its decisions as ones which the Court has a *right* to give, and which they, for that reason, ought to obey. Bases for that authority might include: a formal allocation of power to the Court to decide constitutionality; the Court's expertise; the formal setting in which the Court operates, which evokes respect; charismatic leadership of some judges; people's need for some body or institution which can confine conflict and thus fulfill security needs (Petrick, 1968). The Court's authority is related to the legitimacy people grant it. But using compliance as a measure of legitimacy does not carry our analysis very far. Petrick has recently asserted that the final test of the Supreme Court's legitimacy is compliance with its decisions, particularly important because the Court lacks other legitimating devices like the ballot box. He says that we measure state and local government reaction to Supreme Court decisions in terms of *behavioral* compliance or noncompliance. But how does one know from examining behavior to what extent the Court is considered legitimate? Perhaps a complete failure to attempt compliance would indicate nonlegitimacy, but what about token compliance? Petrick says it may indicate only nonapproval rather than nonlegitimacy. And if noncompliance does not necessarily mean non-legitimacy, but perhaps only nonapproval of a particular decision, has one gone very far?

Petrick (1968: 7) also argues that if "compliance gradually and ultimately replaces non-compliance, it would appear that acceptance of the Court's authority is superseding disapproval of the decision." Perhaps—but perhaps people's views toward the subject matter of the case itself have changed. Does increased compliance with Brown v. Board of Education mean that those people who first resisted the decision now love the Court? Not necessarily, any more than that the same compliance means greater feelings of brotherhood toward members of other races. Perhaps the compliers have accepted the necessity, for political reasons, for reasons of accepting federal funds, of allowing Negroes to attend school with whites; perhaps they are just resigned to the situation. But neither of these latter alternatives means greater legitimacy granted the Court.

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Evasion and Instrumental Noncompliance

When we talk about compliance, we know there is noncompliance. But there is also a shadowy something called evasion, somewhere between outright acceptance and outright refusal to comply. How do we identify it? Some forms are relatively easy to distinguish. People attempt to limit the scope of the decision, to avoid its full force, to make sure it doesn't apply to them. They do not say they will not conform or comply but try to avoid a situation where that would become an issue.[4] Sometimes this is made easy by the Court. If there has been a procedural defect which the Court has invalidated, it may be quite possible for affected officials to achieve the same ends by altering their procedures only slightly, thus making the protection which the Court has appeared to give meaningless, other than as a statement of principle. For example, in Gardner v. Broderick (1968), the Court held that a policeman cannot be discharged for refusing to waive immunity. But if he can be discharged for refusal to answer questions concerning his official conduct, does this decision make much difference to him? It does preserve his Fifth Amendment rights, but means being out of a job even without being prosecuted. Similarly, in Garrity v. New Jersey (1967), the Court held that testimony compelled under threat of loss of job was not admissible in criminal proceedings; thus an officer might testify and lose his job, with only the satisfaction, if it can be called that, of not being prosecuted. Again, in terms of employment, there is little effect.

What should we say when we find state officials persisting in trying to develop a statute or regulations which the Supreme Court will uphold, after the Court has struck down earlier regulations? After Freedman v. Maryland (1965), procedures in a number of jurisdictions were revised to bring them under the Court's new requirements; not all such attempts were initially successful, but there were efforts made. Shall we say that this is evasion or avoidance, or that it is compliant behavior because the individuals involved were trying to mesh their interests/goals/values with what the Court will allow, and sincerely want to do something the Court will find acceptable? Or is the only action we can call compliance in such a situation the total absence of laws which do not exactly resemble the procedural requirements established by the Court in the Freedman case? Certainly even unsuccessful attempts to being oneself within the rulings of the Court are different from the situation in which the Louisiana legislature, at the time of the New Orleans school desegregation crisis, modified statutes only slightly after they were struck down, as part of a continuing battle with the courts to avoid the force of school desegregation orders. But how do we judge? Apparently we must examine motive and intent in making our determination.

Another difficulty in interpretation is created by the fact that some noncompliance is meant to be a grounds for bargaining within the larger political system, that is, it is *instrumental.* "The zone of acceptance is a consequence of

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either tacit or direct bargaining and thus is by no means an independent variable" (Krislov, 1963: 11). Political leaders may feel that if they refuse to grant immediate complaince to the Court's orders, they can gain some ends perhaps not related directly to the subject matter of the cases. The gains they seek may be within the states. Governor Faubus' attempt to prevent desegregation in Little Rock, coming as it did when he was about to face an election contest, may be explained in part as a maneuver for popularity among certain elements in the electorate. The gains may, on the other hand, be at the national level, particularly in Congress. When the national government does not present a united front, instrumental noncompliance is a temptation or meaningful alternative to the state politician. If the person with whom it is hoped a bargain can be struck realizes that the noncomplier must give in eventually, the attempt to bargain by delaying compliance may misfire. On the other hand, if the national official wishes to have the program implemented quickly, he may be willing to compromise or to make concessions in other areas to get his way.

Another Concept: Impact

In recent years, we have seen a shift from concern about the narrower concept, compliance, to the broader one, impact; at least we find the latter studied in addition to the former. The shift in emphasis has not reduced the conceptualization or measurement problems facing students of the judicial process, as we shall soon see, nor has it meant that political scientists have changed their assumptions about what should happen after the Court decides a case. They are still affected by an expectation that decisions of the Supreme Court will have some effect, and find it difficult to accept the possible irrelevance of decisions, or the relatively small role they may play in what occurs after the Court has spoken. If something like school desegregation depends as heavily on the character and structure of the community and on the community's elites as some have suggested (Crain, 1968), the Court's decisions may not mean very much beyond having served as catalysts or sparks for action—but that is a matter for research.

One of the prime difficulties in dealing with impact is that the decisions of the Supreme Court are part of a general milieu in which later events take place and part of a set of multiple causes of such events. If several factors are operating in the same direction, how does one separate the impact the Court's decision has by comparison with other elements of the situation? Schmidhauser (1958: 161) raises the question of how one avoids overstating the influence of a single institution like the Court "upon so complex a social and political development as federal centralization." How does one determine whether companies have taken the Supreme Court's cases on restraint of trade into consideration in determining trade practices, unless corporation officials will talk

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honestly about the subject? If a proposed merger takes a given form, how does one tell what role economic considerations played as contrasted with consideration of legal matters, including both Supreme Court decisions and advice of counsel as to the likelihood of action by the Department of Justice? When trying to judge the impact of the Court's decisions on government regulation of the economy, how does one separate the effects of those decisions from the "natural" growth of the economy and the existence of economic forms like the corporation? Arthur Miller (1968: 81, 131), writing on the American economy, carries the point further and argues that the Court, "rather than being the *cause* of constitutional change, is the *instrument*" of such change by its updating of the Constitution, enabling the document "to remain relevant and current."[5] Had the Court not done this, he asserts, it would have been swept aside. He thus suggests that the Court's impact on the economy is "in the immortal words of Senator Everett McKinley Dirksen, about like that of 'a snowflake wafting down upon the bosom of the mighty Potomac' " (Miller, 1968: 82).

There is, despite Miller's seeming clarity, considerable difficulty with what he says. How does one distinguish between the Court's being a cause and its being an instrument of social change? Even if one avoids one extreme, of assuming the Court to have a direct, unilateral, independent, and immediate effect, it is difficult to come to the opposite conclusion that the Court simply *reflects* what is going on in the society, economy, or polity. Miller (1968: 82) himself says, "Doubtless [the Court] does have some power and does wield some influence over the shape of events." At a minimum, if the Court is in political interaction with other actors, the influence relationship is reciprocal, with the Court affecting others as well as others affecting the Court. Perhaps we can only arrive at the Scotch verdict, "not proved," rather than Miller's stronger assertions about lack of impact.

In talking about Brown v. Board of Education, how much of what has happened with respect to school desegregation in the South does one attribute to the "changing South," to the economic and social changes which accompanied Brown, and how much to Brown itself? To pursue Brown a bit further, how can one determine if Brown has had an effect on movement of whites from the central cities of metropolitan areas to the suburbs? General population movement occurred during the period of Brown and its aftermath, even in Southern cities where segregation in the schools continued. But can one infer from this that Brown did not have any impact on that movement? How is one to tell whether the movement might have been in anticipation of ultimate compliance with Brown, or whether Brown may have reinforced a preexisting desire to move to the suburbs? In order to provide even a preliminary test, one would need year-by-year mobility rates for the pre-Brown as well as the post-Brown years, with the latter divided into precompliance and postcompliance years by area, as well as data from some cities with long-standing

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desegregation (or at least pre-Brown desegregation) for control purposes. One can easily see that obtaining this data would pose considerable problems.

Data on Impact

There are some questions of impact about which data may not be as difficult to obtain. For example, to test the effect of Supreme Court decisions on the level of litigation, one could examine lower-court dockets to determine how many cases have been filed dealing with the subject of a Supreme Court case. Or one could determine requests for certiorari dealing with a given subject. One could also look at the records of a particular organization, like the NAACP, to see if its activities in the field of litigation increased after a court victory. Although these would not provide perfect indicators of impact, they would give substantial evidence on the matter.

Perhaps we can identify situations where the Court's actions have had no relevance, and thus decrease the universe of phenomena at which we look. It is important to isolate the proportions of instances where cases do and do not have impact. This is one situation where negative findings–i.e., that there is no impact–are of extreme importance. Thus to study an area in contemplation of possible impact and to find no impact is an important finding in itself. After this sorting-out process, however, we are still left with situations in which it is unclear whether the Court's decisions did have an effect, and with others where it is fairly clear that there was some effect, but how much or of what kind is not certain. In this connection, it may help to look at the matter of relative rates: some activity may persist after a Supreme Court decision, seemingly indicating no impact, but the rate or intensity of activity may be slowed or advanced. The growth of the "positive state" was not prevented by the Court's striking down attempts at economic regulation, but that does not mean the decisions were without effect, at least on the pace of that growth. To consider only instances where behavior or policy is completely reversed after a Court decision is to limit study of impact unnecessarily. But we must be careful, because there is a "discontinuous reception given Supreme Court decisions" (Miller and Scheflin, 1967: 288), reducing the number of possible instances where we might find a test of impact.

Not all impacts of court decisions are direct. We may be able to talk about the direct effect a Supreme Court decision has on a lower-court judge. But if we are talking about the impact on government officials in local communities, or on "the public," we need to consider both direct impact and indirect impact. This latter phenomenon occurs when the Court's decision has an effect on some officials, who have an effect on others, who in turn finally have an effect on the local community, which may or may not even realize that what is occurring is resulting from the Supreme Court's initial action. These second-order effects of a

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Court decision–reactions of those affected by government agencies on which the Court's decision may first fall–may be greater or clearer than the decision's direct effects. If an agency adjusts its policy or procedure to comply, some disfavored clients will complain; if an agency persists in the face of directives to change, as apparently has occurred with the Patent Office (Shapiro, 1968: 143-226), those wishing the changes ordered by the Supreme Court will react negatively.

The difficulties of separating the impact of the Court's decisions from other factors influencing a given outcome may mean we can isolate impact effectively only where there is direct and obvious (visible) resistance to a Court decision, and that the only impact we can study precisely is clear noncompliance. Part of the problem of determining impact is that we often do not have a test of whether the Court's decision is having an effect. For example, if the public holds parents to a higher standard with respect to the behavior of their children than does the law, how do we know that the law is even relevant? Would we have to say that the only impact in that situation would be a change in public attitude so that only that which the law allowed was considered acceptable? If we note cases in which the Supreme Court has defined the jurisdiction of certain agencies broadly through statutory interpretation, what can we say when the agencies are cautious and do not utilize the full jurisdiction the courts allow?[6] Do we say there is no impact, or that the impact is that the decision is irrelevant, or that the Court has not been successful in getting others to accept what it says is possible?

The Role of Power in Court Decisions

If we do try to go beyond obvious instances of direct noncompliance, we get into matters involving the concept of power, a concept which, despite its centrality for political science, still lacks clear conceptualization. Power involves one actor moving another actor against his will, from passivity to an act or from one act already intended to another act. It may also involve keeping a person from an intended shift in position. If A wants X done, and B does it, one is tempted to say that A has power with respect to B.[7] But this is not really an adequate operationalization. If A wants something done and B may have done it anyhow, or may already be moving in the direction of doing it, we cannot say that A has power with respect to B. On the other hand, it may not be necessary for A to want something done before we can talk about his having power; if B decided to do something because he *thought* A wanted it done, A might have power even if A had not communicated any orders or suggestions. We see this when actors comply with Court rulings before specific enforcement orders are issued, or when they interpret a case as applying to them in advance of such application. This explains why Cardozo said that the power of the Supreme

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Court is not measured solely by the number of times it is exercised. This anticipatory effect also leads to restrictions upon or avoidance of the Court, as well as compliance. Thus, because of rumors the Court would strike down Reconstruction, the House Judiciary Committee reported a bill requiring two-thirds concurrence when a law of Congress was struck down. More recently, the Post Office often mooted cases involving restrictions on receipt of mail when an irate individual threatened to go to court, in order to avoid a Supreme Court ruling on its practices of holding mail.[8]

Some feel we must include in a definition of power the communication of A's desire to B, after which, for power to exist, B would have to do something he would not otherwise have done. However, A may engineer a situation, implied in the term manipulation, so that B does A's bidding without any direct communication or feeling of being coerced. However, the Supreme Court may be less able than other governmental bodies to structure situations in this fashion because it is not able to retain continuous surveillance of cases once they leave the Court's hands. The foregoing implies that, to obtain a clear measurement of power, one must know the intent of actors, at least the intent of those acted upon, just as one must know intent in order to measure compliance as some have defined it.

In measuring the Court's power, one may start with measures which utilize only visible activity. However, even though relatively "hard," such measures are defective because they both go too far and are too limited. They go too far because they include situations in which an actor was already going to do what the Court requires, and they are too limited because they do not include situations in which no behavioral change occurs because the Court has prevented an individual from shifting his position. Therefore, measures of behavioral change or lack of change must be coupled with knowledge of intent, precisely the matter most difficult to uncover. With respect to historical examples, we obviously cannot find many of the actors so that we might inquire about their intent. Even when actors are available, we would be likely to ask them only after a Court decision has occurred, thus allowing them to rationalize their acts and to adjust their responses to what they have already done. Even if we were to ask them before a relevant decision were handed down, their intent might be affected by the expectation of possible rulings and adjustment they had made in their behavior based on anticipation of the Court's ruling in a given direction.

Measuring Impact

If it is so difficult to ascertain intent, are we left without the possibility of studying impact? At least in the short run, the answer would appear to be no, because there is still much we can learn by depicting thoroughly what appears to have occurred in the aftermath of court decisions, in tracing out the

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consequences of Court action to the best of our ability in a far more systematic way than we have done heretofore. What can we use as measures? Where do we begin to look? For example, do we measure the impact of the school desegregation decisions in terms of the percentage of Negro students attending classes in previously all-white schools? Or in terms of the percentage of school districts with some Negroes in integrated classes? Or in terms of the movement of whites to the suburbs from the core cities of metropolitan areas? In the area of criminal procedure, does one look at impact of decisions in terms of alleged increases in the crime rate? In terms of the number of cases which go to trial? In terms of convictions obtained? In terms of changes in police methods? In terms of the growth of interest groups, e.g., of policemen, which arise in opposition to the decisions? Or in terms of the number of cases brought to the courts to test the applicability of what the Supreme Court has declared? An easy but unsatisfying answer for the present is that perhaps all of these, individually or in combination, might be legitimate operationalizations.

There are additional measures. One might be the frequency with which a court decision is mentioned. "When the constitutionality of policy proposals is under discussion, one may expect frequent references to relevant Supreme Court cases" (Wasby, 1968: 102). Because less frequent mention might be expected from nonlawyer policy makers and by lay members of interested publics than from lawyers, "A possible measure of the scope of the impact of Supreme Court opinions would be the frequency with which the opinions were mentioned outside courts and among nonlawyers, particularly by members of 'attentive publics.' " One type of mention received by certain Court opinions is that they do not provide enough guidance for lower-court judges or lawyers dealing with the subject. What such complaints mean, however, is not clear. While it may simply be an escape to or excuse for policy otherwise preferred, it might also mean that the complainers would comply if given the opportunity and the guidance; one simply cannot tell from the complaints themselves.

One can use numbers of those affected as a measure of impact. But if, with regard to school desegregation, one does use the percentage of Negro students attending classes in previously all-white schools, some questions are still unanswered. The percentage involved is usually quite small and is often cited with dismay by those who see it. Robert Crain (1968: 357), however, points out that those militating for school desegregation often cease their efforts when the numbers of Negro students added to previously all-white schools are quite small, perhaps indicating a preference for a symbolic rather than a numerical gain. This, of course, suggests a different basis for evaluation. One also has the difficulty of ascertaining how many Negro parents want their children going to school in previously all-white schools. Apart from the intimidation of those parents which occurs, there may be some who do not wish their children to be involved, or to be among the first. If one is to include them in figuring the base for percentage

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of Negro children in desegregated schools, one may not obtain a precise picture of impact—certainly one would not obtain the same picture as if they were excluded from one's count. To be sure, the percentage of all Negro students in desegregated schools (figured on the largest base[9]) is quite important if one wants to know to what extent the *values* discussed by the justices in Brown have been implemented, a crucial matter regardless of the wishes of the parents involved. But even this suggests again that what one means by impact may require asking different questions under different circumstances.

Even if one solves the problem of calculating the percentage of students now in desegregated schools, one might want to know other items concerning compliance with Brown. What, for example, are the problems after desegregation occurs? Is there social segregation within the schools, or does desegregation occur there and perhaps extend to children's activities after school hours? Has there been restriction of faculty and student freedom of speech on the subject? The point is that it is important to know *where* to look in determining measurements.

Some Other Considerations in Measurement

To return to the matter of the proportionate amount of impact, one must recognize that there may be only a few jurisdictions in which a Court decision, even a doctrinally important one, can have a specific effect on individuals. Although we must keep in mind the difference between class actions, on behalf of the plaintiff "and all other similarly situated," and cases brought only on behalf of a single plaintiff, if a case rule can be used in only a small number of cases, the impact is limited. Examples include some of the Supreme Court's criminal procedure rulings of the 1960s, because the procedure involved occurred in only a single state, as was true with both denial of right to jury (Duncan v. Louisiana, 1968) and courtroom television (Estes v. Texas, 1965), or because some states were already in compliance with rules the Supreme Court incorporated in the Fourteenth Amendment. Other cases with a limited effect include the Penn Central Merger and N and W Inclusion Cases (1968), which affected immediately only the railroads involved in the merger. Although the case might also have the more diffuse effect of encouraging mergers, the number of corporations existing which could be covered by the case was relatively small. The Permian Basin Area Rate Cases (1968) directly affected only one major national government agency and a limited number of corporations involved in the rate-setting proceedings, although other possible effects—for example, on administrative proceedings generally—might radiate from the case.

In dealing with the measurement of impact, we must inject the notion of *time* into our study. Where in time does one look for impact? One must be careful. All impact is not immediate. There may be a lag before those affected even

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know about a decision, much less have time to react to it. One must be careful to distinguish between resistance to the Supreme Court's ruling and the general slowness of the system to respond. Even when officials know of cases and agree that implementation should occur, it may be unrealistic to expect immediate full compliance, particularly where bureaucratic machinery must be altered. The speed of reaction may also depend on how people feel about a decision. Thus, when people approve of a decision, there may be no immediate need for them to act. Follow-up action may be necessary to nail down a decision, but it may await possible voluntary compliance by others. On the other hand, those opposed are more likely to feel compelled to react promptly rather than leave an impression of compliance by nonaction. However, these individuals may change their minds later; that is, we can distinguish between immediate emotional opposition and "sober second thought," as in the case of the Congressman who sponsored, but later withdrew, a resolution opposing the prayer decisions. After time has passed following a decision, the "parade of horribles" which some have felt would come from the decision may not have occurred, and tempers may cool. Thus Murphy (1962: 238) noted, with respect to critics of the Supreme Court's decisions on internal security in the 1950s, that "after several years of living with decisions like *Mallory; Nelson; Yates;* and *Cole v. Young,* a crisis in law enforcement had not developed, nor had packs of Communists descended on the country or infested government employment."

Just as all impact is not immediate, some impact may also continue for a long time, and long-run effects may be greater than short-run effects, although the long-run effects of many decisions are nil, particularly in the economic area, because social forces outrun what the Court has done. Kelly and Harbison (1955: 229) have noted that Marbury v. Madison (1803), which established judicial review, was an example of a case the implications of which were not clear at the time it was decided. "Marshall's argument in favor of the Court's power to declare an act of Congress void was not of major significance at the time he made it." Similarly, the convictions upheld in Gitlow v. New York (1925) had far less importance than the decision's impact through the incorporation of the First Amendment's protections for speech and press in the Fourteenth Amendment.

Time may be important because intervening events may be necessary before a decision is implemented. For example, there was a long lag between decision and action with respect to United States v. Standard Oil Co. (1947), where the Court held there was no recovery by the government under the concept of allocating a cause of action to the master for injury to his servant. The government withdrew a number of suits similar to Standard Oil which were pending at the time of that decision, and Congress did not fill the statutory void left by the case. Only after the General Accounting Office showed in 1960 that substantial sums of money could be recovered and were being recovered by those agencies which were

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acting under their power to issue regulations to that effect, did Congress respond with the Federal Medical Care Recovery Act of 1963 (Noone, 1969: 259-261).

In dealing with impact in relation to time, one can designate an arbitrary cutoff point or talk in terms of immediate impact, that is, obvious changes clearly resulting from a decision or attributed to it, recognizing that the longer the time after a decision, the broader (in more areas) and thinner (less immediate and powerful) the impact. However, it is useful to consider long-run as well as short-run effects. The range of possible effects can be shown as follows: There are immediate impacts, as of case X at point t_1, indicated by (1). Some decisions have no impact; they are never received or heard of, as noted by (2), and as far as impact is concerned, we may say they have aborted. Some blend in with the political milieu, noted at (3). As we proceed through time, there are other decisions (X' and X") which have their impacts, at points t_2 and t_4, noted at (4) and (6) respectively. Our initial case, X, has some long-range effects, for example, note points t_3 and t_5, at (5) and (7). The further one proceeds in time, the more one encounters a problem in distinguishing the impact of the case from other factors and from the impact of other cases on the political environment.

It should be stressed again that the relationship between the Supreme Court and the political environment is not unidirectional. Thus Supreme Court cases lay the groundwork for later cases, in at least two senses: one, a case will spawn additional cases aimed at clarification or extension; and, two, the impact of a case on the environment perhaps changes the environment in such a way that conflicts resulting in cases are produced. The Supreme Court receives feedback from its decisions (represented by the broken-line arrows), which may affect what the Court subsequently does. Thus the impact *of* the Court has an impact *on* the Court.

There is no conclusion to be reached from what has been presented here. We have looked at the way in which the study of the impact of Supreme Court decisions has progressed and have dealt with a number of conceptual and methodological aspects of the subject. It is hoped that this presentation will provide a jumping-off point for those interested in moving us further along the path toward greater knowledge of impact and the judicial process.

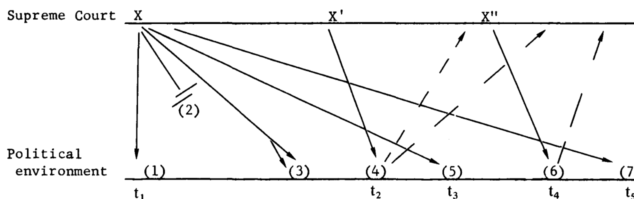

Figure 1.

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NOTES

1. This is in line with the "consumer perspective" on the law advocated by the late Edmond Cahn; he contrasted this with an "official perspective" of the "processors" of the law (Cahn, 1966: 21).

2. The amount of material in Warren (1922) is quite substantial. See also Kelly and Harbison (1955).

3. The set of decisions which followed is presented in Murphy and Pritchett, 1961: 606-618.

4. Blaustein and Ferguson distinguish between "avoidance," comparable to "evasion" here, and "evasion," which is noncompliance.

> There are no constitutional limitations to measures of "avoidance." It is perfectly proper–at least as far as the courts are concerned–for an individual or a state full of individuals to attempt to "avoid" the consequences of desegregation. "Evasion," on the other hand, is against the law. [Blaustein and Ferguson, 1957: 240-241]

5. His distinction is like that made by Sidney Hook (1943) between the "Event-Making" and "Event-ful" Man.

6. See Fainsod et al. (1959: 502) for a discussion of the Federal Trade Commission and the Supreme Court's trade regulation cases.

7. The following discussion draws on "On the Operationalization of 'Power' and 'Class' " in Wasby (1970: 81-84).

8. However, the department's regulations were invalidated by the Supreme Court in Lamont v. Postmaster General (1965), in which the Court made clear that such efforts to block a case would not be allowed to prevent a ruling on the relevant regulation.

9. Nagel (1969: 10) reminds us we should use "as a percentage base only those school districts that have some schoolage Negro children and some schoolage white children." However, if districts have been established so as to reinforce segregation, perhaps this suggestion should not be followed.

CASES

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COLE v. YOUNG (1956) 351 U.S. 536.
DUNCAN v. LOUISIANA (1968) 391 U.S. 145.
ESTES v. TEXAS (1965) 381 U.S. 532.

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GARRITY v. NEW JERSEY (1967) 385 U.S. 493.
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