

# Methodological, Theoretical and Topical Challenges in Judicial Implementation and Impact Studies

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The implementation of judicial decisions is a crucially important, yet understudied corner of judicial politics research. The role of the courts in the policy making process does not end with the issuance of a decision but rather continues as that decision is implemented by other political actors. Many of the Warren Court decisions of the 1950s and 1960s gave rise to a plethora of excellent case studies examining how other political actors responded to and implemented those decisions. More recently there have been far fewer research efforts in the area of judicial implementation and impact in professional journals and at political science conferences. This article explores a handful of potential reasons—theoretical, methodological, and topical—for this decline. While all areas of research face these types of problems to some degree, they are especially daunting for judicial implementation and impact scholars. This article offers a handful of recommendations that can be used to begin to address these problems and begin to fill this substantial gap in the judicial politics literature.

*Does anybody know...where we can go to find light on what the practical consequences of these decisions have been?* – Felix Frankfurter<sup>1</sup>

A budding field of scholarly inquiry in the 1960s and 1970s, the study of the implementation and impact of judicial decisions has waned in recent years. One impact scholar described implementation studies “as an area of scholarly adolescence lying in a ‘no man’s land’ between the studies of public administration and judicial politics; it is of interest to both of the disciplines (and others), yet peripheral to each of them” (Canon, 2004: 100). Such research is more difficult to find in the discipline’s most prominent journals and judicial implementation and impact papers are becoming also becoming more of a rarity at major political science conferences.<sup>2</sup>

This article explores the argument that judicial implementation and impact scholars face an impressive and daunting array of challenges that have contributed to the decline of research in this area. These challenges can be grouped into three areas: methodological, theoretical, and topical. First, there are a host of methodological challenges. Defining and measuring terms is especially challenging in this area as are attempts to study the implementation and impact of judicial decisions over time (Lempert, 1966; Wasby, 1970). Second, there is no overarching theoretical model that ties judicial impact research together (Canon & Johnson, 1999). Instead there are a number of “sub-theories” that have been periodically – some would say haphazardly –

tested over time by various scholars. Finally, research in this area has been rather myopic in scope. Most of the literature consists of case studies that focus on hot button social issues such as school prayer (Sorauf, 1957; Patric, 1957), abortion (Bond & Johnson, 1982), and school desegregation (Peltason, 1961; Rogers & Bullock, 1976). As a result, scholars often ignore numerous areas where judicial decisions are implemented as a matter of course with little fanfare. Collectively, these challenges provide some significant obstacles to judicial implementation and impact scholars, but they are not insurmountable ones. To examine these three challenges, it is important to review the historical foundations of the judicial implementation and impact field, examine how the development of the field has defined and shaped these challenges, and explore possible solutions that scholars can employ to tackle them.

The revitalization of judicial implementation research is important for a number of reasons (Canon & Johnson, 1999; Becker, 1969). Judicial decisions touch all facets of American politics. It is the implementation of judicial decisions – or lack thereof – that gives them meaning. Successful implementation is not a given in the American political system and cannot be assumed (Canon & Johnson, 1999). As a result, it is important to know why some judicial decisions are implemented and others are not. For example, consider the 2007 Supreme Court decisions that dealt with the use of race in assigning students to schools.<sup>3</sup> Some critics excoriated the Court’s decisions as ones that set civil rights back years. Others warned that these decisions would further segregate many school districts (Bazelon, 2008). While it was certainly important to study the breakdown of justices and opinions on each side of the decisions, it is arguably more important to see how local school districts react to and implement them. There

was a similar outcry in response to the Court's 2009 campaign finance decision in *Citizens United*<sup>4</sup> as critics of the Court's decision decried the new-found right of corporations to inject vast sums of money into electoral races across the country. Only time will tell if the Court's critics are right in each of these cases; it is the empirical examination of the judicial implementation and impact process that provides the research scholars need to accurately answer such questions.

## METHODOLOGICAL CHALLENGES

The judicial implementation and impact literature faces a number of important methodological challenges that complicate the study of judicial decisions. First, there are definitional issues. Over time scholars have attempted to measure compliance with judicial decisions, how they have been implemented, and what impact these decisions have had. For a more cohesive body of research to emerge, scholars need to reach some degree of definitional consistency and a greater appreciation for how this affects the scope of the research and the methods employed. Second, the almost exclusive use of case studies has limited judicial impact scholars in some important ways. Third, isolating *impact* as a variable and recognizing the need to measure it over time presents significant methodological challenges. This is especially true since the term *impact* is usually so broadly defined.

When studying the responses to judicial decisions, the most common terms found in the literature are "compliance," "implementation," and "impact" (Canon & Johnson, 1999). Early judicial scholars often couched responses to court judgments in terms of compliance or non-compliance. One either did what the court instructed or did not. Stephen Wasby (1970: 28) noted that compliance "narrows our focus, restricting us to finding out to what degree a specific decision is obeyed." While this may appear to be a relatively simple distinction, many have noted that there are a variety of means of non-compliance to judicial decisions ranging from evasion to outright defiance (Wasby, 1993; Canon, 2004). As a result, even something as seemingly simple as compliance can be a difficult concept to measure. However, many scholars found the use of the term "compliance" to be somewhat limiting (Songer & Sheehan, 1990). Harry Stumpf (1998: 413) notes that the problem with compliance is "not only that it is difficult to operationalize ... but also that compliance is only a part of impact." Compliance, therefore, became a starting point for many judicial scholars.

Judicial scholars seeking a broader examination of judicial decisions began to focus on the implementation of those decisions. Implementation includes other political actors outside those directly responsible for complying with the court's decision. Implementation can be defined as the "behavior of lower courts, government agencies, or affected parties as it relates to enforcing a judicial decision" (Canon & Johnson, 1999: 17). In terms of scope and breadth, implementation falls somewhere between compliance and impact.

In recent decades, most judicial scholars used the term "impact" in their studies. Impact is a much broader term and encompasses a great deal more than just compliance or non-compliance with judicial policies. To Wasby (1993: 364) "impact includes all effects resulting from a decision regardless of whether people knew about the decision." Canon and Johnson defined impact as something which "includes broad legal, political, and social consequences of judicial policies" (Stumpf, 1998: 415). The fact that the impact of a judicial decision can – and often does – encompass phenomena generally studied in other disciplines (e.g., sociology, economics) would seem to provide a wealth of opportunities for interdisciplinary research (Hertogh & Halliday, 2004). Indeed, many judicial scholars have borrowed from theories in other disciplines in their quests to explore the impact of judicial decisions (Canon & Johnson, 1999).

As is readily apparent, studying the impact of a judicial decision has the potential to be an enormous (perhaps even never-ending) task. Some pessimists subscribe to what Hertogh and Halliday (2004) call "impact agnosticism," a belief that it is extraordinarily difficult to talk comprehensively about impact due to the inability to obtain enough empirical data to make such generalizations. As a result of this, it is important for judicial scholars examining the impact of a judicial decision to carefully define what is meant by the term. As Michael McCann (1998: 336) notes, "it is the careful specification of base concepts and theoretical frames that is most important. After all, no study can examine all the effects of legal action or even all the important effects."

Using these terms, we can examine the study of judicial policies from the narrower question of compliance or non-compliance with a court decision, through the implementation of the decision by political actors, to the broad impact of a decision both legally and politically on society. At the most fundamental level, defining what is being studied – impact, implementation and/or compliance – is key. Authors must ask themselves a deceptively simple question: what is it I'm trying to study? What is my focus? While impact is usually the term of choice for most judicial scholars today, it is important that researchers rigorously define the scope of the term as it has the potential to cover a staggering number of effects related to a judicial decision. Different terms tell different stories because the scope of analysis is different for each. While these differences might be problematic, they also have the

possibility of actually being advantageous to those studying judicial decisions. One could employ all three lenses to the same set of cases with each lens revealing a different layer of response to the decision at each level. Such an approach would have the ability to turn a definitional problem into a strength by providing more conceptual depth to the study of judicial decisions.

A second set of methodological challenges facing judicial scholars in this area are related to the types of research designs often employed by scholars studying judicial decisions and the methodological approaches they employ. While judicial impact researchers have employed an increasing variety of methodological tools in recent decades, the literature is replete with acknowledgements regarding the methodological problems inherent in the field. In 1970, James Levine argued that the “low yield” of studies at that time was due to methodological inadequacies. That same year Wasby (1970), in his comprehensive treatment of the judicial impact literature, also emphasized the need for better, more sophisticated methodological approaches to the study of judicial impact.

As early as 1966, Richard Lempert explored the possibilities of using a variety of types of research designs for judicial impact studies and how each could best be employed in that particular field. Despite this, case studies have historically been the dominant method used by judicial impact scholars (see e.g., Dolbeare & Hammond, 1971; Giles & Gatlin, 1980; Patric, 1959; Sorauf, 1959). There are a number of advantages to the case study approach and case studies are often the best tool for answering certain types of questions (Berg, 2008). The case study allows researchers to provide the type of depth that broader analyses lack. Not only can a researcher assess whether a judicial decision was implemented or what its impact was, but he or she can also ask why these results occurred. At the same time, case studies can suffer from a number of inherent deficiencies such as the ability to generalize the results of a particular case study. Jeffrey Segal and Harold Spaeth’s (1993) criticism is that the one-shot post-test design or the one-shot case study that has so often been employed in the study of judicial decisions is often seriously flawed. They argue that the:

[m]ajor deficiency in compliance studies is their inability to measure validity and reliability. Typical methods include asking whether respondents have complied with particular Supreme Court decisions, or following them around to see if they do so. Needless to say, such studies substantially overestimate compliance (339).

In other words, one needs pre and post-test data to more accurately assess the impact of a judicial decision.

The methodological tools at the disposal of political scientists have increased in both number and sophistication over the last several decades. While case studies can be useful tools to investigate some situations it is imperative that judicial impact scholars expand their methodological horizons to incorporate additional tools into their research designs. Advances in quantitative methods now allow for the examination of numbers of cases that previously was not realistically possible. Adding such tools can be of special importance in two areas. First, they can make it easier to study areas where compliance with judicial decisions is the norm rather than the exception. Second, these methods can help researchers study the impact of a judicial decision over time, an important challenge that will be addressed shortly.

When it comes to data and methods, judicial impact scholars frequently relied on recorded data such as court opinions and public records. Canon (1991: 99) argues that “direct observation of relevant behavior provides the most reliable impact data. However, this is quite often impossible or at least impractical on any continuing basis.” Interviews and questionnaires were also widely used in many of the early case studies in this area. Despite Canon’s (1991: 447) assertion that “Impact data are seldom numerous or complex enough to warrant analyses via high-powered statistics,” an increasing number of judicial impact scholars have begun to employ quantitative methods (Giles & Walker, 1975; Bowen, 1995; C. Johnson, 1979) including multivariate (Rossell & Crain, 2001), probit (Marshall, 1989; Spriggs, 1996), and time series analyses (Meier, 1996). The increasing use of quantitative methods in this field certainly addresses some of the weaknesses of prior case studies. Quantitative approaches are becoming more widespread and statistics are being used to supplement the traditional survey, interview, and archival methods traditionally employed in this area. This has the benefit of allowing scholars to examine hundreds or even thousands of cases revealing patterns that would not be readily apparent from small-n case studies.

This leads us to a third important methodological problem which involves longitudinal issues in implementation and impact studies. Many studies have looked at the judicial impact of a decision at a single moment in time rather than over an extended period of time (Stumpf, 1998). While getting a snapshot of compliance to a judicial decision can be valuable, it can be even more useful to examine reactions to a decision over time. One interesting way to conceptualize time as it relates to judicial impact studies was introduced by James Levine (1970). Using a post event wave in terms of time and causality he notes that compliance (or noncompliance) comes first followed by the implementation of the decision and eventually the broader concept of impact. Relationships between court decisions and outcomes are probabilistic rather than deterministic and multiple intervening variables can appear at various

times after a judicial decision (Levine, 1970). Levine recognized this and proposed studying impact in terms of the “causal distance” from the agent of change. Subsequent scholars have paid significant attention to this “ripple effect” by recognizing that different political actors play different roles and have different motivations at different points in time (Galanter, 1983).

Longitudinal issues can be difficult for judicial researchers to address. It is unrealistic in most cases to expect full and immediate compliance with court decisions. Impact occurs over time. One way to address these issues is the use of a time series analysis. A second is to use multiple snapshots at different points in time after a judicial decision (e.g., six months, a year, five years). Revisiting a particular decision in this manner allows researchers to see the patterns that only time can reveal. This requires patience. Judicial researchers cannot be blamed for wanting to examine the responses to a particular decision and then move on to the next project or the next controversial court decision. However, a continued focus on the evolving impact a judicial decision has over time has the potential to reap significant rewards.

## **THEORETICAL CHALLENGES**

Theory is a vital foundation for any social science research agenda, yet some areas of political science are more theoretically developed than others. International relations, for instance, has several macro-theories such as *realism*, a theory used by international relations scholars for decades. One of the more common criticisms leveled at the judicial implementation and impact literature is its lack of a comprehensive theory of implementation and impact. Many of the early judicial impact studies were largely descriptive in focus and resulted in “numerous data collected without even implicit theoretical guidance” (Canon, 1991: 457). Significant theoretical advances in the implementation/impact literature have been few and far between in the past decade. While periodic individual studies have been conducted, we have not seen the development of a comprehensive theory of impact or even a large number of judicial impact studies.<sup>5</sup> As a result of this, some argue that theory continues to play a “modest role” in judicial impact research (Canon & Johnson, 1999).

Reaction to many of the Warren Court’s landmark decisions in the 1960s provided an impetus for further judicial impact research, but it was not until the end of that decade that one finds efforts to move from descriptive, disjointed case studies to a more comprehensive theory of impact. Two important efforts in this direction were Stephen Wasby’s *The Impact of the Supreme Court* (1970) and Theodore Becker and Malcolm Feely’s *The Impact of Supreme Court Decisions: Empirical Studies* (1973). In addition to showcasing a number of empirical impact studies in their volume, Becker and Feely also included a section entitled “Toward a Theory of Impact: Theoretical and Methodological” designed to explore the possibility of a more prominent role for theory in the study of judicial decisions. While Wasby (1970) presented no comprehensive theory of judicial impact in his book, he did attempt to lay some groundwork in that direction by introducing a number (over a hundred) of hypotheses related to a plethora of judicial impact variables. He also encouraged judicial scholars to apply theories from other fields such as psychology and communication to judicial impact research. Indeed, the connection to other fields is a logical one because a judicial decision can impact institutions and people in a variety of economic, political, social, psychological, and legal ways. A renewed interdisciplinary focus could, in turn, draw on approaches from other social science fields in the search for more comprehensive theories of judicial impact.

It is possible that this early theoretical barrier contributed to what Canon (1991) described as a slowdown in the amount of research done in implementation/impact studies during the 1980s. He noted that there were few major impact studies although there was a continuation of smaller scale projects as evidenced by their periodic appearance in professional journals. Canon also attributed this slowdown to the fact that there were fewer Supreme Court decisions requiring major behavioral change during this period of time when compared with the 1960s.

In 1984, Charles Johnson and Bradley Canon released their comprehensive review of the judicial impact literature, *Judicial Policies: Implementation and Impact*. This book, re-released in 1999, continues to be the most comprehensive treatment of the subject. In *Judicial Policies*, Canon and Johnson developed a heuristic model of implementation that divides actors into four different populations – interpreting, implementing, consumer, and secondary – with an understanding that the implementation of a judicial decision is a multi-stage process that involves a variety of actors having different roles in the implementation process. All of the actors in these populations then engage in a series of acceptance decisions and behavioral responses to the judicial decision in question. The development of their populations model is also a partial result of the belief that a “conceptual framework may organize existing research to suggest where empirical or theoretical gaps exist and provide some fundamental concepts or theoretical boundaries for development of theory and eventual research” (Johnson, 1977: 114).

In their review of the judicial implementation and impact literature, Canon and Johnson (1999) organized the theoretical approaches used by judicial scholars into five general categories: *psychological* (Mondak, 1994; Gibson, 1991), *utility* (Giles & Gatlin, 1980; Rogers & Bullock, 1972), *communications* (Spriggs, 1996; Hoekstra & Segal, 1996; Dolbeare & Hammond, 1971), *organizational* (Songer, et. al., 1994; Crouch & Marquart, 1989; Bowen, 1977), and *environmental* (Van Meter & Van Horn, 1975; Giles & Walker, 1975). Additionally, some of these general categories contain various sub-theories. The result is a veritable cornucopia of theoretical approaches to the study of implementation.

It is imperative that future impact scholars recognize the importance of theory and that they tackle the sub-field's "theory problem" head-on. The theoretical challenges to scholars in this area can basically be tackled in two ways. Scholars can continue to seek a macro-theory of judicial impact that either resembles a bulked-up version of one of the many sub-theories in the literature or one that incorporates elements of various sub-theories into a larger theoretical model. Theories that have shown some promise should be explored in more depth and others with little or no explanatory power weeded out.

Instead of seeking a single theory that explains the impact of judicial decisions, it might be wiser to recognize that different situations and different judicial decisions might be best explained by different theoretical approaches and then examine why this might be the case. Such a realization does not need to signal a retreat from attempting to be more theoretically rigorous or consign the sub-field to some morass of theoretical relativism. It is still possible, and indeed necessary, to rigorously test these theories and the common hypotheses they contain to create a literature with a strong theoretical foundation instead of a one that places a focus on disjointed case studies and deemphasizes the importance of theory. Judicial impact research encompasses such a diverse area that it is possible that smaller, "mid-range" theories might be best for examining different aspects of a judicial decision's impact. Such a broad spectrum of theoretical approaches would also seem to indicate areas of study ripe for interdisciplinary theoretical development and research (Hertogh & Halliday, 2004).

## TOPICAL CHALLENGES

The roots of judicial implementation and impact research are relatively recent in origin. Much of the original research in this area was prompted by the many groundbreaking decisions of the Warren Court and was the result, in part, of the realization at that time full compliance didn't always follow Court decisions (Canon, 1991).<sup>6</sup> These roots have influenced the scope of the judicial impact literature. First, one sees a fairly narrow range of topics covered. Second, we see a literature that focuses largely on the Supreme Court of the United States while often ignoring lower federal courts and state courts.

What is evident by looking at the bulk of the judicial impact literature over time is the relative narrowness in the variety of the topics researched by scholars. Stumpf (1998) argues that a "journalistic orientation" has lead most judicial impact scholars to focus on cases involving hot button public policy issues. School desegregation has been the subject of a plethora of studies (Peltason, 1961; Rogers & Bullock, 1976; Giles & Gatlin, 1980; Rossell & Crain, 2001) as has school prayer and church-state relations (Patric, 1957; Sorauf, 1959; Muir, 1967). Additionally, the area of criminal justice has been subject to close scrutiny by judicial scholars (Leo, 1996; Wasby, 1976; Songer & Sheehan, 1990). More recently the impact of *Roe v. Wade* has been a focal point (Bond and Johnson, 1982; Meier, 1996). These are the cases that have received the most attention and generated a good deal of publicity largely because they involved a degree of non-compliance on the part of those responsible for the implementation of the decisions.

In recent decades we have seen some efforts on the part of judicial scholars to broaden the scope of the judicial impact literature including efforts in the areas of patent law, the environment, and media access to criminal trials. Contrary to Martin Shapiro's (1968) earlier findings, Lawrence Baum (1980) found a great deal of compliance to Supreme Court decisions in the area of patent law. Some studies involving First Amendment issues have been conducted as well. In 1988, Traci Reid discovered that lower courts did not automatically comply with Supreme Court decisions regarding media access to criminal trials although federal courts were more likely to comply than state ones. Lauren Bowen (1977) argued that the attitudes of those affected were a key variable in assessing the impact of the Supreme Court's decision allowing lawyers to publicly advertise. Other public policy issues such as affirmative action (Deardorff & Jones, 2007) and the environment (Rosenberg, 2008; O'Leary, 1989) have also been subjects of study.

Examining these previously understudied areas may prove fruitful as studying judicial behavior and the responses to it in a less controversial issue area may shed some light on many of the current assumptions about the manner in which courts operate (Reid, 1988). The negatives associated with the narrowness of the scope of the topics covered in the field are ones that can be easily addressed. The literature needs to move away from a focus on "hot-button"

issues. It is equally important to examine areas where compliance with judicial decisions is the norm and not the exception. Too often scholars have focused on non-compliance to judicial decisions as opposed to exploring why compliance occurs or exploring the impact of a comparatively non-controversial decision.<sup>7</sup>

In 1978, Lawrence Baum argued that the thrust of much of the implementation/impact literature has been an attempt (and a largely successful one at that) to debunk the *upper court myth*. This myth posits that lower federal and state courts follow the Supreme Court's lead and that the Supreme Court is at the heart of the court system. The judicial implementation and impact literature has focused almost exclusively on the Supreme Court and how others have responded to its decisions. Donald Songer and Reginald Sheehan's (1994) study of lower court reaction to the *Miranda* and *New York Times Co. v. Sullivan* decisions provided support for this perspective by documenting substantial compliance by lower courts to Supreme Court decisions. Baum (1980) found a meaningful relationship between Appellate Courts and their subordinates in the area of patent law and argued that they exert real influence although lower courts still had some degree of independence. Neil Romans (1974) noted that lower courts could slow down the implementation of a Supreme Court decision if that decision is vague. Similarly, Henry Glick's (1994) examination of institutional responses to Supreme Court decisions in right-to-die cases revealed that institutions whose policies lagged behind Court decisions altered their policies to comply. More recently Sara Benesh and Malia Reddick (2002) concluded that lower court compliance with Supreme Court precedents varied in relation to a number of political variables.

In 1999, Canon and Johnson noted "No one has studied the general policy impact of state supreme courts and only a few scholars have focused on a particular court" (200).<sup>8</sup> This almost exclusive focus on the Supreme Court is unfortunate since it is in the lower courts that much of the real policy making occurs (Wasby, 1993). Most research efforts at the state level focus on the response of state legislatures to Supreme Court decisions (e.g., *Brown* or *Schempp*) and again the focus is usually on the controversial decisions where there is some degree of noticeable noncompliance (Tarr, 1977). There has also been some work done on state court responses to Supreme Court decisions (Tarr, 1977; Hoekstra, 2005; Romans, 1974).

This lack of attention to state courts is a partial reflection of the larger public law field. Significantly less work is done on state courts in all facets of judicial study. While the Supreme Court of the United States will always occupy a unique position in judicial impact research it is equally important that scholars focus attention on lower federal courts and state judicial systems. It is these courts and their decisions that most frequently impact the policy-making process at both the state and local level. State courts are increasingly making decisions that significantly impact policy in areas such as same-sex marriage.<sup>9</sup>

## CONCLUSION

The study of what occurs in the aftermath of judicial decisions is an important part of studying the American political system. Courts routinely rule on the most important political topics of the day but the implementation of their decisions is not a given. Moreover, these decisions can have a far-reaching impact on society. It is true that important methodological, theoretical, and topical challenges present significant obstacles for researchers, but the first step towards addressing these challenges is to recognize them and consider solutions that will help scholars overcome these obstacles in the future. This article has been a brief attempt to outline some of these issues and offer some tentative ideas that can be used to address them.

## NOTES

<sup>1</sup> Quoted in Becker (1969).

<sup>2</sup> In the last five years only one article, Staton and Vanberg (2008), can be fairly characterized as dealing with judicial impact issues in the discipline's "Big Three" journals (*American Political Science Review*, *Journal of Politics*, and *American Journal of Political Science*). There is another vein of impact research which is most European in nature and grounded primarily in socio-legal studies. This newer body of research focuses primarily on the impact that judicial review has on bureaucracies largely within the context of administrative law (Hertogh and Halliday 2004).

<sup>3</sup> See *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education*, 551 U.S. 701 (2007).

<sup>4</sup> *Citizens United v. FEC*, 130 S.Ct. 876 (2009).

<sup>5</sup> Compare Table 6.1, page 222 in Johnson and Canon (1984) with Table 6-1, page 184 in Canon and Johnson (1999).

<sup>6</sup> Hertogh and Halliday (2004) also note that early impact research focused almost exclusively on American cases with little comparative work in this area.

<sup>7</sup> But see Feeley (2004).

<sup>8</sup> But see Dolbeare (1967), Lehne (1978), and Jacobs (2010).

<sup>9</sup> See *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

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