

*The Role of the Supreme Court in American Politics:
The Least Dangerous Branch?*

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Abstract:

As an institutional player in the policymaking process, the U.S. Supreme Court is able to make policy through judicial activism. The appropriate role of the Court is questioned. Three main dilemmas are identified- democracy, institutional role, and judicial capacity. Despite its ability to make these power decisions, the Court's power is limited by legitimacy and its inability to enforce and implement its decisions. Pacelle concludes by suggesting that the appropriate role of the judicial system is to protect civil liberties, avoid economic matters and have the ability to set aside legislative judgments.

In some aspects, the U.S. Supreme Court is similar to other branches of government. It is subject to public opinion and has the ability to set its agenda by deciding what cases to hear. The U.S. Supreme Court has recently undergone changes that will influence the decisions that it makes in time to come. The Rehnquist Court was known for being a conservative court that adhered closely to the Constitution. I predict that the current Court will follow the steps of its predecessor.

Key Concepts:

- Judicial activism is the ability of the court to make decisions that result in policy. The opposite of activism is restraint- confining decisions and limiting their ability to make policy decisions.
- Legitimacy is a characteristic of an institution whereby it has a legal and perceived right to make binding decisions (Pacelle, 2002).

He who interprets the law is the true lawmaker.

- Arthur Miller, 1982

Book Summary

In *The Role of Supreme Court of American Politics*, author Richard Pacelle (2002) describes the role of the U.S. Supreme Court (Court) as a policymaker in our country. Given its status as an un-elected branch of government, the Court is in a unique situation in which it can make decisions based on personal ideologies and legal factors (Pacelle, 2002, p. 153). The controversy around this subject revolves around the appropriate role of the Court in American politics, given its status.

Though not intended by the Constitution, the Court has evolved to be an active player in the policy making process. The Court has the ability to make decisions through judicial activism. Activist decisions can take many forms, which include overturning precedents, the act of judicial review, and expanding statutory and constitutional provisions (Pacelle, 2002, p. 22). Activist decisions follow a loose interpretation of the Constitution. Alternatively, the Court can practice restraint by adhering to precedents and following other elected branches (Pacelle, 2002). Those in favor of judicial restraint argue that justices should adhere to the language of the Constitution and that it shouldn't change with the times.

The Court is able to make these decisions because they have legitimacy, "widespread approval for the way one exercises political power" (Pacelle, 2002, p.12). Judicial review can act as means of activism or restraint, depending on the decision that is made. Essentially, this action gives the Court the power to "declare an act of Congress or of the president unconstitutional" (Pacelle, 2002, p. 21). The Court's decision can be subject to veto; however, it requires two-thirds of each house in Congress (Pacelle, 2002, p.21).

The policy making process begins when cases are on docket to be reviewed by the Court. In deciding to "[take] certain cases and [refuse] others, the Court makes policy" (Pacelle, 2002,

p.19). If cases are rejected, they are left to be decided by the lower courts. In order to be considered for review by the Court, the case must first meet the criteria of having justiciability-standing, ripeness, and mootness (Pacelle, 2002, p.87).

The appointment and composition of the Court at a given is a reflection of the current administration. Pacelle describes Courts that have existed throughout the nation's history which have demonstrated different degrees of judicial activism, which reflect how policymaking decisions have changed over time. Known active Courts in American history include the Warren and Burger Courts. The Warren Court was marked by "loosening the restraints on litigants" (Pacelle, 2002, p.48). The latter court was known for making decisions about busing and affirmative action (Pacelle, 2002).

Proponents of judicial constraint argue that it is "undemocratic, faces limitations on power, and lacks the capacity to make policy effectively" (Pacelle, 2002, p. 30). The Court is not thought of as one who makes law, but instead "find law in the Constitution and existing precedents and apply it" (Pacelle, 2002, p.30). Since Justices are appointed by the President, they are removed from democracy. Because of this, there are arguments in which the Court should not make policy. These arguments include the idea that elected branches have more legitimacy, accountability and it violates majoritarian democracy (Pacelle, 2002, p. 56-57).

To counter the argument about the Court's undemocratic nature, Pacelle (2002) puts forth that the court was specifically created to be a "check on the other branches of government" (p.61). Instead of making broad policies that are subject to scrutiny from the President, Congress and the public, the Court is also in a position to protect civil liberties and the rights of the minority. Whereas, a strict interpretation doesn't change with the times, Pacelle points out that if

Justices strictly adhered to the Constitution, then women and minorities wouldn't have rights and liberties that they have today.

In addition to democratic concerns, there is concern regarding the institutional and capacity limitations of the Court. The institutional role of the Court determines how much power it has. There are four constraints that limit the institutional role of the Court: justiciability, jurisdiction, and checks and balances (Pacelle, 2002, p. 83). Additionally, the Court lacks the ability to “enforce its decisions and the power over the resources to do so” (Pacelle, 2002, p.81). As a counter argument, the Court is often able to justify its decisions because of its institutional role and checks rarely have to be provoked.

There is also concern over the capacity of the Court to make effective policy. The Court is often seen as a weak policymaker because of its inability to enforce its decisions. Likewise, it is difficult for the Court to “monitor interpretation, implementation, and impact” (Pacelle, 2002, p112). For example, *Brown v. Board of Education*, the landmark case that ended segregation in schools was decided in 1954. However, it wasn't until 1964, when the Civil Rights Act was passed that efforts for desegregation began to take place. Other criticisms revolve around the decisions about broad policy and the inability to effectively intervene with them. Despite the criticism, Pacelle (2002) points out that the Court's attention to an issue creates interest and activity from the other branches of government. The very unelected nature that poses a democratic dilemma, also “frees it from electoral and institutional constraints that pose barriers to change” (Pacelle, 2002, p.108). Though it does take awhile, the other branches will eventually “react and follow the Court's lead” (Pacelle, 2002, p. 128).

Policymaking by the Court is a delicate balance between exercising power and maintaining legitimacy and public support. Pacelle concludes the text with his recommendations

of the appropriate role of the Supreme Court in American politics. The most inherent shortfall of the Court is its inability to implement and enforce its policies. On the other hand, the Court maintains a lot of legitimacy, maintaining support from the public, which makes it difficult for other branches of government to attack it (Pacelle, 2002). Pacelle (2002) recommends that the Court adopt a position doctrine to reaffirm its position as a protector of civil rights, avoid economic issues, and have the ability to set aside legislative judgments.

Assessment

The Role of Supreme Court of American Politics provides a full picture of the extent of power the judicial branch has in the policy process. In his book, Pacelle, describes and demonstrates the unique role of the Supreme Court as a policymaker. With the exception of one reading, the other readings from Theodoulou & Cahn provide similar conclusions about the role of the Supreme Court as an institutional player in the policy process. Cahn (1995) further points out that judges' interpretations have an impact on public policy (Cahn, 1995).

Like the Court is bound and obligated by public opinion and approval, so are decisions made the Congress. In describing a congressman's lawmaking activities, Fiorina (1995) points out that he will "find his district divided on many issues" (Fiorina, 1995, p. 215). The Court faces the same types of resistance, only it has a larger audience, the entire nation. The Court does differ because unlike congressmen whose actions may or may not be politically motivated, justices do not have to see reelection. Additionally, the Court's audience does not have the direct power to repeal a policy that has been made.

When the president creates his agenda, he must choose which policies, events, and ideas have higher priorities. To select which demands are higher than others, the White House will go through a filtering process to determine which problems, solutions, assumptions and players will be set (Light, 1995). Essentially, the most important policies on the President's agenda will more likely be passed. Similar to this process, which was also discussed earlier in the paper, the Court is able to select which cases from the docket it will hear in court. By "taking certain cases and refusing others, the Court makes policy" (Pacelle, 2002, p. 19). After it makes its decision in the case, it becomes a policy.

While Pacelle focuses largely on judicial activism of the U.S. Supreme Court, Baum introduces the highly active nature of appellate courts. During the 1987 term of Court, the Pennsylvania Supreme Court accepted more Debt and contract cases and criminal cases than the Federal Court of Appeals in the Sixth Circuit, and the U.S. Supreme Court (Baum, 1995). Similarly, the higher courts accepted more cases that involved governmental regulation of economic activity than lower courts. The difference in acceptance of cases is a reflection of the different agendas in each sector of government. Also, appellate courts in different states have different domains (Baum, 1995).

Similar to the argument regarding the undemocratic nature of the Court, Nathan Glazer further argues that “judicial activism infringes on democratic policy institutions” (Cahn, 1995, p.206). Glazer claims that the role of the Court has evolved so much that public opinion is weak compared to the decisions made by the Court. I find this contradictory to the facts presented by Pacelle. While the Court does have the power and ability to accept cases and conduct judicial review it is bound and limited by constraints of legitimacy and public opinion.

On a similar note, Glazer (1975) identifies the Supreme Court as an “Imperial Judiciary” characterized by its ability to “reach into the lives of the people” (p. 289). Glazer’s point of view reflects the time in which it was written in 1975. At the time, the Court was occupied by the Burger Court, which succeeded the Warren Court. As mentioned earlier, these Courts were very active and in those times, a number of landmark decisions were passed. Glazer’s criticisms of a Court are justified, however, in hindsight, decisions that were passed, such as busing and affirmative action cases, have had a positive impact overall.

The Rehnquist Court was characterized as a conservative court. During the Rehnquist tenure, the Court accepted many controversial cases and in most instances, adhered to precedents set by previous justices. Notable cases that were decided under the Rehnquist Court include *Grutter v. Bollinger* (2003), which upheld affirmative action, and *Bush v. Gore* (2000), which stopped the recount of ballot votes in Florida during the presidential election in 2000.

With its recent appointments and landmark decisions, the Court has received a lot of notoriety. In recent years the Court has undergone dramatic changes in the make up of its justices. As mentioned earlier, justices who are appointed a reflection of the current administration. In 2005, Chief Justice John Roberts, was appointed to replace Chief Justice William Rehnquist. In selecting Roberts, Bush “chose a justice in the mold of Rehnquist” (Rosen, 2007, p.220). In the following year, another conservative was selected. Justice Samuel Alito replaced retired justice, Sandra Day O’Connor.

The conservative nature of the current Court can be seen in its recent decisions regarding integration in public schools and partial birth abortion. Earlier this year the Court rejected integration plans at public schools in Louisville and Seattle (CBS/AP, 2007). The majority argued that it violated “constitutional guarantees of equal protection” (CBS/AP, 2007).

Since the term began in October 2006, over 60 cases have been decided by the U.S. Supreme Court. Cases that have been accepted were about the 4th Amendment, partial birth abortions, affirmative action, and environmental issues. For the most part, the Court has been characterized as one that practices judicial restraint. In the future, I foresee the Roberts Court to be another conservative court that is not likely to practice judicial activism in its decisions, upholding existing decisions, not straying far from the Constitution.

After reading this book, I would argue that the Court is far from being the least dangerous branch of government. Even though case decisions have the ability to be negated by Congress, the Court has a lot of potential power when it comes to decision making. Despite the claim that the U.S. Supreme Court is a nondemocratic branch of government, I don't believe that it is entirely nondemocratic. The public has the ability to vote certain presidential parties into the administration, who then appoint the justices according to their choosing. Voting is a powerful tool that is taken for granted.

I now see the judicial branch in a way that is not so different from the other branches of government. The courts have similarities with the legislature and the executive branch that I wouldn't have thought of before reading this book. All three branches have the ability to make policy, are subject to public opinion, have the ability to set their own agendas.

Overall, Pacelle's book combined with the assigned readings provides a comprehensive overview of the power and the judicial branch and its role as a policymaker. Pacelle provides the reader with different points of view surrounding the appropriate role of the Court in politics. I agree with Pacelle's suggestions about the appropriate role for the courts. Their ability to make (or not make) decisions is a very powerful tool that should be used with strategy and in the best interest of the public.

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