

BOOK REVIEWS

POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS,
Robert Carp and C. K. Rowland. University of Tennessee
Press, Knoxville, Tenn., 1983. pp. 203. \$17.95.

It is intuitively obvious to many that the policy decisions of federal district judges are influenced by their party affiliation, their geographical region, and the president who appointed them. Little empirical evidence of this proposition has been developed, although many legal scholars and political scientists have studied the federal appellate courts. Political scientists Carp and Rowland have supplied a very thorough study of the policymaking propensities of the federal trial courts.

The authors argue that federal district judges are increasingly involved in a discretionary policymaking role as their dockets expand. Between 1960 and 1980, the number of civil cases filed in federal courts increased more than 300 percent.¹

The emergence of new legal questions for which no precise appellate guidelines exist gives the jurists more leeway to shape or manipulate specific policy outcomes through application and interpretation of general standards and to interject into their decisions their own values and extralegal cues from the larger political environment.²

There are two reasons that no proof of this relationship between judicial characteristics and policy outcome at the district court level has emerged previously; the first is a conceptual problem and the second is a quantitative one. The conceptual problem, the fact that trial court judges are limited in their opportunity for policymaking by their position in the judicial hierarchy,³ is overcome by the authors's recognition that when the law is clear and the appellate courts, particularly the Supreme Court, are cohesive and thus able to promulgate clear guidelines for the trial courts, there is little lower-court discretion and thus scant opportunity for extralegal cues to affect decisionmaking. But when precedent is imprecise and the Supreme Court is either inconsistent or ambiguous, the effects of extralegal cues are heightened as dis-

1. R. CARP & C. ROWLAND, POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS 4 (1983).

2. *Id.*

3. *Id.* at 7-11.

strict courts engage in policymaking. The authors argue that the latter situation is apparent in the Burger Court era with its unstable ideological majority.⁴ The quantitative problem, the inability to compare two or more judges's votes on a single case as in a collegial court, is largely overcome by a comparison of thousands of individual district court decisions on similar topics.

The study is grounded on a massive data base of 27, 772 district court opinions issued by nearly a thousand judges in the forty-four year period between 1933 and 1977.⁵ Carp and Rowland analyzed each case to decide whether the decision was "liberal" or "conservative" within certain substantive classifications, such as criminal justice, civil rights and liberties, or governmental regulation.⁶ They also collected data on the location and the background of the judge who rendered the decision in order to determine which factors correlated with more liberal or more conservative decisionmaking.⁷ The authors do not fall prey to the trap of suggesting that all judicial decisionmaking is based on political or personal preferences; they recognize that evidence and controlling precedent determine the outcome of most cases. But they argue that the traditional legal model is of little use in explaining cases in emerging areas of the law, where evidence conflicts, or where precedents are unclear. In such cases, they argue, extralegal factors come into play.⁸ The authors suggest that some areas of law, such as patent, admiralty, or land condemnation, do not have a clear underlying liberal-conservative dimension and thus are excluded from the analysis.⁹

The analysis reaches several conclusions. For example, Democratic judges are more "liberal" than their Republican counterparts in almost every substantive category, especially in the 1969-1977 Burger Court era.¹⁰ This finding, however, is overshadowed by the significance of the appointing president for judicial voting. The study finds that a president may have a tremendous impact on the judiciary, and thus on judicial policymaking, if the president is committed to appointing judges who share his policy views and provides clear ideologi-

4. *Id.* at 8-11.

5. *Id.* at 14-23.

6. The authors developed five general categories with several subcategories of case content. The five are criminal justice (including habeas corpus petitions, evidentiary motions and criminal convictions); government regulation of the economy (including commercial, environmental, and economic regulations); support for labor; class discrimination (including voting rights, women's rights and minority discrimination cases); and first amendment freedoms (including cases on freedom of expression and religion). *Id.* at 19-23.

7. *Id.* at 14-15.

8. *Id.* at 2-7.

9. *Id.* at 14.

10. *Id.* at 32-50.

cal criteria to implement his desire. Both Lyndon Johnson and Richard Nixon were committed to selecting judges who shared their views and both were successful. Carp and Rowland's data show that Johnson appointees are the most liberal on all issues and that Nixon's are consistently among the most conservative. On the other hand, the appointees of Kennedy, a president who cared little about the views of judges, and Eisenhower, who was not concerned with ideological purity but rather with "competence," reflect no consistent policymaking pattern.¹¹

The book also studies the impact of geographic factors on judicial decisions and concludes that location, and to a lesser extent, the degree of urbanization of the community where the judge sits, do affect voting patterns.¹² Fitting all the variables together, the study finds that two variables—the judge's state and the appointing president—and the interaction between those two variables are the most important sources for discriminating between liberal and conservative policy decisions.¹³

Although the empirical conclusions reached are generally well-supported, there are some conceptual weaknesses in the study. First, the basis for the analysis is the liberal-conservative dichotomy of the 28,000 cases; the authors fail to explain clearly how the dichotomization was accomplished. Did one individual read all 28,000 cases to classify their outcomes? This problem is related to another that the authors acknowledge,¹⁴ but fail to recognize as significant: the fact that the dependent variable—the liberal versus conservative dichotomization of the judge's final vote—is simplistic. Attorneys recognize that rulings on preliminary motions, evidentiary questions, and other "minor" issues during the litigation may be as or more important than the final decision since those earlier rulings have shaped the issues. A further problem is the authors's claim that during certain Supreme Court eras, there were more precedential ambiguities and shifting majorities that allowed more discretionary policymaking by lower courts.¹⁵ But this does not necessarily hold true for every substantive area; even during an era of ideological uncertainty the Court may have provided very clear guidelines to the lower courts on a certain area of law, for example, the "ambiguous" Burger Court's clear directives on obscenity law. In addition, the method of representing the rural-urban character of the court—the number of judges assigned—is somewhat problematical.

11. *See generally id.* at 51-83.

12. *See generally id.* at 84-144.

13. *Id.* at 160-64. *See generally id.* 145-71.

14. *Id.* at 16-17.

15. *Id.* at 10-11.

Another criticism concerns the rather dated sources which the authors rely on in many instances. Most of the sources on rural-urban differences, for example, are decades old.¹⁶ These problems are rather minor, however, and the overall analysis is valid.

Policymaking and Politics in the Federal District Courts will be less useful to practicing attorneys than to political scientists and scholars of legal behavior. The latter groups are provided with a sophisticated empirical study of a relatively unexplored area; the analysis of the impact of the appointing president is especially important. Carp and Rowland have made a significant contribution to the judicial behavior literature; their book is an important study of the lower federal courts.

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DEATH PENALTIES, Raoul Berger. Harvard University Press, Cambridge, Mass., 1982. pp. 242. \$17.50.

In *Death Penalties*,¹ noted constitutional scholar Raoul Berger critically analyzes the "abolitionist" thesis that capital punishment is "cruel and unusual" and therefore violative of the eighth and fourteenth amendments to the federal Constitution. Berger also criticizes the Supreme Court for finding support in the eighth amendment for judicial review of the proportionality of punishments to crimes. Before inquiring into the meaning of the "cruel and unusual punishments" clause, he decries the extension of the eighth amendment to the states, arguing that both the Supreme Court's selective incorporation doctrine and Justice Black's theory of en bloc incorporation are misguided.² Berger's view is that the due process clause of the fourteenth amendment—the vehicle of selective incorporation—is particularly ill-suited to carry the eighth amendment over to the states because due process is "procedural," whereas punishments are creatures of substantive law.³

Berger's analysis of the "cruel and unusual punishments" clause takes as its point of departure the fact that capital punishment was not understood to be cruel and unusual per se in 1791, the year of the ratifi-

16. *See id.* at 118-25.

1. R. BERGER, *DEATH PENALTIES* (1982).

2. *Id.* at 10-18.

3. *Id.* at 18-28.