

1960

Book Review (reviewing Glendon A. Schubert, Quantitative Analysis of Judicial Behavior (1960))

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Recommended Citation

Roger C. Cramton & Hans Zeisel, "Book Review (reviewing Glendon A. Schubert, Quantitative Analysis of Judicial Behavior (1960))," 28 University of Chicago Law Review 182 (1960).

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I cannot tell. What I can report to jurists is this:

The number of holes you (or I) can pick in these volumes is, if you are a pick-ax fan, gratifying. They are not at all that gathering and ordering of Pound's insights and knowledge for which many of us have been hoping. You find here, for example, few traces of his thought about judicial organization, or about the bar, or about dealing with crime.

On the other hand, the number of holes in your (or my) equipment for sound thinking on our own problems, *of today*, which these volumes offer good cement to fill: that is dismaying.

Ave, Caesar!

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Quantitative Analysis of Judicial Behavior. By GLENDON A. SCHUBERT. Glencoe, Illinois: The Free Press, 1960. Pp. xxi, 392. \$7.50.

Any law tribunal presents this puzzle: since for any one case both the facts and the law are given to each judge (or juror for that matter) in exactly the same form, what causes them in many instances to arrive at different conclusions? The mystery is only partly clarified if the judges, as is the custom in our appellate courts, state the reasons for their differing views in written opinions. These opinions normally clarify only the exact points of disagreement, identifying the fact or rule of law which is interpreted differently or given different weight. Much of the puzzle remains. What is the source of the difference? Is it likely to recur in a similar case in a way that may affect the result? Glendon Schubert's substantial volume is the most ambitious of the several attempts in recent years to utilize statistical methods to explore these and other puzzling problems of judicial behavior.

Schubert employs four distinct research techniques with ingenuity and perseverance. A long chapter on "summary decision-making" at the outset of his book analyzes the work of the Supreme Court in terms of its own published statistics; a second section builds on C. H. Pritchett's analysis of voting blocs; a third section, expanding on the interesting work of J. Tanenhaus and F. Kort, discusses the predictive possibilities of scalogram and content analysis of Supreme Court opinions; and a fourth section, very much the author's own original contribution, attempts to apply game theory to judicial decision-making. Thus the book is statistics throughout, statistics that are never dull and which are poised at every page to suggest intriguing solutions. The novelty and interest of Schubert's research make it all the more unfortunate that his work is so beset with shortcomings that the solutions are often more intriguing than meritorious.

The opening chapter on "summary decision-making" provides as good an illustration as any of some of these shortcomings. The chapter deals with the flow of cases to the Court and the patterns of their disposition, and the underlying thesis is that understanding of the Court demands scrutiny of the entire universe of its decisions and not only the small proportion of cases which are illuminated by written opinions. This is a sound idea; statistical methods, in combination with more orthodox analytical and research techniques, might tell us a great deal about the Court's performance of its total job. Such enlightenment, however, will come from the Schubert chapter dealing with "summary decision-making" only as it forewarns other practitioners of these black arts to avoid pitfalls which might seem to condemn the method, while in fact they speak only against its particular application.

At the outset Schubert seeks to establish the proposition that "the delegation of discretionary jurisdictional power to the Court has failed to bring about a reduction in the Court's workload."¹ If "workload" is to be a meaningful term, it must, of course, refer to the time required to perform the judicial task, and not merely to the number of cases of different types which have been decided. Since Schubert speaks in terms of a "lazy" or "active" Court, he is apparently applying a time standard.² But his complete failure to recognize that different types of decisions take differing amounts of time vitiates his conclusion that the grant of discretionary jurisdiction has failed to reduce the Court's workload. The fact relied on by Schubert—that the total number of cases handled by the Court since the advent of the discretionary jurisdiction has increased rather than decreased—has little significance unless it is established that the time required to consider a large number of certiorari applications exceeds the time required to decide a smaller number of appeals on the merits. Schubert lumps all cases together, regardless of their special characteristics (whether or not the case was considered on the merits, what court it came from, on what docket it was placed, etc.), with the implicit assumption that one case involves the same amount of work for the Court as every other case.

This basic error—the equation of dissimilar things—negates much that follows. For example, Schubert's own data reveal that the increase in the overall number of cases going to the Court is in large part due to the growth of the Miscellaneous Docket from zero (before the creation of this docket in 1945) to nearly a thousand applications in recent years. The available evidence indicates that these petitions, most of which are handwritten appeals of indigent

¹ P. 30.

² See pp. 27–28. In order to determine to what extent the discretionary jurisdiction has helped the Court keep pace with the larger demands of a growing society, Schubert might have compared the growth in cases going to the Supreme Court with the growth in cases in the lower federal courts and the state supreme courts, since these cases provide the raw material for Supreme Court review.

prisoners, take up very little of the Court's time.³ Nor does the gradual growth in the number of certiorari applications filed on the Court's Appellate Docket require the conclusion that the establishment of discretionary jurisdiction has not eased the burden on the Court. A much more significant fact is that the Court grants certiorari in, and considers the merits of, a considerably smaller number of cases than it did in the earlier period. Since the time required to deny certiorari is far less than that required for a decision on the merits after oral argument and full consideration, the discretionary jurisdiction would appear to be entirely effective in reducing the workload of the Court. To those who have felt that the Court in recent years has not sufficiently utilized its power to decline to make a decision on the merits, and in attempting to do too much, has impaired somewhat the general quality of its work, the prospect of a Court required to consider the merits of all of the cases brought to it is indeed appalling.

A second section of the same chapter attempts to establish the proposition that the denial of certiorari has substantive significance as an approval of the decision below. The process of proof begins with the statistic that about ninety per cent of all certiorari applications are denied, and appears to end with an asserted interrelationship with a second statistic: of the certiorari applications which are granted and summarily decided about the same percentage (ninety per cent) are reversed. This permits the inference that summary decision of certiorari cases is more likely when the Court disagrees with the decision below. But it is difficult to see how the accidental identity of percentages permits the companion inference "that the Court denies certiorari when it agrees with the decisions of the court below. . . ."⁴ The closest Schubert comes to an explanation of this legerdemain is this cryptic statement: ". . . the fact that 90 per cent of all certiorari cases which are decided summarily result in reversals suggests strongly that a selection factor related to the outcome of the cases is at work."⁵ As to those cases, we can at once agree. For the most part they are cases in which an examination of the certiorari papers convinces the Court that the decision below is inconsistent with controlling precedents. Despite the difficulties of summary action,⁶ the Court is willing in a limited number of cases (an average of twenty-five per term from the 1953 through the 1956 Term) to correct the error without any further investment of its own time. But the fact that in one relatively unimportant category of cases the Court,

³ The Court's method of handling the in forma pauperis applications on the Miscellaneous Docket is briefly discussed in Hart, *The Time Chart of the Justices*, 73 HARV. L. REV. 84, 90 (1959).

⁴ P. 44.

⁵ P. 66.

⁶ The Court's per curiam practice has received increasing attention. See Brown, *Process of Law*, 72 HARV. L. REV. 77 (1958); Comment, *Per Curiam Decisions of the Supreme Court: 1957 Term*, 26 U. CHI. L. REV. 279 (1958); Comment, *Per Curiam Decisions of the Supreme Court: 1958 Term*, 27 U. CHI. L. REV. 128 (1959).

after examination of the certiorari papers, does reach a conclusion on the merits does not support the inference that it also does so in other cases (cases on which the Court purports not to decide the merits). Nor is the inference bolstered by the undoubted fact that the Court denies the vast proportion of certiorari applications (how it could do otherwise escapes the imagination), or by Schubert's solemn repetition of the obvious truth that the denial of certiorari has significance to the disappointed litigant who unsuccessfully sought reversal of the decision below. It should be noted that certiorari cases which are granted and set for argument are as apt to be affirmed as reversed. Why not believe, with as much reason, that the ungranted certiorari cases (had they been granted) would be decided in the same way, resulting in reversals about half of the time?

Schubert's discussion of the summary disposition of "appeals" is more than illogical; it is also uninformed and therefore irresponsible. Here is his conclusion in his own words:

There is the additional question of the extent to which the behavior of the Supreme Court is consistent with what is known as the Rule of Law, at least as applied to the executive and legislative branches. Whatever our expectations might be regarding the Court's discretion to make and break substantive policy norms (in the processes of "constitutional" and "statutory interpretation"), there is probably a widespread expectation that the Court respect the procedural "rules of the game," including both those made by Congress in its control over the appellate jurisdiction of the Court, and those made by the Court itself. Yet, as we have shown, the Court has increasingly come to disregard the statute which defines its jurisdiction in appeals cases.⁷

What are the data which allegedly show that the Court's summary disposition of appeal cases is such a flagrant disregard of a congressional command as to violate the Rule of Law? Foremost is the fact that in recent years the Court has dismissed over fifty per cent of the cases in which litigants invoked the obligatory jurisdiction of the Court. Almost as significant, in Schubert's view, is the fact that the Court does not write an elaborate opinion when dismissing an appeal, but issues brief orders stating a conclusion such as "want of a substantial federal question" or "want of jurisdiction." Schubert, who considers these phrases "so vague and amorphous that they communicate nothing very meaningful,"⁸ does not appear to have examined the briefs and records in any of these cases, nor the many Supreme Court decisions which turn on jurisdictional matters. Thus he reaches his conclusion that the Court is engaged in a dishonest manipulation of its jurisdiction without an examination of the facts. A vigorous defense of the Court's practice, asserting that appeals are not treated in the same way as certiorari applications, has subsequently

⁷ Pp. 378-79.

⁸ P. 50.

been made by Mr. Justice Douglas.⁹ Although the Douglas article was not available to Schubert, one would think that the possibility of frivolous appeals, such as an attempt today to contest the constitutionality of the income tax, would have occurred to Schubert. Why is it surprising that over fifty per cent of purported "appeals" turn out, upon examination, to be frivolous or otherwise unfounded? Why is it surprising that many litigants seek to formulate their claims so as to come within the obligatory jurisdiction of the Court?¹⁰ Why is it surprising that the more general grounds of appeal from state court decisions, when added to greater unfamiliarity with this complicated specialty of federal law, give rise to a larger proportion of dismissals than the appeals from the lower federal courts, which require more specific grounds?

Schubert's discussion of the patterns of affirmances and reversals in various types of cases¹¹ repeats the earlier error of jumping from the fact that the Court in one class of cases makes summary decisions on the merits, and the unrelated fact that certain ratios of various kinds of dispositions have a superficial numerical similarity, to the conclusion that the Court is making decisions on the merits in all types of cases. The facts are these: the Supreme Court, as already indicated, denies certiorari in about ninety per cent of the certiorari cases, regardless of whether the cases come from federal or state courts. But its treatment of appeals differs enormously depending upon the origin of the case. About eighty per cent of the appeals from state courts are dismissed, and about seventy-five per cent of the total per curiam dispositions are "summary" affirmances of appeals from federal courts. Schubert believes that these "patterns of affirmances and reversals in the various types of cases are too definite to have arisen by sheer happenstance . . .," and that they involve a judgment on the merits of the cases.¹² Even if numerical similarity of various ratios were thought to be significant, it is unclear why the ratio of dismissals to total appeals from state courts is not compared to the ratio of per curiam affirmances in federal appeals to total appeals from federal courts rather than to the "federal appeals affirmed as a percentage of total per curiam dispositions on the merits."¹³ If such details are waived, another difficulty remains: why should a

⁹ Douglas, *The Supreme Court and Its Caseload*, 45 CORNELL L.Q. 401 (1960).

¹⁰ It should be noted that in appeals from state courts, if the Court determines from the submitted documents that a case is not within the statutory requirements for an appeal, but is within the certiorari jurisdiction, the Court can and does treat it as a petition for certiorari after the dismissal of the appeal.

¹¹ Pp. 50-67.

¹² P. 66.

¹³ P. 65. If the former ratio is used, Schubert's tables reveal that there were 63 per curiam affirmances in federal appeals and a total of 137 federal appeals during the 1953-1956 Terms, or a ratio of less than fifty per cent.

complicated and unproved explanation be accepted when a much simpler explanation will suffice? The simple explanation is that the different treatment accorded to state and federal appeals is not due to the Court's judgment of their respective merits, but to the differing characteristics of the two classes of cases. Appeals from the federal courts consist largely of direct appeals from United States district courts and are concerned primarily with the administration of federal statutes regulating commerce. Appeals from state courts, on the other hand, always raise constitutional questions. Although a larger portion of the state appeals are found not to come within the Court's obligatory jurisdiction, those that do, present issues of great importance to our federal system and to individual liberty. Once again, Schubert has uncritically shuffled numbers without inquiring whether the underlying units are comparable.

It would be fully as plausible to argue that the summary affirmances of many of the statutory appeals from federal district courts do *not* reflect a judgment by the Court of the merits of these cases (even though they purport to be decisions on the merits), as to argue, as Schubert does, that the dismissal of state appeals reflects a view of their merits (even though they purport not to be decisions on the merits). There is considerable evidence that the court gives less precedent value to per curiam affirmances in cases in which there was no oral argument or full opinion. It may be that the Court follows the practice of summarily affirming those appeals from federal district courts which it does not think are sufficiently important to warrant a full-scale consideration. This hypothesis is advanced only to demonstrate that the figures concerning the Court's disposition of various types of cases, taken by themselves, are not very meaningful. Quantification of such complex data can never be a substitute for intelligent and careful analysis of the characteristics of the cases and of the Court's manner of disposing of them. Statistical methods can add to our knowledge only if the quantitative analysis is preceded by and combined with the most careful investigation of what the measured units stand for.

While the uncritical devotee of the new methodology may be both pleased and intrigued with Professor Schubert's dramatic analyses, it is likely that lawyers, who traditionally distrust statistical and sociological methods, will find their worst prejudices confirmed. To those who, like the reviewers, believe in the fruitfulness of the methods but know that their place in the law needs most careful and modest delineation, the book, with all its ingenuity, is disappointing.

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