Michigan Law Review

Volume 79 | Issue 4

1981

Law, Policy, and the Public Schools

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LAW, POLICY, AND THE PUBLIC SCHOOLS

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LEGISLATED LEARNING: THE BUREAUCRATIZATION OF THE AMERICAN CLASSROOM. By *Arthur Wise*. Berkeley: University of California Press. 1979. Pp. xvii, 219. $10.95.

Legislated Learning is a trendy book that registers high on the Richter scale of academic tremors over law, lawyers, and legal process.[1] It is also a very bad book. It is a pastiche of themes and erudite quotations unblemished by harmonizing influences. The first task of a reviewer of *Legislated Learning* closely resembles that of a good editor. Before analysis may proceed, hypotheses must be distilled and then distinguished from each other. Passing references, inconsistent with the major themes of the book — for example a spanking new discussion of federalism near the end of the work (pp. 202-03, 206-08) — need to be banished from the mind. Once the reader mentally edits the book to render it more comprehensible, four interrelated arguments emerge. These vary in persuasiveness from the plausible to the absurd.

At one level, the author regurgitates much of the writing and thinking of Donald Horowitz[2] and Nathan Glazer,[3] and contends that courts are not competent to set education policy in the guise of deciding concrete disputes between parties (pp. 75-77, 118-85). To Wise and others, the best examples of incompetence involve construction of open-textured state and federal constitutional provisions by the judiciary (pp. 3-6, 131-39, 155-85), though unlike Glazer, Wise rests his argument more on concerns about competence than about the legitimacy of judicial intervention. A second and related theme is that dispute resolution in the public schools has increasingly been "legalized" as educational decisions are appealed to courts or state administrative agencies and as legal models of dispute resolu-

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1. *See* Book Review, 5 J. EDUC. FINANCE 481 (1980).

2. *See* D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).

3. *See* N. GLAZER, COURTS AND SOCIAL POLICY (publication forthcoming); Glazer, *Towards an Imperial Judiciary?*, 41 PUB. INTEREST 104 (1975); Glazer, *Should Judges Administer Social Services?*, 44 PUB. INTEREST 64 (1978).

tion are mandated within the schools themselves (pp. 75-77).[4] Rule and procedure overwhelm discretion (p. 131). And ultimately this results (or may result?) in the increased "bureaucratization of the American classroom" (the book's subtitle) and in the loss of local control (pp. 48-49).

The third theme, a critique of major policy innovations of the last fifteen years, moves well beyond criticisms of judicial intervention and the adversary method of resolving disputes. Rather, it treats judicial, legislative, and administrative decision making as birds of a feather. Such agencies, in Wise's view, frequently express policies through rules and procedures, and those policies are wrongheaded for a variety of reasons. They may embody an unduly restrictive view of the goals of education, they may ignore resource limitations and gaps in the technology of producing educational outcomes, and they may overlook distortions introduced through bureaucratic implementation (pp. 55-61). Most importantly, in pressing for equal educational outcomes for various groups of children, policymakers have increasingly moved well beyond specification of inputs and procedures. The result is that many policies fail.

Wise argues that the problem lies with "a legalistic conception of education and the school" (p. 52). Repeal of bad legislation or the overturning of bad court decisions will not suffice because the flaw lies in the ways that politicians, policymakers, and judges think about the world. Legal rationality is but one example of a rational model, and the author believes that rational models (be they economic, scientific, organizational, or whatever) are often misguided (p. 79). Rationality too often leads to "hyperrationalization" (pp. 47-48), a goal-oriented consideration of the fit between means and ends that produces "logical" solutions that are not firmly rooted in reality (pp. 65-66, 115). Put simply, the mind of the decision maker superimposes rational schemes on disorderly educational organizations and on the subtle and complex art of teaching (pp. 78-103).

The incompetence theme is primarily taken up in chapter four. Wise relies extensively on Donald Horowitz's book, *The Courts and Social Policy*[5] (pp. 120-26). The research is rather one-sided, with no references to scholars like Abram Chayes[6] or Laurence Tribe[7]

4. *See* Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STAN. L. REV. 841, 851-59 (1976); Yudof, *Procedural Fairness and Substantive Justice: Due Process, Bureaucracy, and the Public Schools*, in FUTURE TRENDS IN EDUCATION POLICY 109 (J. Newitt, ed. 1978).

5. *See* D. HOROWITZ, *supra* note 2, at 255-98.

6. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

7. *See, e.g.*, Tribe, *Seven Pluralist Fallacies: In Defense of the Adversary Process — A Reply*

who defend judicial involvement in complex institutional litigation.[8] Wise finds courts incompetent for a number of reasons. Courts are charged with making decisions and creating policy in the absence of information about the workings of educational institutions and the likely consequences of intervention (p. 121). Courts are too rationalistic, too insensitive to rough-and-tumble politics, and too bound to theories of rights. The piecemeal character of litigation (p. 123), the tendency to eschew compromise (p. 121), the necessity of narrowing issues and goals (pp. 123-24), the difficulty of relying upon social-science evidence (pp. 145-46), and the focus on the extreme cases for general rules (p. 124) may lead to unreliable results. There are fewer participants in the judicial process than in the legislative process (pp. 121-22), and those who do participate have an incentive to withhold information that would be damaging in an adversary proceeding.

One part of the argument is that courts are less competent fact-finders than legislatures. But for all of Wise's analysis of the New Jersey School Finance case (pp. 155-85) and his reliance on Horowitz's study of *Hobson v. Hansen*[9] (pp. 135-39), he only succeeds in showing that courts often are inept fact-finders. Whether legislatures are less inept is a different question, a largely empirical one which cannot be answered with polemical assertions.[10] A recent study by Michael Rebell and Arthur Block, comparing legislative and judicial processes in the education field, found that issues frequently were more thoroughly and intelligently discussed in the judicial forum.[11] Legislative hearings tended to be ritualistic as proponents and opponents of the bill called their witnesses. The caliber of testimony in judicial proceedings, while hardly overwhelming, tended to be better because more witnesses were called and because the witnesses were more carefully questioned. For the very reason that courts tend to be more rationalistic and less oriented toward politics (a point Wise makes), one might well expect that courts would more thoroughly air factual issues. And as Abram Chayes

to Justice Rehnquist, 33 MIAMI L. REV. 43 (1978).

8. *See* Kirp, *School Desegregation and the Limits of Legalism*, 47 PUB. INTEREST 101, 122-25 (1977).

9. 269 F. Supp. 401 (D.D.C. 1967), *aff'd en banc sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). *See* Hobson v. Hansen (Hobson II), 327 F. Supp. 844 (D.D.C. 1971). *See generally* Michelson, *For the Plaintiffs — Equal School Resource Allocation*, 7 J. HUMAN RESOURCES 283 (1972); O'Neill, Gray & Horowitz, *For the Defendants — Educational Equality and Expenditure Equalization Orders*, 7 J. HUMAN RESOURCES 307 (1972).

10. *See* Chayes, *supra* note 6, at 1304-16.

11. *See* M. REBELL & A. BLOCK, EDUCATIONAL POLICYMAKING AND THE COURTS (publication forthcoming).

has noted, modern courts in public interest litigation are not as limited by rules of evidence and other devices in their fact-finding as they were in the past.[12] Of course, to say that courts are equally or more competent fact finders than legislatures is not to say that they should be entrusted with public policy decisions. But Wise's point is largely limited to judicial competence, and he ignores the question of whether it is legitimate for courts to make decisions premised on "legislative" facts.

A second branch of Wise's competency argument is that courts must and should justify their decisions in terms of legal authority. This means that courts may deduce educational solutions from laws and precedents while ignoring the realities of the situation (pp. 75-76, 122-24): "In interpreting laws as a means of solving educational problems, the courts focus on explicit . . . phenomena, on formal rather than informal structure, on rationale rather than reality" (p. 122).

In large measure, this point is well taken. There is always the danger that judges will craft decisions that meet the highest standards of legal justification, but will reach uncommonly silly results. But Wise sweeps far too broadly. If a court is construing a statute and it employs reasonable means to discern the legislative purpose, what more should one expect? The solution is properly deduced from the law, and if the result is awkward, the legislature should change the law. More to the point, Wise's observations fly in the face of the legal realism of the last fifty years. The problem may be more that a court can manipulate constitutional and statutory text and precedents to reach a solution that it believes is wise, than it is that such authorities command an unwise solution. Dr. Wise is somewhere back in the nineteenth century in his conception of the formalism of the legal process;[13] indeed, the formalists of that age may appear to be legal realists by comparison with him. And had Wise been more concerned with the legitimacy of judicial intervention, he might have realized that it is the very lack of strictures on judicial decision-making that has caused critics of judicial activism to charge the courts with usurping legislative functions.[14]

12. *See* Chayes, *supra* note 6, at 1296-98.

13. *See generally* G. GILMORE, THE AGES OF AMERICAN LAW 41-67 (1977); K. LLEWELLYN, THE COMMON LAW TRADITION 38-41 (1960); White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973).

14. *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); J. ELY, DEMOCRACY AND DISTRUST (1980); L. LUSKY, BY WHAT RIGHT? (1975); Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359 (1975); HART, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977).

The third branch of the competence argument concerns the implementation of remedies in complex school litigations. The argument is powerfully, if cryptically, made:

> The legal process also contains its own theories of human behavior and of organization. Ordering the school administrator or teacher to alter his behavior is deemed sufficient to induce behavioral change. When the order is to cease a behavior, it may work; when the order is to perform a behavior, it may not. Schools are assumed to be organized according to the Weberian ideal of hierarchical authority. [P. 76.]

The difficulty is that Wise does not elaborate upon this promising theme and that he overlooks the work of Christopher Stone,[15] William Clune,[16] David Kirp,[17] and others[18] who have thought about the implementation of court decisions. Familiarity with the literature would have lead to at least four additional qualifications and interpretations. First, in an age of complex institutional litigation, the law, in animistic fashion, may fail to distinguish the alteration of individual behavior from the alteration of institutional behavior. Even in the fields of contracts and torts, institutional and individual liability may have very different policy implications. What deters an individual from engaging in some behavior may not deter an organization.[19] The results may be unintended and serendipitous. Second, the concepts of fault, individual responsibility, and choice that underlie legal sanctions may become attenuated when the sanctions are imposed on an organization with thousands of employees, with various roles, with no single person responsible for many decisions.[20] Third, legal sanctions may have an insignificant effect on the behavior of school organizations because they appear to occur almost randomly and are balanced against professionalism, bureaucratic demands, public pressure and the like.[21] Finally — and this is an important point missed by the author — the nature of the judicial

15. C. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR (1975). *See* CORPORATE AND GOVERNMENTAL DEVIANCE (M. Ermann & R. Lundman eds. 1978).

16. Clune, *Wealth Discrimination In School Finance*, 68 NW. U. L. REV. 651 (1973). *See also* M. FEELY, P. PIELE, E. HOLLINGSWORTH & W. CLUNE, III, SCHOOLS & THE COURTS (1979).

17. Kirp, *supra* note 4; Kirp, *Race, Politics and the Courts: School Desegregation in San Francisco*, 46 HARV. EDUC. REV. 572 (1976).

18. *E.g.*, Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977).

19. *See generally* C. STONE, *supra* note 15; Berman, *The Study Of Macro- And Micro-Implementation*, 26 PUB. POLICY 157 (1978).

20. *See generally* C. STONE, *supra* note 15; Elmore, *Organizational Models Of Social Program Implementation*, 26 PUB. POLICY 185 (1978).

21. *See generally* S. SARASON, THE CULTURE OF THE SCHOOL AND THE PROBLEM OF CHANGE (1971); C. STONE, *supra* note 15.

decision may be critical to the manner of its implementation. If the decision is relatively clear and not strongly opposed by important constituent groups, and if its implementation does not conflict with bureaucratic values, then the decision may well be implemented in hierarchical fashion with little deviation.[22] In my own work I have argued that procedural requirements, for example, are more likely to be implemented (at least in form if not spirit) than substantive requirements such as protection of student rights or abolition of school prayers.[23]

Legislated Learning's second major theme is that rules and formal procedures have come to dominate public schooling in America, and that every substantive and procedural requirement limits "the discretionary performance of school officials by proscribing or prescribing ends or means" (p. 131). Wise lays particular emphasis on the Supreme Court's *Goss v. Lopez*[24] decision requiring an informal hearing for students suspended for less than ten days (p. 133). At this point the argument becomes more complex. If "legalization" refers to the tendency "to discover, construct, and follow rules,"[25] the phenomenon is not limited to judicial interventions (p. 51). When Congress guarantees access to student records and requires hearings to contest alleged inaccuracies in the records,[26] when state legislatures enact public sector collective bargaining laws applicable to teachers,[27] and when school boards adopt codes of student rights and responsibilities,[28] they are contributing as much to the legalization process as court decisions. Thus, Wise equates all policies embodied in rules and regulations with the process of legalization (p. 61). And thus all hierarchically imposed policies, not just court decisions, restrict the autonomy of school teachers and administrators. This argument has clear implications for democratic constraints on public

22. *See* Yudof, *Legalization of Dispute Resolution, Distrust of Authority, and Organizational Theory: Implementing Due Process for Students in the Public Schools*, — WIS. L. REV. (1981) (in press). *See generally* A. GOULDNER, PATTERNS OF INDUSTRIAL BUREAUCRACY (1965); S. SARASON, *supra* note 21.

23. *See* Yudof, *supra* note 22.

24. 419 U.S. 565 (1975).

25. J. SHKLAR, LEGALISM 21 (1971) (not cited or discussed by Dr. Wise).

26. 20 U.S.C. § 1232g (1970) (Family Educational Rights and Privacy Act).

27. *See generally* L. MCDONNELL & A. PASCAL, ORGANIZED TEACHERS IN AMERICAN SCHOOLS (1979); D. WOLLETT & R. CHANIN, THE LAW AND PRACTICE OF TEACHER NEGOTIATIONS (1974).

28. *See* M. CHESLER, MAINTAINING ORDER AND ADMINISTRATIVE DISCRETION: THE DETROIT UNIFORM CODE OF STUDENT CONDUCT (1976); EDUCATIONAL RESEARCH SERVICE, CODES OF STUDENT DISCIPLINE AND STUDENT RIGHTS (1975).

schools and for the appropriate role of professionals in education. These implications will be discussed below.

For the moment, however, it is sufficient to note that Wise seriously mischaracterizes a pervasive problem of political, organizational, and legal theory.[29] He believes that the assumption underlying legalization is that "[r]ules and procedures are superior to the exercise of judgment as means to promote equal and fair treatment in schools" (p. 56), and that frequently "hyperrationalization" results:

> Hyperrationalization occurs when conformity to norms is not achieved by the procedures and rules imposed — when procedures are followed but the norm of fairness is not necessarily attained; when rules are obeyed but the norm of equality is not necessarily attained. [P. 66.]

What Wise misses is that the successful operation of any complex organization involves a balancing of discretion and rules. On the one hand, rules establish standards for behavior, provide guidance to the novice or the marginally competent, and promote uniformity of treatment. On the other hand, those on the firing-line ("street level bureaucrats" in the phrase of Weatherly and Lipsky)[30] need to be able to exercise their best judgment in individual situations if they are to accomplish policy objectives. This is as true for teachers and school administrators as it is for police officers, social workers, and postal employees. Rules and discretion are complementary elements in the achievement of policy objectives. Identifying the equilibrium point is a vexing problem and the subject of considerable dispute. But Wise unnecessarily confounds analysis by perceiving the problem as a choice between a government of laws and a government of men.

In his zealousness to demonstrate the extent of legalization in the schools, the author also distorts the law.[31] For example, he admits that the *Goss* decision, "taken by itself, is a limited intervention into the affairs of a school" (p. 132). Essentially, an administrator need only inform the student of the alleged violation of school rules and listen to his or her side of the story. Indeed, Professor Kirp has argued that *Goss* may represent a shift away from equating due pro-

29. *See, e.g.*, W. MOMMSEN, THE AGE OF BUREAUCRACY 99 (1974); R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 54 (1961). *See generally* K. DAVIS, DISCRETIONARY JUSTICE (1969); T. LOWI, THE END OF LIBERALISM (1969); P. SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE (1969); J. SHKLAR, *supra* note 25; Weatherley & Lipsky, *Street-Level Bureaucrats and Institutional Innovation: Implementing Special-Education Reform*, 47 HARV. L. REV. 171 (1977).

30. Weatherley & Lipsky, *supra* note 29.

31. *See* Thurston, Book Review, 5 J. EDUC. FINANCE 481, 482 (1980).

cess with adversarial hearings and toward less formal dialogues in the resolution of school disputes.[32] But Wise says that the limited reading of *Goss* "may be deceptive, since its reasoning may easily be extended" (p. 133). Obviously, any reading of a case *may* be deceptive; cases acquire meanings as they are reflected upon and employed as precedents. Wise, however, gives no examples of any extensions of *Goss*. He only cites language in the opinion that suspensions for ten days or longer may require more demanding procedures (the law of the land well before *Goss*)[33] and a law review article written a year after *Goss*.[34] He completely ignores recent Supreme Court decisions limiting the definitions of property and liberty interests protected by due process requirements.[35] He does discuss *Board of Curators v. Horowitz*,[36] but in a most disingenuous way. In that case the Court drew a distinction between disciplinary and academic suspensions, and held the due process clause inapplicable to the latter. Wise states that the Court found the process given "sufficient," and discusses the views of three justices who disagreed in part with the majority (p. 135). Any lawyer worth his or her salt would recognize *Horowitz* and the corporal punishment case[37] as clear limitations on the reach of *Goss*. It is as if the author wrote much of the chapter on "legalizing the schools" (pp. 118-54) around the time of *Goss*, and then refused to reconsider his conclusions as contrary evidence emerged. His discussion of these Supreme Court cases also stands as a monument to the poor quality of legal research found in much of the book. The chapter could have been much improved had Wise referred to the standard constitutional law texts and casebooks.

The author's discussion of the impact of legalization on the classroom is schizophrenic. Without citing any empirical evidence, he asserts that teachers "increasingly" have been treated as bureaucrats: "If schools are not performing well, they are instructed to tighten specific operations — a phenomenon we call 'bureaucratic rationali-

32. *See* Kirp, *supra* note 4, at 864; Wilkinson, *Goss v. Lopez: The Supreme Court as School Superintendent*, 1975 SUP. CT. REV. 25.

33. *See generally* Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545 (1971).

34. Dessem, *Student Due Process Rights in Academic Dismissals from the Public Schools*, 5 J. L. & EDUC. 277 (1976).

35. *See, e.g.*, Flagg Bros. v. Brooks, 436 U.S. 149 (1978); Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 424 U.S. 693 (1976). *See generally* Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977).

36. 435 U.S. 78 (1978).

37. *See* Ingraham v. Wright, 430 U.S. 651 (1977).

zation.' If teachers are not performing well, they are to be precisely instructed on what to teach and how to teach — we call this view 'rationalistic teaching' " (p. 81). "Rationalistic teaching," then, is clearly a cost of the legalization and bureaucratization processes. Wise next wishes to show that schools do not conform to rational bureaucratic models, and hence are not amenable to rational bureaucratic reforms. In order to demonstrate this point, he reverses field:

> Consensus on goals is lacking. Formal power may be centralized, but its influence at the classroom level is attenuated. . . . Increasingly, analysts question whether schools are or can be closely coordinated, what the effects of planning are, and how interdependent the components of school organization are.
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> Teachers, of course, do not . . . readily accept a rationalistic characterization of their roles. . . . The rationalistic mode of thinking may be dissonant with the reality of teaching. Substantial evidence suggests that the primary reason is that the rationalistic conception of teaching is perceived by teachers as not salient, useful, or relevant to the demands of their work. [Pp. 90, 96.]

Thus Dr. Wise would have it both ways. Legalization and bureaucratization are increasingly entering the classroom, with destructive effects on education, and yet the rationalistic model (of which legalization is a part) is ineffective because decision makers in the hierarchy find it difficult to reach down to the classroom level. The difficulty arises because of both the loose organizational nature of schools and the resistance of teachers to such central direction.[38] Hence legalization is a villain both because it does and does not have an impact on classrooms.

Dr. Wise's third major theme, the critique of major policy innovations of the last fifteen years or so, need not long detain us. The author is surely on secure ground in suggesting that such scientific management schemes as management by objectives, zero-based budgeting, and management information systems have not been great successes in the public schools (pp. 12-19). He is also correct in arguing that statutes and court decisions addressed to improving educational outcomes (reading skills, good citizenship, economic self-sufficiency, etc.) are doomed to failure given the presently indeterminate relationship between educational resources and educational outcomes (pp. 7-12). This is particularly true if there is no consensus

38. *See generally* Weick, *Educational Organizations as Loosely Coupled Systems*, 21 AD. SCI. Q. 1 (1974); March, *American Public School Administration: A Short Analysis*, 86 SCH. REV. 217 (1978).

on appropriate outcomes, if those outcomes are difficult to measure, and if it is undesirable to treat education in such a crudely instrumental fashion (pp. 115-17). His critique of minimum competency testing legislation (pp. 24-27, 68) is particularly compelling:

> One result, and a second example of wishful thinking [the first example is the belief that federal compensatory education expenditures will boost student achievement], has been that state legislatures and state courts have been requiring by law specified levels of performance on the part of school-people and schoolchildren. Competency-based graduation requirements and the rulings for "thorough and efficient education" demand that the schools produce outcomes which they may not be able to achieve. [P. 68.]

The lesson may be obvious, but perhaps Wise is correct in asserting that many legislatures and some courts have not learned it: a law or court decision cannot successfully command what it is presently impossible to do. So too, Wise is surely correct in suggesting that limited technology, scarcity of resources, the unnecessary narrowing of goals, bureaucratic structure, and limited knowledge of educational processes may all cut against successful policy innovations (pp. 65-69).

If there is a weakness in this aspect of *Legislated Learning*, it lies in Wise's hyperbolic description of the movement toward regulating education outcomes through law and legal processes. For example, I have no doubt that many of those who voted for Title I of the Elementary and Secondary Education Act of 1965[39] intended to improve the educational plight of poor children and to work toward a breaking of the nexus between poverty and educational failure. In this regard the experience with title I has been far from satisfactory (pp. 8-12, 68). But it may be unfair to characterize title I in such a unidimensional fashion, for the goals of title I may have been many and fluid. Perhaps the Congress had in mind providing financial assistance to school districts with large concentrations of poor children. Or perhaps it wished to create the opportunities for learning without great concern about the ultimate result. Further, title I programs are formulated by local school districts, subject to the basic requirement that the monies be spent on children with severe educational deficiencies. Congress did not mandate particular educational outcomes. Indeed, it did not even mandate particular educational offerings. Rather, at best, it made money available to local school districts to allow them to define appropriate outcomes and the means of achieving those outcomes. I do not think that I am quibbling over

39. Pub. L. No. 89-10, 79 Stat. 27 (1965), 20 U.S.C. §§ 236-241k (1976 & Supp. III 1979) (the act has been substantially amended since 1965).

words in asserting that this is a far cry from the meanings that one typically associates with such polemical terms as "*mandate[d]*" (p. 3) and "legislated learning."

The discussion of the New Jersey school financing case, *Robinson v. Cahill*,[40] is far more persuasive. Dr. Wise makes out a strong case that the New Jersey Supreme Court, in construing the "thorough and efficient" education clause of the state constitution, shifted from an equal educational opportunity approach to an adequate achievement approach. Such judicial decisions, as I argued eight years ago, are wrongheaded; they do not create intelligible standards for school officials and they seek to accomplish what present education technology cannot achieve.[41] But Wise overstates the case by suggesting that cases like *Robinson* are the norm. Other state school financing cases have not taken the *Robinson* tack.[42] And it certainly confounds reality to assert that "the U.S. Supreme Court has tended to shift concern from equality of educational opportunity to adequacy of educational achievement" (p. 3). The author cites *Brown v. Board of Education*[43] for this proposition (pp. 3-5). Yet there is not a shred of evidence in the confused desegregation cases of the 1970s to link racial balance remedies with a constitutionally identified goal of improved student achievement.[44] Perhaps the Justices hope for such a result, and certainly many commentators pray for it, but modern desegregation cases simply do not turn on concerns about educational outcomes.[45] Wise also cites *San Antonio Independent School District v. Rodriguez*,[46] a case involving a fourteenth amendment challenge to the Texas school financing law, as evidence of the movement toward focusing on education outcomes (pp. 5-6). Yet the plaintiffs lost in the Supreme Court, and this reality overwhelms Wise's unper-

40. (Robinson I) 62 N.J. 473, 303 A.2d 273 (1973); (Robinson II) 63 N.J. 196, 306 A.2d 65 (1975); (Robinson III) 67 N.J. 35, 335 A.2d 6 (1975); (Robinson IV) 67 N.J. 333, 351 A.2d 713 (1975); (Robinson V) 69 N.J. 449, 355 A.2d 129 (1976); (Robinson VI) 70 N.J. 155, 358 A.2d 457 (1976); (Robinson VII) 70 N.J. 464, 360 A.2d 400 (1976).

41. Yudof, *Equal Educational Opportunity and the Courts*, 51 TEXAS L. REV. 411, 419-34 (1973).

42. *See, e.g.*, Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977); Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975) (relief denied); Olsen v. State *ex rel* Johnson, 276 Or. 9, 554 P.2d 139 (1976) (relief denied). *See generally* Clune & Lindquist, *Serrano and Robinson: Studies in the Implementation of Fiscal Equity and Effective Education in State Public Law Litigation*, in M. FEELY, P. PIELE, E. HOLLINGSWORTH & W. CLUNE, *supra* note 16, at 67; Levin, *Current Trends in School Finance Reform Litigation: A Commentary*, 1977 DUKE L.J. 1099.

43. 347 U.S. 483 (1954).

44. *See* Yudof, *supra* note 41, at 439-44.

45. *Id. See generally* Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROB. 57 (1978).

46. 411 U.S. 1 (1973).

suasive discussion of dicta in the majority opinion and the views of the dissenters. Moreover, Wise appears to equate a concern for the impact of school financing laws and racial segregation on achievement with the notion of mandating particular educational processes and outcomes. In all of the cited decisions, this is manifestly not the case.

The fourth theme of *Legislated Learning*, by far the most radical, is that virtually all forms of policymaking (Wise is unclear on this) are premised on rationalistic models, and that policymaking is thus doomed to failure. At the simplest level, Wise questions the value of systems of thought in resolving school problems.[47] He believes that legal, economic, bureaucratic, professional, or other rational models are inadequate bases for making or implementing policy choices. A major reason for his skepticism is that public schools themselves do not operate in accordance with rational models:

> Educational policymakers behave as though they believe that schools operate according to the rationalistic model. That model postulates that schools operate by setting goals, implementing programs to achieve these goals, and evaluating the extent to which the goals are attained. The goal-oriented process is assumed to be effectuated through a bureaucratic distribution of formal authority and work responsibility. It is further assumed that the attainment of goals provides sufficient incentives to drive the system. . . . Policies which promise to increase productivity and equity are imposed on the existing structure of the school in the anticipation that they will improve education.
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> . . . What may be wrong with the rationalistic model is that those who are attempting to change or control schools by reference to it are implicitly basing their actions on a set of assumptions that may be different from the assumptions, opinions, and the theories under which the schools actually operate.
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> The failure of schools to conform to the rationalistic model may be seen in the failure thus far to create models which help explain the process of schooling empirically. [Pp. 78-79.]

Policymakers, then, tend to impose an artificial order on a highly chaotic reality, and this explains why "so far, mechanisms of control in schools have not ensured compliance with long-range plans" (p. 89).

If Wise limited himself to this proposition, his thesis would be debatable, but still well within the bounds of current debates in political science. Such eminent political scientists as Aaron Wildav-

47. *See* A. WILDAVSKY, SPEAKING TRUTH TO POWER: THE ART AND CRAFT OF POLICY ANALYSIS (1980); Lindblom, *The Science of "Muddling Through,"* 19 PUB. AD. REV. 79 (1959).

sky,[48] Paul Peterson,[49] and Charles Lindblom[50] (none of whom are cited by the author) have vehemently warned against taking rational, theoretical constructs from the various disciplines and applying them with full force to complex organizations. Lindblom speaks of the "science of muddling through"[51] as perhaps the best way to view the behavior of people within organizations. Wildavsky prefers the marketplace and the political processes to determination by experts of what would be just and effective.[52] But, alas, Dr. Wise goes much further. He does so in two respects. First, by equating all policies embodied in legal rules with rationalism, he suggests that even legislation, the result of rough and tumble politics, is fatally flawed. Wildavsky and Lindblom's point is far different. They are suggesting that intellectualization and expertise are to be distrusted and that we should rely on poltical and market processes to establish policies. Put somewhat differently, they argue that political and market processes are rational means of governing education, and hence they would object primarily to policy made by the self-declared expert in accordance with some model of human behavior. Thus they might object to judicial intervention within a constitutional framework, or to adminstrative intervention supposedly grounded in public administration theory, but they would not object to laws enacted by elected bodies pursuant to democratic principles. Second, in a sort of vulgarized version of Horkheimer[53] and Oakeshott,[54] Wise also appears to deny the efficacy of instrumental reasoning — indeed, in contrast to Wildavsky, he is worried about "common sense rationality" (pp. 69-70). Wise declares that he is concerned about a policymaking process that "views education as the means by which the child is prepared to take his place in society" (p. 106).[55]

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48. *See* A. WILDAVSKY, *supra* note 47.

49. *See* P. PETERSON, SCHOOL POLITICS CHICAGO STYLE 128-39 (1976).

50. *See generally* C. LINDBLOM, THE INTELLIGENCE OF DEMOCRACY (1965); Lindblom, *supra* note 47. *But see* C. LINDBLOM, POLITICS AND MARKETS (1977).

51. Lindblom, *supra* note 47, at 88.

52. *See* A. WILDAVSKY, *supra* note 47.

53. *See* M. HORKHEIMER, ECLIPSE OF REASON (1947); R. UNGER, KNOWLEDGE & POLITICS (1975).

54. *See* M. OAKESHOTT, RATIONALISM IN POLITICS (1962). For a trenchant application of Oakeshott's perspective to constitutional law, see Nagel, Book Review, 127 U. PA. L. REV. 1174 (1979).

55. The school and the teachers are the instruments which will transform the child into a productive, literate, law-abiding citizen. The notions that education is important in its own right, that education may lead a person to challenge rather than accept society, and that education is a gift which society bestows upon the individual are absent from the instrumental view of education. . . . [A]s the influence of policymakers becomes more pervasive, the risk is that the instrumental goals will become the exclusive goals.

The vital thrust of *Legislated Learning* therefore is quite simple: The problem with public schools is that they are subject to educational policies. Presumably this message undercuts the notion that centralization is the evil; for even school boards, superintendents, and principals may be capable of formulating educational policies through instrumental reasoning. To govern is to err. And be aware that Wise, unlike Professor Tribe, is not simply warning us about the dangers of a rampant instrumentalism.[56] Tribe worries that objective reason (instrumental means-ends analysis) tends to weed out soft, unquantifiable variables, to assume that the ends are static, to ignore the fact that means may redefine and become ends, to ignore interrelationships among ends, and ultimately to deter us from thinking about the goodness or justice of the ends themselves (subjective reason). Wise, however, appears opposed to reflection;[57] he is troubled that "[t]he pressures to solve educational problems through policy interventions appear unremitting" (p. 199). But what is the alternative to thinking about the deficiencies of public education and about the most efficacious ways of addressing those deficiencies? Wise fails to understand that people can apply reason and common sense to problems in the real world that are not governed by neat rules of some rationalistic model. Any reflection is rationalization of a type. The alternative, I suppose, is to go "with the flow," a substitution of a secular Taoism for reflective judgments. And Wise comes very close to this, implying that if only there were no policy, children would be instilled with the desire to learn and to develop to their full potential. Without policy, there would be no conflict between the preferences of the individual and those of the group: all would be a part of a grand, romantic unity. Kenneth Arrow has described this mysticism:

> The tension between society and the individual is inevitable. . . . [S]ome sense of rational balancing of ends and means must be understood to play a major role in our understanding of ourselves and our social role. Let me illustrate by presenting or, more precisely, carica-

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. . . .

. . . The rationalistic paradigm fails to make a place for the school as an institution for learning; it fails to make a place for a humanistic teacher; and it fails to provide a place for education conceived as self-development.

Pp. 106, 117.

56. See Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617 (1973). *See generally* Tribe, *Ways Not to Think about Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974); Tribe, *Policy Science: Analysis or Ideology?*, 2 PHILOSOPHY & PUB. AFF. 66 (1972).

57. *Cf.* Nagel, *supra* note 54, at 1183 (" 'Rational' conduct, which should not be confused with 'sensible' or 'efficient' conduct, is 'behavior *deliberately* directed to the achievement of a *formulated* purpose and governed solely by that purpose.' " (footnotes omitted)).

> turing some thought tendencies. We have one, loosely called "the new Left thought," not so new perhaps. . . . Bakunin and Sorel had spoken to the same point many years ago. But it is a real one. There is a demand for what might be termed sincerity, for a complete unity between the individual and the social roles, the notion that somehow in an ideal society there would be no conflict between one's demand on oneself and one's responses to the demands of society.[58]

Wise takes us to this ideal society and away from any real society. In his ideal world, he substitutes consensus for authority.[59]

Since Wise is not yet operating in the New Jerusalem, the implications of his analysis are profoundly undemocratic. If democracy requires that self-controlled citizens have the opportunity to influence policy and to select leaders,[60] then presumably elected leaders in Congress, in state legislatures, and on local boards of education should determine educational policies. Otherwise, there is no process of consent, and the professionals are free to do what they please. And if this is the case, then it is of the utmost importance that elected officials have the ability to control or at least to direct the behavior of those responsible for delivering educational services. In other words, if elected officials cannot demand that unelected public servants behave in conformity with established public policy, then the electorate itself has lost control of the public enterprise. Wise has simply gotten carried away with his objections to judicial intervention and legalization ("legal rationality") by not distinguishing them from the systemic needs of any democratic order. Furthermore, he ignores the fact that many policies do work. Elected officials (and administrative agencies subject to legislative oversight) decide such matters as compulsory attendance, minimum curriculum requirements, grade structure, and the like. To be sure, this is a far cry from regulating education outcomes. But the point is that public officials routinely set policies that are followed. It also is paradoxical that Wise presumably would allow government owned and operated schools to exist, and yet deny to the public the power to direct those schools. But Wise takes this position because he equates political choice and compromise with a mindless rationalism.

Finally, Dr. Wise's war on rationalism would bring even more power to professional educators. The argument against rationalistic thinking is usually employed to defend the political processes from assaults by those who claim greater expertise: educators, lawyers,

58. K. ARROW, THE LIMITS OF ORGANIZATION 15-16 (1974).

59. *See id.* at 69.

60. *See* D. BOORSTIN, DEMOCRACY AND ITS DISCONTENTS 10 (1974); C. FRANKEL, THE DEMOCRATIC PROSPECT (1962).

public administrators, and the like. *Legislated Learning* stands the argument on its head by using it to attack political outcomes and to ensure that professional educators are the effective winners. Teachers are to eschew the abstract and the oversimplified in favor of a concept of responsibility "for a whole, real child" (p. 97). They are to translate "formal goals into personalized objectives" (p. 99). Teachers, in short, will obliterate rampant instrumentalism and magically synthesize the interests of the social group, the parents, the children, and the educators. This means that the professionals would assume the powers that Dr. Wise would take away from the policy-makers. The "solution" would simply exacerbate the primary obstacle to improving education, which is that professionalism too often isolates public schools from accountability to the citizenry. As Cohen and Farrar have noted,

> There are real political imbalances in the governance of American schools, which contribute to the poor performance of political reforms to increase participation. But the real imbalance is not political in origin. It results more from a social division of labor that encourages the specialization of work, the professionalization of roles, and the partitioning of authority. In advanced industrial societies this solidifies professional power in education, as well as discouraging active parental involvement. . . .
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> . . . Professionals gain economic returns, social satisfaction, personal status, individual identity, and group power from their roles. And parents, most of whom have occupations providing similar rewards, have seen their educational role narrowed and redefined.[61]

Thus the possibility of political remedies for school deficiencies is already remote because "the imbalance in school power does not have political roots."[62] Wise, through his naïve brand of anti-rationalism, would narrow even further the universe of political solutions to the problems of public education.

How can Dr. Wise's proffered solution be so wide of the mark? Perhaps it is because he seems to have no understanding of the etiology of the movement toward more law and procedures in the governance of public schools. For Wise, those who advocate reform policies are very much like the activist Supreme Court Justice in Walter Murphy's *The Vicar of Christ*: "He simply — and totally — disbelieved in law. To him law was not man's groping toward general principles upon which to build a better society, but a means to achieve, and instantly, the particular social reform that was that day

61. Cohen & Farrar, *Power to the Parents? — The Story of Education Vouchers*, 48 PUB. INTEREST 72, 92 (1977).

62. *Id.*

troubling his new-found conscience."[63] Legalization and rationalization strike like lightning as reformers and those in favor of increased accountability, productivity, and equity press their claims on schools through the legislative and judicial processes. But why have they chosen to assert such claims at this time? Have not such demands existed for more than a hundred years? How does one account for popularly elected legislatures moving in this direction — along with federal and state judges? The answer lies, I believe, in the increased distrust of school authorities in the post-World War II era. If school officials may not be trusted to exercise properly their discretion, then legal rules and procedures may be adopted as means of constraining that discretion.

The distrust of officialdom may have many causes, and some may lie outside the public school setting.[64] Part of it may have to do with the equality revolution and the revolution of rising expectations. As particular groups demand equal treatment and as people demand that government satisfy more of their wants, inevitably the public service products of government come in for greater scrutiny. The trend is reinforced by inflation and other economic problems that make taxpayers more wary of public services. The questions of accountability and bang for the buck come to the fore as people ask whether the public or the private sector can most efficiently satisfy their wants. Thus, it is no longer enough for government to provide more police officers, teachers, and social workers; rather, people wish to know whether crime rates will be reduced, whether learning will improve, and whether family problems are being solved.

Under these circumstances, the legalization process can be understood as an attempt to reinforce weakening authority links in the governing process. Legalization is a response to the crisis of legitimacy, an attempt to make decisions appear legitimate by reaching them through the appropriate formal processes. Legitimacy through democratic consensus and expertise are perceived as failing. Further, legalization may be perceived as an attempt to reestablish a sense of community by requiring a discourse among the governors and the governed. The intimacy of face-to-face relations is often lost as the population and the public sector expand, as decision making becomes increasingly bureaucratized and centralized, and as power flows from traditional mediating institutions such as families, churches, and interest groups. The paradox, however, is that a com-

63. W. MURPHY, THE VICAR OF CHRIST 147 (1979).

64. Much of the concluding discussion is taken from Yudof, *supra* note 22.

pelled intimacy through legal processes appears to be the very antithesis of a community of shared values. The more reliance that is placed on legal processes, the more difficult it may be to achieve a true sense of community in which public officials are trusted to make decisions consistent with prevailing social, political, and economic norms.

There are a few specific factors that may contribute to the distrust-legalization-distrust cycle in public education. First, student tests scores have declined, and studies have questioned the effectiveness of pouring additional resources into public schools. Second, the "equality revolution" and the "revolution of rising expectations" have reinforced the notion that public schools should not only educate, but also provide the means for socioeconomic advancement. Public schools rarely can keep up with such rising expectations. Third, as the school population levels off and fertility declines, fewer adults have children in the public schools. Adults who receive no direct benefit from public schools may be more critical of the performance of those institutions. This distrust may be reinforced by sharply increasing local and state tax burdens and by the rise of more militant teacher organizations. Finally, the civil rights movement, the failure of many Great Society social programs, and a growing anti-professional bias may also contribute to the decline in public trust in public schools.

In the end, public schools will not be very joyous places unless some balance is achieved between rule and discretion. They will "reflect an increasingly anomic world in which private entitlement backed by formal procedure apparently arises to fill a vacuum left by the withering of that certain spirit we may call community."[65] Nonformalism is premised on trust, and trust is what is lacking in the school environment. But despite Wise's diagnosis, formalism did not create that mistrust in the first instance: it is merely a manifestation of the underlying lack of community. The reestablishment of trust is a precondition to the establishment of informal structures. And because Wise fails to identify this problem, his solutions are unlikely to resolve it.

65. Michelman, *Formal and Associational Aims in Procedural Due Process*, in NOMOS XVIII: DUE PROCESS 126, 149 (J. Pennock & J. Chapman eds. 1977).