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Plato's Ideal and the Perversity of Politics

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EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM. By *Michael A. Rebell and Arthur R. Block.* Chicago: The University of Chicago Press. 1982. Pp. xv, 319. $23.

It will help us to cherish Plato's ideal, without sharing his hasty conclusion about the perversity of those who do not listen to reason. [1]

Educational Policy Making and the Courts, as its subtitle suggests, is much less concerned with demarcating the boundaries of judicial intervention in public school controversies than it is with exploring, from an empirical perspective, the competing assertions frequently made by proponents and opponents of judicial activism. The education sphere, in the light of the controversial nature of many judicial decisions involving teacher seniority, school finance, student rights, bilingual education, and the like, provides a convenient and appropriate context in which to test various hypotheses on the capabilities of courts and the legitimacy of their decisions (p. xi).[2] The authors are extremely ambitious. They seek to close the "gap between theoretical debates about judicial activism and empirical research into actual trial court behavior" (p. xii). If the book does not entirely succeed, and it does not, this does not detract from the pathbreaking nature of the enterprise. Others may build on their research, refining the methodology and more carefully delineating the limits of empirical research with respect to the vexing normative issues of judicial activism.

I.

Rebell and Block were influenced by the views of Abram Chayes, who warmly endorses the book on the dust cover, and in many respects the book attempts to test empirically assertions made by Chayes in his perceptive 1976 article in the *Harvard Law Review*.[3] Chayes suggested that the courts have entered a new era of public law litigation and that this type of litiga-

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1. W. LIPPMANN, PUBLIC OPINION 261 (1965).

2. *See, e.g.,* R. ELMORE & M. MCLAUGHLIN, REFORM AND RETRENCHMENT: THE POLITICS OF CALIFORNIA SCHOOL FINANCE REFORM (1982); D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); R. LEHNE, THE QUEST FOR JUSTICE (1978); LIMITS OF JUSTICE (H. Kalodner & J. Fishman eds. 1978).

3. Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281 (1976). *See also* Chayes, *Foreword: Public Law Litigation and the Burger Court,* 96 HARV. L. REV. 4 (1982).

tion, involving the operation of public policy and complex institutions, contrasts markedly with traditional litigation involving only disputes between private individuals about private rights (p. 4). Traditional litigation is "bipolar" (involving two opposing interests) and "retrospective" (liability turns on events that have already occurred). The remedies flow naturally from the rights, with the impact of a remedy largely being limited to the immediate parties. Notwithstanding Chief Justice Marshall's dictum on the separation of rights and remedies in *Marbury* v. *Madison*,[4] traditional litigation treats them as highly interdependent. Corbin was more accurate when he said that "[i]n the whole field of law there is no right without a remedy. . . . [T]he only useful test as to the existence of a right is that some legal remedy is provided."[5]

The "new model" litigation departs significantly from these generalizations. The litigation is "multipolar," involving many parties and interests, and the aim is frequently to correct systemic wrongs in complex institutional settings,[6] *e.g.,* mental hospitals, public schools, and police departments. The focus may be on group rights (blacks, prisoners, students) more than on individual hurts.[7] Given the nature of the wrongs, predictions as to future occurrences are as important as past events, and the remedies are often broad and require significant changes over time in institutional regularities. Remedies do not flow inexorably from the wrongs,[8] and the impact of a court order usually will be felt more widely than in traditional law suits. In order to deal adequately with the factual complexities and to ease the process of implementation,[9] decrees are often negotiated by the parties. The judge's role then becomes more one of orchestrating the proceedings, prodding the parties to agree, and building support among the relevant interest groups, than one of a neutral umpire mandating a particular remedy.[10]

Professor Chayes' article is largely descriptive, and its primary contribution lay in articulating, organizing, and synthesizing changes in the judicial process that lawyers, judges, and scholars only inchoately understood. While the new model does not describe all modern litigations, it focuses attention on the differences in decisional processes between traditional pri-

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4. 5 U.S. (1 Cranch) 137, 162-63 (1803).

5. 5 A. CORBIN, CORBIN ON CONTRACTS 2 (1964).

6. *See generally Symposium: Legal Remedies in a Society of Large-Scale Organizations,* 1981 WIS. L. REV. 861.

7. *See generally* Fiss, *Groups and the Equal Protection Clause,* 5 PHIL. & PUB. AFF. 107 (1976); Van Dyke, *Justice as Fairness: For Groups?,* 69 AM. POL. SCI. REV. 607 (1975).

8. *See, e.g.,* Rhode, *Class Conflicts in Class Actions,* 34 STAN. L. REV. 1183, 1195-200 (1982); Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court,* 42 LAW & CONTEMP. PROBS., Autumn 1978, at 57.

9. *See, e.g.,* Kirp, *Legalism and Politics in School Desegregation,* 1981 WIS. L. REV. 924 (discussing the political aspects of implementing school desegregation); Yudof, *Implementation Theories and Desegregation Realities,* 32 ALA. L. REV. 441 (1980-1981). *See generally* M. MCLAUGHLIN, EVALUATION AND REFORM: THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965, TITLE I (1975); Berman, *The Study of Macro- and Micro-Implementation,* 26 PUB. POLY. 157 (1978); Elmore, *Backward Mapping: Implementation Research and Policy Decisions,* 94 POL. SCI. Q. 601 (1979); Elmore, *Organizational Models of Social Program Implementation,* 26 PUB. POLY. 185 (1978).

10. *See* Diver, *The Judge as Political Power Broker,* 65 VA. L. REV. 43 (1979).

vate law claims *(e.g.,* contracts, torts, and property) and more controversial constitutional and statutory litigations in such diverse areas as reapportionment, school desegregation, and employment discrimination. The new model clarifies the often heated debates over standing, class actions, ripeness, and mootness by revealing that the antagonists often hold widely disparate views as to the nature of the judicial process.[11] But equally as important, Chayes' analysis poses problems for those defending and advocating an expansive role for the judiciary. If courts are to engage in broad factfinding to decide multipolar disputes, and to participate in the fashioning of broad remedies oriented to the future, are they not acting as legislative bodies? How competent are courts to engage in such tasks? What do courts know about interpreting social science evidence?[12] Do the parties before courts represent the full range of interests in a policy area? Is not the adversarial process too piecemeal for the articulation of broad policy? How can courts monitor and enforce decrees requiring widespread cooperation and institutional action? In short, do courts have the institutional capability to perform the tasks assigned to them or assumed by them under the public interest litigation model?[13]

Capability, of course, is not unrelated to legitimacy of authority. Deference is frequently accorded those who exercise authority wisely. For example, patients may allow physicians to exercise authority over their care because they think that physicians know best, that they make good decisions, that they provide needed treatment in a highly skilled manner.[14] Similarly, if courts are discharging their new responsibilities well, this may be a reason to continue to assign those responsibilities to courts. Chayes said as much in his public law litigation article, cryptically defending judicial activism on instrumental grounds.[15]

But the ache of judicial review in a democracy does not go away so easily. Tyrants may also make sound decisions; the trains may run on time; the economy and standard of living may improve. But the exercise of authority, however capably or wisely, may be illegitimate. As Robert Dahl and Charles Lindblom have stated, democracy requires that citizens have the "last say," that they have the real ability to select leaders and influence policy decisions. The "First Problem of Politics . . . is the antique and yet ever recurring problem of how citizens can keep their rulers from becoming tyrants."[16] While it may be fatuous to believe that a majority of citizens actually approves of every decision made by public officials, the consent of the governed requires, at a minimum, a process of consultation between leaders and the citizenry, a process that legitimates the exercise of

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11. *See generally* Chayes, *Foreword: Public Law Litigation and the Burger Court,* 96 HARV. L. REV. 4 (1982); Rhode, *supra* note 8.

12. *See, e.g.,* Wolf, *Northern School Desegregation and Residential Choice,* 1977 SUP. CT. REV. 63.

13. *See* references in note 2 *supra*. *See also* Diver, *supra* note 10; Glazer, *Should Judges Administer Social Services?,* 50 PUB. INTEREST 64 (1978); Kirp, *supra* note 9; Note, *Implementation Problems in Institutional Reform Litigation,* 91 HARV. L. REV. 428 (1977).

14. *See* C. LINDBLOM, POLITICS AND MARKETS 18 (1977).

15. *See* Chayes, *supra* note 3, at 1313-16.

16. R. DAHL & C. LINDBLOM, POLITICS, ECONOMICS AND WELFARE 273, 276 (1976).

authority.[17]

In riveting our attention to the new breed of public interest litigation, Professor Chayes takes us beyond the capability question, and reopens the traditional debate over the legitimacy of courts entertaining such litigations. As law suits begin to resemble, less and less, traditional bipolar litigations, one significant justification for judicial review begins to fade. Chief Justice Marshall argued 180 years ago that "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[18] In part, he defended judicial review on the ground that the judiciary must interpret and apply the Constitution and laws, as duly enacted, if it were charged with the responsibility of deciding concrete cases. Many have disagreed with Marshall, particularly with regard to the finality of judicial review.[19] But what if, as Chayes' analysis suggests, courts were deciding matters of broad public policy in the absence of a "case" or "law" in the traditional sense? Is the exercise of judicial authority legitimate under such circumstances?[20]

In responding to such quandaries, Rebell and Block move beyond the utilitarian defense of Chayes, perhaps sensing that utility alone is not enough[21] and that, in any event, there are conflicting views as to the efficacy of the courts' work in public interest cases. They rely upon the theories of Herbert Wechsler[22] and Ronald Dworkin[23] for the proposition that "[t]o the extent that courts decide issues in terms of 'principles,' they are acting within the proper sphere of judicial decision making; to the extent that they decide issues in terms of 'policies,' they are, according to the critics, intruding into the legislative or executive domain" (p. 23). Strangely enough, there is not much elaboration by the authors as to how principled judicial decisionmaking enhances the legitimacy of the exercise of judicial authority. They largely limit themselves to quoting from Dworkin:

> [T]he line between "principle" and "policy" is difficult to establish. . . . Nevertheless, we agree with Dworkin that "the direction to these judges to decide cases on grounds of principle cannot have the same effect that the direction to decide on grounds of policy would have." [P. 23.]

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17. As Charles Frankel put it,

> "Government by consent" cannot be interpreted to mean that those who are governed necessarily agree with what their rulers decide to do. Nor can it mean that "the majority" agrees. For in a democracy the minority, too, is presumably governed by its consent. But to speak of majorities and minorities and the inevitability of disagreements is to suggest what "government by consent" expresses. It expresses the hope for a society in which ordinary people can influence the actions their leaders take . . . . [T]hey are required to obey only after having been actively consulted by those who issue the orders.

C. FRANKEL, THE DEMOCRATIC PROSPECT 34 (1962).

18. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). *See also* THE FEDERALIST, No. 78, at 525 (A. Hamilton) (J. Cooke ed. 1961).

19. *See, e.g.,* L. HAND, THE BILL OF RIGHTS 9-10 (1958).

20. *See* Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream,* 11 GA. L. REV. 969 (1977).

21. *See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

22. *See* Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959).

23. *See* R. DWORKIN, *supra* note 21.

The same assertion is made at a number of other points in the book *(e.g.*, pp. xi-xii, 7, 201).

The failure to elaborate on principled decisionmaking is unfortunate. This is evident in the commingling of the theories of Wechsler and Dworkin. Presumably, the requirements of neutral principles and reasoned elaboration of those principles in judicial opinions reflect the notion that judicial power should not be exercised in the same manner as legislative power. The corollary assumption is that the expertise of courts lies in articulating and applying neutral principles, that they have been delegated responsibility to resolve controversies by reasoning by example or analogy in accordance with "a coherent body of principled rules."[24] And, more than that, the principles and applications should be embedded in a "comprehensive system," a commitment that Lon Fuller argued leads to reliance on "legal fictions."[25]

The mode of decisionmaking required of courts is, in some loose sense, a substitute for the substantive and procedural rules adopted by elective bodies to control discretion in government bureaucracies.[26] But neutrality of principle cannot suffice. As the late Alexander Bickel noted, it leaves the "hardest questions" unanswered: "Which values, among adequately neutral and general ones, qualify as sufficiently important or fundamental or whathaveyou to be vindicated by the Court against other values affirmed by legislative acts?"[27] The contribution of Dworkin to the debate, in the authors' words, is his argument that "legal rights may be based not only on a discrete set of applicable precedents and statutes, but also on justifying principles derived from institutional structures and morality, and political theories integrating the two" (p. 9).

A legitimate principle needs to be more than general and neutral; it needs to be derived from a legitimate source. Otherwise, the principle itself is illegitimate. Thus, the legitimacy of judicial activism in constitutional litigation cannot be determined, absent agreement on a theory of constitutional interpretation that identifies legitimate sources for principles. But the authors do not propound such a theory. They do not respond to Dworkin's many critics.[28] They do not pick a point on the continuum from Thomas Grey's unwritten constitution[29] to Raoul Berger's search for original intent in text and history.[30] They appear agnostic about the nature of the principles they examine.

By virtue of its conceptualization, the study then is largely limited to comparing the decisionmaking approaches of legislative and judicial bodies, and, as the authors admit, the results are inconclusive as to the legitimacy of judicial activism (p. 25). Even assuming that courts and litigants frame policy arguments in terms of principle, a natural tendency if they are

24. A. BICKEL, THE LEAST DANGEROUS BRANCH 25 (1962).

25. L. FULLER, LEGAL FICTIONS 49-53 (1967).

26. *See generally* K. DAVIS, DISCRETIONARY JUSTICE (1969); T. LOWI, THE END OF LIBERALISM (2d ed. 1979); P. SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE (1969).

27. A. BICKEL, *supra* note 24, at 55.

28. *See, e.g.*, Greenawalt, *Policy, Rights, and Judicial Decision,* 11 GA. L. REV. 991 (1977).

29. *See* Grey, *Do We Have an Unwritten Constitution?,* 27 STAN. L. REV. 703 (1975).

30. *See* R. BERGER, GOVERNMENT BY JUDICIARY (1977).

to avoid charges of usurpation of authority, and assuming further that policies and principles can be distinguished in hard cases (a point the authors found sticky), the inferences to be drawn are quite limited. *Educational Policy Making and the Courts* tells us more about the differences in how courts and legislatures approach problems, and how the authors approach courts and legislatures, than it does about the legitimacy of judicial activism.

II

The major empirical component of *Educational Policy Making and the Courts* is a study of 65 randomly selected education cases litigated in federal district courts between 1970 and 1977 (p. 21). Individual document files were assembled for each of the "caselets," and researchers reviewed court opinions, key pleadings, briefs, and other materials from court files (p. 224). In 60 of the 65 cases, the researchers were able to interview the attorneys for the principal parties (p. 225). The authors constructed a set of questions to be answered for each caselet, and reports were drafted by researchers under the direction of the principal investigators (pp. 224-25). These questions ranged from straightforward requests for information (for example, did the court retain jurisdiction over the case and for how long?) to more difficult qualitative evaluations of the claims and their resolution (for example, what was the degree of compliance with the court's order, and how novel was plaintiff's legal theory?). The authors present the results of the caselet studies in four chapters, each of which deals with a particular aspect of legitimacy or capability: "Principle/Policy Issues" (chapter 2), "Interest Representation Issues (chapter 3), "Fact-finding Capability Issues" (chapter 4), and "Remedial Capability Issues" (chapter 5). These chapters occupy about fifty pages and are crisply organized and written, with a "summary of findings" at the end of each.

The caselet analysis is supplemented by two detailed comparative case studies of legislative and judicial decisionmaking in the education sphere, and these two case studies take up more than twice as many pages as the more quantitatively oriented summaries of the caselet findings. The New York study concerns judicial and legislative responses to disputes between those seeking to increase the proportion of minority teachers and principals in New York City public schools and those committed to traditional hiring practices, seniority rules, and lay-off procedures. The second case study focuses on the recent bilingual-bicultural education controversy in Colorado, and the efforts of Mexican-Americans to alter the curriculum in public schools and to secure the hiring of more Mexican-American personnel. Four chapters are devoted to the case studies. They are rich in detail, and give the reader a feel for the complexity and subtleties of public interest litigation that, inevitably, cannot be obtained from the caselets. At the conclusion of each chapter, the authors analyze their research from the perspectives of principle/policy, interest representation, factfinding, and remedial issues, and, with few exceptions, the findings are broadly consistent with the findings for the caselet study.

The discussion of interest representation issues is, in some ways, the most puzzling aspect of the book. To the extent that all interested parties are represented in a public interest litigation, this would appear to reflect

more on the *capability* of courts in adjudicating such matters than on the *legitimacy* of their doing so. That is true if one eschews utilitarian defenses of legitimacy,[31] as the authors do. That is, if the court is aware of all of the benefits and costs of a decision, that decision is more likely to be correct and workable. The authors, on the other hand, argue that

> [t]o the extent that courts today engage in . . . policy deliberations, the legitimacy of their actions is clearly undermined if (as under the traditional bipolar model) a limited number of litigants speak only for their particular interests and the courts receive no direct input concerning the perspectives or needs of the majority of citizens who might be affected by a wide-ranging decree. [P. 9.]

The authors' perspective on interest representation suggests theories of legitimacy apart from, and perhaps inconsistent with, the principle/policy dichotomy. Wider interest representation is relevant to legitimacy only if one believes that it enhances accountability (gives citizens something like the "last word") or that democracy entails giving minorities, underrepresented in legislative bodies, the opportunity to check majoritarian excesses through the judicial process.[32] It is as if the authors are saying that courts should engage in principled decisionmaking, but if they depart from principle and fashion policy, that too is appropriate so long as courts consider all of the relevant interests and issues. Principled decisions, derived pursuant to an acceptable theory of judicial review, would not necessarily require broad interest representation, except insofar as principles may be accommodated or blunted by the likely consequences of their application.

A majority of the sixty-five cases in the sample were brought by minority individuals or groups, and these plaintiffs tended to prevail more frequently than "other" plaintiffs (p. 42). This is not surprising and is consistent with the view that judicial review protects interests thought to be at risk in pluralistic political processes, and that this is a legitimate function for courts. Nonetheless, as the authors admit (p. 36), the fact that minority groups frequently prevail in the courts does not necessarily mean that they do not have "fair access to the legislative process" (p. 36). Minority individuals and groups may turn to courts to maximize their chances of success even in circumstances where they are not frozen out of legislative processes. Further, the frequency of minority success in court tells us little about whether decisions are principled, and may run counter to the proposition that courts are aware of and respond to the "needs of the majority of citizens" (p. 9).

The treatment of other interest representation issues is provocative. In seventy-one percent of the cases, the plaintiffs requested certification of a class, but such certification was granted in less than half of the cases (pp. 42-43). In many cases, the court simply ignored or neglected these requests, and in a smaller percentage of cases the requests were denied outright, largely on technical grounds (pp. 42-43). Perhaps these statistics indicate a desire to represent broadly a large class, but as the authors correctly note, there is little evidence to suggest that judges are taking meaningful meas-

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31. *See generally* Rhode, *supra* note 8, at 1200-01.

32. *See, e.g.*, J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 129-70 (1980); J. ELY, DEMOCRACY AND DISTRUST (1980).

ures in education cases to assure themselves of the representativeness of the plaintiff's claims (p. 38). Nor does pursuit of class action status necessarily suggest that public interest attorneys address their clients' preferences rather than their own philosophical predilections[33] (p. 42). Courts, however, do tend to grant motions for joinder, intervention, or *amicus* status, and a majority of the cases involved multiple plaintiffs or defendants or groups. But courts did not encourage additional interests to participate, perhaps fearing that more participants would bring more complexity and delay to the litigation. The authors surmise that some interests and perspectives may not have been represented in these judicial proceedings (p. 43). Whatever the consequences for Chayes' "new model" litigation, the authors reach the striking conclusion that legislatures and courts are equally adept or inept in terms of canvassing the different interests and issues in their decision making processes.[34] And the nature of the controversy, "rather than [the] . . . inherent institutional characteristics of the judicial or legislative forums," appears to determine the "breadth and depth of interest representation" (pp. 193-94).

With regard to factfinding capability issues, *Educational Policy Making and the Courts* should do much to dispel the myth that courts are less capable than legislative bodies in eliciting and analyzing factual information. When one reads the critical evaluations of the judicial process emanating from social scientists, one often imagines legislative bodies with extensive staffs drawn from eminent scholars of the Brookings Institution or the Rand Corporation and hapless courts mired in nineteenth-century rules of evidence and procedure.[35] Attorneys work diligently to suppress or distort facts, the adversary process reveals only a small slice of the larger pie of information that should undergird decisions, and judges, untutored in statistics and social science methodologies, ignore the revealed truths of social science. Legislators, while imperfect, attend more closely to the facts, to the difficulties in implementing legal mandates, and to the relationships among policy areas. This "conventional wisdom" is contrary to the experiences of many who have participated in judicial and legislative proceedings.

Rebell and Block show that judges, particularly federal judges in public interest litigations, appear anxious to illuminate the issues with facts, the discovery process is usually quite extensive, and social scientists are frequently enlisted to offer testimony on the heady issues before the court. Without juries, there is a tendency to consider virtually any piece of evidence proffered by the parties. The parties, anxious to bolster their posi-

33. *See generally* Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation,* 85 YALE L.J. 470 (1976) (discussing the potential conflict between the client's desires and the attorney's ideology); Rhode, *supra* note 8, at 1293-94.

34. The New York comparative study demonstrates that the same groups tend to participate in the legislative and judicial processes with respect to particular education issues, albeit minority groups were more influential in the court proceedings. Pp. 141-42. In Colorado, the comparative pattern of representation was the same, but in both forums the controversy was bipolar, largely pitting Mexican-American organizations and legislators against more conservative state officials and legislators. Interestingly, plaintiffs prevailed in the Colorado legislature and lost in federal court. The authors swallow hard and admit that the Colorado experience is an "exception" to their hypotheses about minority access to legislative bodies. P. 193.

35. *See* notes 2 & 12, *supra*.

tions, happily seize on supportive social science research, often in a knee-jerk manner.[36] The authors have the impression that judges are quite attentive to the evidence, albeit they tend to challenge the efficacy or relevance of social science offerings. By way of contrast, legislatures often have inadequate staffs, and individual legislators may rush to judgment without being fully apprised of the issues and facts. In my experience, legislative hearings are more ritualistic than court hearings. Each side calls its witnesses, and testimony often is sought more to generate public and media support for or opposition to a bill than it is to inform decision making. Rather than crafty cross-examination, hostile witnesses may be greeted with silence or the absence of members of the committee. In short, legislative proceedings may be as adversarial as court proceedings, and yet allow for a less orderly and less meticulous evaluation of the facts. This is not to say that either judges or legislators are adept at analyzing complicated facts (both often misinterpret social science findings), nor is it to suggest the legitimacy of courts exercising broad authority to settle policy disputes. But in an effort to lop off every head of the hydra-headed monster of judicial activism, critics too frequently distort this capability question in an effort to bolster their position on the legitimacy issue.

The authors are adept at demonstrating the comparative competence of courts with respect to factfinding issues, but they do so primarily through elaboration of caselets (pp. 45-46) or the longer case studies.[37] In one case, for example, a cooperative discovery process generated all the data required for extensive social science studies by both parties.[38] In particular, Rebell and Block argue that public agencies often felt an obligation to disclose information relating to broad questions of educational policy (p. 46). Further, as the New York case study demonstrates, judges are able to chide the parties into doing the leg-work to provide additional data necessary to the adjudication of the suit (p. 143). They suggest that courts compensate for their own lack of staff resources "by inducing the parties themselves to gather and submit the necessary information" (p. 143).

With regard to the treatment of social science evidence, the authors were unable to demonstrate that attentiveness to such evidence leads to reliance on it. Judges rarely based their decision on the testimony of social scientists (p. 37). Rather judges tended to employ various "avoidance devices" to resolve social science controversies. This is not surprising. Courts may have a healthy desire to rest their decisions on narrow grounds, leaving the broader issues to the political process. Citation to policy studies often leads

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36. *See* Yudof, *supra* note 8.

37. The quantitative analysis yields precious few insights into the factfinding process. For example, it is not clear what inferences one should draw from the statistics showing that formal discovery requests were made in 38 of the 65 cases and that courts ruled on the fairness of discovery in only 7 cases. P. 45.

38. Brown v. Board of Educ., 386 F. Supp. 110 (N.D. Ill. 1974), an intra-district school financing suit brought in Chicago, indicates how discovery may be used to aid in the decision-making process. The school district supplied plaintiffs with extensive records on expenditure patterns and staffing, and the plaintiffs used these records to provide the data for analysis by experts. The reports of plaintiffs' experts were turned over to the defendants, and defendants' experts reanalyzed the data and fashioned their own reports. The cooperative process of exchanging information led to agreement on a number of factual issues. P. 45.

to charges of "social engineering." And, as Lindblom and Cohen,[39] among others,[40] have noted, social science evidence does not resolve difficult normative questions, it supplements but does not supersede "ordinary knowledge,"[41] and frequently it does not converge around a single perspective on a problem (that is, it poses more questions than it answers).[42] The unwillingness to rely upon social science evidence may also indicate a devotion to principle, and the absence of relevant and persuasive research. Its actual influence may be indirect and incremental over long periods of time, as findings become a part of "ordinary knowledge."

Even if courts can be faulted for ignoring the findings of students of public policy, the shortcoming is widespread among public officials, including legislators. Consider what Rebell and Block have to say about the Colorado legislature's consideration of bilingual education issues. Expert testimony "primarily served a showcase function," which interviews with legislators confirmed "did not significantly shape the final outcome" (p. 194). Alas, *Educational Policy Making and the Courts* is fully consistent with the conclusion of Lindblom and Cohen that "in public policy making, many suppliers and users of social research are dissatisfied, the former because they are not listened to, the latter because they do not hear much they want to listen to."[43]

The interesting question, of course, is what inferences should be drawn from the authors' comparative analysis of factfinding and decisionmaking in courts and legislatures. Are courts "better" decisionmakers than legislative bodies? What does one mean by better? This critical point will be discussed more fully below. For present purposes it suffices to note that the authors perceive the judicial process as being more analytical, more attentive to the evidence, more systematic and more comprehensive.[44]

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39. C. LINDBLOM & D. COHEN, USABLE KNOWLEDGE ch. 4 (1979).

40. *See, e.g.,* Cahn, *Jurisprudence,* 30 N.Y.U. L. REV. 150 (1955); Yudof, *supra* note 8. *See generally* EDUCATION, SOCIAL SCIENCE, AND THE JUDICIAL PROCESS (R. Rist & R. Anson eds. 1972).

41. C. LINDBLOM & D. COHEN, *supra* note 39, at 35.

42. *Id.* at 47. *See also* Cohen & Weiss, *Social Science and Social Policy: Schools and Race,* in EDUCATION, SOCIAL SCIENCE, AND THE JUDICIAL PROCESS, *supra* note 40, at 72.

43. *Id.* at 1.

44. For example, in comparing the two forums in Colorado, the authors state that

> [t]he legislative experience in Colorado revealed a . . . pattern of lack of capacity for systematic fact-gathering or analytical fact analysis. Particularly striking in this regard is the contrast between the legislative deliberations and the *Otero* trial. . . . The court's decision was, for the most part, attentive to the evidence and based on specific factual findings.

P. 194. And similarly, with regard to the New York legislature they observe that

> [i]t is often assumed . . . that legislatures, in comparison with the courts, possess an independent fact-gathering capability. Despite the New York State Legislature's high-ranking staff resources, it does not actually provide sufficient resources for substantive investigation and research. . . .
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> Consequently, the legislature, like the court, was left to rely on the parties to supply basic data . . . .
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> . . . There was no pretense that evidence or expert testimony would be considered objectively and dispassionately. . . . [T]he legislature, by the very nature of its political approach, is even more strongly inclined toward avoiding basic social fact issues [than are the courts]. As a result, in this case, no factual record that could be subjected to scrutiny was ever produced. Thus, comparing the legislature's and the court's capabilities . . . is

The authors' empirical analysis of remedial capability issues is inconclusive. There is some evidence produced by the authors that courts are disinclined to grant broad, systemic reform decrees, and that judges attempt to adhere, as circumstances permit, to more traditional remedies (pp. 59-60). But surely the percentage of cases classified as involving reform decrees does not tell us very much about the intrusiveness of judicial remedies. And intrusiveness itself is a legitimacy question and not primarily a capability question. Finally, the dearth of meaningful measures of compliance tends to obscure the significance of empirical studies on a phenomenon as difficult to define as it is to observe.[45] I am skeptical that one can determine the degree of compliance with reform decrees simply by interviewing the attorneys, seventy-eight percent of whom indicated that there was "complete compliance" with the court's order (p. 65).[46]

Nor is the absence of contempt citations, duly noted by the authors, a bellwether for compliance (p. 70). Plaintiffs and their attorneys may not have the continuing interest, the tenacity, or the resources to monitor compliance, and generally courts are dependent on the parties to produce evidence of compliance or noncompliance. Even the extended case study of the *Chance* litigation[47] in New York indicates little more than that the court was a catalyst for change, ended the stalemate over personnel policies, and gave some direction to the negotiations taking place among the interested parties (pp. 118-19). If the court was not overly intrusive, it was not overly successful either (pp. 119, 146).

The most impressive aspect of *Educational Policy Making and the Courts* is its exploration in the case studies of how remedies were formulated in legislatures and courts. The authors, supporting Chayes' thesis, found that "the process of fashioning . . . a remedy was remarkably similar in the two forums" (p. 145). In the *Chance* litigation the fashioning of an appropriate "plan" was left to the parties, with the court mediating and

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largely beside the point, simply because the legislature did not even purport to obtain and assess such data.

P. 144 (footnotes omitted). Thus, while the Rebell and Block research suggests that courts may be more capable of analyzing complex facts for decisionmaking, it also suggests that the primary distinction between courts and legislatures may be in their respective modes of solving policy problems. *See generally* Nagel, Book Review, 127 U. PA. L. REV. 1174 (1979) (arguing that Professor Tribe's rationalism should not be imposed on legislative decisionmaking).

45. Students of implementation theory endlessly debate the meaning of compliance and how it should be measured. *See* Clune & Lindquist, *What "Implementation" Isn't: Toward A General Framework for Implementation Research,* 1981 WIS. L. REV. 1044,1066-72. Perhaps if the clearly identified goal is to ensure that 30% of a school district's teachers come from minority groups, compliance is not difficult to ascertain (p. 65). But if the goal is to provide an "appropriate education" to handicapped students, if the legislature had latent or conflicting objectives, or if it intended to delegate broad authority while embracing only symbolic reform, the difficulties of ascertaining compliance are manifest. *See, e.g., id.*; Yudof, *Legalization of Dispute Resolution, Distrust of Authority, and Organizational Theory: Implementing Due Process for Students in the Public Schools,* 1981 WIS. L. REV. 891. Furthermore, defendants may comply with the letter but not the spirit of the law, *e.g.,* by providing due process hearings to students charged with misconduct but not objectively and fairly considering the student's side of the story.

46. *See generally* Kirp, *supra* note 9.

47. Chance v. Board of Examiners, 330 F. Supp. 203 (S.D.N.Y. 1971). For the barrage of additional opinions by the district and appellate courts, see pp. 262-63 n.13.

arbitrating disputes in those areas where they could not reach agreement. Similarly, the various interest groups negotiated with each other in the New York legislature, with the education committee breaking deadlocks (p. 145). In Colorado, representatives of the concerned groups met with key members of the legislature and hammered out the provisions of the bilingual education bill (p. 195). Since in neither forum did public officials take primary responsibility for the remedy, the authors conclude that, in general, there is no basis for assuming that courts are less able than legislatures to deal with complex remedial issues affecting large-scale public institutions. They are subject "to the same strengths and weaknesses" (p. 145).

Perhaps the critical point here is that at the remedial stage there is often no pretense, in either courts or legislatures, of principled decisionmaking in the sense that the remedy flows logically or analytically from the identified wrongs. The parties and interest groups, with different perceptions of the problem and of what needs to be done, may each attempt a logical approach to the remedial issues, but the final result is a function of bargaining and is unlikely to reflect a unitary analytical perspective. The only major distinction that the authors suggest is that the political bargaining process over judicial remedies is limited primarily to educational issues, whereas the legislature may engage in bargaining across many public programs, trading educational expenditures for reductions or increases in other service categories (pp. 195-96).[48] They infer from this that the comprehensiveness of the legislative remedies in the education sphere "can be undermined as the process unfolds by the particularistic concerns of various political interests" (p. 195). Thus, according to Rebell and Block, the politics of remedies in courts blunts accusations of judicial intrusiveness and enhances the prospects for compliance with an order, whereas in legislatures a similar political process leads to a failure to scrutinize facts and compromises the comprehensiveness of the remedy. Ah, the perversity of politics.

III

In the last chapter, in what must have been an excruciating passage for Messieurs Rebell and Block to write, the authors candidly admit that their work may have proceeded on many wrong-headed assumptions (p. 215). Courts and legislatures are highly imperfect, but the available evidence does not suggest that courts are less capable than legislatures of canvassing the different interests, ascertaining the facts, interpreting social science evidence, devising remedies, or implementing their decisions. There is plenty of ineptitude in the public sphere; neither courts nor legislatures have a monopoly. But in examining judicial activism, how relevant are the capability issues? Should we be concerned with the relative absence of principle in legislative deliberations? In other words, have the issues in the debate over judicial activism been appropriately framed? Rebell and Block think not.

> [T]he critical question, we now believe, is not whether the courts are "better" or "more capable" fact-finders or implementers of remedies than are legislatures, but whether particular aspects of social problems should be handled through the principled, analytic judicial process or through the

48. *See* Nagel, *supra* note 44, at 1192.

instrumental, mutual adjustment patterns of the legislatures. [P. 215, footnote omitted.]

The legislative process, while not uninfluenced by principles (particularly the principles of individual members),[49] is largely one of reconciling differences, of bargaining, of compromise.[50] Information is highly relevant to the political process, "but such information need not be explored systematically nor related logically to the final outcome" (p. 208). The judicial process, on the other hand, aspires to analytic decisionmaking and to the justification of decisions in the light of principle, though the effort may fall short and politics and bargaining may influence the result (p. 208). If, as Alexander Bickel once opined, "[n]o good society can be unprincipled; and no viable society can be principle-ridden,"[51] how should a democratic society go about assigning policymaking responsibilities?

This question is both broader and narrower than traditional inquiries into judicial activism. It is narrower in the sense that it assumes that principled judicial decisionmaking counters assertions that decisions of unelected federal judges, at least in constitutional litigations, are antidemocratic and hence illegitimate.[52] This is hardly an incontestable proposition. Robert Nagel, for example, drawing on the philosophical writings of Michael Oakeshott,[53] suggests that proponents of judicial review unconvincingly seek to justify the broad influence of constitutional law on public policy "by identifying rationalism with legitimacy, somewhat as the law generally tends to confuse good argument with good policy."[54] Critical theorists, building on the nihilist elements of the legal realist tradition, see neutral principles and reasoned elaboration as subterfuges for accomplishing the objectives of liberal individualism.[55] Legal theory allows judges to give their decisions a gloss of inevitability as a way of obscuring value judgments and choices.[56]

The question is broader in that even democratic societies must choose between analytic or rational modes of decisionmaking and what Lindblom and Cohen describe as the "interactive" method of addressing policy problems.[57] There may be no neat dividing line between the two. There may be agreement that neither principle nor political bargaining should govern all manner of decisionmaking. There may be advantages in institutions with different modes of decisionmaking interacting with each other. But by some process (perhaps analytic, interactive, or both) particular types

49. *See* Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation,* 27 STAN. L. REV. 585 (1975). *See generally* D. MORGAN, CONGRESS AND THE CONSTITUTION (1966) (exploring the interaction of constitutional principles and politics).

50. *See* Nagel, *supra* note 44, at 1191-93.

51. A. BICKEL, *supra* note 24, at 64.

52. *See id.*

53. M. OAKESHOTT, RATIONALISM IN POLITICS (1962).

54. Nagel, *supra* note 44, at 1183.

55. *See* Unger, *The Critical Legal Studies Movement,* 96 HARV. L. REV. 561 (1983).

56. *See, e.g.,* Tushnet, *Deviant Science in Constitutional Law,* 59 TEXAS L. REV. 815 (1981); Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies,* 57 TEXAS L. REV. 1307 (1979). *But see* P. BOBBITT, CONSTITUTIONAL FATE (1982).

57. C. LINDBLOM & D. COHEN, *supra* note 39, at 20.

of problems or issues will be thought to be better suited to one mode of problem solving or the other.[58] And this is true even if federal judges stood for election every five years or if their constitutional decisions were subject to congressional revision.

Charles Lindblom and David Cohen, in their extraordinary work, *Usable Knowledge*,[59] amplify many of these themes. They compare a policy process designed to enable policy makers to understand problems and to solve them through analysis with the interactive model, the stimulation of action "so that the preferred outcome comes about without anyone's having analyzed the given problem or having achieved an analyzed solution."[60] There is no strict dichotomy, but the difference in emphasis is clear:

> Strictly speaking, since people never stop thinking the alternatives are a frontal analytical attack on some identified problem, or interaction in which thought or analysis is adapted to the interaction and is therefore on some issues displaced by interaction.[61]

For example, even if each voter is well-informed and thoughtful, there is a difference between a single person or body deciding on who should be President, in the light of certain objectives and means-ends relationships, and the aggregation of individual preferences through the interaction of elections. The ultimate choice of a President, in a sense, may be "irrational," but in another sense the choice has simply been made by another means of decisionmaking.[62] So, too, the behavior of buyers and sellers in the marketplace may solve allocation of resources problems, albeit resources may also be allocated by planners employing a "frontal analytical" approach.[63]

The problem is that those who aspire to rationality, whether judges or policy analysts, may tend to treat interactional politics or bargaining as illegitimate, as atavistic, or as simply perverse.[64] Lindblom and Cohen quote

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58. The distinction between interactive and rational decisionmaking has been discussed by a number of prominent scholars. Charles Lindblom, in a famous article, has compared the "science of muddling through" to goal-oriented, instrumental problemsolving. Lindblom, *The Science of "Muddling Through"*, 19 PUB. AD. REV. 79 (1959). *See also* P. PETERSON, SCHOOL POLITICS CHICAGO STYLE 128-39 (1976). Wildavsky argues that politics and markets are generally preferable to decisionmaking by experts. A. WILDAVSKY, SPEAKING TRUTH TO POWER: THE ART AND CRAFT OF POLICY ANALYSIS (1980). Daniel Bell stresses that the "hopes of rationality" — "a rationality of means that are intertwined with ends and become adjusted to each other" — "necessarily falls before politics," bargaining among persons. D. BELL, THE COMING OF POST-INDUSTRIAL SOCIETY 365 (1976). Bell casts doubt on Max Weber's notion of a progression toward rationality in advanced industrial nations, and argues that society is rebelling: "rationality, as an end, finds itself confronted by the cantankerousness of politics, the politics of interest and the politics of passion." *Id.* at 350, 366. Michael Oakeshott suggests that "the objects of our desires are known to us in the activity of seeking them," and he decries the tendency to test and reject tradition and authority in the light of rationalist criteria. M. OAKESHOTT, *supra* note 54, at 58. *See also* Nagel, *supra* note 44, at 1183. Oakeshott, like the others, is not rejecting common sense or purposeful behavior or thinking; rather he is attacking the modern tendency to substitute instrumental reasoning, embedded in systems of thought (whether law, political science, or policy analysis), for bargaining, tradition, and other less analytical modes of making policy decisions. *See id.* at 1183.

59. *See* text following note 39 *supra*.

60. C. LINDBLOM & D. COHEN, *supra* note 39, at 20.

61. *Id.* at 20.

62. *Id.* at 21-22.

63. *Id.* at 22.

64. *See* W. LIPPMANN, *supra* note 1, at 261; Nagel, *supra* note 44.

numerous social scientists who view interactive problem solving as an abberation, regretting the unwillingness of legislators and other policymakers to listen to reason.[65] Similarly, consider the symbolic hubris in the "rational basis test" under the equal protection clause, the notion, at least theoretically, that laws may be declared unconstitutional because of the lack of fit between means and ends.[66] Why is it not sufficient that the enacted law is the one that commanded a majority, that adjusted individual and group interests in a tolerable way, that reflected bargain and compromise? Perhaps I have taken the rational basis test too seriously; for the test may veil other constitutional concerns. But the purported mode of analysis is troublesome. Surely, it is one thing to reserve expressly a place for principle, to invalidate a law because it discriminates by race or violates the free exercise of religion, and it is quite another to suggest that laws fail because they fall short of meeting the analytical standards of judges.

Educational Policy Making and the Courts falls perilously close to embracing the hubris of rationality, of treating political processes as a lingering perversion of collective decisionmaking. If legislators do not articulate clearly their objectives, if they respond to interests and not arguments, if they ignore information or do not consider it in a detached manner, it does not follow that the decision is necessarily "wrong" or inferior to judicial decisions.[67] Legislatures, of course, are not mystically endowed with wisdom. Some legislative decisions may be worse than others; sometimes there may be a failure to recognize and address constitutional concerns; ignorance or prejudice may prevail.[68] But there are advantages to "legislative 'irrationality.' "[69] Principle may legitimate decisions, but so may politics. And "politics is haggling, or else it is force."[70]

To some extent, Rebell and Block recognize these points. When all is said and done they are uncomfortable with some of the inferences that may be drawn from their study of comparative institutional capabilities. They have disarmed some of the critics of judicial activism, they have shown that courts are not bumbling fact-finders incapable of recognizing diverse interests or devising comprehensive remedies, but in so doing they have raised other issues. If courts bargain over remedies like legislatures, does this not

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65. C. LINDBLOM & D. COHEN, *supra* note 39, at ch. 3.

66. Nagel, *supra* note 44, at 1189-91. *See generally* P. BREST & S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 549-76 (2d ed. 1983).

67. Nagel, *supra* note 44, at 1191-92.

68. *See generally* Bice, *Rationality Analysis in Constitutional Law,* 65 MINN. L. REV. 1 (1980).

69. Nagel, *supra* note 44, at 1192.

> If values need not be formally articulated and consistently pursued, legislators can serve many interests at once . . . . Legislators are free to respond to intensity as well as articulateness . . . . Even if no objective is fully achieved, many groups can be partially satisfied and can therefore be expected to retain some sense of loyalty to the governmental process. Because negotiation and trading "across substantive fields" are encouraged, the hard sacrifices that different allocations of resources require are implicitly recognized. . . . Because compromise is necessary and abstract argument is of limited value, groups are encouraged to find the common ground in their positions, rather than to insist on apparently irreconcilable differences of principle.

Id. at 1192-93.

70. D. BELL, *supra* note 58, at 365.

establish capability at the price of undermining legitimacy? Paradoxically, the more competent courts are in adjusting interests, the more they may depart from the principled decisionmaking that is supposed to distinguish them from legislative bodies. If legislatures do not weigh the facts and examine issues analytically, does this mean that courts are superior decisionmakers? But this conclusion undercuts democratic theory and elevates a new breed of philosopher kings, giving them unacceptable powers in a democracy.

In the end, the authors do not claim that their study will change many minds on the issue of judicial activism (p. 216). Like Antoine de Saint Exupéry's Little Prince on the fourth planet, they understand that counting the stars does not yield their secrets or establish ownership.[71] They see a need to reformulate the issues and to probe the boundaries of different modes of problem solving. If Rebell and Block did not grasp this point when they began this book many years and drafts ago, neither did many other legal scholars. And we should be grateful for their contribution; for they have laid the foundation for the work that needs to be done.

71. A. DE SAINT EXUPÉRY, THE LITTLE PRINCE ch. 13 (K. Woods trans. 1943).