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Book Reviews

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BOOK REVIEWS

THE COURTS AND SOCIAL POLICY. By Donald L. Horowitz. Washington, D.C.: The Brookings Institution, 1977. Pp. 309. $11.95 (cloth), $4.95 (paper).

*Reviewed by Stephen L. Wasby**

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I. INTRODUCTION: THE COURTS AND SOCIAL PROBLEMS

Judicial action dealing with a wide and increasing range of social problems has drawn analysts' attention at least since *Brown v. Board of Education.*[1] In addition to standard doctrinal criticism, there has been an increasing examination of the effects of courts' decisions and, more recently, of courts' capacity to deal with social problems. Some analysts now claim that the courts have been tendered not only new but also different problems that they cannot handle effectively because the cases require judges and juries to digest new types of information and because the courts cannot properly implement their decisions.

Two examples of the numerous statements of the problem suffice here. Stuart Scheingold argues that because litigation is cumbersome and tends to compartmentalize and fragment problems, it

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1. 347 U.S. 483 (1954).

must be used with particular care. "The lawyer can feel reasonably confident about using litigation to force delivery on existing legal commitments," he maintains, but expectations about new policy should be more modest because "judicial policy initiatives emerge erratically and unpredictably."[2] Because expectations are created by rules and because patterns of interest develop around those rules, courts "cannot treat their commitments lightly."[3] Moreover, courts are "only modestly endowed with coercive capabilities;" even if they can deal with defiant individuals, they are unlikely to be able to bring large groups or powerful organizations into line.[4]

Robert G. Dixon, Jr., recently phrased the problem in this way:

> New principles or values judicially selected for special protection are broad, and they intersect ambiguously with the details of industrial, social, and political life. Their just application depends on factual appraisal to ascertain whether the principle itself is being served or hurt by the statute in question in any particular case. A legislative-type process of factfinding and an administrative process of mixed rulemaking and adjudication are needed to illumine new principles before they can be handled with assurance—modes of operation not transferable to the judicial function without risk to the "neutral" judging function itself.[5]

A long and honorable tradition of normative argument supports a limited role for the judiciary.[6] Although it is possible to approach judicial capacity with a high degree of objectivity, social science literature on the subject is relatively scarce. Only a thin line divides evenhanded analysis from thinly veiled apologies for a self-restraint preferred because of the conservative results produced. The line is especially easy to cross in the social climate of the 1970's, in which support for civil rights has cooled and the Supreme Court has become less willing to provide new remedies for social ills.[7] Yet social scientists have an obligation not to cross the line; they can avoid doing so only by defining precisely the question to be addressed, developing a framework for its examination, carefully collecting their data, and then systematically analyzing it.

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2. S. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND POLITICAL CHANGE 118 (1974).

3. *Id.* at 111.

4. *Id.* at 8.

5. Dixon, *The 'New' Substantive Due Process and the Democratic Ethic: A Prolegomonon*, 1976 B.Y.U. L. REV. 43, 73.

6. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111 (1962); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

7. *See* S. WASBY, CONTINUITY AND CHANGE: FROM THE WARREN COURT TO THE BURGER COURT (1976). Recent arguments against the "imperial judiciary" are R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FORTEENTH AMENDMENT (1977); L. GRAGLIA, DISASTER BY DECREE (1976).

Attempts at explaining judicial capacity often have failed because of indecision about whether to focus only on the courts or to compare the courts with the other branches of government. Courts look much better when their capacities are compared with those of other governmental institutions than when viewed in isolation. There has also been an unwillingness to give full recognition to the context in which the courts find themselves, particularly the position of enforcing civil rights legislation and other Great Society social programs of the 1960's. Despite the Warren Court's "civil liberties revolution," based on the fourteenth amendment, many of the issues faced by the judiciary in the last decade, such as women's rights and employment discrimination, involve primarily statutory interpretation, hardly a new judicial task.

Because, as de Tocqueville pointed out, American social, economic, philosophical, and political issues are cast in legal form, the issue of judicial capacity to deal with such issues remains the same, while the substance of policy varies over time. In the words of Judge William Doyle of the Tenth Circuit: "The problem of judicial involvement in social policy is thus a matter of long standing."[8] Sometimes, as in the argument that led to passage of the Judges Bill of 1925,[9] which gave the Supreme Court its certiorari jurisdiction, or in the more recent debate about revising our federal appellate court system,[10] the issue has arisen as a question of overload; there are thought to be more cases than can be processed properly. At other times, as in Lawrence Friedman's portrayal of the courts and contract law at the end of the nineteenth century, the focus has been more centrally on whether courts are inappropriate for dealing with particular types of questions:

> Courts were not equipped to handle business disputes as rapidly and efficiently as a brawling capitalist economy demanded. . . . [J]udges were judges, not mediators. They named winners and losers. . . . Moreover, judges simply lacked enough business acumen. They were trained in law, not in business; certainly not in the business details and jargon of a thousand fields.[11]

At still other times, the two elements of overload and basic judicial

8. Doyle, *Social Science Evidence in Court Cases,* in EDUCATION, SOCIAL SCIENCE, AND THE JUDICIAL PROCESS 11 (R. Anson & R. Rist eds. 1977).

9. Act of Feb. 13, 1925, Pub. L. No. 68-415, 43 Stat. 936 (codified at 28 U.S.C. §§ 1254-1257 (1970)).

10. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM ("Hruska Commission"), STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975).

11. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 465 (1973). Friedman argues that, as a result of these judicial shortcomings, those in contract disputes stayed out of court. They worked out their own problems or went to arbitration, and "the business of running economy and society drained out into other hands." *Id.* at 338.

capacity have coalesced, as in present efforts to divert certain categories of cases, such as small claims or uncontested divorces, from the courts into alternative methods of dispute settlement.

II. THE HOROWITZ STUDY

Donald Horowitz's *The Courts and Social Policy* is a serious effort to deal with the question of judicial capacity. Horowitz talks first of the expansion of judicial responsibility, which he thinks is a departure from the traditional exercise of the judicial function, and then explores the sources of this growth, particularly expansive statutory interpretation. He believes that courts do not do well at interpreting the mixes of statutes, regulations, and local arrangements with which they are faced more and more frequently. *Griggs v. Duke Power Co.*,[12] which invalidated non-job related tests with discriminatory effects, and *Lau v. Nichols*,[13] which held that failure to remedy Chinese children's English language deficiencies deprived them of the opportunity to be educated, are used as examples. Horowitz then discusses attributes of adjudication, focusing particularly upon courts' ability to handle social facts and to implement their decisions.

Giving particular attention to the problems courts face when two target populations, for example, the lower courts and the police, are affected by a court ruling or when target populations are at some distance from the courts, he examines whether some policy areas, issues, or target populations are more appropriate than others for judicial intervention. After discussing the limitations of litigation, law, and social science and the implementation of judicial decisions, he briefly compares courts with the other branches of government on the basis of the setting of agendas, their reliance on staff, the unrepresentativeness of parties, the scope of their decisions, the bargaining to reach those decisions, and the ability to oversee the impact of their decisions. Horowitz concludes with the assertion that the distinctiveness of the judicial process makes the courts unfit for much of government's important work, but warns against augmenting judicial capacity for fear that the courts will become too much like other institutions.

The author illustrates his principal themes with four case studies that constitute the core of the book. His studies of the Philadelphia *Area-Wide Council* case,[14] in which the federal court for the

12. 401 U.S. 424 (1971).
13. 414 U.S. 563 (1974).
14. North City Area-Wide Council v. Romney, No. 69-1909 (E.D. Pa. Nov. 12, 1969),

Eastern District of Pennsylvania was called upon to interpret the meaning of "citizen participation" in the federal Model Cities program, and of *Hobson v. Hansen,*[15] in which the federal district court for the District of Columbia twice in a four-year period dealt with inequalities in expenditures by the District of Columbia for education, focus primarily upon the courts' ability to deal with social facts. The author examines *In re Gault,*[16] in which the United States Supreme Court extended due process protections in juvenile court proceedings, and *Mapp v. Ohio,*[17] in which the Court imposed upon the states the fourth amendment exclusionary rule for improperly seized evidence, in terms of the implementation of the decisions and their impact.

With the *Area-Wide Council* case, Horowitz explores the Model Cities program nationally, the Area-Wide Council-Model Cities administration conflict, and the downgrading of citizen-dominated corporations. With roughly half the study devoted to such "environment," litigation receives relatively brief attention, except for the Third Circuit's ruling strongly favoring citizen participation.

In *Hobson v. Hansen,* the district judge used an "overriding justification" test for policies with negative effects on minorities and focused his attention primarily on equality of per pupil expenditures for teachers' salaries. Horowitz's attention is drawn to changes in the District's schools between *Hobson I,* which examined resource inequality but did not order direct dollar equalization, and *Hobson II,* in which the question, with counsel playing an important role, was narrowed to equalization of teacher costs at the elementary level. Implementation of *Hobson II,* we find, took place largely through transfer of special resources teachers, and was affected by the presence of Title I (Elementary and Secondary Education Act) funds.

In dealing with *Gault,* Horowitz focuses on the relation between juvenile court procedures and juvenile delinquency, particularly the belief that procedural informality hindered offender rehabilitation. With *Mapp,* he stresses that evaluations of the case depend on which element of its rationale—deterrence of improper police be-

rev'd, 428 F.2d 754 (3d Cir. 1970), *on remand,* 329 F. Supp. 1124 (E.D. Pa. 1971), *rev'd,* 456 F.2d 811 (3d Cir. 1971), *cert. denied sub nom.* Rizzo v. North City Area-Wide Council, 406 U.S. 963 (1972), *on remand,* No. 69-1909 (E.D. Pa. Sept. 6, 1972), *aff'd,* 460 F.2d 1326 (3d Cir. 1972).

15. 265 F. Supp. 902 (D.D.C. 1967), *appeal dismissed,* 393 U.S. 801 (1968), 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969), *further relief ordered,* 320 F. Supp. 409, 720 (D.D.C. 1970), 327 F. Supp. 844 (D.D.C. 1971).

16. 387 U.S. 1 (1967).

17. 367 U.S. 643 (1961).

havior or principled refusal to condone improper police activity—is emphasized. He concludes from studies of the unstated assumptions about the deterrence argument that the police are concerned with convicting people, not merely with harassing them, and that both prosecutors' actions and lower court decisions can affect the police.

The Courts and Social Policy is flawed in a number of important respects. Despite the impression that it represents the state of the art on how to study the capacity of the judiciary to resolve social problems, the book is primarily an argumentative legal brief, not a balanced examination of the problem. It has the surface quality of objectivity, but on the whole is not objective, embodying among its biases an orientation favoring government programs.[18] Although the case studies are of some interest and although the author handles judicial treatment of social science well, the book does little to advance our knowledge and understanding of the inherent limitations of courts. The existing literature, which contains more balanced statements of much of what Horowitz has to say,[19] is inadequately treated. Nor is Horowitz's work a solid doctrinal analysis of the type we have come to expect from law professors.[20]

This reviewer's basic criticism of the book is that Horowitz seems to be unclear about both his purpose and his conclusions. The reader is likely to come away from the book unsure about whether Horowitz wants to improve matters or leave them as they are. The author adopts no systematic framework even for his case studies, and his argument is difficult to follow. He is unsure whether to assess the capacities of courts by themselves or to compare them with other policy-making institutions, and his infrequent comparisons are inadequately developed. Much of his analysis is composed of arguments and selective quotations, and he often ignores important facets of the available literature. He defers analysis to the last chapter instead of closely analyzing each of his cases in turn, and his analysis contains disappointingly few references to the case studies. All of this results in a presentation of much underanalyzed and unanalyzed material and mere assertions of propositions quite disconnected from the data base upon which they are supposed to

18. Horowitz assumes, for example, that HUD was correct in the *Area-Wide Council* case, with the Third Circuit interfering with HUD's program.

19. *See* notes 65 & 160 *infra*.

20. For an example of tightly reasoned analysis of the Supreme Court's use of the fourteenth amendment, see Dixon, *The Supreme Court and Equality: Legislative Classifications, Desegregation, and Reverse Discrimination*, 62 CORNELL L. REV. 494 (1977). Dixon deals with some of the points raised by Horowitz, *e.g.*, the relation between right and remedy. *Id.* at 509, 542.

rest. Thus it is not surprising that Horowitz finds exactly what he sets out to find. The book comes close to being merely a polemic against the use of the courts by people who feel they cannot achieve desirable social policy—or even simple fairness—through other governmental institutions. Accepting most of the traditional separation of powers thinking about the courts, Horowitz, ignoring the ideological biases of the traditional exercise of the judicial function, which often served to protect those in positions of authority, assumes its validity.

Horowitz does not begin with a thorough search of the relevant literature from which he might have borrowed or derived hypotheses about the adjudicatory process and from which he might have derived guidance both in the choice of cases examined and in his analysis.[21] Although he acknowledges the existence of such hypotheses, he "deliberately avoid[s]"[22] them, a practice that is inexcusable in social science, which is meant to be cumulative. If Horowitz believes earlier explanations were ineffective, he has an obligation to explain why. Despite this avoidance of relevant hypotheses, he claims "to build on what we know"[23] and says he chose cases for his case studies on the basis of that which was familiar about the adjudicatory process, a course of action bound merely to reinforce conventional wisdom. Here as elsewhere, plausible argument does not necessarily make good social science. To confirm—or not disconfirm—what one has hypothesized is not per se improper; what is unacceptable is to foreordain one's conclusions. The author's method of proceeding makes it almost inevitable that he would find the capacity of the judicial process to handle social policy weak at best.

In addition, Horowitz's statements frequently are inadequately substantiated. For example, his assertion that "[m]uch judicial activity has occurred quite independent of Congress and the bureaucracy, and sometimes quite contrary to their announced policies"[24] is certainly worth exploring, but it is not equivalent to a generalization based on data. In claiming that "the wealthy invariably want the courts to strike down action the other branches have taken" while "the disadvantaged often ask the courts to take action

21. Examples of the literature that Horowitz acknowledges but ignores include S. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES 243-68 (1970), and Grossman, *The Supreme Court and Social Change*, 31 AM. BEHAVIORAL SCIENTIST 535, 545-49 (1970).

22. D. HOROWITZ, THE COURTS AND SOCIAL POLICY 62 (1977).

23. *Id.* at 64.

24. *Id.* at 5-6.

the other branches have decided not to take,"[25] Horowitz ignores the many instances in which the disadvantaged have attacked existing government policies, such as welfare regulations[26] and prison rules.[27] In addition, in a laundry list of judicial intervention purported to demonstrate the "considerable expansion of judicial responsibility" into areas traditionally thought to be inappropriate for judicial activity,[28] he fails to indicate the frequencies with which such intervention occurs, something that social scientists quite properly have come to expect. Other empirical statements unsupported by data include the comments that judges "tire quickly of repeated sequences of litigation before them,"[29] that "the question of representativeness [of cases] rarely occurs" to judges,[30] and that "the courts recurrently assume . . . that they are working with more or less uniform situations for which a single rule will suffice."[31] Certainly judges do complain from the bench that certain cases ought not to be before them and *may* be unhappy if a case returns to court when the underlying controversy might have been resolved elsewhere,[32] but that is hardly the same as their tiring quickly.[33] Had Horowitz interviewed judges, he might have had a firm basis for this and other statements, but no such data is evident. Nor are selective quotations from law review articles a substitute which satisfies the canons of social science, because they are often written to lobby for a particular point of view. Yet Horowitz uses one citation to an *Alabama Law Review* article to support a claim that there has been a "withering of the mootness doctrine" and another, to a *Virginia Law Review* article, for the "abundant evidence" as to the intent of the sponsors of the statutory provision at issue in *Griggs*.

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25. *Id.* at 11, n.41.

26. *See, e.g.,* Dandridge v. Williams, 397 U.S. 471 (1970); Goldberg v. Kelly, 397 U.S. 254 (1970); Shapiro v. Thompson, 394 U.S. 18 (1969).

27. *See, e.g.,* Estelle v. Gamble, 429 U.S. 97 (1976); Finney v. Arkansas Bd. of Correction, 505 F.2d 194 (8th Cir. 1974); Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972).

28. HOROWITZ, *supra* note 22, at 4-5.

29. *Id.* at 68.

30. *Id.* at 268.

31. *Id.* at 261.

32. For a discussion of "repeater" litigation and docket-management in the Supreme Court, see S. WASBY, A. D'AMATO, & R. METRAILER, DESEGREGATION FROM BROWN TO ALEXANDER: AN EXPLORATION OF SUPREME COURT STRATEGIES *passim* (1977) [hereinafter WASBY, D'AMATO, & METRAILER].

33. Nor is the point proved by citation of the famous "time-chart" article, Hart, *Foreword: The Time Chart of the Justices,* 73 HARV. L. REV. 84 (1959), and the Freund study group's recommendations for a National Court of Appeals, FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972), *reprinted in* 59 A.B.A.J. 139 (1973), which bear instead on whether judges have inadequate time to carry out their duties.

Inadequate analysis is another problem for Horowitz. As early as the first chapter he asserts that the Court's decisions in *Griggs v. Duke Power Co.*[34] and in *Lau v. Nichols*[35] depart from the language and legislative history of Titles VI and VII of the Civil Rights Act of 1964.[36] He suggests that the *Griggs* Court, in considering the provision in Title VII insulating ability tests to screen potential employees if "not designed, intended or used to discriminate" on racial grounds, misinterpreted the phrase "used to discriminate."[37] Horowitz says the phrase is quite clear, but if this were so, under the plain meaning doctrine judges would not resort to legislative history. Moreover, if the Court seriously misinterpreted Congress' will, one might ask why, although reversals of the Supreme Court's statutory interpretation rulings occur with some frequency,[38] nothing has been done to overturn the decision; no evidence is presented that reversal legislation was even introduced. Horowitz simply is not justified in concluding that "*Griggs* cannot be understood as a traditional exercise in statutory exegesis"[39] or that "no one could mistake *[Griggs* and *Lau]* for 'interstitial' statutory interpretation."[40] In *Griggs,* Congress had passed a statute and when that statute was tested in court, the judges gave some meaning to it, hardly an unusual exercise of judicial power. In *Lau,* the statute came to court after development of HEW regulations, also hardly an unusual situation when the statute authorizes governmental agencies to define the provisions of the statute. Horowitz, who also argues that the HEW regulations "enlarged" the statute, adopts a crabbed view of discrimination (failure to provide equal treatment), which would have left San Francisco's Chinese children failing to understand classes taught in English. Nor does he show any appreciation of anti-Oriental discrimination in that city, an important social fact bearing on the controversy underlying the case.

In addition to these failings, the author's case studies are poorly chosen, poorly designed, and poorly executed. One gets not an examination of the cases through previously developed hypotheses or systematic testing of plausible, competing generalizations, but

34. 401 U.S. 424 (1971).

35. 414 U.S. 563 (1974).

36. HOROWITZ, *supra* note 22, at 14-17.

37. *Id.* at 14-15.

38. Note, *Congressional Reversal of Supreme Court Decision: 1945-1957,* 71 HARV. L. REV. 1324 (1958). Krislov notes 50 instances in which Congress reversed the Court between 1944 and 1960. S. KRISLOV, THE SUPREME COURT IN THE POLITICAL PROCESS 143 (1965).

39. HOROWITZ, *supra* note 22, at 15.

40. *Id.* at 17.

rather an unsatisfactory hodgepodge of facts and illustrations designed to reinforce a point of view adopted in advance.

Horowitz's cases are sweeping decisions in which:

> social and "political reality" might diverge from "judicial reality"; where social science was involved; where there was an unfamiliar government program in litigation and where there was a familiar one; where the follow-up abilities of the courts were tested; where major national policy was being laid down; and where local disputes were being settled but with wider ramifications. I was interested in finding decisions that reallocated resources as well as those that asked institutions to modify their behavior, decisions that seemed to impose purely procedural requirements and those that demanded substantive change. I was looking for different numbers and types of target populations: lower courts and bureaucracies, organizations that function in close proximity to the courts and those that operate at some remove from them.[41]

He says his cases are representative, not in a statistical sense, but in not being aberrational and asserts that "frequency is not an issue in this study."[42] Perhaps "such problems are easier to identify by illustration than by description,"[43] but how is one to know whether the cases are aberrational without some idea of the frequency with which they occur? If the problems to which Horowitz directs his readers' attention occur only infrequently, then the issue of judicial capacity would be of much smaller dimension than he makes it out to be. Even if his cases are unrepresentative, they could be analyzed usefully. Social scientists have long known that analysis of deviant cases can be fruitful *if* one knows the baseline. As Horowitz concedes, the case-study method does not allow a projection of frequency,[44] but one could make assertions about judicial incapacity if the cases were properly chosen. Apart from the question of frequency, the cases *are* unrepresentative in that only one of the four is a trial court ruling, despite the obviously larger role that trial courts play in dealing with social facts, and two are Supreme Court decisions. None are state court decisions, implying, inaccurately, that they do not face these problems.

However selected, the cases should have been treated systematically based on a common framework. His failure to do so thus

41. *Id.* at 65-66.

42. *Id.* at 63. Horowitz also does not support with frequency data his argument that statutes provide a major source of the growth of judicial activity. An examination of the annual November issues of the *Harvard Law Review*, which report on the year's Supreme Court activity, indicate the change in the mix of cases in the Supreme Court. *See also* Casper & Posner, *A Study of the Supreme Court's Caseload*, 3 J. LEGAL STUD. 339 (1974) and Griswold, *The Supreme Court's Case Load: Civil Rights and Other Problems*, 1973 U. ILL. L.F. 615.

43. HOROWITZ, *supra* note 22, at 298.

44. *Id.* at 63.

decreases the usefulness of his case studies. Horowitz talks of "mov[ing] backward into the environment" before discussing relevant litigation,[45] but only for the *Area-Wide Council* case does he do so. With each of the other three cases, Horowitz plunges almost immediately into the case at hand. The *Hobson* case study, which focuses on the changes in the District of Columbia schools between *Hobson I* and *Hobson II,* is primarily an opinionated view of the defects of the latter ruling. In his study of *Mapp,* in which a discussion of the Court's pre-*Mapp* search and seizure doctrine would have provided a more complete understanding of the Court's rationale, there is no attention to such crucial cases as *Wolf v. Colorado,*[46] in which the Court applied the fourth amendment, but not the exclusionary rule, to the states, and *Irvine v. California,*[47] in which some of the justices' impatience with police misbehavior was quite evident. Still another disparity is Horowitz's data base. Only in the *Hobson* study does Horowitz rely upon interviews with lawyers who participated in the case, thus minimizing the importance of lawyers' roles and litigation strategy in the cases he examines.

III. Judicial Capacity and Litigation Characteristics

A. *The Growth of Social Policy Litigation*

The first element of Horowitz's basic argument about litigation characteristics is that courts formulate social policy more frequently today than in the past. He thinks that the dispute between judges and legislatures, long settled in England, is still an open contest in this country, with judges increasing the scope of their power, having departed from the traditional exercise of judicial restraint.[48] Courts, he contends, are now involved in "decisions that would earlier have been thought unfit for adjudication,"[49] and much recent judicial action "has occurred quite independent of Congress and the bureaucracy, and sometimes quite contrary to their announced poli-

45. *Id.* at 65.

46. 338 U.S. 25 (1949).

47. 347 U.S. 128 (1954). For a discussion of *Irvine,* see Westin, *Bookies and "Bugs" in California: Judicial Control of Police Practices,* in The Uses of Power: 7 Cases in American Politics 117 (A. Westin ed. 1962).

48. That judicial power has expanded is not a new claim and a statement that "the courts have tended to move from the byways onto the highways of policymaking" is hardly innovative. Horowitz, *supra* note 22, at 9. Charges of judicial supremacy and judicial policymaking long have been leveled at the courts. Critics often have complained that courts were meddling in matters that were none of their business—economic regulation until the late 1930's, civil liberties more recently.

49. *Id.* at 4.

cies."[50] Because individual cases have become subordinated to judicial policymaking, he believes, "there is somewhat less institutional differentiation today than two decades ago."[51]

At bottom, however, Horowitz is not clear on what is new. At one point, he writes that "the types of decisions being made by the various institutions—their scope and level of generality—seem to be converging somewhat, though the processes by which the decisions are made and the outcomes of those processes may be quite different. . . ."[52] Yet this statement does not indicate whether it is the *results* that are convergent or the *processes* that led to them. Horowitz's argument seems to depend on the latter, but his apparent dislike of the results of some social policy litigation leaves him in a quandary.

Horowitz seems to be saying that current social policy litigation poses fundamental issues about adjudication, not merely because it is new, but because it is different in kind from past litigation. The *Area-Wide Council* and *Hobson* cases, he contends, are "far from the ordinary run of judicial experience,"[53] although the "ordinary run" is never identified.[54] To blame judges for inability to handle litigation because of lack of familiarity with the subject matter is one thing. Few governmental institutions do well with new problems, but time and preparation can overcome that difficulty. It is quite another thing to claim that the basic characteristics of adjudication are at stake in these new cases. Yet by lumping together newness and other elements of the new social policy litigation, Horowitz obscures just what is at the heart of the problem or how much each element contributes to the problem.[55]

The courts' "abrupt departure" from the past, Horowitz says, results from an "aggregate of features,"[56] one of which is that courts are increasingly called upon "to judge action very much in progress."[57] Yet this is hardly new. Courts often are called upon to issue injunctions in situations in which time is of the essence, such as stockholder suits to prevent mergers; if they fail to act quickly,

50. *Id.* at 5-6.

51. *Id.* at 20.

52. *Id.*

53. *Id.* at 171.

54. School desegregation cases resulting in complex remedies have occurred in virtually every major metropolitan area. The compensatory education plans now approved for Detroit are only the newest generation of those remedies. *See* Milliken v. Bradley, 433 U.S. 267 (1977).

55. A similar difficulty is created when Horowitz presents a typology of issues, but does not say how each type of issue might affect the judicial process.

56. HOROWITZ, *supra* note 22, at 5.

57. *Id.* at 92.

unscrambling the eggs later is exceptionally difficult. To justify his argument, Horowitz calls particular attention to courts' willingness to expedite injunction hearing schedules, although he does not make clear what is wrong about such action[58] and elsewhere has noted that the status quo is not likely to be preserved without prompt injunctive relief.

Another abrupt departure from the past that Horowitz sees is that decisions now frequently not only stop governmental action, but also require that something be done, "nothing new in principle, but new in degree," with the "character of the demand for action" changed as a result.[59] Remedies used by judges in social policy cases, according to Horowitz, "are reminiscent of the kinds of programs adopted by legislature and executives."[60]

Horowitz's insistence on distinguishing between judicial ordering that something be done and ordering that something be stopped, "between foreclosing an alternative and choosing one, between constraining and commanding,"[61] poses a fundamental conceptual problem. An order to halt a particular action may constrain a governmental body somewhat more than an order to do something. If the governmental agency is told to stop what is at the heart of its program, however, it is as fully constrained as if a positive injunction had been issued. Similarly, a series of decisions each of which orders the cessation of a particular governmental course of conduct and in the aggregate leaves perhaps only one option open might be no less constraining than a directive to undertake specific action. Indeed, Horowitz himself seems implicitly to recognize that there is little difference between acting and not acting when he admits that the executive and legislative branches "often effectively say no by saying nothing."[62] Yet there is a difference between the forms of action which different societal interests require to gain their ends.

58. *Id.* at 11. The Third Circuit's *Area-Wide Council* ruling was ineffective because the Council had not sought an injunction pending appeal; too much already had happened that could not be undone.

59. HOROWITZ, *supra* note 22, at 7, 11 n.41. Despite his criticism of courts for requiring particular action of other branches of the government, he attacks the Supreme Court's decision in *Lau v. Nichols* because, although it did not require any particular action, the Court said "that inaction was forbidden." *Id.* at 16. The basis for Horowitz's criticism apparently is that the decision has given rise to a controversy between those who wanted bilingual-bicultural education and those who thought training in English as a second language to be appropriate. For a discussion of the controversy, see Waugh & Koon, *Breakthrough for Bilingual Education:* Lau v. Nichols *and the San Francisco School System,* 6 CIV. R. DIG. no. 4, at 18 (1974).

60. HOROWITZ, *supra* note 22, at 7.

61. *Id.* at 19.

62. *Id.* at 22.

Business interests seeking injunctions against economic regulation legislation require only an injunction against an act to be successful. However, disadvantaged social groups seeking equality of treatment from the government or seeking to have the government enforce existing rules need more; the government must be forced to act where it has neglected or refused to do so. Were the courts not to act, the disadvantaged would remain disadvantaged or would become more so; the results would not be neutral. The type of action the courts dictate may have changed, but it had to if the courts were not to remain largely instruments of those already in possession of economic and governmental power.

B. Basic Litigation Characteristics

Horowitz examines the characteristics of litigation to stress the weakness of the adjudicatory process as a policymaking tool. The basic problem with his approach, however, is that he never develops a clear definition of "judicial." He does not do this even when he asserts that the amount of readjustment in social policy cases raises the question of the degree to which such problems are "judicial."[63] The problem becomes obvious when, to show that the worst cases come to court, he uses cases before state antidiscrimination commissions, which he says are like the courts because they are quasi-judicial in nature.[64] Although admittedly, as J. Woodford Howard has observed, "neither the sole nor necessarily the most frequent use of adjudication is located in the judiciary,"[65] Horowitz does not return to these commissions to examine any differences in context and operation between them and the courts, an exercise that might help explain the meaning of the concept "judicial."

Had Horowitz confronted the literature suggesting that law is not a distinct social phenomenon and other literature that attempts to differentiate law from other institutional means of social control, he might have forced himself to define his terms. Malcolm Feeley, asking "whether law is so distinctive a social phenomena that it can serve as a *core* concept in the development of general social theory," concludes that it probably cannot.[66] "Law," Feeley observes, "does not perform a unique social function, nor is it a singular form of

63. *Id.* at 167.

64. *Id.* at 42.

65. Howard, *Adjudication Considered as a Process of Conflict Resolution: A Variation on the Separation of Powers*, 18 J. PUB. L. 339, 340 (1969).

66. Feeley, *The Concept of Laws in Social Science: A Critique and Notes on an Expanded View*, 10 LAW & SOC'Y REV. 497, 501 (1976).

social control."[67] Legal rules "are only one of a number of systems of rules, often overlapping and entwined, which shape people's aspirations and actions, and by which they are judged and resolve their troubles."[68]

Despite such arguments, most of us are believers. We do see law as something different from other social phenomena. This belief, which is part of the so-called myth of rights, in turn has its effects. According to Scheingold: "The law is real, but it is also a figment of our imaginations. Like all fundamental social institutions it casts a shadow of popular belief that may ultimately be more significant, albeit more difficult to comprehend, than the authorities, rules and penalties that we ordinarily associate with law."[69] If law is real in this sense and if by extension there are courts, specialized social institutions that interpret law in particular ways, then we must take pains to define courts' quintessential elements if we are to study them. Horowitz, however, chooses not to do so, causing confusion in the remainder of his analysis.

A point of orientation is provided by Theodore Becker, who has defined a court as:

> (1) a man or body of men (2) with power to decide a dispute, (3) before whom the parties or advocates or their surrogates present the facts of the dispute and cite existent, expressed, primary normative principles (in statutes, constitutions, rules, previous cases) that (4) are applied by that man or those men, (5) who *believe* that they should listen to the presentation of facts and apply such cited normative principles impartially, objectively, or with detachment . . . and (6) that they may so decide, and (7) as an independent body.[70]

Independence and impartiality are particularly important. If our standards were that persons called judges had to be fully independent of either their society or their own values, there would be no judicial independence "and thus there would be no courts." A judge is impartial, however, as he or she "is dependent upon the law (bound to interpret and apply it)."[71]

Others have identified key elements of legality similar to Becker's conceptualization, emphasizing in particular the use of reason and deliberateness or, in sum, formality. A legal solution thus is one characterized by the taking of time "for *deliberate* action, for *articulate* definition of the issues, for a decision which is

67. *Id.*
68. *Id.*
69. SCHEINGOLD, *supra* note 2, at 3.
70. T. BECKER, COMPARATIVE JUDICIAL POLITICS: THE POLITICAL FUNCTIONINGS OF COURTS 13 (1970).
71. *Id.* at 144.

subject to *public scrutiny* and which is *objective* in the sense that it reflects an explicit community judgment and not merely an explicitly personal judgment."[72] The point is not which of these elements, if any, Horowitz should have adopted; the point is that he casually uses the term "judicial" without making any effort to grapple with these conceptualizations.

In one of his principal themes, Horowitz says that the judicial process is "prone to carve up related transactions and to treat as separate those events and relationships that are intertwined in social life."[73] Legal reasoning, he asserts, is nonprobabilistic, "every-last-case reasoning, rather than run-of-the-cases reasoning."[74] Judges, he insists, are preoccupied with individual cases and seldom think about the representativeness of cases before them. The result is piecemeal policy making, "hardly an optimal mode of general decisionmaking."[75] This "expenditure of social resources on individual complaints, one at a time," which provides the "distinctiveness of the judicial process," he concludes, "is what unfits the courts for much of the important work of government."[76]

Horowitz does not realize that incremental decisions characterize most policymaking.[77] Administrative agencies also are criticized for failing to make more frequent use of rulemaking and for placing predominant reliance on a case-by-case approach. On the other hand, policy made one-case-at-a-time does not necessarily imply ad hoc decisionmaking. Judges often do think down the line to the next case, often in the form of questions from the bench about the implications of their rulings[78] and often in a more formal manner. For example, the federal courts of appeals have developed procedures for dealing with cases that raise common issues: panels with similar cases must communicate with each other to avoid conflict,[79] and *en*

72. H. BERMAN & W. GREINER, THE NATURE AND FUNCTIONS OF LAW 26 (3d ed. 1972).

73. HOROWITZ, *supra* note 22, at 260.

74. *Id.* at 32.

75. *Id.* at 268.

76. *Id.* at 298.

77. The classic statement on incrementalism is Lindblom, *The Science of "Muddling Through,"* 19 PUB. AD. REV. 79 (1959). For the most cogent argument that best describes judicial decisionmaking, see Shapiro, *Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis,* 2 LAW IN TRANSITION Q. 134, 155 (1965): "The theory of incrementalism may explain, or at least describe, the phenomena of stability and gradual change in law just as well or better than stare decisis. . . ."

78. WASBY, D'AMATO, & METRAILER, *supra* note 32, at 367-68, provides some examples with respect to the *Rachel* and *Peacock* removal cases. City of Greenwood v. Peacock, 384 U.S. 808 (1966); Georgia v. Rachel, 384 U.S. 780 (1966).

79. *See* Wasby, *Communication Within the Ninth Circuit Court of Appeals: The View from the Bench,* 8 GOLDEN GATE U.L. REV. (forthcoming, 1978).

banc courts may be convened when a broad new rule is required. Moreover, in order to focus on underlying policy issues, the Supreme Court has encouraged petitioners for certiorari to emphasize the broad relevance of their cases, and the Court has often joined cases into groups;[80] as Horowitz notes, the clerk designated as "E.C." (*Escobedo* cases) those raising what became the *Miranda* question after *Escobedo* was decided. Nor does Horowitz take into account rules developed by the federal courts to apply to certain classes of cases[81] or the development of the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence. Furthermore, although Horowitz admits that not all judicial decisions are made on an ad hoc basis when he refers to the "increasing subordination of the individual case in judicial policymaking,"[82] with justice suffering as a result, he does not reconcile this theme with his stress on the case-by-case approach to policymaking.

Horowitz never seems sure where he wishes to place blame for the faults he finds in adjudication. He places most of it on the judges, who are, he says generalists as a result of recruitment, socialization, and pressures from the flow of their work.[83] Although his argument seems to be that the difficulties are systemic, that is, inherent in the judicial system, he fails to recognize that they may simply result from inadequate preparation and training, factors to which we have only recently begun to give serious attention.

Problems caused by "impatience or inexperience or inadvertence"[84] are not systemic; similarly, if judges "often have little tolerance for advance detail" because they "are not recruited for their managerial interest or aptitude,"[85] training can be provided.[86] Ignoring Chief Justice Burger's suggestion that many lawyers arguing in

80. WASBY, D'AMATO, & METRAILER, *supra* note 32, at 16, 38, 54, 64-67, 303, 311, 325, 333, 335, 414-15.

81. *See, e.g.*, General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133 (W.D. Mo. 1968).

82. HOROWITZ, *supra* note 22, at 9.

83. Yet there is some specialization which does not meet the eye. Horowitz argues that on the U.S. Courts of Appeals, "the continuous reshuffling of panel members leaves little room for a division of labor or the development of spheres of expertise." *Id.* at 30. Even in the larger circuits, judges monitor and comment on cases of interest from other panels in particular areas of the law in which they have some expertise. For example, one judge whose specialty before taking the bench was antitrust reads and comments on all the antitrust cases in his circuit.

84. *Id.* at 139.

85. *Id.* at 266.

86. For example, through seminars at the Federal Judicial Center and the National College of the Judiciary.

federal court are not competent, Horowitz fails to acknowledge their responsibility for the deficiencies in our system of adjudication. He does acknowledge the lawyers' role in formulating the issue in *Hobson v. Hansen,* but fails to carry his analysis one step further to consider whether the attorneys, by not anticipating the effects of *Hobson I,* should bear as much responsibility as the judge for the court's inability to predict *Hobson II.* In his discussion of *Area-Wide Council,* he says that there is "no evidence" that any of the background underlying the "widespread participation" language of the Model Cities Act was brought to the court's attention.[87] This, of course, was the responsibility of the lawyers in the case. Horowitz makes the strange argument that the lawyers in the case had no reason to be "versed in the nuances of various social programs that occupy the time of politicians and bureaucrats."[88] Why else, one might ask, do we provide attorneys for government agencies? Are lawyers for the Department of Housing and Urban Development to be less responsible for staying abreast of developments affecting their agency than are judges?[89]

C. *The Relative Capacity of Courts*

Because Horowitz fails to compare courts systematically with legislatures and administrative agencies, his treatment of the differences between the institutions is wholly inadequate. Quite early he claims that "there is as of now no basis for firm conclusions about the relative capacities of our institutions."[90] At the book's end, when the author concedes that other institutions are also flawed ("there is plenty of incapacity for officials to share"[91]), he says that the question of "relative institutional capacity" has "stalked" the book.[92] It is more appropriate to say that it lags far behind. To demonstrate the incapacity of courts to solve social problems does

87. HOROWITZ, *supra* note 22, at 88. It appears, however, that Horowitz did not examine the briefs to ascertain what information was given the court.

88. *Id.*

89. The government's attorneys at times lack even more basic information. In a recent case against a county official charged with fraud and false swearing, neither an assistant United States Attorney nor his superior knew whether a local government could use Comprehensive Employment Training Act (CETA) employees for in-kind matching contributions or for work regularly done, although the case apparently turned on those matters. Whatever the other complexities of CETA, those were fundamental questions to which answers could have been easily obtained. Moreover, the judges, while modest about their knowledge, obviously knew more about CETA than did the attorneys. United States v. Anderson, Nos. 77-1647, 77-1648 (8th Cir. argued December 12, 1977).

90. HOROWITZ, *supra* note 22, at 24.

91. *Id.* at 293.

92. *Id.* at 294.

not at the same time demonstrate whether the other branches of government would do better. If all policymaking bodies lack capacity, one's prescriptions will be quite different than they would be if only the courts are unable to solve social policy problems.

Horowitz regularly fails to see mistakes committed by the other branches. When he says, "[t]he record suggests that the courts are better equipped with machinery to discover the past than to forecast the future,"[93] he writes in apparent ignorance of the military's renown for fighting the last war and economists' efforts to avoid last decade's recession. He notes that courts have difficulty making advance estimates of the magnitude or direction of the effects of their decisions, but does not mention the failures of legislatures and executive agencies to predict effectively. Judicial correction of policy is intermittent, we are told, but there is no recognition that agencies charged with enforcing legislation do not engage in continuous monitoring. Judicial energy might falter and judges might abandon a problem, but bureaucracies are also inconstant in their pursuit of goals other than self-preservation.[94]

Horowitz also emphasizes that courts are not self-starters. He argues that, because courts are basically dependent on litigants, judges are deprived of control and coordination of policymaking. Most legislative action, however, results only from a series of constituent or interest-group complaints. Indeed, a single individual may be able to get a case through the judicial system more easily than he can get a bill through the legislature. Moreover, what of the frequent criticism of executive agencies and regulatory commissions for their lack of responsiveness to those bringing complaints? The author's concession that "no decisionmaker really sets his own agenda"[95] comes much too late to be helpful. In asserting that courts cannot be self-stoppers—"It is difficult to prevent a judicial deci-

93. *Id.* at 264.

94. Other deficiencies in comparison are numerous:

(a) "The judicial process is less subject to exogenuous political influences than are the other branches" and "there are fewer participants in the adjudicative process than in the legislative process." *Id.* at 22, 23. As to the latter, perhaps, but "exogenuous" is not defined and suhstantial amicus curiae participation in important cases is not discussed.

(b) The judicial process is "among the most public of decision processes." *Id.* at 64. "Sunshine" laws for legislatures and executive agencies make such a statement patently inaccurate. The final results of judicial deliberations fill many volumes, but even in the federal courts most trial court decisions are unreported and an increasing number of federal court rulings are "Not for Publication" although available to the parties. Most crucial is the fact that, while formal procedures are known, outsiders are not present during deliberations.

95. *Id.* at 294.

sion"[96]—Horowitz also fails to recognize that, *particularly* in social policy cases, rules of standing and justiciability are regularly used to avoid decisions; this is quite evident in the Burger Court's rulings on access to the courts.

Had Horowitz desired to be systematic in his treatment of the relative capacities of governmental institutions to solve social problems, he need only have turned to the extremely compact and balanced argument of J. Woodford Howard, Jr., in his 1969 article for the *Journal of Public Law* entitled "Adjudication Considered as a Process of Conflict Resolution: A Variation on the Separation of Powers," which Horowitz characterizes in a footnote as a "partial inventory," but with one minor exception otherwise ignores. Noting similarities as well as differences in the institutions, Howard points out, for example, that both legislators and judges are generalists and, as such, "share common problems of being adequately informed about disputes and in their relations with experts."[97] Legislators, in fact, Howard concludes, are likely to make less effective use of information sources because "debate is less focused and the witnesses and data are often stacked as a means of providing a public record for decisions reached elsewhere and on different evidence."[98]

Playing down the self-generating aspect of legislative action, Howard asserts that "legislatures function most effectively under conditions of outside policy guidance . . . suggest[ing] that differences in initiatives are at best differences in degree."[99] Moreover, Howard observes, "the scope of issues is apt to be broader in legislatures than in courts," with more claimants, interests, and viewpoints exerting pressure in the legislative process than in adjudication.[100] According to Howard, "what differentiates decision-makers are the stimuli they receive and how they may respond within the framework of their office."[101] Neither adjudication nor legislation is more restrained than the other. Rather, "they operate under different sets of constraints."[102] The central distinguishing characteristic

96. *Id.* at 22.

97. Howard, *supra* note 65, at 350.

98. *Id.* at 350-51.

99. *Id.* at 343. However, "dependence on claimants for defining issues and structuring options is apt to be larger in adjudication than in legislation," *id.* at 346; planning and uniformity of policy cannot be easily achieved, with "the choice of cases . . . in the hands of dispersed actors." *Id.* at 367. Moreover, private initiative, "the indispensable starter in judicial enforcement of personal rights," can be restricted either by intimidation or the financial limitations of those wishing to bring cases." *Id.*

100. *Id.* at 346.

101. *Id.* at 343.

102. *Id.* at 360.

of adjudication, he concludes, "is that every choice by every actor except jurors must be publicly accounted for or rationalized every step of the way. No other process of social decision imposes such requirements. In effect, adjudication is controlled by a different system of accountability."[103] Overall, Howard finds adjudication to be an effective technique for policymaking in:

> a relatively narrow range of social conflicts. . . . [I]t works most effectively in concert with other agencies, preferably under circumstances of unified policy goals so that institutional conflict is minimal. Alone, when other actors are stalemated or acquiescent, it may successfully umpire clashing jurisdictional claims and thus unfold the latent meaning of constitutional principles.[104]

IV. Courts and the Impact of Judicial Decisions

Horowitz's case studies lead him to stress "the impotence of the courts to supervise the implementation of their decrees" and "their limited ability to monitor the consequences of their action."[105] The court's decision in *Hobson II*, Horowitz argues, indicates the need for periodic readjustment of judicial decrees. Although he recognizes the difficulty of assessing the influences of *Hobson II* beyond its "fairly clear and direct consequences," Horowitz points out that the ruling affected a wide range of activities. Some effects were "ephemeral," but significant long-range effects, such as better information systems and changed budgetary procedures, also occurred. One important lesson of *Hobson*, says Horowitz, is that judicial decrees require periodic readjustment, something which did not occur in this instance because the parties were reluctant to return to court one more time.

When he turns his attention to *Gault*, Horowitz finds that, while ostensibly procedural, the ruling had broader substantive effects, largely because there was "no way to limit the impact to one discrete segment of the interconnected parts of the juvenile justice system."[106] Trends toward legislative creation of separate categories of juvenile offenders, particularly PINS (persons in need of supervision), and toward diversion from formal proceedings accelerated, and delinquency simultaneously became more criminalized at least for serious offenses. These broad effects of *Gault*, however, were limited by the Court's misunderstanding of the role of lawyers in juvenile proceedings. The Court assumed—mistakenly, Horowitz contends—that the decision would result in more formalized juve-

103. *Id.* at 349.
104. *Id.* at 369.
105. Horowitz, *supra* note 22, at 264.
106. *Id.* at 218.

nile court procedures and presumably more contested dispositions as lawyers became involved on a routine basis. Lawyers, it turns out, appear much less often than the Court anticipated.[107] In addition, juvenile defense attorneys, who often share the values of the court, engage in plea-bargaining on behalf of their clients, and urge their clients to "tell the truth" rather than to avail themselves of their fifth amendment right to remain silent. Not only did these aspects of the lawyers' posture not help juvenile defendants but in some situations represented juveniles actually received more severe sentences. Unfortunately, Horowitz's discussion of *Gault*'s effect is flawed by his failure to take into account that aspect of the ruling which said that the decision required counsel only where institutionalization might result. Nor does Horowitz discuss juvenile court officers' habit of letting the disposition dictate the procedure they use or judges' practice of avoiding *Gault*-specified procedures by deciding first that no institutionalization will be required.[108]

Horowitz also fails to take into account two other critical "environmental" factors, changes in the age of majority and judicial assignment procedures. Different juvenile court "styles" are mentioned but not whether a judge is a permanent full-time juvenile court judge rather than a regular trial judge wearing a juvenile judge hat part-time; the former, particularly if in their positions for a long time, would be more sympathetic to the aims of the juvenile court movement than the latter.[109] If retaining a juvenile in custody until his or her majority means retention only until age eighteen instead of age twenty-one, prosecutors may prefer to proceed against a seventeen-year-old as an adult, thus further reinforcing the trend, which *Gault* accelerated, toward criminalizing serious offenses committed by juveniles.

In another case study, careful examination of the post-*Mapp* studies, particularly the work of Bradley Canon,[110] and identifica-

107. *Id.* at 187.

108. *See* Lefstein, Stapleton, & Teitlebaum, *In Search of Juvenile Justice: Gault and Its Implementation*, 3 LAW & SOC'Y REV. 491, 496 & n.7.

109. *See* Canon & Kolson, *Rural Compliance with Gault: Kentucky, A Case Study*, 10 J. FAM. L. 300 (1971) (not cited by Horowitz).

110. He cites "Taking Advantage of a Quasi-Experiment Situation: The Impact of *Mapp v. Ohio*" (paper presented by B. Canon at the American Political Science Association meetings, 1974), and (later), Canon, *Organizational Contumacy and the Transmission of Judicial Policies: The* Mapp, Escobedo, Miranda, *and* Gault *Cases*, 20 VILL. L. REV. 50 (1974). The former can be found, revised, as *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels*, 5 AM. POL. Q. 57 (1977). However, Canon's more extensive *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Preciptious Conclusion*, 62 KY. L.J. 681 (1973-1974), is not cited, nor does Horowitz make use of Canon's study of the frequency with which state supreme courts answered important search questions

tion of factors affecting its impact, such as the extent of police knowledge about search law, the offense charged, the kind of police unit involved, and the way cases are handled in court, led Horowitz to conclude that the exclusionary rule has been at least somewhat effective. Its deterrent effect has not been uniform, however, and new police behavior developed, including perjured testimony, harassment of offenders, and illegal arrests to punish criminals where the rules prevented convictions.

Somewhat like the *Gault* Court, the *Mapp* Court assumed the existence of an operating system of formal proceedings in which defense lawyers would raise motions to suppress illegally obtained evidence. The justices, Horowitz contends, did not appreciate that many lawyers do not press illegal search questions and that trial judges often are hostile to having such questions raised.[111] Although *Mapp* (like *Gault)* was decided several years before the Court legitimized plea-bargaining,[112] the failure of the Court to recognize the pervasiveness of plea-bargaining was even more evident. Horowitz suggests that *Mapp*'s effect will be greatest in situations in which the prosecutor screens cases for inadequate or improperly seized evidence and will be far less at the post-indictment stage. Thus *Mapp's* effects may be further reduced by the Court's ruling in *United States v. Calandra,*[113] in which the Court held that the fourth amendment does not require exclusion of improperly seized evidence from grand jury proceedings. *Calandra,* says Horowitz, makes it easier to secure indictments, thus, in combination with *Mapp*'s effects, further encouraging pretrial disposition by plea-bargaining.

Horowitz attributes many of the unanticipated consequences of the decisions he examines to the courts' focus on rights. This produces a tendency to "highlight the proposed innovation and . . . [to] blur into the background the character of the receptacle for that innovation."[114] Moreover, the courts are confined to the reallocation of existing resources and cannot direct the expansion of budgets or the raising of new resources, which are legislative functions.[115]

posed by the applicability of federal search law to the states, certainly a factor in police compliance with fourth amendment rules. Canon, *Reactions of State Supreme Courts to a U.S. Supreme Court Civil Liberties Decision,* 8 LAW & SOC'Y REV. 109 (1973).

111. HOROWITZ, *supra* note 22, at 254.

112. Santobello v. New York, 404 U.S. 257 (1971); North Carolina v. Alford, 400 U.S. 25 (1970); Parker v. North Carolina, 397 U.S. 790 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Brady v. United States, 397 U.S. 742 (1970).

113. 414 U.S. 338 (1974).

114. HOROWITZ, *supra* note 22, at 262.

115. *Id.* at 257-58. Court rulings, of course, can produce pressure for the expansion of governmental expenditures and bureaucrats seeking larger budgets try to manipulate courts

Because courts assume "that they are working with more or less uniform situations for which a single rule will suffice,"[116] Horowitz believes they "find it difficult to devise a coherent program of action."[117] At the mercy of subsequent events and mainly dependent on subsequent litigation to correct the inadequacies in their initial rulings, courts thus are unable to minimize the unintended consequences of their rulings.

As with other questions, Horowitz seems unsure where to place responsibility for providing judges with feedback in order to assist them with implementation of their rulings. Because of the government's problems with external monitors, he prefers to give primary responsibility to litigants, their attorneys, and the judges themselves. However, he seems unhappy about the methods that lawyers and judges have developed, finding "a mark of the increasing overlap between courts and administrators" in the requirements of "periodic compliance reports" which some decrees contain.[118] Horowitz also argues that monitoring of the effects of a case belongs in the bureaucracy when such monitoring "edges over into constant supervision, or if the latter is what is really required."[119] Despite these problems, Horowitz looks with favor on having cases return to court because decrees can then be recalibrated. If judges and lawyers have enough energy, he says, "no redefinition of the 'right' and recalibration of the 'remedy' is necessarily the last."[120] Thus he finds the recurring nature of *Area-Wide Council* and *Hobson* encouraging. One way in which courts may ascertain appropriate information about implementation is for the judges to ask lawyers to propose additional alternative remedies. Here, Horowitz makes the ingenious suggestion that the winning party, instead of formulating only a single-option decree, should put forth every available alternative, specifying the consequences of each.[121] Still another option is for courts to retain jurisdiction over a case, thus removing the plaintiff's

to obtain such decrees. Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972), a ruling on expenditures for the District of Columbia's special problem children, is used by Horowitz as an example in which such attempted manipulation did not succeed, leaving only redistribution.

116. HOROWITZ, *supra* note 22, at 261.

117. *Id.* at 22.

118. *Id.* at 55.

119. *Id.* at 293. An additional complication, *federal* court supervision of *state* officials, is not considered. *See* O'Shea v. Littleton, 414 U.S. 488 (1973) (judges' allegedly discriminatory practices); Gilligan v. Morgan, 413 U.S. 1 (1973) (Ohio National Guard riot control rules).

120. HOROWITZ, *supra* note 22, at 167.

121. *Id.* at 288.

burden of having to return to court with renewed litigation. Masters can also be appointed to oversee the implementation of a decision and to make recommendations to the judge.

Horowitz underestimates judges' information about the effects of their decisions.[122] Our expectations of what judges should do make it difficult for them to speak openly about the subject or, when they do, to disclaim that it affects their rulings on the merits, as Justice Powell did in his opinion for the Court in *San Antonio Independent School Dist. v. Rodriguez*[123] in adverting to the financial turmoil that would have resulted from invalidation of the property tax for school financing purposes.[124] Other Supreme Court opinions reveal the justices' awareness of potential effects. For example, in refusing to apply certain rules of criminal procedure retroactively, the Court regularly has spoken of the effect of retroactive application on the administration of justice. That the Court's refusal to give retroactive effect to most of those rules may well have been based upon strategic considerations,[125] indicates not only that the justices are aware of the potential effects of their rulings, but that they *act* on that knowledge. Moreover, the justices' explicit use of the effect on criminal justice as a criterion in these cases also indicates that what Horowitz calls "costing" may enter litigation not merely "through the back door,"[126] but directly as well.

Where does Horowitz's discussion of implementation and impact fit into the literature? He provides effective criticism of impact studies when he asserts that:

> (1) . . . the significance of court decisions is not primarily measured in terms of compliance, (2) [but] it lies heavily in the consequences of compliance (often in second-order consequences), (3) in consequences registered in other forums besides the intended forums, and (4) sometimes in consequences produced as much by the interaction of several court decisions as by any one of them.[127]

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122. Horowitz says that "of course" the Court's change in position on the compulsory flag salute case, from Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940), to West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), had nothing to do with the first ruling's effects, HOROWITZ, *supra* note 22, at 55, but this ignores the strong likelihood that the justices were aware that Jehovah's Witnesses had been persecuted and their buildings burned. *See* Manwaring, *The Flag Salute Case*, in THE THIRD BRANCH OF GOVERNMENT: 8 CASES IN CONSTITUTIONAL POLITICS 27-28 (H. Pritchett & A. Westin eds. 1963).

123. 411 U.S. 1 (1973).

124. *Id.* at 56 n.111.

125. Fahlund, *Retroactivity and the Warren Court: The Strategy of a Revolution*, 35 J. POL. 570 (1973).

126. HOROWITZ, *supra* note 22, at 34. Considerations of cost, of course, regularly figure in the disposition of torts claims. *See, e.g.*, Douglas, *Vicarious Liability and Administration of Risk* and Calabresi, *The Costs of Accidents*, in PERSPECTIVES ON TORT LAW 109, 142 (R. Rabin ed. 1976).

127. HOROWITZ, *supra* note 22, at 287. On the last point, I have suggested elsewhere that

He has problems, however, with certain basic concepts. Evasion of rulings is one useful concept from the literature of which he does not avail himself.[128] More important, he refers to the "implications" of cases, particularly in his discussion of *Area-Wide Council* and, to a lesser extent, *Gault.* Lawyers have long discussed the *implications* of rulings, but such speculations are not the same as specifying what happens when a case is handed down in terms of how it is *implemented* or in terms of its actual *impact.*

Horowitz also misses other important aspects of the literature. For example, his statement that "the lawsuit and the court decree are often thought to be more powerful moral influences than are alternative avenues of problem solving"[129] is at odds with the proposition that the executive and particularly the legislative branches are more legitimate sources of law for bringing about social change than are the courts.[130] In addition, the author totally ignores the burgeoning policy analysis literature, which could have assisted not only in his consideration of implementation, revealing difficulties that legislatures and administrative agencies have experienced,[131] but also with the broader questions of institutional capacity and the reliance of courts upon social research.[132]

Despite Horowitz's measured evaluation of *Mapp,* his general view of what we should expect the courts to accomplish seems unleavened by the realization that less than full compliance and even some resistance must be expected. As Baum has recently pointed out, we tend to gauge the response to Supreme Court decisions by an impossibly high standard in which a mixed reaction to the ruling is seen as failure.[133] Instead, we should be aware that "no policymaker can expect complete acceptance of its policies by other institutions that are subject to competing influences, and even partial

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the effect of a line of cases would be greater than the effect of a single case. WASBY, *supra* note 21, at 247.

128. *Id.* at 30-32.

129. HOROWITZ, *supra* note 22, at 22.

130. Evan, *Law as an Instrument of Social Change,* in APPLIED SOCIOLOGY 285-91 (A. Gouldner & S. Miller eds. 1965).

131. M. DERTHICK, NEW TOWNS IN TOWN: WHY A FEDERAL PROGRAM FAILED (1972); J. PRESSMAN & A. WILDAVSKY, IMPLEMENTATION (1973). *See also* Van Horn & Van Meter, *The Implementation of Intergovernmental Policy,* in PUBLIC POLICY MAKING IN A FEDERAL SYSTEM 39 (C. Jones & R. Thomas eds. 1976).

132. *See* Cook & Scioli, *Impact Analysis in Public Policy Research,* in PUBLIC POLICY EVALUATION 95 (K. Dolbeare ed. 1975); Caplan, *Social Research and National Policy: What Gets Used, by Whom, for What Purposes, and With What Effect?,* 28 INT'L SOC. SCI. J. 187 (1976); Jones, *Why Congress Can't Do Policy Analysis,* 2 POLICY ANALYSIS 251 (1976). For a good introduction, see POLICY STUDIES REVIEW ANNUAL, (S. Nagel ed. 1977).

133. Baum, *Lower-Court Response to Supreme Court Policies: Reconsidering a Negative Picture,* 4 JUST. SYS. J. (forthcoming, 1978).

acceptance is often difficult to achieve."[134] The Court cannot provide definitive rulings in all policy areas or review more than a relatively few lower court decisions, thus allowing lower courts much latitude in generating policy. Indeed, the relationship between the Supreme Court and the lower federal courts is not unlike the relationship between any superior and subordinates who, at least some of the time, through delay and avoidance can constrain considerably what the superior attempts to accomplish.[135]

Part of Horowitz's difficulty here may stem from a faulty view of the role of adjudication in the overall pattern of societal dispute settlement. He complains that "the lawsuit can increasingly be thought of [as] an option more or less interchangeable with options in other forums"[136] and claims that adjudication is inappropriate "for those problems best resolved by a process of negotiation."[137] At least since the NAACP began its attack on racial discrimination,[138] it should hardly be surprising that disgruntled parties seek favorable policy where they can find it. Even earlier, courts served as alternative dispute-settlement and policymaking forums when the advantaged (the Liberty Lobby rather than the NAACP) turned to them for help to avoid what they saw as the ravages of state and federal economic regulation.

Courts not only are a place of retreat after defeat elsewhere, but litigation is often another step in an ongoing process.[139] Horowitz, however, recognizes neither that cases come to court after negotiation has broken down nor that negotiation does not cease when a case is filed. Cases often are settled once they are well along in the judicial process.[140] Perhaps Howard has put it best: "Adjudication usually comes somewhere in the middle of conflict resoluton se-

134. *Id.*

135. Baum, *Implementation of Judicial Decisions: An Organizational Analysis*, 4 AM. POL. Q. 86 (1976); Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017 (1959).

136. HOROWITZ, *supra* note 22, at 10.

137. *Id.* at 22-23.

138. *See* R. KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION (1976); C. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES (1959).

139. As two commentators have observed, "Adjudication often is only a phase or tactic in ongoing processes of conflict resolution." Sarat & Grossman, *Courts and Conflict Resolution: Problems in the Mobilization of Adjudication*, 69 AM. POL. SCI. REV. 1200, 1213 (1975).

140. *See* Benjamin & Morris, *The Appellate Settlement Conference: A Procedure Whose Time Has Come*, 62 A.B.A.J. 1433 (1976); "The Appellate Settlement Conference: An Effective Procedural Reform" (paper presented by J. Goldman to the American Political Science Association, 1977). Indeed, my observation of oral argument of a number of National Labor Relations Board cases in the Eighth Circuit revealed that appellate judges at times from the bench encourage settlements.

quences. Thus it serves less to avoid conflict than to channel and resolve disputes already begun."[141] As the literature on implementation and impact indicates, adjudication does not end matters. Instead of saying that "the law is what the judges say it is," we need to realize that it is more accurate to say that "the law is what the judges say it is, after all others have had their say."[142]

V. JUDICIAL RELIANCE UPON SOCIAL SCIENCE DATA

Courts long have been faced with facts drawn from social research. A change in the use to which social science data have been put, however, has created a problem. In the Brandeis brief, developed to show the *existence* of social facts on which the legislature could have based its decision to pass a statute, the *validity* of facts was not an issue. Yet the validity of social facts did come very much into issue when litigants turned from trying to sustain legislation to attacking it.[143] The problems involved in judicial attempts to use social facts and particularly social science research have been noted in the literature,[144] and Horowitz handles the issue quite well.

Horowitz shows the relation between the impact of judicial decisions and courts' use of social facts: "[S]ources of judicial information can affect not only the soundness of a decision, but also its legitimacy and ultimately its impact."[145] As he notes, the Supreme Court's reliance on police interrogation manuals in *Miranda v. Arizona*[146] led police to think that the Court had inaccurate information about police practices, which affected not only the soundness but also the impact of the decision.[147] The Court's famous footnote

141. Howard, *supra* note 65, at 339.

142. WASBY, *supra* note 21, at 21.

143. *See* P. ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE (1972), reviewed by Wasby, 18 VILL. L. REV. 519 (1973).

144. "As the legal questions of school desegregation have become more and more complex . . ., social science research has become less certain and more debatable—or at least it seems so to many lawyers and judges." Levin & Moise, *School Desegregation Litigation in the Seventies and the Use of Social Science Evidence: An Annotated Guide*, 39 LAW & CONTEMP. PROB. 50, 55 (1975). "The process of informing the judicial mind in prominent constitutional cases is far more complicated than is suggested by the traditional conception of the adversary system." Lamb, *Judicial Policy-Making and Information Flow to the Supreme Court*, 29 VAND. L. REV. 46, 61 (1976). *See also* the comments by Judge William Doyle (10th Circuit), *supra* note 8, at 10-11.

145. HOROWITZ, *supra* note 22, at 278. *Cf.* Miller & Barron, *The Supreme Court, The Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1222 (1975) ("Compliance with law can be frustrated when access to the information upon which a decision is based is needlessly restricted.").

146. 384 U.S. 436 (1966).

147. HOROWITZ, *supra* note 22, at 277-78.

eleven in *Brown v. Board of Education*[148] provides another example in which the use of social facts hindered the legitimacy of the Court's decision.[149] The Court's use of social facts also can facilitate acceptance, as in *Terry v. Ohio,*[150] in which the Court used information on the danger to officers on the street presented in an amicus brief by Americans for Effective Law Enforcement.

Looking at judicial treatment of social facts in the *Area-Wide Council* case, the author stresses the court's lack of knowledge of the recurrent nature of disputes between citizen groups and Model Cities administrators and of the heterogeneity of situations to be affected by a single judicial order. *Hobson* demonstrates that when the data are inconclusive, the party with the burden of proof invariably loses. The case also reveals the interplay of empirical economic questions with legal questions: legal questions determine what empirical facts are relevant, and the empirical facts presented affect the legal rulings. Horowitz argues that social science, even if it did not produce the result in *Hobson,* certainly hardened the court's determination to come to the conclusion it reached, in part because important qualifications about the relation between expenditures and educational quality were lost in the translation of the data into the summaries that were submitted to the court as evidence.[151]

In *Gault,* social science findings also were important, reinforcing the Court's commitment to the use of formal procedure in juvenile proceedings. Skeptical about the juvenile courts, the Court was not similarly skeptical about social science. The tentative nature of social science findings about the negative relation between informal juvenile court proceedings and juveniles' rehabilitation was suppressed because the justices relied on secondary materials that were not tentative. Disconfirming evidence about the relationship came only after the ruling.

Horowitz says that courts generally have only a modest competence to find social facts. On the whole, they pay too little attention to social facts and process information about them unsatisfactorily. Courts do not even do well with facts about other courts, as the *Gault* and *Mapp* case studies demonstrate. Judicial factfinding is particularly ill-adapted to ascertaining social facts, which are different from the legal facts needed for deciding particular cases. Just as there is an inescapable tension between the unique facts of a

148. 347 U.S. at 494 n.11.

149. *See* WASBY, D'AMATO, & METRAILER, *supra* note 32, at 103-05.

150. 392 U.S. 1 (1968).

151. HOROWITZ, *supra* note 22, at 279.

given case and the recurrent facts of a pattern of cases, so are there "fundamental differences between legal inquiry and social science inquiry."[152] The adversary process, Horowitz argues, obfuscates behavioral issues. Judges' dependence on summaries of social scientists' research, problems with expert testimony, and rules of evidence all create difficulties, as does the fact that appellate courts generally are foreclosed by the "clearly erroneous" evidentiary rule from addressing social facts on appeal. Moreover

> on the one hand, the piecemeal character of adjudication tends to distort social facts in the direction of isolating related phenomena; on the other hand, the emphasis on the individual litigants' case and the reliance on formal rather than behavioral materials both distort social facts in the direction of a usually fictitious uniformity.[153]

Horowitz says judges, distant from the facts with which they have to deal, are "likely to be doubly unimformed, on particulars and on context."[154] Just as he underestimated judges' awareness of the potential effects of their decisions, he underestimates their knowledge of the social facts that are an ingredient of those decisions, although he concedes that judges are "very much immersed in the general culture."[155] It is, however, clear that, like most lawyers, judges generally are ignorant of social science methods and techniques.[156]

Changes in the ways in which courts obtain and process social science data are necessary. Courts should not be limited to considering only those facts that the litigants before them choose to reveal. Miller and Barron have suggested that judges, instead of taking judicial notice of facts which are in controversy, could "remand the issue of the taking of judicial notice of a particular issue of legislative fact to the trial court."[157] Rules for judicial notice of legislative facts could also be adopted. Courts also could ask for further briefs on legislative facts or could ask the Solicitor General to brief the broad aspects of a controversy.[158] These suggestions fit in with the

152. *Id.* at 274.

153. *Id.* at 262.

154. *Id.* at 31.

155. *Id.* at 56.

156. Only a few of the nation's law schools have had (or have) the capability to train law students in social science (resisted by most law students when it is available), and programs developed to teach lawyers about social science, in particular the National Science Foundation's SSMILE (Social Science Methods in Legal Education) program, have not been able to reach very many.

157. Miller & Barron, *supra* note 145, at 1233-34.

158. They also raise the question of a panel of resident social scientists but feel the incompatibility between social science data and the adversary method would make this ineffective.

idea, consonant with the bias against advisory opinions we find in adversary process, that the facts are to be as fully developed as possible before a case comes to court. Like the doctrines of primary jurisdiction and exhaustion of remedies, they are devices to have the facts developed by those with the appropriate expertise. These remedies are also very much in tune with feeling that in a democracy the appropriate place for fact-finding is not the courts, another explanation of judges' reluctance to deal with social facts regardless of competence, but one which Horowitz does not discuss. Because he assumes additional problems would result from adoption of changes in the methods that courts use to obtain data beyond that put before them, Horowitz shies away from providing the courts with the increased ability to inform themselves, although he does suggest some modest changes in both the rules of evidence and appellate review. Yet he does not take the position that the courts should avoid data. Instead, he argues that if courts placed more reliance on social data, judges would see how unclear answers are and thus would be more cautious about prescribing solutions to complex social problems by means of broad, uniform legal rules. This position, however, seems to leave Horowitz wanting to have it both ways, the result of which would be to leave the courts in their present muddle.

VI. Conclusion: The Courts and the Consideration of Judicial Capacity

Even if one takes serious exception to many of Horowitz's arguments, one need not disagree with the proposition that judges should consider judicial capacity before accepting a case or in rendering decisions and formulating their decrees. Horowitz himself provides a reasonable summary of some questions judges might ask:

> whether the situation they propose to control is too fluid to grasp by means short of day-to-day management; whether the case is representative of some universe of cases onto which a rule can be fastened; whether the social milieu is too diverse for a single rule; whether there are sufficient incentives to induce those formally subject to the court's orders to adopt the court's goals and implement them in other than perverse ways; whether the interaction of several targets will combine "chemically" to transform the decree on the ground; and whether the court can find out what is happening to its decree after the decree has been rendered.[159]

Rather than developing a new set of questions for determining capacity, the best way to conclude this examination of the Horowitz

159. Horowitz, *supra* note 22, at 273.

volume is to present a brief summary of a cogent preliminary study of judicial capacity recently developed by Lief Carter, which provides a model for analysis of the judicial capacity issue. The types of questions usually asked about judicial policymaking, Carter asserts, include first, whether judicial review is democratic; second, whether a court decided wisely in a particular case; and third, whether its legal reasoning was of high quality.[160] Elements of the wisdom of a court's particular decision, such as whether a court in a given instance adopts empirically sound assumptions and whether a court's solution produces the intended consequences, are among the types of questions Horowitz asks in his case studies. A fourth type of question concerns "the capacity of courts to respond to problems effectively," says Carter, adding that "we may assess effectiveness both in isolation and in comparison with the institutional characteristics of other policy-making bodies."[161]

For an institution to qualify as appropriate to deal with a given problem, Carter maintains that its policy must "accord with fundamental, widely shared beliefs about acceptable governmental action;" its policy must "carry some plausible hope of alleviating the problem;" and its promulgation and implementation of the policy must not "destroy the position and authority of the policy's source."[162] Carter identifies four pairs of criteria that an institution must satisfy. In each pair, the second element "examines whether, regardless of the skills of members of a given policy-making institution (PMI), any other PMI is equally or better prepared to proceed, and whether alternative policy sources, even if they may be better equipped technically to proceed, will in fact do so."[163] Thus Carter injects into the discussion both *comparative capacity* and the *will to proceed,* the first of which Horowitz considers only haphazardly and the latter virtually not at all.

Carter's four technical criteria are: (1) *familiarity* with the language in which a policy problem is articulated and an *understanding* about "cause-and-effect beliefs that define the existence of a problem in the first place;"[164] (2) *reliable access to information* bearing on the causes of the problem, on all solutions proposed and on their direct and indirect consequences, on targets, and on strategies for implementation; (3) *the ability to reformulate*

160. Carter, *When Courts Should Make Policy: An Institutional Approach,* in PUBLIC LAW AND PUBLIC POLICY 141, 142-43 (J. Gardiner ed. 1977).

161. *Id.* at 144.

162. *Id.* at 145.

163. *Id.* at 146.

164. *Id.* at 145.

policy when new information is obtained; and (4) once there is *agreement* that a problem exists and on perceptions of the problem, the *public's belief* that the institution's authority and competence match the problem, so that affected target populations will not ignore policy initiatives regardless of their content.

These criteria of technical competence, effective information processing, and political acceptability, Carter says, "will support different conclusions at different times as policy moves generate new information and as political conditions and public values change."[165] Courts were the appropriate institutions to act on desegregation in 1954, when no one else would act and when there was no bureaucratic machinery to enforce policies, but subsequent policy changes and changes in the composition of the electorate now complicate that picture.

Applying his criteria, Carter finds judicial intervention clearly inappropriate for the solution of substantive due process issues and for determination of policy issues like the bombing of Cambodia, in the latter because the courts had no control over implementation and no routinized access to information about international negotiations. On the other hand, judicial action on reapportionment and criminal procedure issues was appropriate. On the question of reapportionment, Carter contends, the legislature would not act, there were no clear costs for the courts to intervene, the courts could operate from a philosophically powerful set of assumptions, and the availability of census data allowed frequent restructuring of districts through litigation.[166] On criminal procedure issues, the goal of avoiding excessive police power was widely shared, the legislatures and police were not likely to act, and because the questions arose out of the legal system itself, the judges would be familiar with the language and with the problems of confessions and lack of counsel.[167] (One must remember, however, Horowitz's well-developed point that the justices did not do well with either *Gault* or *Mapp* despite such presumed familiarity.)

Carter finds judicial intervention to be less appropriate in three other policy areas—abortion, the death penalty, and racially preferential policies. On abortion, the affected minority could not force a policy change, but the legal and political traditions on which the Court drew were not as clear as those, for example, on the issue of school prayer, in which "the bulk of the indicators justify judicial

165. *Id.* at 148.
166. *Id.* at 149-50.
167. *Id.* at 150.

intervention."[168] Moreover, new empirical scientific findings could necessitate invalidating a decision on abortion. In dealing with the issue of the death penalty, Carter contends, there is no clear constitutional norm on which the judges could draw. Empirical questions about its effect are as yet unresolved, the issue can be bargained politically, and intense and broad retributive feelings pose risks for the courts.[169]

Carter's analysis leads him to suggest that judges in some instances can provide rough but plausible answers to at least these questions:

> Does the case raise problems that men with legal training and experience have any special competence to analyze?
>
> Is this case likely to receive wide or narrow press coverage? Will it likely become a general campaign issue? Will virtually any available policy choice offend widespread political values and interests?
>
> Are other [policy-making institutions] currently actively attempting to deal with this policy issue, or is the policy issue presented to the court tangential or unrelated to issues on current electoral and/or bureaucratic agendas?
>
> To what extent will the public perceive the issue as necessarily embodying values ingrained in both popular political philosophy and constitutional doctrine . . . such that the courts may claim moral competence to make policy? To what extent, conversely, does the court run the risk of being perceived factually wrong?[170]

Such questions, coupled with the items Horowitz notes, provide a good starting point for judges who choose to look at judicial capacity. Effective use of such questions as another element in the mix of concerns judges must face means admitting not only that courts are policymakers but also that they engage in strategy, a thought that many resist because they prefer not to think of courts as political institutions.[171] Yet, if courts are to be effective, they must engage in strategy. Courts should be beacons of principled deliberation, but at the same time, they should not emit sterile pronouncements to which no one pays heed. To be most effective, courts probably should limit the explicitness with which they approach the issues raised here. Their resulting inexplicit methods of approaching these issues will provide the subject matter for much future study. One hopes that such studies will be modeled more on the work of Howard and Carter than on *The Courts and Social Policy*, which through its

168. *Id.* at 151.

169. *Id.* at 153.

170. *Id.* at 155.

171. The few existing analyses of strategy include: W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964); Greenberg, *The Supreme Court, Civil Rights, and Civil Dissonance*, 77 YALE L.J. 1520 (1968); and WASBY, D'AMATO, & METRAILER, *supra* note 32.

failure to be systematic or to approach the subject of judicial capacity in a more straightforward, evenhanded manner, does not assist us in understanding the judicial process as it could have.

THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM. By Randall Bridwell and Ralph U. Whitten. Lexington, Mass.: Lexington Books, 1977. Pp. xv, 206. $18.00.

*Reviewed by Herbert A. Johnson**

This short and tightly written volume will have a major impact upon the legal history of the federal constitution and on the diversity jurisdiction of federal courts. Professors Bridwell and Whitten have undertaken a re-evaluation of the role that common law played in nineteenth-century federal jurisprudence. They question the accepted belief that the doctrine of *Erie Railroad Co. v. Tompkins*[1] has greater historical foundation than the repudiated rule of *Swift v. Tyson*,[2] which permitted the development of federal common law in diversity of citizenship cases. Basic to their argument is the postulate that modern theories of jurisprudence have been read into our historical analysis of the nineteenth-century legal system. The fundamental mistake made by historians is the constant insistence that the language of the cases of the period and the writings about its jurisprudence actually mean what one thinks they should mean by modern standards, rather than what they seem to mean as practiced by people of the period.[3] The results have been misleading, according to the authors, and historians will recognize an indictment of anachronism emerging from their discussion.

While the sources relied upon by the authors of this book are orthodox enough—case reports, statutes, jurisprudential writings, and personal papers—the authors grapple with these materials in new and challenging ways. Fundamental to their study is the historiographical problem of the way in which the early national lawyers

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1. 304 U.S. 64 (1938).

2. 41 U.S. (16 Pet.) 1 (1842).

3. R. BRIDWELL & R. WHITTEN, THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM xiii-xiv (1977).

and judges approached decisionmaking. This question in a number of respects touches upon the traditional debate whether Anglo-American judges find the law or whether they by their decisions actually make new law. Bridwell and Whitten argue convincingly that the evidence proves that before 1860 judges viewed their function as that of rendering decisions that would effectuate the normal expectations of the parties, which in turn were based upon the customary usages of the communities in which the controverted transactions took place, including the trade customs which applied to the case.[4] They observe that, by way of contrast, after 1860 judges began to take a realistic position toward the law and their functions and began to consider rules of law as the commands of a central sovereign authority, based upon and implementing public policy within its political jurisdiction.[5] No longer did law find its origin in customs and usages; rather it was produced either by legislative enactments or by judicial decisions that established rules of conduct and ordered individual expectations along policy lines selected by the legislators and judges.

The authors' evaluation of the role of custom in judicial decisionmaking and their sense of the law-finding function of judges are entitled to very serious consideration. Local custom had a pervasive influence upon the development of law in colonial America and, although that reliance declined somewhat during the eighteenth century, custom and usage were still major elements in the growth and reception of law in the decade preceding the American Revolution.[6] The extent to which the colonial legal system survived the American Revolution remains unknown. Despite William Nelson's carefully researched study of Massachusetts in the period, it remains unclear whether the American Revolution had a substantially disruptive effect in the area of private law or jurisprudence.[7] Certainly Nelson has demonstrated that the community-centered jurisprudence of the colonial period had given way to a more individualistic and laissez-faire economic philosophy by 1830. Yet this in itself is not indicative of an alteration in the methodology of judicial

4. *Id.* at xv, 4-5, 11-14.

5. *Id.* at 116-19, 137.

6. Goebel, *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416 (1931); Haskins, *The Beginnings of Partible Inheritance in the American Colonies*, 51 YALE L.J. 1280 (1942); as to the eighteenth century see Johnson, *English Statutes in Colonial New York*, 58 N.Y. HIST. 277 (1977).

7. W. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1975); *see also* Flaherty, Book Review, 26 U. TORONTO L.J. 108 (1976); Johnson, Book Review, 76 COLUM. L. REV. 713 (1976); Morris, Book Review, 21 AM. J. LEGAL HIST. 86 (1977).

decisionmaking. Indeed the conclusion that the American Revolution worked a dramatic change in the concept of law and in judges' assessment of their functions must await close study of the available judicial writing in the various state courts.

More recently, Morton J. Horwitz has argued that an instrumental approach to judge-made law became increasingly common after 1780, fostered by an altered view of the position of courts in the legal system and by an emerging desire to develop a public policy designed to encourage business enterprise.[8] Bridwell and Whitten comment that "if Horwitz is correct about the American common law system between 1780 and 1860 we are surely wrong"[9] and then proceed to discuss their disagreements with Horwitz. Simply put, they challenge the new approach to law that Horwitz identifies in early nineteenth-century America, claiming that much of the uniqueness disappears when the older system is examined in greater detail without slipping into the anachronism of using twentieth-century methods to examine eighteenth- and nineteenth-century law.[10]

Although the authors correctly emphasize their differences from Professor Horwitz's instrumentalist view, Horwitz's work and that of Nelson must be distinguished from theirs. *The Constitution and the Common Law* must be judged as a study of public law and of the application of private-law rules in a federal context that of necessity injects public-law considerations into what otherwise would be merely private-law cases. There can be no doubt that the American Revolution, coupled with the implementation of two federal constitutions between 1781 and 1790, worked a significant change in American public law. American constitutionalism was not merely a branch of English public law; even before independence, the proximity of separate provinces had created a need for serious legal discussion of conflict of laws rules.[11] The rise of colonial opposition to the Crown had been effectuated through the establishment of various modes of cooperative effort, culminating in a union of separate states with increasingly close constitutional ties with each

8. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 16-30 (1977). For review of the Horwitz volume, see Arnold, Book Review, 126 U. PA. L. REV. 241 (1977); Gilmore, Book Review, 85 YALE L.J. 788 (1977); Bloomfield, Book Review, 30 VAND. L. REV. 1102 (1977). Professor Arnold comments that "much future energy will likely be expended trying to catch Horwitz out" and that the idea that law should be responsible to social forces has "a curiously twentieth century aura." 126 U. PA. L. REV. at 241-42 (1977).

9. BRIDWELL & WHITTEN, *supra* note 3, at 22.

10. *Id.* at 22-29.

11. Johnson, *John Jay: Lawyer in a Time of Transition, 1764-1775*, 124 U. PA. L. REV. 1260, 1283-84 (1976).

other. The Revolution also had generated a confidence in popularly elected legislatures. The successful conduct of the war by a central legislative government and by states dominated by strong legislative power had strengthened American affection for government by positive acts of legislative power. In addition, the independence of the judiciary had been a strong theme of the movement toward revolution, leading one to suspect that American judges may well have had second thoughts about their subordination to the will of the legislative branch of government.[12] Indeed those second thoughts may have been totally submerged in the evolution of the principles of judicial review, first by the state courts, then by the lower federal courts, and finally by the Supreme Court in *Marbury v. Madison.* To suggest in this brief manner that American development from 1776 to 1800 altered the constitutional position of the common-law judges is not to claim that their actions in private-law cases necessarily were influenced by the change. The suggestion, however, does emphasize the need to reconsider the issues of continuity and change in both public and private law betwen 1776 and 1860.

It is at the nexus of public law and private law—the diversity jurisdiction of federal courts—that Bridwell and Whitten have chosen to labor. Carefully reading opinions of the Supreme Court and of the lower federal courts, they spell out in gratifying detail the contours of federal common law jurisdiction. The discussion is extremely perceptive and highlights the characteristic view of federal judges that, in delineating diversity jurisdiction, federal courts must act in conformity with the overall pattern of political and economic federalism inherent in the Constitution. Thus, although state law should be applied in most diversity cases (assuming that appropriate fixed rules were available for this purpose), it would violate the constitutional concept of federalism to apply a state rule that reflected bias against noncitizens of the state. This was the very essence of diversity jurisdiction.[13] From this and numerous other examples, the authors conclude that no simple mechanism for the selection of law, such as that enunciated in *Erie,* should be used by modern federal courts in diversity cases, unless judges are willing to ignore clear constitutional mandates to neutralize state bias against nonresidents.

12. *See* G. WOOD, CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 148-49 (1969); Klein, *Prelude to Revolution in New York: Jury Trials and Judicial Tenure,* 17 WM. & MARY Q., 3d Ser., 439-62 (1960).

13. BRIDWELL & WHITTEN, *supra* note 3, at 11-12, 29-33, 75-76, 81, 105, 131.

Although Bridwell and Whitten argue in favor of the legitimate exercise of federal common-law jurisdiction, given the nineteenth-century view of the Constitution and federalism, they are far from concurring with Professor Crosskey's position that Congress originally was intended to be a supreme legislature and that the Supreme Court was expected to be the judicial head of the United States.[14] Rather they plead the more limited, and more plausible, hypothesis that within the limitations of federalism and separation of powers, federal common-law jurisdiction was exercised more in the nineteenth century than it is today under the *Erie* doctrine.[15] Under the federal constitution, the common law conferred no jurisdiction upon the lower federal courts; that was solely dependent upon constitutional or legislative grant. On the other hand, when the extra-territorial nature of the underlying transaction or the subject matter gave rise to relevant legal issues beyond state lines, federal courts might seek and apply rules of common law from the sources of local custom, general custom, and precedent that were available to them. Federalism required the development of an independent conflict of laws theory and an independent common-law function in federal tribunals when the need arose in diversity cases to protect the rights of nonresidents.[16] Separation of powers, on the other hand, sharply limited the ability of federal courts to apply common-law rules when there was no reservoir of custom or precedent upon which to draw. Thus, although the United States Supreme Court in *United States v. Hudson*[17] decreed that there was no federal common law of crimes and that no indictments would lie except as they were based upon statutes, common-law rules were found and developed on the civil side, for example, in admiralty litigation.[18]

Most convincing are the authors' conclusions concerning jurisdiction, their analysis of styles of decisionmaking in the diversity context, and their appreciation of the impact of federalism and separation of powers as factors limiting the jurisdiction and jurisprudence of federal judges. In other areas, such as the development of commercial law in federal courts, the evidence seems to fit well into the hypothesis that decisions were shaped to conform to the reasonable anticipations of the parties and to neutralize the possi-

14. W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953).

15. BRIDWELL & WHITTEN, *supra* note 3, at xiii.

16. *Id.* at 77-81.

17. 11 U.S. (7 Cranch.) 31 (1812).

18. BRIDWELL & WHITTEN, *supra* note 3, at 37-60.

bility of locally biased rules of law. Yet on balance, there are suggestions in the early case law of the Supreme Court that should lead us to pause before fully accepting the Bridwell-Whitten thesis.

In effectuating the economic goals of the federal consitution, the Supreme Court spelled out the doctrines of sanctity of contract and vested property rights. These workhorse doctrines of constitutional law, of course, are best exemplified by *Fletcher v. Peck*[19] and *Trustees of Dartmouth College v. Woodward,*[20] which are elementary applications of federal protections under the contract clause. On the other hand, in *Huidekoper's Lessee v. Douglass*[21] the Court did not place its reliance upon the contract clause, but rather upon the principle of promissory estoppel in striking down what it considered to be an extraordinary application of state legislative power and ignoring the construction of a Pennsylvania statute by the highest court of the state. In *Fletcher* Chief Justice Marshall spelled out the common law on the power of states to annul grants of title to real property and suggested that it existed apart from the power of the federal government, which under the federal constitution was bound to protect them.[22] Similarly, in *Fairfax's Devisee v. Hunter's Lessee*[23] Justice Story applied English common-law procedures to state sequestration of alien estates, both as a limitation upon state action and as an inherent part of the common law of the American colonies and states.

Sustaining the federal government's right of preference under the Bankruptcy Act of 1800 in *United States v. Fisher,*[24] Chief Justice Marshall found his justification in the power of Congress to adopt provisions to ensure the ability of the federal government to collect sums payable to the public treasury.[25] Marshall's alter ego, Justice Washington, dissented from the majority opinion, contending that the government's preference would make uncertain the property rights of individuals and undermine the stability of private commercial transactions.[26] This and similar cases illustrate a changed emphasis in jurisprudence at a relatively early date. Clearly, as Bridwell and Whitten argue, whenever possible, the federal courts attempted to satisfy the expectations of the parties, and

19. 10 U.S. (6 Cranch.) 48 (1810).
20. 17 U.S. (4 Wheat.) 250 (1819).
21. 7 U.S. (3 Cranch.) 1 (1805).
22. 10 U.S. at 77.
23. 11 U.S. (7 Cranch.) 603 (1813).
24. 6 U.S. (2 Cranch.) 358 (1804).
25. *Id.* at 396.
26. *Id.* at 397.

yet it is also clear that as far as federal jurisprudence was concerned, matters of public policy and a need for judicial positivism asserted an influence over the decisionmaking of the federal judges.

In filing a caveat against the major thesis of *The Constitution and the Common Law,* this reviewer should not be taken as detracting from the importance of the work as a fresh insight and major reinterpretation of the legal and constitutional history of federal law from 1789 to the Civil War. This book does much to illustrate the danger of reading nineteenth-century history through the dark glasses of twentieth-century assumptions concerning the nature and application of law. At the same time, closer historiographic attention needs to be devoted to the influence that an altered public law after 1776 had upon the development of private law in the American states and the federal courts. In posing this challenge to the legal historians working in the field, the authors have made their most valuable contribution.

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