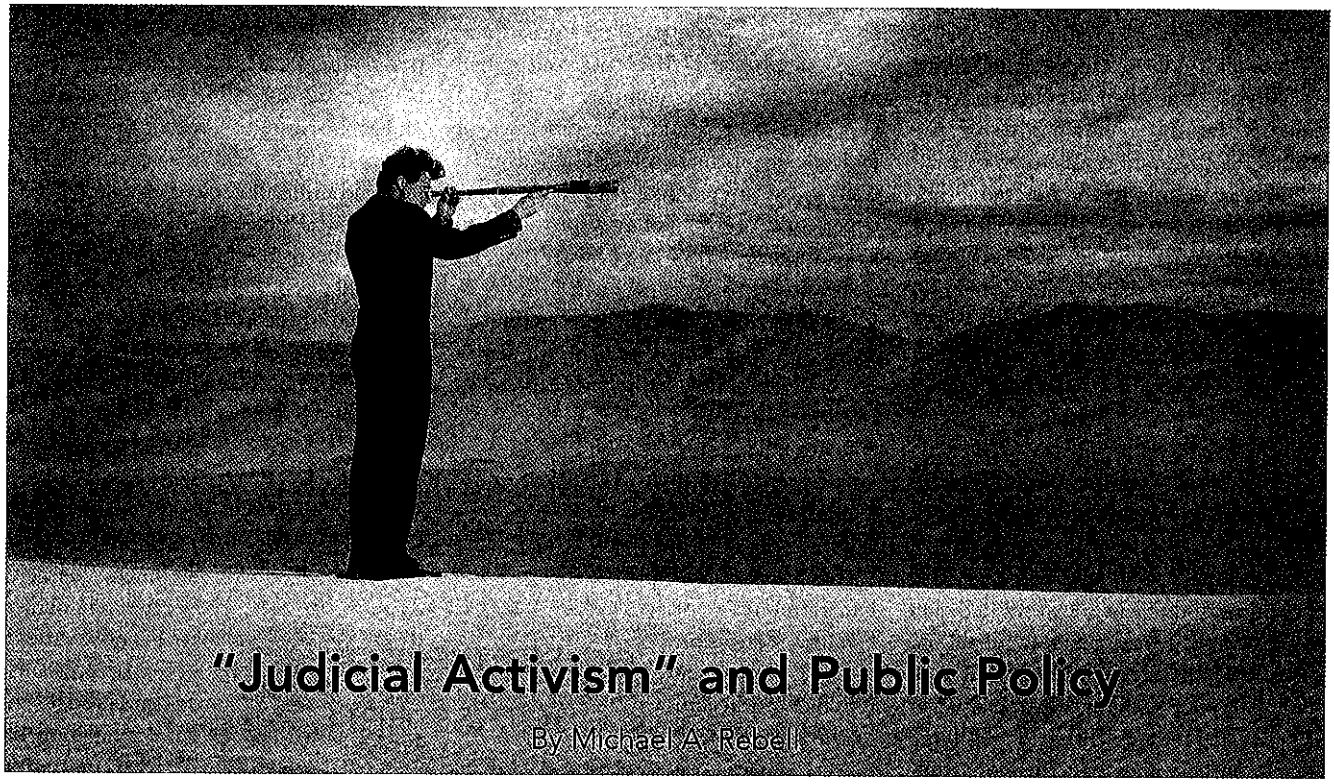

"Judicial Activism" and Public Policy

By Michael A. Rebell

Although political infighting about "judicial activism" still dominates Supreme Court confirmation hearings and other political debates, scholars and policy makers generally work with a more realistic view of the judiciary's role in the modern administrative state:

> [A]s our state has become increasingly administrative and managerial, judicial policy-making has become both more necessary for judges to produce effects and more legitimate as a general model of governmental action.[1]

This court's new role, and the intense political debate about judicial activism, first became prominent in the struggle to enforce the Supreme Court's decision outlawing school segregation in *Brown v. Board of Education*.[2] In *Brown II*,[3] a year after the initial constitutional holding, the Court authorized federal district courts to oversee the implementation of school desegregation by local school districts. In doing so, it initiated a "new model" of public law adjudication[4] in accordance with which both federal and state courts have for the past half century issued broad remedial decrees that go beyond the traditional judicial role of resolving private disputes between individuals and substantially affect the implementation of public policy.

Accordingly, over the past 55 years the federal courts have promoted institutional reform in the schools not only in regard to desegregation but also in areas like bilingual education, gender equity, and special education. They also have fostered reforms in other social welfare areas, such as the deinstitutionalization of services for the developmentally disabled and the improvement of prison conditions. State courts similarly have taken on such "new model" responsibilities in areas like fiscal equity in education, land use, and gay rights.

The new model of public law adjudication has become such an established part of the legal landscape that conservatives as well as liberals now routinely ask courts to remedy legislative or executive actions of which they disapprove. In fact, the Supreme Court under Chief Justice William Rehnquist struck down more congressional statutes than its predecessors—from 1994 to 2004, the Court invalidated about six congressional statutes a year, compared to an average of one every two years prior to 1991—and the Roberts court, which has, among other things, declared key parts of the McCain-Feingold campaign finance law and state laws regarding late-term abortions unconstitutional, appears to be continuing or accelerating this trend. It is time, therefore, to reconsider the "judicial activism" debate. This article will attempt to do so, based on the realities of what the federal and state courts have actually been doing in cases involving public policy over the past five decades and on perspectives of policy makers and scholars who have considered the significance of this experience.

During the early days of judicial enforcement of desegregation decrees, the federal courts' forays into policy making in areas that traditionally had been considered to be in the legislative or executive domain were repeatedly attacked as violating traditional separation of powers precepts.[5] Defenders of the courts' new role argued that the judges were merely adapting traditional concepts of judicial review and their obligation to

enforce constitutional rights to the needs of a complex administrative state.[6] They argued that "[n]o branch could correctly claim to be the representative of the people. Representation was to be by each of them, according to the functions they performed."[7] Probably the most influential academic analysis of these issues was that of Harvard law professor Abram Chayes, who related the growth of judicial involvement in the reform of public institutions since *Brown* to the broader expansion of governmental activities in the welfare state era.[8]

The courts' institutional capacity to carry out these broad new remedial tasks successfully was also widely questioned. Critics claimed that courts were incapable of obtaining sufficient social science data and that judges were generally unable to understand and digest the data that were obtained.[9] They also contended that judges lacked coherent guidelines for resolving policy conflicts and that, therefore, they would fail to undertake a comprehensive policy review or to consider the overall implications and consequences of their orders.[10] Defenders of this new judicial role retorted that the courts' lack of established organizational mechanisms was a virtue, not a vice, because it permitted a flexible response that could be tailored to the needs of the particular situation.[11] They emphasized that the courts had always delved into complex social and economic facts,[12] and that processes of judicial appointment or election assured that judges were "likely to have some experience of the political process and acquaintance with a fairly broad range of policy problems."[13]

In the 1980s, my colleague Arthur R. Block and I, seeking to test the validity of the competing arguments, undertook two empirical studies of educational policy making by courts, legislatures, and the Office of Civil Rights in the U.S. Department of Health, Education and Welfare (OCR).[14] In regard to the separation of powers issues, we concluded that judicial deliberations tended to be based on constitutional principles, rather than on policy considerations directed toward immediate consequences, although in many circumstances the distinctions between "principle" and "policy" were difficult to draw. Significantly, however, judges tended to approach the issues in a distinctly different way: their decisions tended to reflect a "rational-analytic" decision-making mode (defined in terms of judgments reached and supported by fact and analysis in the light of explicit standards of judgment), in contrast to the mutual adjustment processes (defined in terms of the reconciliation of positions of competing interest groups through political bargaining) that tend to predominate in legislative decision making.

> While pundits argue that the courts usurp legislative powers, Congress and state legislatures ask courts to take on more policy-making activities.

Another conclusion was that the evidentiary records accumulated in the court cases were more complete and had more influence on the actual decision-making process than did the factual data obtained through legislative hearings. The latter tended to be "window dressing" to justify political decisions that had already been made. Even more comprehensive and sophisticated than that of either the courts or the legislatures was the OCR's fact gathering, but questions arose concerning the objectivity of the agency's use of the data since the OCR tended to adopt a "prosecutorial" stance in its approach to the evidence.

In regard to remedies, our studies concluded that judicial remedial involvement in school district affairs was both less intrusive and more competent than generally assumed, largely because school districts and a variety of experts usually participated in the formulation of decrees, with the courts serving as catalysts and mediators. OCR proved effective in administering remedial agreements that called for immediate, statistically measurable implementation, but in regard to a major desegregation agreement that required phased-in implementation over a number of years, the agency's "staying power" and its ability to respond flexibly to changed circumstances was markedly less effective than that of the courts.

A comparative analysis of the fact-finding capabilities of Congress and the courts similarly found that the traditional assumptions of legislative superiority were unjustified. Professor Neal Devins questioned whether Congress "has the incentives to take fact-finding seriously." He pointed out that committee chairs generally set the agenda for hearings for partisan purposes, that their staffs prepare witnesses to say what the majority party wants to hear, and that "lobbyists . . . often pad the legislative history in ways that support their objectives."[15]

In recent times, the courts' role in

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social science fact-finding and in overseeing remedial processes has become more extensive and more established. For example, the U.S. Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[16] substantially expanded the authority of federal judges to determine the admissibility of scientific evidence. Essentially, federal judges now are being asked "to make informed discriminations between good and bad science."[17] Academic researchers also have begun to look to the courts for effective resolution of major social science issues because the courts' discovery processes are sometimes more comprehensive than data-gathering techniques available to professionals in the field. Clive Belfield and Henry M. Levin, two leading educational researchers, recently concluded that "[b]oth in terms of resources and access to documents, data, and personnel, the Court's investigation far exceeded that typically made by researchers."[18]

The public also has come to look to the courts for an assessment and resolution of highly controversial issues involving sensitive issues of science and public policy. For example, the volatile issue of whether "intelligent design" is a valid scientific theory that should be taught to high school biology students has apparently been resolved by the decision a few years ago of a federal district court judge in Dover, Pennsylvania.[19] The judge's declaration that "after a six week trial that spanned twenty-one days and included countless hours of detailed expert witness preparations, the Court is confident that no other tribunal in the United States is in a better position than are we to traipse into this controversial area"[20] was widely accepted. A national commentator noted,

> In this case [the courtroom] proved to be an ideal forum. . . . The trial also allowed the lawyers to act as proxies for the rest of us, and ask of scientists questions that we'd probably be too embarrassed to ask ourselves. In a courtroom, you must lay an intellectual foundation in order to earn a line of questioning—and so the lawyers stripped matters neatly back to the first principles of science.[21]

And one of the Dover school board members remarked,

> This is a judge making a ruling on a case where both sides got to present their side, fully. This should bring some closure at least for our community. I'm sure there are many other communities throughout the United States that will be waiting for this verdict with great interest.[22]

Vehement criticism of particular instances of active judicial involvement in the social policy sphere still resounds in political debates and in the popular press. The irony is that while these pundits persist in arguing that the courts' new role is usurping legislative powers, Congress and the state legislatures themselves are continually asking the courts to take on more policy-making activities by passing statutes that directly or implicitly call for expanded judicial review. A prime example is the Individuals with Disabilities in Education Act in which Congress set forth a detailed set of substantive and procedural rights and explicitly established a new area of court jurisdiction for individual suits, regardless of the amount in controversy.[23] Even critics of judicial involvement in social policy making recognize the legislative trend toward creating new statutory rights that expand the enforcement responsibilities of the courts. Thus, Ross Sandler and David Schoenbrod decry the fact that Congress, first with civil rights and then with environmental issues, disability rights, transportation, and a number of other areas, "responded to these new challenges by creating statutory rights enforceable in federal court against state and local governments."[24] But under these circum-

stances, as Chayes aptly put it, we should "concentrate not on turning the clock back (or off), but on improving the performance of public law litigation."[25]

Concerns about the courts' capacity to engage in sophisticated fact gathering and remedial processes also have been muted by empirical investigations of what the other branches of government actually do in similar situations. One of the shortcomings of the judicial activism debate was its focus on the limitations of the judicial branch, while it ignored the comparable institutional shortcomings of the legislative and the executive branches. For example, Donald Horowitz, one of the foremost critics of the courts' new role, catalogued a bevy of examples of alleged judicial incompetence, ranging from receiving information in a skewed and halting fashion to failing to understand the social context and potential unintended consequences of the cases before them.[26] As Professor Neil Komesar forcefully pointed out, however, Horowitz's critique, like that of many of his current disciples, was unreasonably one-sided:

> Horowitz's study can do no more than force us to accept the reality of judicial imperfection. By its own terms it is not comparative, and that is far more damning than Horowitz supposes. All societal decision makers are highly imperfect. Were Horowitz to turn his critical eye to administrative agencies or legislatures he would no doubt find problems with expertise, access to information, characterization of issues, and follow-up. Careful studies would undoubtedly reveal important instances of awkwardness, error and deleterious effect.[27]

Komesar's insights provide a fruitful basis for understanding the important role that courts have played and need to play in contemporary public law cases. If we accept the fact that government will continue to have a large role in educating children, establishing a safety net for impoverished citizens, ensuring access to medical care, and providing retirement benefits to senior citizens, the courts have a vital role in ensuring that Congress, state legislatures, and administrative agencies respect constitutional and statutory rights in the development and implementation of these programs. Instead of continuing to debate whether the courts should be involved in these situations, the time and efforts of policy makers, scholars—and judges—would be better spent in considering, from a functional perspective, how the courts' comparative institutional advantages in terms of maintaining a focus on basic legal principles, fact-finding and "staying power" over long-term remedies might best be applied to specific situations.[28] ■

Endnotes

1. Malcolm M. Feeley & Edward L. Rubin, Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons 344 (1999).

2. 347 U.S. 483 (1954).

3. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

4. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976).

5. *See, e.g.*, Nathan Glazer, *Toward an Imperial Judiciary?*, 41 Pub. Int. 104 (1975); Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977). *See also* Philip Kurland, Politics, The Constitution and the Warren Court 203 (1970) (accusing judges of acting like "Platonic Guardians").

6. *See, e.g.*, Frank M. Johnson, *The Role of the Federal Courts in Institutional Litigation*, 32 Ala. L. Rev. 264 (1981); Owen M. Fiss, *Forward: The Forms of Justice*, 93 Harv. L. Rev. 1 (1979).

7. Edward Levi, *Some Aspects of Separation of Powers*, 76 Colum. L. Rev. 371, 376 (1976). *See also* Richard Nealy, How Courts Govern America (1981).

8. Chayes, *supra* note 4, at 1281.

9. *See, e.g.*, Donald L. Horowitz, The Courts and Social Policy (1977); Eleanor P. Wolf, *Social Science and the Courts: The Detroit Schools Case*, 42 Pub. Int. 102 (1976).

10. *See, e.g.*, Horowitz, *supra* note 9; Jeremy Rabkin, Judicial Compulsions: How Public Law Distorts Public Policy (1989).

11. Chayes, *supra* note 4. *See also* Robert D. Goldstein, *A Swann's Song for Remedies: Equitable Relief in the Burger Court*, 13 Harv. C.R.-C.L. L. Rev. 119 (1978).

12. Paul Rosen, The Supreme Court and Social Science (1972); Chayes, *supra* note 4.

13. Chayes, *supra* note 4, at 1308.

14. Michael A. Rebell & Arthur R. Block, Educational Policy Making and the Courts: An Empirical Study of Judicial Activism (1982); Michael A. Rebell & Arthur R. Block, Equality and Education: Federal Civil Rights Enforcement in the New York City School System (1985).

15. Neal Devins, *Congressional Fact Finding*, 50 Duke L.J. 1169, 1182–84 (2001).

16. 506 U.S. 914 (1992).

17. Sheila Jasanoff, *Judicial Fictions: The Supreme Court's Quest for Good Science*, 38 Soc'y 27, 29 (2001).

18. Clive R. Belfield & Henry M. Levin, *The Economics of Education on Judgment Day*, 28 J. Educ. Fin. 183 (2002).

19. Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707 (M.D. Pa. 2005).

20. *Id.* at 735.

21. Margot Talbot, *Darwin in the Dock: Intelligent Design Has Its Day in Court*, New Yorker, Dec. 5, 2005, at 66, 68.

22. James Anthony Whitson, *The Dover (PA) Evolution Case: A True Win for Education?*, Tchrs. C. Rec. (2006), *available at* http://www.tcrecord.org (Id. No. 12271).

23. *See* 20 U.S.C. § 1415(e)(2) (2000); *see also, e.g.*, Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.) (requiring states to adopt federal standards to obtain federal funds). The Adoption Assistance and Child Welfare Act has reportedly spawned foster care litigation in at least 34 states. *See* National Center for Youth Law, Foster Care Reform Litigation Docket (2006), http://www.youthlaw.org/fileadmin/ncyl/youthlaw/publications/fcrldocket06.pdf. Additionally, the Clean Air Act of 1970 establishes a right to healthy air and explicitly authorizes citizen suits. *See* Clean Air Act § 304(a), 42 U.S.C. § 7604(a) (2000).

24. Ross Sandler & David Schoenbrod, Democracy by Decree: What Happens When Courts Run Government 17 (2003).

25. Chayes, *supra* note 4, at 1313. In at least one area, that of prison litigations, Congress has acted affirmatively to limit judicial involvement. Thus, the Prison Litigation Reform Act of 1995 (PLRA), among other things, limits the type of relief that courts can provide, makes any relief granted subject to termination after two years, and abridges the courts' authority to appoint a special master. Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended at scattered sections of 18 U.S.C.).

26. Horowitz, *supra* note 9.

27. Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 Mich. L. Rev. 657, 698 (1988).

28. I develop these points further, in regard to the important role that the courts need to play in providing a meaningful educational opportunity to students from poverty backgrounds, in Michael A. Rebell, Courts and Kids: Pursuing Educational Equity Through the State Courts (U. Chicago Press, 2009).