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Review of "Educational Policymaking and the Courts: An Empirical Study of Judicial Activism" by Michael A. Rebell and Arthur R. Block

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Book Review

EDUCATIONAL POLICYMAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM. By Michael A. Rebell and Arthur R. Block. Chicago, Illinois, The University of Chicago Press 1982. Pp. xv, 319. $27.50.

*Reviewed by James J. Fishman**

"Thou shall not sit
With statisticians nor commit
A social science"[1]

I. Educational Policymaking in the Courts

For over twenty years the common wisdom has been that legal realism is dead.[2] *Educational Policymaking and the Courts: An Empirical Study of Judicial Activism*[3] by Michael A. Rebell and Arthur R. Block makes rumors of legal realism's death exaggerated.[4] This is not the place to argue whether legal realism is a philosophy, a movement, a creed, or a school.[5] At the very least it is a method of undertaking research, of using the

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1. Auden, *Under Which Lyre*, in COLLECTED SHORTER POEMS 225 (1966).

2. *See* Gilmore, *Legal Realism, Its Cause and Cure*, 70 YALE L.J. 1037 (1961); Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459 (1979); Note, *'Round And 'Round The Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1676 (1982).

3. M. REBELL & A. BLOCK, EDUCATIONAL POLICYMAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM (1982) [hereinafter cited as REBELL & BLOCK].

4. This is a paraphrase of Mark Twain's comment: "The report of my death was an exaggeration." J. BARTLETT, FAMILIAR QUOTATIONS 763a (14th ed. 1968) (quoting a cablegram sent from London by Mark Twain to the Associated Press on June 2, 1897).

5. *See generally* K. LLEWELLYN, THE COMMON LAW TRADITION 508-18 (1960) [hereinafter cited as COMMON LAW]; Llewellyn, *Some Realism About Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1930-1931) [hereinafter cited as *Some Realism*]; *see also* Schlegel, *supra* note 2.

techniques of the social sciences to better understand the judicial process.[6] *Educational Policymaking and the Courts* is a unique attempt to relate significant empirical data to arguments raised in the controversy over judicial activism by subjecting a broad survey of representative educational areas, two in depth judicial case studies, and two comparative legislative case studies to a common theoretical framework. The authors analyze the role of courts in educational policymaking in an effort to determine whether the judiciary has the capacity and authority within traditional constitutional doctrines of the separation of powers to resolve social policy issues through intervention into the policymaking process.

The involvement of courts in educational matters has resulted in a cottage industry of law review articles, student notes, and comments. With but a very few exceptions, this scholarship has taken Auden's quip to heart. It has focused either on the analysis of the constitutional legal doctrines involved, reviews of the West Publishing Company's advance sheets, or in a few instances, in-depth atheoretical case studies of significant educational litigation. There has been little research which systematically investigates actual judicial practices and integrates relevant legal theory with such empirical findings. Rebell and Block have attempted to bridge that gap. To report that they are but partially successful is nonetheless a substantial accomplishment.

II. The Theoretical Framework: The Judicial Activism Controversy

In the first chapter Rebell and Block present an overview of the intellectual debate over judicial activism and the court's role in policymaking.[7]

While the judiciary has become involved in complex institutional reforms of other areas of modern life besides education,[8]

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6. *See* Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821-34 (1935); *Some Realism*, *supra* note 5, at 1236-37, 1240-41, 1244-45; Note, *supra* note 2, at 1674-76.

7. The discussion is conducted on a high intellectual level and is somewhat abstruse, except for those who are teachers or students of constitutional law.

8. *See, e.g.*, Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. N.D. 1976) (prison systems); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. N.D. 1972) (state mental health systems).

educational policy litigation has been a prime focus of the "judicial activism" controversy. According to Professor Abram Chayes, increasing involvement of the judiciary in institutional reform and policymaking has led to a new kind of lawsuit.[9] Whereas the traditional lawsuit is bipolar, involving a contest between two individuals or entities with diametrically opposed interests wherein the impact of the court's judgment is confined to the immediate parties, this new model of public law litigation is multipolar, involving numerous parties and points of view, with broad remedial decrees which are often negotiated by the parties. The court's decree often has important consequences for many outside the courtroom. In institutional reform litigation "[t]he subject matter of the lawsuit is often not a dispute between private individuals about private rights, but a grievance about the operation of public policy."[10]

The authors use Professor Chayes' model of the new public law litigation as a framework within which to examine four controversies in the judicial activism debate. They divide the issues into two basic categories: 1) legitimacy — whether judicial involvement in policymaking is in keeping with the courts' proper role within the American separation of powers system; and 2) capacity — whether the judiciary can handle capably the new responsibilities it has assumed.[11] Critics of judicial activism claim that the courts have far exceeded their role under the separation of powers as envisioned by the framers of the Constitution.[12] Defenders of judicial activism have responded that this activism is not antidemocratic but provides an important element of popular sovereignty, and that the Constitution is a body of "fundamental law" established for the specific purpose of insuring that basic individual rights and liberties would not be compromised by the tyranny of the majority operating through the legislature.[13] The political debate, say the authors,[14] has

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9. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976).

10. *Id.* at 1302.

11. REBELL & BLOCK, *supra* note 3, at 4.

12. *See, e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY 249-50 (1977).

13. *See* Johnson, *The Constitution and the Federal District Judge*, 54 TEX. L. REV. 903, 914-15 (1976); Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 374-78 (1976).

been paralleled in the more rarified area of legal scholarship by a discussion articulated in terms of "principle/policy" issues: whether courts should be limited to deciding cases on the basis of strict legal principles or should be free to engage in broader policy deliberations. Those favoring the "principle" approach prefer a more limited traditional role within the separation of powers scheme.[15] Supporters of the broader policy approach accept and encourage more judicial activism within the policymaking arena normally the domain of the other branches of government.

On still another plateau, the principle/policy distinction can be viewed as a jurisprudential debate between the instrumentalism of legal realism — its openness to a judicial role in policymaking, and receptivity to the use of social science evidence by the courts — and the "principled" approach of Professor Wechsler, later adapted by Professor Dworkin.[16] Both Wechsler and Dworkin insist that judicial decisions be based on "neutral principles" of law, but Dworkin argues that the sources of "principles" are broader.[17] These sources are sufficiently rich to provide a single right answer to every hard case. Dworkin believes that judges should not decide policy issues but should base their rulings on principles even if such rulings have substantial social or political implications. He claims his approach fits much of contemporary judicial activism into a "principled" mold.[18] The authors agree with Dworkin that while the line between principle and policy is difficult to establish, the division can be made. Further, the way judges perceive their role and formally justify their decisions and the manner in which the parties present

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14. REBELL & BLOCK, *supra* note 3, at 7.

15. In Nixonian days, this group was known by the label "strict constructionists."

16. REBELL & BLOCK, *supra* note 3, at 8-9. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS. 57 (1978). Professor Dworkin insists that judicial decisions be based upon neutral principles of law. But, he takes a different view of what is encompassed by law. Legal rights therefore may be based on a discrete set of precedents and statutes and also on justifying principles devised from institutional structures, morals, and political theories integrating the two. REBELL & BLOCK, *supra* note 3, at 8-9. *See* Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

17. REBELL & BLOCK, *supra* note 3, at 8-9.

18. *See* Dworkin, *Seven Critics*, 11 GA. L. REV. 1201, 1237 (1977).

their claims, although not providing incontrovertible distinctions between principle and policy, constitute important behavioral data.[19] Thus, in their analysis of education cases the authors attempt to determine the degree to which parties justified their claims and defenses and the courts explained their decisions — on the basis of principle or policy.[20] Rebell and Block focus upon two questions in analyzing the judiciary's factfinding capabilities: 1) to what extent were the courts able to obtain the necessary information; and 2) how effectively did the judges deal with and comprehend the social science data presented to them?

Related to the legitimacy debate is the question whether the parties in the new public law litigation are sufficiently representative of the interests affected by a court order.[21] In the traditional separation of powers view, the legislature is the primary repository for the articulation of public policy issues because it theoretically represents all parties. To the extent that courts engage in public policy issues their legitimacy is affected, particularly if the litigants speak only for themselves and large numbers affected are unrepresented in the litigation.[22]

To test whether all those having a substantial interest in the cases studied were represented in the court proceedings, Rebell and Block attempt to answer the question empirically by determining: 1) were most social policy lawsuits in federal courts filed by minority plaintiffs; 2) to what extent were class action procedures used to argue the depth of representation; 3) to what extent did the party structure follow the broad breadth of representation implied in Chayes' theory; and 4) were there any indications that in a significant number of cases litigated by the public interest advocacy, lawyers remained unresponsive to their

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19. REBELL & BLOCK, *supra* note 3, at 33.

20. Principle is defined as "[a] statement establishing a right of an individual against the state or against another individual (or, less frequently, the right of an institution to maintain the integrity of its legally defined prerogatives)." REBELL & BLOCK, *supra* note 3, at 23.

A policy is "[a] statement concerning collective goals. Policy arguments consider the relative importance or desirability of particular social goals, and/or the relative efficiency and desirability of particular methods for achieving such goals." *Id.* at 24.

21. *Id.* at 9. *See* D. HOROWITZ, THE COURTS AND SOCIAL POLICY 49-50 (1977); Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 491 (1976).

22. REBELL & BLOCK, *supra* note 3, at 9.

clients' interests?

In addition to the legitimacy of court activism, the debate on the judiciary's proper role has focused upon "the comparative ability of the courts to deal effectively and efficiently with social problems that traditionally were handled exclusively by the legislative and administrative branches."[23] Is the factfinding process of litigation suited for the complex data gathering needed to "discover the truth"? Critics of judicial activism have argued that even if courts were able to obtain sufficient social science data, they would be untrained to fully understand and assimilate it.

The most striking aspect of the new public law litigation model is the remedial decree which provides for a complex ongoing regime of performance involving the court in detailed supervision of the implementation of new policies and practices. This surveillance is often protracted as a result of resistance to the implementation of the decree.[24]

The remedial decree is at the core of the new public law litigation. It is at this remedy stage that the breadth of those affected first may be discerned.[25] The issue of judicial intrusiveness into the legislative and executive domain becomes central at this plateau. Broad remedial decrees have been criticized because they involve courts in administrative or legislative responsibilities for which they are ill-suited. The authors measure the extent of judicial intrusion into the local policymaking process by classifying all of the cases where the plaintiffs prevailed into categories of reform decree and self-executing judgments.[26] They also study party participation in the formulation of the decree, the use of monitoring mechanisms, and the effectiveness of court intervention.[27]

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23. *Id.* at 11 (emphasis omitted).

24. Chayes, *supra* note 9, at 1298-1302. *See also* Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 813-42 (1978).

25. REBELL & BLOCK, *supra* note 3, at 58.

26. *Id.* at 59.

27. *Id.* at 61.

III. Methodology

Rebell and Block have undertaken a prodigious amount of research. They have systematically examined sixty-five federal trial court proceedings decided between 1970 and 1977 which attempted to change system-wide practices, policies, or rules in the public schools.[28] They have interviewed 130 attorneys for the principal parties in sixty of the sixty-five cases. Finally they have organized their research to empirically test the four issues in the judicial activism debate: first, did courts decide issues in terms of legal principles thus acting within the proper sphere of judicial decisionmaking or did they reach decisions on the basis of policymaking thereby, as their critics would say, intruding into the responsibilities of other branches of government; second, were those with a substantial interest in the controversy represented in court proceedings; third, did the judiciary have the capability to engage in comprehensive factfinding and analysis; and finally, did courts have the ability to devise and implement appropriate remedies?[29] Excluded from their sample are non-public school cases and all of the school desegregation cases decided during the time frame selected. The authors believe that the excluded categories have been subject to substantial doctrinal and empirical analysis and want to cover the largest number of cases without necessarily duplicating work done by others.[30] The omission of desegregation cases, containing issues which have so inflamed the public if not the commentators over the role of the court, is unfortunate, for it diminishes the authors' conclusions.

The sample includes the full universe of published decisions during the time frame selected, rather than a stratified sample including cases selected randomly from categories within the total universe. Fifty-one percent of the cases involved regulation of student speech and conduct.[31] These cases are not only dated, they may be more typical of classical bipolar litigation. Further-

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28. *Id.* at 63.

29. *Id.* at 65.

30. *Id.* at 221.

31. The authors correctly suggest that the grooming cases, all of which occurred from 1970 to 1973, were proxy wars reflecting views on the Vietnam conflict and on the counterculture. *Id.* at 27.

more, several unanswered questions rise to the surface: has educational policymaking changed over time as courts have become more accustomed to such cases; do the authors find that there is any statistically significant difference in earlier cases from the later ones in their sample; are the results statistically significant in terms of relevance to the judicial activism debate? The authors admit that the degree of confidence of their inferences could be questioned, but they claim that if they applied a formal statistical test, there would be a confidence level of ninety-five percent.[32] This test could not be done because of the nature of the sample. The authors state that the primary reason the reader should believe the validity of their conclusions is that they are based on well informed judgments. This is not an altogether satisfactory answer.

IV. The Case and Legislative Studies

To illustrate in greater detail the quantitatively based findings and to expand upon them with more qualitative analysis, Rebell and Block undertake comprehensive studies of two complex federal cases, *Chance v. Board of Examiners*[33] and *Otero v. Mesa County Valley School District No. 51*.[34] Heeding the warning of Professor Donald Horowitz to be "chary of drawing inferences about the courts without an institutionally comparative frame of reference,"[35] the authors also undertake two detailed studies of the New York and Colorado legislative approaches to educational policy problems similar to those in the

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32. *Id.* at 226. The confidence level is the certainty that the conclusion or result is not due to the randomness or normal occurrence. The confidence level of 95% is used to prove or disprove hypotheses. The authors state:

> This estimation rule [the 95% confidence level] cannot be applied to observations of our sample without important qualifications — namely, that the sample we are studying was not drawn strictly at random, and that the population from which the sample was drawn did not consist of homogeneous, independent units (since earlier court decisions affect later court decisions).

Id. at 308 n.21. *See* 2 K. YEOMANS, STATISTICS FOR THE SOCIAL SCIENTIST 38-43 (1970).

33. 330 F. Supp. 203 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972), *aff'd*, 496 F.2d 820 (2d Cir. 1974), *rev'd*, 534 F.2d 993 (2d Cir. 1976), *rev'd*, 561 F.2d 1079 (2d Cir. 1977).

34. 408 F. Supp. 162 (D. Colo. 1975), *reh'g denied*, 568 F.2d 1312 (10th Cir. 1978), *on remand*, 470 F. Supp. 326 (D. Colo. 1979), *aff'd*, 628 F.2d 1271 (10th Cir. 1980).

35. REBELL & BLOCK, *supra* note 3, at 73 (quoting D. HOROWITZ, THE COURTS AND SOCIAL POLICY 18 (1977)).

judicial case studies. These federal cases and legislative approaches provide a fascinating comparative analysis as to how different institutions approach common issues.

Chance v. Board of Examiners was brought on behalf of a class of black and Puerto Rican educators who alleged that the traditional examination system used to license principals and other supervisors in the New York City public school system was racially discriminatory. After issuance of a preliminary injunction in 1971, and a final judgment based on a consent decree of two of the parties in 1972, the compliance stage of the litigation continued for another six years! It involved the court in such issues as validation of standardized tests, definition of qualifications for educational leadership, parental involvement in the hiring and evaluation process, and affirmative action requirements for staff layoffs. Although the second circuit ordered the district court to terminate its jurisdiction, at least one court litigation[36] and another federal case based on related issues persist today.[37]

Otero v. Mesa County Valley involved a class action complaint on behalf of Mexican-American parents and school age children residing in a Colorado rural town. The suit alleged that the school district's educational program and hiring practices discriminated against Chicanos. Plaintiffs requested that the court institute a comprehensive bilingual/bicultural curriculum and require affirmative action hiring programs.

The New York legislative study involved a teacher seniority-layoff bill considered in 1976 which addressed several issues relating to teacher demands as opposed to concerns of supervisory professionals raised in the *Chance* litigation. The Colorado study centered on that state's legislature's deliberations in 1975 over a bilingual/bicultural educational program, an ideal counterpoint to the issues presented in *Otero*. In New York the *Chance* court granted plaintiff's claim, but the legislature did not pass the seniority-layoff bill. In Colorado, after an acrimonious trial, the *Otero* court entered judgment for the defendants on all counts, however, the Colorado legislature passed a broad bilingual/bicultural program. *Chance* differed from *Otero* not

36. *See* Elsberg v. Board of Educ., 99 Misc. 2d 1101, 418 N.Y.S.2d 508 (Sup. Ct. Kings County 1979).

37. *See* Macchiarola v. Board of Examiners, No. 81 Civ. 4798 (S.D.N.Y. 1981).

only in the judgment. In the former, negotiations between the parties were harmonious; discovery remarkably efficient. In *Otero* relationships were acrimonious and factfinding disputed throughout the trial. The thrust of *Chance* was in its protracted remedial phase; in *Otero* the important focus was on liability factfinding.

Otero was an example of how not to bring complex and controversial educational litigation. Even the plaintiff's attorney admitted the case should not have been brought in the district of Grand Junction which was conservative and not accustomed to dealing with this type of racial issue.[38] If there was any positive aspect to this lawsuit, it was the cultural and political awakening of the Chicano community and the realization by Anglo educators that they had to take into account the cultural aspirations of Hispanic students. Whether this is the proper function of a court, however, is not addressed in this study.

One of the most significant aspects of this book is the finding which disputes the common assumption concerning the superiority of legislative as opposed to judicial factfinding capabilities. Both legislatures — New York, where each legislator has some research capacity, and Colorado, where research capability is allied to the committee structure — reveal a lack of capacity for systematic or analytical fact analysis. Legislative hearings constituted a showcase function: the facts accumulated were not scrutinized by the legislators and did not appear to have had major impact on the final outcome.[39]

Moreover, in the legislative area there is no mechanism for compelling efficient discovery. A court can compensate for lack of staff by requiring the parties to submit necessary evidence. In the legislative process there are neither the resources nor the interest in such information. The legislature by nature of its political approach is more inclined toward avoiding basic social fact issues and data assessment.

In terms of the capacity to consider broad comprehensive implications of major reforms, courts and legislatures are subject to similar strengths and weaknesses. In both fora the interested parties work out the details of the remedy. The authors conclude

38. REBELL & BLOCK, *supra* note 3, at 282 n.11.
39. *Id.* at 194.

that there appears to be no basis for arguing that the courts are less capable of comprehensively structuring complex systematic reforms than the legislature.[40] That may seem less of an issue, however, than whether the courts should shape these comprehensive reforms.

V. Major Conclusions

A. *Principle/Policy*

In sixty-four of the sixty-five cases the complaints contained at least one claim grounded in the form of "principle". Nearly all of plaintiffs' attorneys framed their complaints in a form of an allegation based upon constitutional rights, so necessary to standing in federal district court. The obviousness of this approach recalls Derek Bok's aside: "All research corrupts but empirical research corrupts absolutely."[41] However predictable this conclusion may seem, a function of empirical research is to look for laws or connections among facts in order to explain and to predict. Only by building up such basic generalizations can we obtain more valid conclusions.[42]

Professor Dworkin has been criticized for the intricate distinctions he has drawn between principles and policies, because they are so ephemeral that they serve simply as a shield protecting activist judges from charges of usurpation.[43] The authors find that they can not categorize all of their cases as "policy" or "principle" because their primary principle can be applied in individual disputes without substantive consideration of certain limited policy arguments.[44] Consequently, the authors develop a third category of qualified principle; for instance, in student grooming cases when the plaintiff would argue principle, judges would have to consider the validity of the defendant administrator's claims that ruling for the plaintiff would lead to disruption

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40. *Id.* at 210.

41. D. BOK, THE PRESIDENT'S REPORT 1981-82, at 6 (Report to Overseers of Harv. U. 1983).

42. *See* READINGS IN THE PHILOSOPHY OF THE SOCIAL SCIENCES 6-11 (M. Bradbeck ed. 1968).

43. Greenawalt, *Policy, Rights, and Judicial Decision,* 11 GA. L. REV. 991, 1036 (1977).

44. REBELL & BLOCK, *supra* note 3, at 24.

of the educational program. Eighty percent of all of the cases fall into this intertwined principle/policy category. The authors find this result "striking and unexpected"[45] and admit that critics and proponents of judicial activism have viable arguments. The authors further split hairs by concluding that what is significant in such cases is not whether policy arguments are ever involved in court decisions, but whether the crux of the case involves a matter of principle that properly belonged before the courts.[46] Interestingly, when the courts, as opposed to the researchers characterized the case as based upon policy grounds, the defendant school board won each time.

B. *Interest Representation Issues*

The study confirms the prevalent assumption that most educational policy litigations are brought by minorities.[47] One reason for this may be that the courts provide better access to minority aspirations than the legislature, which often treats minorities as just one more interest group.

A criticism of institutional reform litigation is that the plaintiffs speak only for themselves, yet a broader group having a direct stake in the outcome of the lawsuit is unrepresented. Rebell and Block assume that depth of representativeness can be ascertained by determining whether cases were filed as class actions. The authors state that class action status is significant since it can serve as a barometer of plaintiffs' intentions to speak for a broader group of individuals interested in policy reform.[48] Other reasons, however, come to mind. Attorneys' fees and general litigation strategy may promote the class action technique in institutional reform litigation since the defendants will have a greater incentive to settle before trial.

A significant finding in the survey is that judges tend either

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45. *Id.* at 25.

46. *Id.* at 201.

47. Fifty-six percent of the cases sampled were brought by suspect and "semi-suspect" classes. Minority plaintiffs were successful in 71% of the cases.

Semi-suspect classes include disadvantaged groups treated more recently by statutes and court decisions as disadvantaged minorities in need of special protection, even though the Supreme Court has not explicitly identified them as suspect classes. The authors include in this category: females, handicapped, poor, and elderly. *Id.* at 36.

48. *Id.* at 37.

to delay the classification of the litigation as a class action or ignore such claims. The corollary of this finding is the judiciary's failure to provide the protective mechanisms of Rule 23[49] which hold plaintiffs' attorneys responsible for explaining what groups they represent and how they propose to represent broader interests. The authors believe that although class certification procedures potentially can provide a substantial assurance of representativeness, they presently are not being utilized to effectuate this goal. Possibly, the critics are correct in interpreting the lack of class actions to mean that not all of the interests affected by the litigation are involved in it. Courts readily granted requests for intervention either as a party or as *amicus*. In contradiction to the assumptions of Professor Chayes' multipolar model, additional parties tended to support with variations the arguments of the main participants rather than to set out distinct independent perspectives.

Thus, courts appear to be open to broad involvement of all interested parties, but not all potentially affected groups seek to participate, and even those groups who do participate do not present a broad spectrum of strongly diverse views to the courts. The authors conclude that it may be that the real issues in educational litigations are essentially bipolar and that all interests are generally being adequately represented. One might conclude, however, that the inherent bipolar orientation of the adversarial judicial process discourages a broader multipolar approach.[50] It may be that certain kinds of cases — grooming and speech — are bipolar. Certainly, if desegregation cases had been included, the multipolarity of the sample would have increased. Another reason for bipolarity of representation is that the issues involved are essentially bipolar but the remedial phase is multipolar. This may also explain why judges made decisions on class action allegations after trial.[51] Perhaps it is only after the factfinding is developed and a decision reached that parties are even aware that they may be affected by the court's decision.

Fifty-seven percent of the sample cases were brought by

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49. FED. R. CIV. P. 23.
50. REBELL & BLOCK, *supra* note 3, at 41.
51. *Id.* at 37.

public interest attorneys.[52] These lawyers brought the more complex cases involving a greater degree of substantive reform and were more likely to raise novel or relatively novel legal issues.[53] Public interest attorneys generally pick and choose their cases. The more intricate educational cases with highly novel legal theories are of great interest because of their potentially important ramifications. Because these cases are so highly cost inefficient and plaintiffs tend to be minorities and poor, only a specialized public interest attorney could possibly afford to mount such litigation. Furthermore, only public interest attorneys may have the technical and financial resources to litigate an extensive reform case.[54] Rebell and Block tentatively conclude that public interest attorneys do speak for their clients rather than promote their own ideological views.[55] They say that the real debate is whether it is desirable for society to provide minority group interests with legal resources to bring major reform cases.[56] That may be overdrawing the issue.

C. *Factfinding Capability Issues*

The study concludes that the adversary process is an effective information gathering technique in social policy litigations.[57] Where the school board was the defendant, discovery was complete and efficient. Perhaps these defendants were more inclined to accede to requests for information because of their inherent public exposure, and the natural public interest in the disputes.[58]

Although every case in the sample challenged the system-wide application of an educational policy, in relatively few was the resolution of conflicting social fact evidence central to the court's decision.[59] De-emphasizing social factfinding does not,

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52. *Id.* at 43.
53. *Id.* at 41-42.
54. The authors found this in *Chance*. *Id.* at 114.
55. *Id.* at 204.
56. *Id.* at 205.
57. *Id.* at 46, 115, 205.
58. *Id.* at 206.
59. Judges often utilized various avoidance devices which allowed for disposal of plaintiff's claims on the merits without a close scrutiny of the parties' competing social fact arguments. *Id.* at 50.

admit the authors, address the question whether judges have the capacity to comprehend and decide these issues.[60] Quantitative assessments are resistant to such survey techniques. It should be pointed out that in school desegregation cases, which were not included in the study, the use of data may be different. Complicated factfinding is often based upon analysis of asserted causal hypotheses or controversial data.

Critics of the use of complex social science evidence in educational cases may have underestimated the judiciary's ability to comprehend this data. At least in this study, judges who did deal with social fact evidence had little difficulty in obtaining a working familiarity with these concepts and used them to assess the credibility of key witnesses. The authors conclude that both the strength and weakness of the courts as a factfinding mechanism depend on the adversary system which is its motivating force.[61] If the opposing parties present a complete record, the court is equipped to deal with it. If one of the parties fails to present countervailing arguments or information, a court lacking an independent specialized knowledge of the area will base its decision on the facts and arguments before it. Whatever criticisms there are of the ability of the judiciary to engage in factfinding, Rebell and Block find that courts are much better equipped than legislatures to evaluate social fact evidence systematically and to render analytically reasoned decisions.[62]

D. *Remedial Capability*

The data rebuts the criticism that the judiciary lacks the resources, expertise, or perspective needed to implement educational reform successfully. Reform decrees were not used in most of the cases in which the plaintiffs prevailed because judges, consistent with traditional canons of judicial caution, attempted to approve the least expansive vindication of plaintiffs' rights.[63] The degree of compliance by the parties also may impact upon the scope of the remedy. In many institutional reform cases, recalcitrant defendants oblige the judge to order a wide ranging

60. *Id.* at 54.
61. *Id.* at 207.
62. *Id.* at 209.
63. *Id.* at 59.

"reform" decree. In the sample presented, the degree of compliance was higher than one might have expected. The question is posed whether this affected the type of decree issued.

A study of the factual situation in desegregation cases could undermine the results of the study. In desegregation cases widespread noncompliance by publicly elected school board officials and by parents was common. The judge alone remained to implement the decree. Unlike the desegregation cases, with one exception, the courts in the sample did not become fully involved in the day-to-day administrative policy ramifications of their orders.

VI. Conclusion

Did the research settle the major issues in the judicial activism debate? Rebell and Block found that the courts do not act in strict accordance with certain assumptions of the classical separation of powers theory. In public law litigation they operate in a more political manner than the role contemplated under the traditional model of court adjudication. Courts have conducted themselves more than competently in this difficult new area. The defects in judicial performance are not caused by the ineptness of the judiciary compared to other governmental agencies but by the social, political, and technical characteristics of the particular controversies.[64] The authors point to an increased activism in all branches of government and suggest the need to reformulate the basic issues in the judicial activism controversy. They also suggest future empirical research to consider the long-term consequences to the courts in terms of the legitimacy of plunging into social controversy.[65]

This reviewer came away from *Educational Policy Making and the Courts*, and specifically from the detailed case studies, with the belief that the variables attached to a lawsuit are so random and diffuse that to draw generalities from any sample requires much more sophisticated statistical analysis than that which is presented in this empirical study. The authors honestly share with the reader their own ambiguities on this issue.[66] Yet,

64. *Id.* at 214-15.
65. *Id.* at 216.
66. *Id.* at 199.

if quantitative conclusions are at too low a level of generalization, the danger is that they become insignificant. For example, if all reviewers of this book reduced their answers to a simple yes or no in response to the question: "Did you like this book," we could tabulate a generalization about the book. But how useful or significant would it be? This is not to minimize Rebell and Block's achievement. They are among the first to attempt to link a coherent theory of the legal process to empirically grounded research. Hopefully, this important book will encourage the authors and others to continue such research.

A final word of praise is owed to the University of Chicago Press. In an age when editing and publishing practices are to traditional standards as organ music at the ball park is to Handel, it should be noted that this is a graphically well designed and edited book.