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'JUDICIAL ACTIVISM' REVISITED: A COMPARATIVE INSTITUTIONAL ANALYSIS OF THE STATE COURTS' ROLE IN ENSURING EQUAL EDUCATIONAL OPPORTUNITY

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Fiscal equity and education adequacy litigations constitute the most dynamic constitutional law initiative of the state courts in American history. After the United States Supreme Court declared that education was not a "fundamental interest" under the federal constitution,[1] constitutional challenges to the inequitable and inadequate funding of public education have been litigated extensively in the state courts of 45 of the 50 states. At an accelerating rate, the state courts have upheld plaintiffs' claims: since 1989, plaintiffs have prevailed in 75% of education adequacy cases.[2] In doing so, these courts have articulated and formulated the right to a basic quality education for all public school students.

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[1] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

[2] In the early years, most of these cases were litigated under "equity" theories based on equal protection clauses in state constitutions. Between 1973 and 1988, plaintiffs prevailed in 7 of 22 final decisions of highest state courts in these cases. See, Michael A. Rebell, "Education Adequacy, Democracy, and the Courts," in Christopher Edley, Timothy Ready and Catherine Snow, eds., *Achieving High Educational Standards for All* (National Academy Press, 2002) (hereafter "Education Adequacy, Democracy and the Courts"). Since 1989, when the right to an "adequate" education under substantive education clauses in state constitutions became the predominant claim, plaintiffs have prevailed in 21 of 28 state highest court decisions. (a current report on the status of the education adequacy cases nationwide is maintained on the ACCESS website, http://www.schoolfunding.info/litigation/litigation.php3). For a discussion of the doctrinal distinctions between "equity" and "adequacy" cases, see Education Adequacy, Democracy and the Courts.

Implementation of the court decrees in these cases has led to notable successes. In Kentucky, the courts' intervention has resulted in dramatic reductions in spending disparities among school districts,[3] the redesign and reform of the entire education system, and a significant increase in that state's student achievement scores.[4] In Massachusetts, enactment of the Education Reform Act of 1993 in response to that state's adequacy litigation has also sharply reduced the funding gaps between rich and poor school districts, [5] and the percentage of students achieving proficiency on state tests has risen dramatically.[6] As a result of litigation in Arizona, facilities standards have been aligned with the state's learning standards, and all school buildings are being brought up to the new code.[7]

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[3] Molly A. Hunter, "All Eyes Forward: Public Engagement and Educational Reform in Kentucky," *Journal of Law & Education*, Vol. 28, No. 4 (October 1999), 485.

[4] Kentucky Department of Education, "Report on The 10th Anniversary of Education Reform in Kentucky" (2000), 72-87 (retrieved from http://www.education.ky.gov/KDE/HomePageRepository/Publications/Report+on+The+10th+Anniversary+of+Education+Reform+in+Kentucky.htm).

[5] *Hancock v. Driscoll*, 2004 Mass. Super. LEXIS 118 (Mass. Sup. Ct. Apr. 26, 2004), overruled on other grounds, *Hancock v. Commissioner of Education* 822 N.E.2d 1134 (Mass. Supreme Judicial Court, 2005).

[6] For example, on the fourth grade English Language Arts examinations the percentage of students meeting proficiency rose from 20 percent in 1998 to 55 percent in 2003; on the tenth grade math examination the percentage meeting proficiency over that five-year period rose from 25 percent to 50 percent. The Rennie Center for Education Research and Policy, *Reaching Capacity: A Blueprint for the State Role in Improving Low Performing Schools and Districts* (Spring 2005), 9.

[7] Molly A. Hunter, "Building on Judicial Intervention: the Redesign of School Facilities Funding in Arizona" (Campaign for Fiscal Equity, Inc., 2003).

In some states, the mere filing of a complaint has led to significant reforms.[8] Even where plaintiffs have not prevailed in a litigation, the issue of finance reform has been put at the top of the legislative agenda, in some cases prompting significant legislative changes.[9] The courts' involvement in this area has also spurred the wide-spread use in over 30 states of "costing out" studies, which have substantially improved the methodologies used to determine objectively the amount of resources needed to provide an adequate education.[10]

Despite the dramatic impact of their interventions and a record of notable successes, the state courts' widespread involvement in educational adequacy litigations has not consistently realized its potential for promoting positive educational reform. Although legislatures and governors in some states have responded promptly and

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[8] In Iowa, within a year after a coalition of 160 school districts and individuals filed suit challenging the school funding system, the legislature passed a bill replacing the current local-option sales tax for schools with a pool of sales-tax money that would be distributed on a per-pupil basis, and the suit was withdrawn. Lynn Okamoto, "House OKs Bill on School Tax Pool," *Des Moines Register*, April 24, 2003 (retrieved from http://desmoinesregister.com/news/stories/c4780934/21086606.html); Iowa Dep't of Rev. SF445 press release, June 2, 2003 (retrieved from http://www.state.ia.us/tax/news/nrSF445.html); Molly A. Hunter, *Iowa Suit Seeks Equitable and Adequate School Funding* (retrieved from the ACCESS site, http://www.accessednetwork.org/ states/ia/lit_ia.php3). [North Dakota: Dale Wetzel, "School Lawsuit Ends," *Bismarck Tribune*, January 11, 2006 (retrieved from http://www.bismarcktribune.com/articles/2006/01/11/news/topnews/108347.txt).]

[9] See, e.g., G.A. Hickrod, et al, "The Effect of Constitutional Litigation on Education Finance: A Preliminary Analysis," 18 J of Edu Fin 180 (1992) (reductions in inequity occur in states experiencing education finance litigations, whether plaintiffs prevail or not, compared to states in which there has been no litigation). *See* also, William S. Koski and Henry M. Levin, "Twenty-Five Years After *Rodriguez*: What Have We Learned?" 102 Teachers College Record 480, 506 (2000) ("Surely every state legislature is aware of the possibility of educational finance litigation and many have likely taken prophylactic measures.").

[10] For a history, overview and analysis of the use of costing out studies, see Michael A. Rebell, "Professional Rigor, Public Engagement and Judicial Review: A Proposal for Enhancing the Validity of Education Adequacy Studies" (forthcoming).

positively to judicial decrees,[11] in other states there has been excessive delay and resistance to court orders,[12] sometimes combined with threats to revoke the court's authority to hear these cases.[13] In two instances, State Supreme courts, after initially

[11]In Vermont, for example, within months of the court's decision the legislature enacted a dramatic set of sweeping education finance reforms. (Michael A. Rebell and Jeffrey Metzler, "Rapid Response, Radical Reform: The Story of School Finance Litigation in Vermont," 31 Journal of Law & Education 167 [2002]). In Wyoming, the Joint Appropriations Committee of the legislature promptly commissioned and implemented a cost study according to the Court's order in *Campbell County School District v. State*, 907 P.2d 1238 (Supreme Court of Wyoming 1995). As noted above, the Kentucky legislature promptly responded to the Court's decision in *Rose v. Council for Better Education*, 790 S. W. 2d 186 (Kentucky 1989) by enacting a thorough-going reform scheme that dramatically exceeded the court's requirements. See, Hunter, All Eyes Forward, supra note 3.

[12] In New York, for example, the legislature failed to act by the July 30, 2004 deadline established by the New York State Court of Appeals in *Campaign for Fiscal Equity ("CFE") v. State of New York*, 801 N.E. 2d 326 (NY, 2003), causing plaintiffs to seek and obtain a further remedial order from the trial court. *CFE v. State of New York*, Index 111070/93, *Notice of Appeal* [Supreme Court of New York County, Apr. 15, 2005], appeal pending. In New Hampshire, the state legislature and governor reacted to the court's ruling in *Claremont School District v. Governor*, 703 A.2d 1353 (1997) by proposing a number of constitutional amendments limiting the court's power and affirming the state's unconstitutional school funding system. After the amendments failed to pass, the legislature created a funding system that did not address many of the tax issues raised by the lawsuit, and which was based upon the results of a cost study that had been substantially manipulated to lower costs. Their reaction led to further legal challenges. Drew Dunphy, "Moving Mountains in the Granite State: Reforming School Finance and Defining Adequacy in New Hampshire," (Campaign for Fiscal Equity, 2001), 14-25.

[13] In Kansas, for example, after the state Supreme Court responded to the legislature's failure to comply fully with its initial order with a definitive requirement for a substantial funding increase by a date certain, leaders of the state Senate informed the Governor that they would comply only if the education finance reform bill were accompanied by a constitutional amendment revoking the court's jurisdiction over education finance issues in the future. (John Hanna, "Showdown looms as Republicans plan amendment," *Lawrence Journal-World*, June 17, 2005 (retrieved from http://www2.ljworld.com/news/2005/jun/17/showdownlooms/?politics); John Milburn, "Senate pushes for constitutional amendment," *Lawrence Journal-World*, June 29, 2005 (retrieved from http://www2.ljworld.com/news/2005/jun/29/senate_pushes/).Within weeks, this resistance was overcome and a bill enacted in accordance with the court's order. *Montoy v. State*, 278 Kan. 769; 102 P.3d 1160; 2005 Kan. LEXIS 2 (Supreme Court of Kansas).

confronting opposition to their orders, retreated from the fray and terminated the cases before an appropriate remedy had been fully effectuated.[14]

One of the major reasons for delay and resistance to constitutional mandates in these cases is that there is an "absence of a legitimate legal discourse" [15] that straightforwardly supports the judicial interventions. Opponents attack the legitimacy of the court's involvement, claiming that it is a usurpation of legislative and executive authority in separation of powers terms. In addition, they disparage the capacity of "generalist" judges to make constructive educational policy judgments.[16] These charges of judicial usurpation and judicial incompetence, which stem from political opposition to the desegregation decrees of the federal courts in the 1960s and 1970s, have little doctrinal or empirical substance. In the absence of a clear conceptual framework that

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[14] In both Alabama and Ohio, state supreme court judges are elected and the education adequacy case became a major issue in the judicial elections. New judges who were critical of the court's adequacy ruling replaced members of the majority who had voted for the education finance reforms. In Alabama, the result was a *sua sponte* move by the state supreme court in 2002, to reopen *Alabama Coalition for Equity v. Spiegelman*, 713 So. 2d 937 [1997] a case it had decided for the plaintiffs in 1993. After soliciting arguments from the two sides, the court dismissed the case, citing a violation of separation of powers. "Alabama Supreme Court Dismisses Funding Case it Previously Affirmed," Access website, May 31, 2002 (retrieved from http://www.schoolfunding.info/states/al/5-31-02ACEdismissed.php3). In Ohio, despite repeated rulings by the state supreme court that the state's school funding system was unconstitutional in *DeRolph v. State* (677 N.E.2d 733 [1997], 728 N.E.2d 993 [2000], 754 N.E.2d 1184 [2001]), the legislature failed to enact sufficient reforms. Once the supreme court changed hands, the new justices agreed to a request by the state to end the compliance process, effectively putting an end to the case. "Ohio," Access website (retrieved from http://www.schoolfunding.info/states/oh/lit_oh.php3).

[15] Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (Cambridge: Cambridge University Press, 1998), 338.

[16] *See, e.g.* Michael Heise, "Litigated Learning and the Limits of the law," 57 Vand L. Rev. 2417 (2004); Kenneth W. Starr, "The Judiciary and the Uncertain Future of Adequacy Remedies: A Look to the Past," a paper presented at the conference on "Adequacy Lawsuits: Their Growing Impact on American Education," Kennedy School of Government, Harvard University, October 13-14, 2005.

affirmatively supports the courts' proper role in these cases, however, judges and their supporters are put on the defensive and sometimes withdraw from the fray before their remedial responsibilities have been fulfilled.

This article seeks to revisit and then transcend the traditional "judicial activism" debate by analyzing the role that the state courts have played in education adequacy litigations over the past two decades, and the enhanced role that they should undertake in the future. It will propose a "legitimate legal discourse" that will explain how the courts, acting in concert with legislatures and executive agencies, can and must ensure effective remedies in cases involving widespread deprivations of important constitutional rights.

Part I will summarize the traditional judicial activism debate over the legitimacy of the courts' involvement in cases that deal with social policy making and their capacity for dealing with complex social policy issues. Many of the criticisms lodged by opponents of judicial activism have in recent years essentially been mooted by legislative decisions to authorize and even to require additional judicial involvement in education and other areas of social policy. Moreover, empirical analyses have demonstrated that the courts have proved capable of evaluating complex social science evidence and of formulating extensive remedial decrees, especially when viewed from a comparative institutional perspective that also considers problems that legislatures and executive agencies encounter in attempting to resolve difficult social policy issues.

Part II distinguishes the roles of state courts from federal courts in institutional reform litigations. Traditional notions of "legitimacy" are less significant in the state court context because state court judges are closer to the local political process than their federal counterparts; federalism concerns do not overlay the relationship between the

courts and the legislative and executive branches, and most state constitutions can be amended more easily than the federal constitution. The question of "capacity" does loom large in this sector, however. This is not because of an inherent limitation on the courts' ability to engage in social fact evaluation or remedial oversight, but because of the broad range of institutional reform issues at the state level that might arguably justify judicial intervention, and the state courts' limited resources. State courts must, therefore, limit their discretionary involvements to areas of social policy that are of overriding constitutional significance and in which the other branches of government, acting on their own, prove unwilling or unable to enforce important constitutional guarantees. Education adequacy claims justify judicial intervention on both these counts. Moreover, in many state constitutions, access to a basic quality education is set forth as a "positive right" that calls for the affirmative governmental action in contrast to the "negative restraints" of the federal constitution. These affirmative constitutional provisions *require* the courts to act to ensure that the constitutional rights at issue are effectively enforced.

Part III sets forth a new conceptual framework for considering the courts' contemporary role in institutional reform litigations, based on comparative institutional analyses of the relative strengths and weaknesses of the legislative, executive and judicial branches in specific social policy contexts. The framework also emphasizes the importance of promoting a "colloquy" among the branches geared to promoting effective solutions to social policy problems. The comparative institutional framework is then applied in Parts IV and V to specific examples of social science fact finding and the formulation of remedies in education adequacy cases.

Part IV begins with a discussion of the distinction between "interpretative" and "instrumental" fact-finding that was at issue in the controversy about the use of social science evidence by the U.S. Supreme Court in *Brown v. Board of Education*, which triggered much of the traditional judicial activism debate. This distinction is less significant in the state court education adequacy context, it will be argued, because the core constitutional value here, "adequate education" is subject to continuing reconsideration based in large part on current social science evidence and understandings. An effective colloquy between courts, legislatures and state education departments, in which judicial fact-finding plays a central role, has led to significant conclusions about the elements of a basic quality education in New York, North Carolina, South Carolina and a number of other states. The courts have also entered into an important "colloquy" with the other branches and with professionals in the developing field of "costing out" studies in helping to define the scope of this newly-developed field of social science and in analyzing the validity of particular studies. Judicial fact-finding has also led to definitive conclusions that have largely resolved the long-standing controversy in the social science literature on whether money "matters" in education reform.

Part V first explores the conceptual difficulties involved in defining "success" in the context of education adequacy litigations. The quantitative measures of "success" used to assess the outcome of equity litigations (*i.e.* reductions in disparities in expenditures or increases in overall spending on education) are of limited use in determining whether a meaningful opportunity for an adequate education has actually been provided to all students. A model for assessing sustained success is then proposed, based on the use of broad-based outcome measures and the interactive, comparative

institutional commitment by all three branches of government to a) adequate funding, b) the building of instructional capacity in low-performing schools, and c) extensive accountability measures Finally, the concluding section revisits the classical "right/remedy issue and argues that the state courts, through an on-going colloquy with the other branches of government, have a constitutional obligation to ensure that *effective* remedies are put into place whenever students have been systematically denied the opportunity for a basic quality education.

I – The Legitimacy and Necessity of Judicial Intervention

Brown v. Board of Education,[17] the U.S. Supreme Court's landmark desegregation ruling in 1954, precipitated a new, more expansive role for the federal courts in dealing with major social policy issues. Federal courts throughout the country took on the monumental task of overseeing the dismantling of dual school systems. The *Brown* precedent also quickly led to the articulation and implementation of new rights in regard to ensuring equal opportunities in school discipline practices,[18] bilingual education,[19] gender equity,[20] special education,[21] and other educational policy areas. In addition, *Brown* spurred judicial involvement in combating unconstitutional practices in a diverse range of other social policy areas including institutions for the mentally ill[22] and

[17] 347 U.S. 483 (1954).
[18] See, e.g., *Goss v. Lopez*, 419 U.S. 565
[19] See, e.g. *Lau v. Nicols*, 414 US 563 (1974).
[20] See, e.g. *U.S. v. Virginia*, 518 U.S. 515 (1996).
[21] See, e.g. *Mills v. Board of Education*, 348 F. Supp. 866 (D.C., 1972), Pennsylvania Association of Retarded Children v. Commonwealth, 343 F.Supp 279 (E.D. Pa 1972).
[22] See, e.g. *Wyatt v. Stickney*, 344 F. Supp 373 (M.D. Ala, 1972), *aff'd in part sub nom. Wyatt v. Aderhold*, 503 F.2d 1305 (5th Circuit 1974).

the developmentally disabled,[23] prison systems,[24] and local regulation of land use practices.[25]

In 1976, Harvard Law Professor Abram Chayes attempted to document and conceptualize this "new model" of judicial involvement in social policy reform, in a highly influential article entitled, "The Role of the Judge in Public Law Litigation." [26] Chayes 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. Over the years, he claimed, this expansion led both to an increase in regulations with concomitant judicial review, and to an easing of traditional judicial limitations such as standing rules and doctrines of justiciability. Chayes contrasted the traditional role of the courts as "umpires" for private disputes with their new regulatory role in the welfare state era. He postulated that whereas the traditional lawsuit is "bipolar" (*i.e*., a contest between two individuals or entities with diametrically opposed interests), "retrospective" (*i.e.*, concerning events that are already completed), and involves an "interdependence between right and remedy," the "new model" public law litigation is multi-polar (involving numerous parties and points of view), "forward looking," and frequently

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[23] New York State Association of Retarded Children v. Rockefeller, 357 F. Supp 752 (E.D. N.Y., 1973). For a case study analysis of this case, see, David J. Rothman and Sheila M. Rothman, *The Willowbrook Wars: A Decade of Struggle for Social Justice* (New York: Harper & Row, 1984).

[24] The extensive involvement of the federal courts in reforming unconstitutional practices in state prison systems is discussed in detail in Feeley and Rubin, Judicial Policy Making and the Modern State, supra note 15.

[25] See, e.g., *Hills v. Gatreaux*, 425 U.S. 284 (1976). For a case study discussion of the New Jersey Supreme Court's extensive involvement in *Southern Burlington Co. NAACP v. Mt. Laurel*, 336 A. 2d 713 (1975), see David L. Kirp et al, *Our Town: Race, Housing and the Soul of Suburbia* (New Brunswick: Rutgers University Press, 1995).

[26] Abram Chayes, "The Role of the Judge in Public Law Litigation," 89 Harv. L.Rev. 1281 (1976).

involves the court in prolonged supervision of the implementation of new policies and practices designed to overcome the problems exposed by the case. In short, "[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."[27]

Chayes's historical and analytical perspective on this new model of public litigation still did not satisfy many of the critics. The courts' forays into policy-making in areas that traditionally were considered in the legislative or executive domain were considered a violation of traditional separation of powers notions and a usurpation of legislative and executive prerogatives. [28] Defenders of the courts' new role argued that the courts were merely adapting traditional concepts of judicial review to the needs of a complex administrative state[29] and that "No 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."[30]

The courts' institutional capacity to carry out successfully these broad new remedial tasks was also widely questioned. Critics claimed that courts are incapable of obtaining sufficient social science data and that judges generally are unable fully to

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[27] Id at 1302.
[28] See, e.g., Nathan Glazer, "Toward an Imperial Judiciary?" 41 Public Interest 104 (1975); Raoul Berger, *Government by Judiciary: the Transformation of the Fourteenth Amendment* (Cambridge: Harvard University Press, 1977). See also, Philip Kurland, *Politics, The Constitution and the Warren Court* (Chicago: University of Chicago Press, 1970), 203 (accusing judges of acting like "Platonic Guardians').
[29] 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).
[30] Edward Levi, "Some Aspects of Separation of Powers," 76 Col. L. Rev. 371,376 (1976). See also, Richard Nealy, *How Courts Govern America* (New Haven: Yale University Press, 1981).

understand and digest the data that are obtained.[31] They also contended that judges lack coherent guidelines for resolving policy conflicts and that, therefore, they fail to undertake a comprehensive policy review or to consider the overall implications and consequences of their orders.[32] Additional troubling aspects of the remedial decree in institutional reform litigations, from this point of view, are its "long duration and wide impact,"[33] and the fact that the remedy has extensive "consequences for third parties."[34]

Defenders of this new remedial role retorted that the courts' lack of established organizational mechanisms is a virtue, not a vice, because it permits a flexible response that can be tailored to the needs of the particular situation.[35] Moreover, many of the strengths of the traditional adversary process, which is a highly efficient mechanism for ensuring an effective information flow to the judge, carry over to the new model cases. [36] The courts have always delved into complex social and economic facts, [37] and processes

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[31] See, e.g. Donald L. Horowitz, *The Courts and Social Policy* (Washington, D.C.: The Brookings Institution, 1977), Eleanor P. Wolf, "Social Science and the Courts: The Detroit Schools Case," 42 Public Interest 102 (1976).

[32] See, e.g. Horowitz, The Courts and Social Policy, supra note 31 and Jeremy Rabkin, *Judicial Compulsions: How Public Law Distorts Public Policy* (New York: Basic Books, 1989). In a later work, Horowitz acknowledges, but decries, many of the deep-seated changes in the structure of the legal system which reflect the new model of public law litigation. Donald L. Horowitz, "Decreeing Organizational Change: Judicial Supervision of Public Institutions," 1983 Duke L.J. 1265 (1983).

[33] Robert F. Nagel, "Separation of Powers and the Scope of Federal Equitable Remedies," 30 Stan. L. Rev. 661, 710 (1978).

[34] Id. *See* also Gerald E. Frug, "The Judicial Power of the Purse," 126 U. PA. L. Rev. 715 (1978); Paul J. Mishkin, "Federal Courts as State Reformers," 35 Wash & Lee L. Rev 949, 965 (1978).

[35] Chayes, The Role of the Judge, supra note 26 at 1309; 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).

[36] See, e.g. Thibault, Walker and Lind, "Adversary Presentation and Bias in Legal Decision-making," 86 Harv. L.Rev.386 (1972).

[37] Paul Rosen, *The Supreme Court and Social Science* (Urbana: University of Illinois Press, 1972).

of judicial appointment or election assure that judges are "likely to have some experience of the political process and acquaintance with a fairly broad range of policy problems."[38]

Although criticisms of particular instances of active judicial involvement in social policy making still resound in political debates and in the popular press, serious academic discussion of the "legitimacy" of the courts' enhanced role has been muted in recent years.[39] Chayes's contention that the courts' expanded role is a fundamental judicial reaction to deep-rooted social and political trends seems to be borne out by the fact that the activist stance initiated during the Warren Court era has persisted to a large extent through the Burger and Rehnquist[40] years and that conservatives no less than liberals now

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[38] Chayes, The Role of the Judge, supra note 26 at 1308.

[39] The historical validity of the concept of the "counter majoritarian" nature of judicial intervention has been strongly questioned by Barry Friedman, "The History of the Counter Majoritarian Difficulty: Part One: The Road to Judicial Supremacy," 73 N.Y.U. L. Rev. 333 (1998). *See also,* Bruce Ackerman, *We the People* (Cambridge: Harvard University Press, 1991), 40 (describing how, since the New Deal, "an activist regulatory state is finally accepted as an unchallengeable constitutional reality").

An additional reason for the waning of scholarly discussion of the "legitimacy" of judicial activism has been the fact that public choice scholarship in recent years has cast doubt on the traditional assumption that legislative enactments reflect majority preferences. See, e.g., Daniel A. Farber and Philop P. Frickey, *Law and Public Choice* (Chicago: University of Chicago Press, 1991), Jerry L. Mashaw, *Greed, Chaos and Governance: Using Public Choice to Improve Public Law* (New Haven: Yale University Press, 1997), 165; William N. Eskridge, Jr., "Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation," 74 Va. L. Rev. 275, 275-76 (1988).

[40] Indeed, if "judicial activism" is defined in terms of declaring an act of the legislature unconstitutional, the Rehnquist court has been the most activist in American history. Until 1991, the U. S. Supreme Court struck down an average of about one Congressional statute every two years. Since 1994, the Court has struck down 64 Congressional provisions, or about six per year. This invalidated legislation has involved social security, church and state, campaign finance, and a host of other major social policy issues. Paul Gewirtz and Chad Goldner, "So Who Are the Activists?" *New York Times,* July 6, 2005 [op-ed]. Gewirtz and Goldner also point out that the Court's most conservative members tended to be the most "activist": Justice Thomas voted to strike down 65.63% of these Congressional provisions, Justice Scalia 56.25%, in contrast to only 39.06% for Justice Ginsberg and 28.13% for Justice Breyer.

tend to look to the courts routinely to remedy legislative or executive actions of which they disapprove.[41] As Feeley and Rubin have noted:

> [Judges] are part of the modern administrative state….And they fulfill their role within that context. Under certain circumstances that role involves public policy makings; as 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.[42]

The irony of the fact that some political commentators and academics continue to invoke anachronistic "judicial activism" phrases is that, while these pundits persist in arguing that the courts' new role is usurping legislative powers, Congress and the state legislatures have themselves asked the courts to take on more of these policy-making activities by passing regulatory statutes that directly or implicitly call for expanded judicial review.[43] The significance of this trend of the creation of new statutory rights

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[41] *See, e.g., Gratz v. Bollinger* 539 U.S. 244 (2003) (declaring unconstitutional college's policy of granting racial preferences in its admissions policy) (*Cf. Grutter v. Bollinger* 539 U.S. 306 [2003] [upholding policy of considering race as a valid factor in promoting diversity in law school admissions]); *United States v. Morrison* 529 U.S. 598 (2000) (declaring unconstitutional the Violence Against Women Act); *United States v. Lopez* 514 U.S. 549 (1995) (invalidating Gun Free School Zones Act); *Roslyn Union Free Sch. Dist. No. 3 v. Hsu*, 85 F.3d 835 (2d Cir. 1996) (allowing school religious club to require its officers to be Christians), cert. denied, 117 S. Ct. 608 (1996). See also, Frew ex. rel. *Frew v. Hawkins*, 540 U.S. 431 (2004) (re-iterating power of federal courts to enforce broad-ranging consent decrees in institutional reform litigations).

[42] Feeley and Rubin, Judicial Policy Making and the Modern State, supra note 15 at 344.

[43] For example, in the Individuals with Disabilities Act, 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. 20 USC §1415(e)(2) (1994). *See* also, e.g., the Adoption Assistance and Child Welfare Act of 1980, P.L 96-272, 94 Stat. 500, which requires states to adopt federal standards to obtain federal funds. It has reportedly spawned foster care litigation in at least 34 states. National Center for Youth Law, "Foster Care Reform Litigation Docket" (2000) (retrieved from http://www.youthlaw.org/fcrldocket2000.pdf) [ck] Clean Air Act of 1970, establishing a right to healthy air and explicitly authorizing citizen suits. Clean Air Act of 1970 42 U.S.C. s/s 7401 et seq., ¶ 304.

which explicitly or implicitly expand the enforcement responsibilities of the courts has been recognized even by harsh critics of judicial involvement in social policy making.[44] Under these circumstances, 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…." [45]

Concerns regarding the courts' capacity to engage in sophisticated fact-gathering and remedial processes have also been muted by the findings of empirical investigations into what courts actually do in these cases. One of the major shortcomings of the judicial activism debate was its focus on the limitations of the judicial branch, while ignoring the comparable institutional shortcomings of the legislative and the executive branches. For example, Donald Horowitz, one of the foremost critics of the court's new role, catalogued

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[44] *See, e.g.*, Ross Sandler and David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government* (New Haven: Yale University Press, 2003). Although recognizing the significance of this trend, Sandler and Schoenbrod are highly critical of its implications: "By extrapolating [the Brown precedent] to a whole host of newly minted rights, [Congress has] created a new governmental lineup in which one set of officials at the federal level largely escapes accountability for the costs of the laws they pass and another set of officials at the state and local levels lacks the power to balance the costs of implementing the federal statutory rights against other competing priorities." Id at 33. *Cf* Mark Tushnet, " Sir, Yes, Sir: The Courts, Congress and Structural Injunctions, 20 Const. Com 189 (2003) (arguing that Sandler and Schoenbrod's criticism of the courts is misguided since the political branches, through clear democratic processes, authorized and required them to enforce the affirmative rights at issue).

[45] Chayes, The Role of the Judge, supra note 26 at 1313. In one area, that of prison litigations, Congress has acted affirmatively to limit judicial involvement. Thus, the Prison Litigation Reform Act, 18 U.S.C.A.§ 3626 (1966)("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. To a large extent, however, the PLRA is the exception that proves the rule. Despite this strong Congressional attempt to eliminate or limit federal court involvement in prison litigations, the courts have continued their involvement in reforming prisons in order to protect prisoners' constitutional rights to humane conditions of confinement. [Add cites. Comp: "Report on the Prison Litigation Reform Act: What Have the Court's Decided So Far?" by Barbara Belbot in The Prison Journal (2004, http://ft.csa.com/ids70/resolver.php?sessid=f8dc99d8e62ce32cb9b54bf8701e9029&server=md3.csa.com&check=7ae4873da9be1c409842f35c1948c1c0&db=sagecrim-set-c&an=10.1177%2F0032885504268177&mode=pdf&f1=0032-8855%2C84%2C3%2C290-316%2C2004)

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.[46] As Prof. Neil Komesar has 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.[47]

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[46] Donald Horowitz, The Courts and Social Policy, supra note 31. Horowitz continues to be cited repeatedly today by critics of judicial policy-making. See, e.g. Joshua Dunn and Martha Derthick, "Who Should Govern? Adequacy Litigation and the Separation of Powers," 19 a paper presented at the conference on "Adequacy Lawsuits: Their Growing Impact on American Education," Kennedy School of Government, Harvard University, October 13-14, 2005.

[47] 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). Komesar elaborates on his comparative analytic approach in Neil K. Komesar, "Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis," 51 Chi L. Rev 366 (1984). See also, Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (Chicago: University of Chicago Press, 1997).

For additional theoretical perspectives on comparative institutional analysis, see also, Fritz Scharf, "Judical Review and the Political Question: A Functional Analysis," 75 Yale L.J. 517 (1966) ( ); Eskridge, "Politics Without Romance," supra note 42 (exploring courts' comparative institutional advantages in fairly considering all views and formulating balanced public policy from a "public choice" perspective"); Edwin L . Rubin, "The New Legal Process: The Synthesis of Discourse and the Microanalysis of Institutions," 109 Harv. L. Rev. 1393 (1996) (calling for a new synthesis of process, law and economics, and critical legal theories into a "new realm of comparative legal analysis that explores institutional capacities under particular circumstances"); Mark Tushnet, "'Sir, Yes, Sir': The Courts, Congress, and Structural Injunctions," 20 Const. Com 189, 203 (2003) ("Once we abandon the delusion that problems of policy rationality and democratic legitimacy are distinctive to judicial enforcement of statutory requirements, we're going to need careful assessments of the legitimacy and capacity of

In the 1980s, my colleague Arthur R. Block and I undertook two major empirical studies that applied comparative institutional analysis techniques to actual instances of educational policymaking by courts, legislatures, and administrative agencies. The first study compared policy-making, fact-finding, and remedial oversight practices of courts and legislatures through comparative analyses of how courts and legislatures had actually handled comparable faculty desegregation and bilingual education initiatives in New York and Colorado; this study also considered "caselets" of judicial policy making in over 60 other cases throughout the country.[48] Our second study compared the practices of the federal Office for Civil Rights (OCR) in investigating and remedying discriminatory educational practices with the policy making, fact-finding and remedial practices of courts in comparable situations.[49]

In regard to policy-making, our comparative analyses concluded that judicial deliberations tended to reflect a "rational-analytic" decision-making mode, in contrast to the mutual adjustment processes that tend to predominate in legislative decision making.[50] Administrative policy-making we referred to as a "pragmatic/analytic" policy

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different institutions of governance--of different political processes--to address a range of policy issues. Focusing solely on the problems associated with some judicial enforcement proceedings does not advance the real inquiry.")

[48] Michael A. Rebell and Arthur R. Block, *Educational Policy Making and the Courts: An Empirical Study of Judicial Activism* (Chicago: University of Chicago Press, 1982).

[49] Michael A. Rebell and Arthur R. Block, *Equality and Education: Federal Civil Rights Enforcement in the New York City School System* (Princeton: Princeton University Press, 1985). Although the core case study here involved New York City, detailed comparative perspectives were also obtained of comparable OCR activities at the time in Chicago, Los Angeles and Philadelphia.

[50] See also, James Q. Wilson, ed., *The Politics of Regulation* (New York: Basic Books, 1980), 390 ("The courts provide a ready and willing forum in which contending interests may struggle over the justification and interpretation of specific rules and practices, matters that ordinarily are of little interest to congressional committees or the White

making mode because it was more committed to solving the problem at hand than the unstructured mutual adjustment processes of the legislature, but more politically sensitized and flexible than the approach of the courts.[51]

One of the major conclusions of our comparative empirical studies 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. These tended to be "window dressing" occasions organized to justify political decisions that had already been made.[52] Fact gathering through the administrative process proved to be more comprehensive and more sophisticated than that of either the courts or the legislatures, at least in this massive OCR special investigation context, but questions arose concerning the objectivity of the agency's use

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House except when dramatic events…bring an issue to the fore."); Charles R. Wise, *The Dynamics of Legislation, Leadership and Policy Change in the Congressional Process* (The Jossey-Bass Public Administration Series) (San Francisco: Jossey-Bass, 1991) (legislative policy-making is piece-meal and does not encourage large-scale policy change.); Charles Lindblom , *The Intelligence of Democracy: Decision Making Through Mutual Adjustment* (New York: Free Press, 1965) (discussing partisan mutual adjustment decision-making by legislatures).

[51] Cf. Keith Hawkins and John M. Thomas, ed. *Making Regulatory Policy* (Pittsburgh: University of Pittsburgh Press, 1989) (agency policy making is a mix of incrementalism and "comprehensive policy making.").

[52] A comparative analysis of the fact finding capabilities of the U.S. Congress and the courts reached similar conclusions, *see* Neal Devons, "Congressional Fact Finding," 50 Duke L.J. 1169 (2001). See also, J. Craig Youngblood and Parker C. Foise III, "Can Courts Govern? An Inquiry Into Capacity and Purpose," in Richard Gambitta, et al., eds., *Governing Through Courts* (Beverly Hills, CA: Sage, 1981) (critiquing Horowitz' assumptions regarding judicial capacity), and Sheila Jasanoff, "Judicial Fictions: The Supreme Court's Quest for Good Science," 38 Society 27, 28 (2001). ("Adversarial questioning of experts in legal proceedings has frequently exposed hidden interests and tacit normative assumptions that are embedded in supposedly value-neutral facts. The confrontation of lay and expert viewpoints that the law affords has emerged as a powerful instrument for probing some of the untested epistemological foundations of expert claims.")

of the data since the OCR tended to adopt a "prosecutorial" stance in its approach to the evidence.[53]

In regard to remedies, our studies concluded that judicial remedial involvement in school district affairs was both less intrusive and more competent than is generally assumed, largely because school districts and a variety of experts generally participated in the formulation of reform decrees, with the courts serving as catalysts and mediators. OCR proved effective in administering remedial agreements that call for immediate, statistically measurable implementation, but in regard to the major New York City faculty desegregation agreement that called for 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 the court's.[54]

In the years since our study was completed, the courts' role in social science fact finding and in overseeing remedial processes has become more extensive and more established. The U.S. Supreme Court substantially expanded the authority of federal

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[53] See also, James O. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* (Cambridge: Cambridge University Press, 1978), 24 (discussing the implications of authorizing administrative agencies to combine investigative, prosecutorial and adjudicatory functions); Eskridge, Politics Without Romance, supra note 42 at 308 ("an agency tends to be 'captured" over time, as interest group demands grow increasingly asymmetrical and the agency loses outside political support and institutional momentum.").

[54]Gary Orfield, after completing a number of case studies of judicial involvement in lengthy desegregation cases similarly concluded that "Courts have some special strengths in removal from politics and the ability to stay with a complex issue long enough to implement change." Gary Orfield et al, *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education* (New York: The New Press, 1996), 350.

Legislatures do not purport to engage in remedial oversight of the reform processes they initiate, although oversight hearings and modification of statutory provisions in light of events could be said to constitute analogous functions. We did not, therefore, attempt to extend our comparative analysis of remedial oversight capabilities to the legislative domain.

judges to determine the admissibility of scientific evidence when it ruled in 1992 in *Daubert v. Merrell Dow Pharms, Inc*.[55] that judges must determine whether expert evidence proferred by a party is "scientifically valid."[56] Essentially, judges now are being asked to assess expert evidence and "to make informed discriminations between good and bad science."[57]

The public also has come to look to the courts for an assessment and resolution of highly controverted issues involving the intersection between science and public policy.[58] 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 recent decision of a federal district court judge in Dover, Pennsylvania.[59] The judge's declaration that " after a six week trial that spanned twenty-one days and included

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[55] 506 U.S. 914 (1992).
[56] Id at 590-91, n. 9.
[57] Jasanoff, Judicial Fictions, supra note 52 at 29.
[58] Researchers also appear to be looking to the courts as a source 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: "Both in terms of resources and access to documents, data, and personnel, the Court's investigation far exceeded that typically made by researchers." Clive R. Belfield and Henry M. Levin, "The Economics of Education on Judgment Day," Occasional Paper No. 28, National Center for the Study of Privatization in Education, Teachers College, Columbia University, 17 (July, 2001). Belfield and Levin also opined that:

> Courts can navigate well through (disputed) social science arguments regarding educational outcomes, educational inputs (the education production function), and the deployment of teacher inputs. Moreover, rulings themselves can offer useful guidance to researchers on what fields of inquiry are important for resolving key public policy concerns, on what empirical evidence and which methodologies are deemed most valid, as well as indicate new areas for academic interest. Id at 24-25.

[59] *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707; 2005 U.S. Dist. LEXIS 33647 (M.D., PA, 2005).

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,"[60] was widely accepted by national commentators[61] and local public officials[62] alike.

Increasing reliance on the courts to resolve controverted social science issues does not, of course, prove that courts are perfectly suited to undertake all of these fact-finding responsibilities. The adversary system has at times proved remarkably adept at objectively assessing complex social science data, but when one of the parties fails properly to present significant relevant information that supports its side of the argument, the court may come to an erroneous or biased conclusion.[63] It does appear, however, from a comparative institutional perspective that courts increasingly are perceived to be relatively less flawed than other imperfect decision-making authorities in whom these

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[60] Id. Sl. Op. at 63. The Judge also remarked that "Those who disagree with our holding will likely mark it as the product of an activist judge. If so, they will have erred as this is manifestly not an activist court." Id at 137.

[61] "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." Margot Talbot, "Darwin in the Dock: Intelligent Design Has Its Day in Court," *The New Yorker*, December 5, 2005, 66, 68.

[62] One of the Dover school board members remarked that, "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." James Anthony Whitson, "The Dover (PA) Evolution Case: A True Win for Education?" *Teachers College Record* (Jan 4, 2006).

[63] See, Rebell & Block, Educational Policymaking and the Courts, supra note 48 at 207 (discussing failures of attorneys to present relevant evidence in bilingual education case), Eleanor Wolf, Social Science and the Courts, supra note 31 at 103 (discussing the implications of defendants' tactical decision to offer no evidence regarding residential housing patters in the Detroit school desegregation case).

responsibilities might be lodged. The manner in which comparative institutional analysis can be used to enhance the ability of courts, as well as other governmental institutions, to more effectively resolve disputes involving complex social science issues will be discussed further in Parts III-V below.