

# Book Reviews

## Courts and Legislatures as Arbitrators of Social Change

*Educational Policy Making and the Courts: An Empirical Study of Judicial Activism.* By Michael A. Rebell & Arthur R. Block. Chicago: The University of Chicago Press, 1982. Pp. xv, 319. \$27.50.

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The theory of comparative institutional advantage allocates substantive decisionmaking between courts and legislatures according to their relative ability to make truly representative decisions.<sup>1</sup> According to utilitarian democratic theory, the only acceptable basis for social choice among competing values is the number and intensity of popular preferences. Because the legislature is much better equipped to register popular values than courts, the legislature is presumptively the superior decisionmaker.<sup>2</sup> The legislature, however, is never a perfect representational institution.<sup>3</sup> Sometimes courts can better reconstruct the results of a truly representational

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1. See Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative*, 79 MICH. L. REV. 1350 (1981) (applying comparative institutional analysis to various institutions and issues); Komesar, *Taking Institutions Seriously: A Strategy for the Construction of Constitutional Analysis*, 51 U. CHI. L. REV. (1984) (forthcoming) (comparing judiciary to legislature as reviewer of legislative action). Unlike some theories of judicial review that depend upon "natural" rights, comparative institutional advantage is compatible with the radical separation of law from morals essential to liberal democracies. See R. UNGER, KNOWLEDGE AND POLITICS 76-80, 85-88 (1975).

2. Cf. Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 SUP. CT. REV. 49, 64, 74 (discussing Locke's and Pufendorf's arguments giving primacy to legislation).

3. See D. MUELLER, PUBLIC CHOICE 263-70 (1979) (pointing out difficulties of redistributive questions in democratic legislatures under positivist, contractarian theories); see also Michelman, *Universal Resident Suffrage: A Liberal Defense*, 130 U. PA. L. REV. 1581, 1584-88 (1982) (all distributions of political rights are also distributions of economic wealth).

process. Comparative institutional advantage holds that judicial review is proper in such cases. By refusing to act unless action is needed to increase representativeness, the use of comparative institutionalism turns the counter-majoritarian difficulty<sup>4</sup> on its head: Courts will act only when they are more democratic than legislatures.

Because the legislative process is subject to a number of predictable and patterned flaws, the scope of the representational flaws of legislatures is not necessarily small. First, there is *de jure* or *de facto* exclusion; insular minorities may be locked out of the legislative process so that their preferences do not register.<sup>5</sup> Among represented interests, there is the tyranny of the majority—when weak preferences of a bare majority may dominate strong preferences of a minority<sup>6</sup>—or the tyranny of the minority—when strong preferences of a special interest may overwhelm even stronger, but diffuse, preferences of a majority.<sup>7</sup> Indeed, almost all important provisions of the Constitution can be seen as examples of concern about representational failure (i.e., as expressing institutional distrust).<sup>8</sup> Comparative institutional advantage can therefore become a theoretically grounded method of interpretivism<sup>9</sup> that resolves the tension between textual and structural methods of interpreting the Constitution.

The existence of representational flaws in the legislature does not by itself justify review. For a court to intervene, the court must be able to correct the legislative flaw and must address other issues in the same case, some of which the legislature is clearly better able to decide. Even when legislatures are seriously flawed, courts may be worse—as the political (nonracial) gerrymandering left over after the reapportionment decisions perhaps suggests.<sup>10</sup> Conversely, legislatures may be adequate while courts

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4. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–23 (1962) (describing difficulty of establishing constitutional authority for judicial review of legislative decisions).

5. This is the premise of the famous *Carolene Products* footnote. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). See generally Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 *YALE L.J.* 1287 (1982) (historical analysis of footnote 4 of *Carolene Products* and counter-majoritarian difficulty).

6. This may be the problem with all the true “moralisms,” and the justification for protecting erotic material as free speech. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-16, at 661–62 (1978) (describing Supreme Court’s standards in obscenity cases).

7. This is one way to interpret the problem both in *Carolene Products* and the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). For a lucid explanation of the “two tyrannies” as poles of a continuum, see Komesar, *Housing, Zoning, and the Public Interest*, in *PUBLIC INTEREST LAW* 218, 219–21 (B. Weisbrod ed. 1978).

8. See J. ELY, *DEMOCRACY AND DISTRUST* 87–104 (1980) (Constitution concerned with reinforcing representation).

9. I tend to agree with Professor Michaels that all of the prevailing theories of constitutional interpretation are interpretations of the meaning of the text and intentions of the Framers, but that it is nonetheless possible to identify arguments which are not interpretations of, but, in effect, rejections of, the Constitution. See Michaels, *Constitutional Fate: Theory of the Constitution* (Book Review), 61 *TEX. L. REV.* 765, 772–76 (1982).

10. See *Karcher v. Daggett*, 103 S. Ct. 2653 (1983).

## Educational Policy Making

are superior, as with procedural due process.<sup>11</sup> Courts may be the superior institution for deciding one aspect of a case but inferior at resolving another, as when advancing minority rights requires large-scale administration.<sup>12</sup>

Rebell and Block's *Educational Policy Making and the Courts* is an empirical study dominated by two types of concerns about comparative institutional advantage. First, the book asks a series of questions about general judicial competence in cases affecting educational policy. Do courts decide cases according to "principle," the supposed jurisprudential basis for their authority?<sup>13</sup> Are judges able to find facts sufficiently well to deal with policy questions?<sup>14</sup> Can courts represent all the interests involved in educational policy cases?<sup>15</sup> Finally, can they design effective and legitimate remedies?<sup>16</sup> Each question is designed to test assertions of the critique of judicial activism that raises doubts about the element of judicial capacity. The authors answer each question in favor of the competence of courts to decide educational policy.

Rebell and Block also explore the specific relative competencies of courts and legislatures in representing racial minorities' interests in educational policy. In addition to a statistical survey of sixty-five federal "trial court proceedings" concluded between 1970 and 1977,<sup>17</sup> the book contains two extensive case studies comparing judicial and legislative treatment of similar educational issues.<sup>18</sup> On the issue of affirmative action in hiring,<sup>19</sup> minorities in New York State had some success in the federal courts but little in the state legislature.<sup>20</sup> In contrast, minorities in Colorado achieved in the state legislature<sup>21</sup> what they were abruptly denied in the federal courts—a victory on the issue of bilingual/bicultural education.<sup>22</sup> What the authors conclude from these fascinating case studies is unclear, but the question raised is obvious: If courts are the champions of minorities, why

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11. *Santosky v. Kramer*, 455 U.S. 745, 755-56 (1982) ("[T]he degree of proof required in a particular type of proceeding 'is the kind of question which has traditionally been left to the judiciary to resolve.'" (citation omitted).

12. *Milliken v. Bradley*, 418 U.S. 717, 741-45 (1974). The Court's willingness to confront problems of administration is inevitably affected by its willingness to represent minorities against the legislative status quo. See *infra* pp. 776-77; see also Clune, *Wealth Discrimination in School Finance*, 68 Nw. U.L. REV. 651, 664-75 (1973) (discussing difficulties of identifying minority interests in school financing cases).

13. M. REBELL & A. BLOCK, *EDUCATIONAL POLICY MAKING AND THE COURTS* 23-43 (1982) [hereinafter cited by page number only].

14. Pp. 44-57.

15. Pp. 34-43.

16. Pp. 58-70.

17. Pp. 21-70.

18. Pp. 73-196.

19. Pp. 75-122.

20. Pp. 123-46.

21. Pp. 175-96.

22. Pp. 147-74.

did courts grant minorities only a single, incomplete victory in the two cases studied?<sup>23</sup>

The book does not explain how to integrate its two methods of institutional comparison. The exploration of general judicial competence is not systematically related to that of specific comparative judicial competence, though both explorations use an educational data base and address the rights of racial minorities or cultural and political nonconformists.<sup>24</sup> This failure of integration makes both comparative frameworks seem incomplete. Abstract judicial capacity divorced from substantive issues makes no sense: It is as if the question were simply an heuristic exchange about whether courts or legislatures are the better institutions to "make policy." And so we are left wondering why both courts and legislatures have mixed success in representing minority interests.<sup>25</sup>

In the rest of this Review, I would like to recast the Rebell and Block book in a sharper comparative institutional framework which combines generic capacity questions with questions concerning capacity on the specific substantive issue of representing racial minorities. It seems to me that much of the intriguing content of the book stems from the picture of courts fulfilling two distinct, somewhat opposed roles in deciding cases brought by racial minorities and non-conformists. One role is *legislative correction*, identifying and compensating for imperfection in the legislative process. The other is *judicial correction*, compensating for legislative cor-

23. Although the results of the New York litigation are difficult to summarize because the relevant judicial and administrative decisions spanned eight years, pp. 79-85 (overview of litigation), the minorities involved had obtained significant concessions until the Second Circuit order terminating jurisdiction put the case in limbo. See *infra* pp. 776-77. In Colorado, the court flatly denied the plaintiffs' request for bilingual/bicultural education and affirmative action in educational hirings. *Otero v. Mesa County Valley School Dist.*, 408 F. Supp. 162 (D. Colo. 1975).

24. Rebell and Block define non-conformists as persons challenging governmental actions allegedly "directed against unconventional political, religious, or cultural beliefs or practices." P. 36.

25. A brief synthesis of the two perspectives does appear at the end of the book:

[T]he difficulties courts have encountered in effectuating relief under circumstances of entrenched resistance should not be considered a criticism of the capability of judicial institutions, *per se*. Comparatively speaking, in such situations courts experience substantially the same problems as would any governmental agency attempting such thoroughgoing systemwide reforms. (In many of the instances, the courts became involved precisely because the other branches are unable or unwilling to handle such confrontational issues.) Our findings have shown that in situations where the parties (and the public) are inclined to cooperate (or at least to avoid strong resistance), courts are capable of fashioning effective relief. Thus, in the areas of remedies, as in the area of fact-finding and interest representation, many of the arguments that have been used to criticize judicial capabilities are, we believe, more reflective of the social, political, and technical characteristics of particular public policy controversies than of any comparative judicial incapacity to deal with those issues.

P. 214. This passage is consistent with a modern comparative institutional framework: Courts and legislatures sometimes differ in their capacities to solve different substantive issues; substantive difficulties arise from social and political realities rather than legal categories; identification of a legislative flaw (or strength) is not conclusive because it is not *comparative*. The only essential element of a complete analysis not mentioned is that a single case may involve many issues, and courts may have a comparative advantage in resolving some issues and a comparative disadvantage in others.

rection (a recorection, if you will): Having taken a problem away from the legislature to correct a flaw in the legislative process, courts strive to restore the political process in the parts of the case where political representation is appropriate. Courts are visibly concerned with their obvious relative disadvantage in deciding representational issues.

Part I of this Review concerns legislative correction; Part II, judicial correction. In both parts, I argue that comparative institutional analysis serves both a positive and a normative function. Positively, the book shows courts fulfilling the roles suggested for them by comparative institutional analysis; normatively, the theory allows us to identify lapses from the proper judicial role. I conclude with a discussion of the systemic limits to judicial activism implied by comparative institutional analysis.

### I. LEGISLATIVE CORRECTION: A COMPARATIVE ADVANTAGE

#### A. *Courts as Democracy for Minorities: Need and Capacity*

The book's best evidence of minority underrepresentation in the legislature comes from the case study of the New York legislature's reaction to claims that minority educators were unfairly harmed by layoffs of school personnel:

None of the legislators (and, indeed, none of the interest groups involved) ever disputed the basic claim that recently hired minority teachers were disproportionately affected by the layoffs. But the minority claims were not viewed as principle issues entitled to preeminent consideration. Rather, they were seen as one legitimate interest to be weighted [sic] against other legitimate and competing policy claims in reaching a final workable (or at least politically acceptable) solution.<sup>26</sup>

Weighing interests against each other is the function of a truly representative legislature. Comparative institutional analysis suggests reformulating the problem as one of representational bias. In the context of discriminatory employment practices, past discrimination has created a large group of people (securely employed whites) with a powerful interest in the status quo. The intensity of preferences in favor of this status quo probably is strong enough to outweigh the intensity of preferences in favor of equal employment opportunity. Minorities need "preeminent" consideration now because of subordinate consideration in the past. Thus, comparative institutional analysis suggests this historically complex (yet intuitively plausible) justification for affirmative action: Contemporary

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26. P. 141.

legislative power may be unrepresentative because it reflects past discrimination.

If legislatures are incapable of giving fair weight to minority preferences, how is it possible to explain minority legislative victories? One of the book's most interesting findings is the success in the Colorado legislature of a bill mandating bilingual/bicultural education, a bill that passed in the face of the identical conservative political opposition that plagued the plaintiffs in a federal court case in Colorado also seeking bilingual/bicultural education.<sup>27</sup> The authors suggest several explanations: Two prominent Chicano legislators adopted the bill as a first priority;<sup>28</sup> the more experimentally minded legislature was more accepting of novel educational theories;<sup>29</sup> the pro-education aspects of bilingualism/biculturalism emerged more readily in the legislature than did the conservative "anti-rights" plank.<sup>30</sup>

A comparative institutional perspective suggests two explanations. On the one hand, nothing in the theory predicts that legislatures will be absolutely incapable of fairly representing minorities or that courts will always fairly represent minorities; the Colorado case may simply be an example of institutions acting counter to their usual predilection. On the other, the legislature, though generally inferior to the courts in representing minority interests, may be the superior institution with respect to bilingual/bicultural education but the inferior one with respect to equal employment opportunity. While new educational programs can be adopted at a relatively low cost to any specific interest group, equal employment tends to be a zero sum game between well-represented groups.<sup>31</sup> The latter situation greatly hinders legislative movement away from the status quo.

Whatever uncertainties are raised by the case studies about comparative judicial and legislative capacities in representing minority interests, the statistical survey strongly supports judicial capacity. Rebell and Block report that fifty-six percent of the cases in their sample were brought by minorities, who prevailed in seventy-one percent of their cases, whereas other plaintiffs prevailed in only thirty-five percent of theirs.<sup>32</sup>

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27. Pp. 188, 190 (bill termed "revolutionary," "un-American").

28. Pp. 180-81. The key to getting anything done in our society (and probably any society) is power and priority, access and clout. Success in the legislature may require what Eugene Bardach calls the implementation "fixer." E. BARDACH, *THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES A LAW* 273-78 (1977). In the case of judges, the judicial office brings the power, but judicial sympathy is needed for priority.

29. P. 192.

30. Pp. 182-85.

31. Interestingly, the Colorado legislation also contained provisions requiring affirmative action in hiring. Relative to the total population of employees, however, the impact of such requirements would have been minimal. In any case, the affirmative action requirement was softened in the final version of the legislation. P. 190.

32. P. 36.

The book's analysis of judicial methodology also shows the capacity of courts to represent out-groups. Rebell and Block make much of the adherence of courts to "principle" over "policy." Principle is "[a] statement establishing a right of an individual against the state or against another individual";<sup>33</sup> policy considers "the relative importance or desirability of particular social goals, and/or the relative efficiency and desirability of particular methods for achieving such goals."<sup>34</sup> Although Rebell and Block attempt to use the idea of principle to rescue courts from the forbidden political act of preferring one policy over another, the authors finally concede that a principle might be simply a policy judgment reached by a higher court, or a new democratic value expressing itself in the form of litigation.<sup>35</sup> Legal realists are thus confirmed in their suspicion that a principle is a policy endowed with judicial priority and called a "right"; the formalistic distinction between policy and principle is untenable.

Comparative institutionalism, which converts politics directly into doctrine, provides a coherent explanation. If minorities require better representation, a doctrine of "better minority representation," commonly called the doctrine of suspect classification, is appropriate. Thus, stripped of mystifying formalism, references by courts in these cases to principles or rights may safely be understood as references to minority rights. When courts enforce rights, they are giving one particular interest preeminent consideration.

It is, therefore, some reflection of the willingness of courts to take seriously the claims of minorities and non-conformists that ninety-seven percent of the cases involved principle or principle/policy balancing.<sup>36</sup> Even more clearly, the refusal to recognize the presence of a principle is a kiss

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33. P. 23.

34. P. 24.

35. The authors note:

Our conclusion that district court judges generally tread cautiously in policy-oriented cases and maintain a reasonably workable principle/policy distinction in applying constitutional and statutory standards is not, of course, a complete answer to those who do not agree on the content of these standards, and who believe that the principles announced in such major decisions of the United States Supreme Court as *Tinker*, *Goss*, and *Lau* were themselves too broad and usurped the prerogatives of school boards or legislators. An immediate answer to this position is that when courts are properly operating within the sphere of principle as defined by the Supreme Court, the institution of American government that has been acknowledged (at least since *Marbury v. Madison*) to have the responsibility for determining ultimate constitutional principles, they cannot be said to be violating separation-of-powers limitations or to have usurped policy roles of other branches. Beyond this doctrinal answer, however, we believe that an important consideration, which is not often recognized in the discussions of legitimacy, is that much of the increased judicial activity in social policy areas appears to stem from a dramatic increase in the number of substantial "principle" claims brought to the courts, rather than to a shift in judicial orientation from the traditional concentration on "principle" issues toward a new willingness to consider cases based on "policy" claims.

Pp. 201-02 (footnotes omitted).

36. P. 25.

of death: "Defendant school boards won 100% of seven cases [in] which courts characterized [plaintiffs' claims] as based on policy . . ." <sup>37</sup> If a policy has priority, it is a principle. Principle, or right, is the language of judicially preferred policies, and judges prefer policies when the policies are legislatively underrepresented.

B. *Finding Flaws in the Legislative Process: The Window of Judicial Fact Finding*

Not being representative institutions, courts cannot determine flaws in the representational process from first-hand experience. Consequently, comparative institutional advantage suggests the need for a method by which courts can recognize the existence of legislative bias. The willingness of a minority or non-conformist to sue is hardly sufficient. The book suggests the importance of a solid, factual record as the primary method for verifying legislative bias. Rebell and Block refer repeatedly to a finding that, contrary to the critique of judicial activism, courts are impressively capable fact gatherers while legislatures are more interested in voter preferences than in analytically developed facts. <sup>38</sup> Facts, it would seem, are the judicial window on the world, an obvious substitute for representative feedback.

In the New York equal employment litigation (*Chance*), for example, extensive proof showed the unfavorable effect of the formal examination system on the placements of minorities as educational administrators. <sup>39</sup> In contrast, the Colorado bilingual/bicultural litigation (*Otero*), which the minorities lost, was plagued with confusion about every essential social fact—the existing linguistic disabilities of the children, the contribution of inferior public education to these disabilities, and the feasibility of bilingual/bicultural education as a remedy. <sup>40</sup>

The good factual record apparently has a social and political background, however. The New York litigation was brought by experienced counsel of the Legal Defense Fund and utilized the well-established norms of Title VII of the Civil Rights Act, <sup>41</sup> itself one of the crowning achievements of decades of social movement litigation over the legitimacy of interpreting disparate impact as evidence of unlawful discrimination. In addition, many of the essential facts were provided voluntarily by local

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37. P. 31 (footnote omitted).

38. Pp. 114–15, 143–44, 194, 205–08. I tend to see politics and the so-called rational analytic method as complements rather than competitors. See Yudof, *Plato's Ideal and the Perversity of Politics*, 81 MICH. L. REV. 730, 742–44 (1983).

39. Pp. 87–89.

40. Pp. 156–68, 184.

41. 42 U.S.C. § 2000e (1976); see p. 264 n.33.

school authorities highly sympathetic to the plaintiffs' claims, perhaps because of the effective representation of minorities in local educational politics.<sup>42</sup>

The Colorado lawsuit presented the opposite situation. Inexperienced counsel bungled the factual record at several points.<sup>43</sup> The legal theory of bilingual/bicultural education was novel,<sup>44</sup> and the precedents were ambiguous.<sup>45</sup> The plaintiffs, as well as their public-interest advocates, had not achieved local political legitimacy and representation; indeed, a defensive and provincial government viewed them as "outsiders agitators."<sup>46</sup>

I am suggesting that a solid factual record in social movement litigation is largely the result of society's gradual recognition of the plausibility of the claim and the relevance of certain facts.<sup>47</sup> We see here some of the inherent conservatism<sup>48</sup> of courts. The firm, factual record for an unorthodox pro-minority claim is the product of patient social movement advocacy surviving the initial period of astonishment and proceeding to a series of related judicial and legislative victories.

### C. *Lapse in Legislative Correction: The Conservative Judge*

The federal judge in *Otero*, Fred Winner, is probably a good example of "representational failure" in courts. Comparative institutionalism suggests other explanations for the result—the poor factual record, novel minority claim, difficult judicial remedy—but the book claims that the judge aggravated or even took advantage of problems instead of trying to solve

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42. Pp. 79, 82, 91, 102, 113, 115.

43. Pp. 155, 161, 164–65.

44. Pp. 168–69.

45. Pp. 149, 151–53.

46. P. 149.

47. The *Otero* plaintiffs' attorneys seemed to agree:

The underlying problem, as the plaintiffs' attorneys defined it, was that neither Chicanos nor Anglos realized the extent of the disparity between the educational achievements of the two groups of students. No one understood that the school was responsible for this disparity and that feasible methods existed to eradicate it. The plaintiffs saw the *La Voz* demands and the *Otero* lawsuit as vehicles for educating people about the Chicano experience in District 51 schools. Despite the ultimate dismissal of their complaint, this educational purpose may well have been achieved. The *Daily Sentinel* reported regularly and in detail the plaintiffs' arguments, on one occasion even giving the school-by-school dropout statistics. One established, politically moderate Chicano businessman decided to testify for the plaintiffs at the trial, indicating that the plaintiffs' ideas were gaining broader support in the Chicano community. And, at the close of the trial, the *Daily Sentinel* itself editorialized that no matter who won, the suit had taught the community much about the importance of educating individuals, rather than "cramming [all children] into a common Anglo mold."

P. 150 (footnotes omitted).

48. I use the words "conservative" or "conservatism" in this Review in the narrow sense of opposition to change and belief in the majoritarian status quo. Unfortunately, conservatism has richer meanings. Some conservative positions, such as the preservation of community, are actually minority positions politically in spite of being "old fashioned." But "conservative" seems closer to my meaning than "reactionary," which I used in previous drafts.

them. Therefore, because of the judge's own conduct, it is impossible to determine if the case was rightly decided from a comparative institutional perspective.

Judge Winner was known to be "a conservative on civil rights cases,"<sup>49</sup> a reputation that the trial suggested was richly earned. He tipped his hand early about his preference for the more restrictive of the precedents,<sup>50</sup> then sat back passively while a bewildering evidentiary standoff developed between antagonistic parties.<sup>51</sup> Pro-minority activism is perhaps too much to expect from a judge who thinks that "school personnel should . . . be awarded combat pay" for dealing with lawsuits, that "statutes and procedures established to provide equal opportunity are subject to abuse by minority complainants who are seeking not merely equal rights but special advantages,"<sup>52</sup> and who warned in a published opinion that antidiscrimination statutes could be used as "a means of coercion" against employers.<sup>53</sup>

More instructive is the subtle campaign of opposition that a judge can wage because of his power over the details of trial proceedings. Judge Winner sat back smugly while evidentiary chaos developed; in *Chance*, Judge Mansfield took the lead in developing the facts.<sup>54</sup> In the test results introduced for the defense by the imperturbable Dr. Gene Glass<sup>55</sup> to show that Chicanos performed less well than Anglos because of lower socioeconomic status and intelligence,<sup>56</sup> the judge could see only "minor technical criticisms."<sup>57</sup> On the effectiveness of bilingual/bicultural education, however, he came out of his skeptical and quiescent shell to call the evidence "illogical, unbelievable, and unacceptable."<sup>58</sup> By selecting key points at which to be active or passive, a judge can make a large difference with relatively little effort, especially given inexperienced plaintiffs' counsel.<sup>59</sup>

Unquestionably one of the greatest contributions of this book is bringing our images of courts and legislatures closer together. Dedicated legislators can give minority issues the combination of power and priority traditionally associated with courts. Antagonistic judges can squelch minority

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49. P. 155.

50. *Id.*

51. Pp. 154-55, 172, 206.

52. P. 290 n.85.

53. *Id.*

54. P. 172.

55. P. 165.

56. P. 162.

57. Pp. 161, 287 n.65.

58. P. 167.

59. Obviously frustrated with the *Otero* trial, Rebell and Block design their own trial strategies at several points. *See, e.g.*, pp. 164-65 (proposing written counteranalysis of Glass report); p. 161 (suggesting how plaintiffs could have easily impeached defendants' proof of children's English proficiency and lack of Spanish proficiency).

claims simply by being obstinate. And, of course, the social philosophy of both legislators and judges is ultimately responsive to the representative process. Our received image from Warren Court days is that of a liberal federal judiciary courageously facing intransigent southern democracies. The real world also contains conservative federal judges sitting in states where successful Chicano politicians get a sympathetic hearing from their brethren in sunbelt legislatures.<sup>60</sup>

## II. JUDICIAL CORRECTION: PRESERVING THE COMPARATIVE ADVANTAGE BY INCORPORATING PROXY POLITICS

### A. *A Variety of Techniques*

Much of the critique of judicial activism is inconsistent.<sup>61</sup> For example, courts are criticized for being insufficiently representative when they act in the traditional, insulated bipolar fashion<sup>62</sup> and "too political" when they bring the wider community into the courtroom and resort to negotiation rather than formal law to settle disputes.<sup>63</sup> A theory of comparative institutional advantage is not so confused. Although a court may take an issue from the legislature in order to correct a specific bias, representative capacities of legislatures deficient in one respect may be a great asset with respect to other parts of the same case. Public law litigation<sup>64</sup> especially tends to bring many issues into the courtroom along with the fates of the underrepresented plaintiffs.<sup>65</sup> To the extent that political representation is lost on the former issues, the comparative advantage of courts is also diminished. Thus, a theory of comparative institutional advantage has unambiguous advice on this subject: Courts should attempt to incorporate the

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60. Apparently even a sunbelt state is not a single "world." The judicial and legislative proceedings in Colorado seemed to occur in total isolation from each other. P. 175.

61. See Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1037-38 (1980).

62. Pp. 9-10.

63. See, e.g., Berns, *supra* note 2, at 49, 51-52, 82-83 & n.116; Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 125; Kurland, *Earl Warren: Master of the Revels*, 96 HARV. L. REV. 331, 339 (1982). The recommended escape from politics is an emphasis on principle. See *supra* pp. 768-69. For a more sociological view, see Kirp & Babcock, *Judge and Company: Court-Appointed Masters, School Desegregation, and Institutional Reform*, 32 ALA. L. REV. 313, 318, 395-96 (1981).

64. See generally Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (describing fundamental characteristics of public law litigation); Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980) (well established, but politically uncontroversial commercial litigation has some characteristics of public law litigation); Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982) (describing interest representation in public law litigation); Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977) (dispute resolution at remedial stage).

65. See p. 113; Clune, Serrano & Robinson, *Studies in the Implementation of Fiscal Equity and Effective Education in State Public Law Litigation*, in 2 SCHOOLS AND THE COURTS 67, 69 (P. Piele ed. 1979) ("During the Robinson litigation, over thirty parties in interest or amici came before the court.").

political process, or a proxy for it, in every aspect of a case for which there is no legislative bias.<sup>66</sup> Rebell and Block give us many examples in which the courts simulate political processes through techniques of broad representation and negotiation.

*Chance* is a good example of a case involving a core of minority rights surrounded by a periphery of essentially political problems. Minority plaintiffs were seeking a means of employment testing that would give them more representation among school administrators, especially in schools in their own communities. There were many other objectives, essentially unrelated, that would have to be accommodated in the overall plan. One important issue concerned the distribution of authority among the Board of Examiners, the New York City School Board, and the community school boards.<sup>67</sup> If a job performance standard were substituted for paper-and-pencil tests, for example, who would do the evaluation? What blend of meritocratic evaluation and political control should be chosen, and at what level of government,<sup>68</sup> given that various blends produced an acceptable representation of minorities? How should employees "bumped" by a new personnel system be treated? Would there, for example, be interdistrict bumping?<sup>69</sup>

The *Chance* court answered these questions with an extraordinary blend of measures for increasing political participation. Two separate advisory bodies were created: a Task Force to produce a negotiated settlement and an Advisory Council to advise the Chancellor of the New York City Schools, both staffed with members from a range of interest groups. The Task Force was created more or less spontaneously, in order to satisfy Judge Mansfield's demand for a negotiated settlement. Judge Mansfield issued preliminary orders that disrupted the status quo, creating a climate conducive to negotiations, but he expressed the greatest reluctance to enter a final judgment.<sup>70</sup>

The Advisory Council established procedures for handling appoint-

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66. The judicial-legislative dynamic is often complicated:

Public law litigation typically falls into a pattern of a series of judicial decrees followed by government responses; *Serrano* was no exception. Three successive school finance provisions were involved . . . . The process of litigation and legislative response surrounding *Robinson* is somewhat more complicated than that surrounding *Serrano* since it involves three statutes, one trial court opinion, and seven supreme court decisions.

Clune, *supra* note 65, at 77, 85.

67. Pp. 92-100. The federal court had to decide whether the new procedures satisfied the New York State Constitution. *Chance v. Board of Examiners*, 561 F.2d 1079, 1088 (2d Cir. 1977) ("[A] federal court which is shaping a remedy for constitutional violations should, other things being equal, choose among alternatives the one which is consistent with state law."). On whether other things were equal, see *infra* note 86.

68. P. 106. At one point in the litigation, for example, a question arose about favoritism being exercised by local boards.

69. P. 97.

70. P. 102.

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ments on an interim basis, while the Task Force developed plans for both temporary and permanent licensing.<sup>71</sup> One of the ironies of *Chance* was that, because of formalistic reversals of trial court actions in the Second Circuit, the supposedly “interim” administrative measures adopted by the Advisory Council (known as Circular 30) became the status quo during the long, unpredictable litigation.<sup>72</sup>

On the basis of their case studies of the legislative and judicial processes in New York and Colorado, the authors conclude that broad-based political participation is just as common in courts as in legislatures:

In other words, in neither state did the forum determine the extent of party polarity. Rather, participation seemed to be determined by the willingness of certain groups to take a public stand in areas of intense controversy (involving, in these instances, highly charged racial and ethnic issues) . . . . Pending further empirical research, we would tentatively conclude that the assumption that the relatively narrow party representation in some public policy cases stems from inherent limitations of the judicial process may be overemphasizing institutional factors and minimizing consistent patterns of public behavior by the groups interested in the underlying controversies.<sup>73</sup>

The pattern of participation and negotiation detailed in the *Chance* case study is strongly supported by the aggregate data. Of the sample of sixty-five cases, fifty-seven percent involved multiple participants. Political patterns at the remedy stage are even more interesting. First, judges have a strong penchant for the least intrusive remedy; self-executing injunctions and declaratory judgments are more common in these cases than reform decrees requiring continued judicial involvement.<sup>74</sup> Second, in thirteen of the fifteen reform decree cases, one of three kinds of political participation played a significant role in formulating the decree: authoritative legislative or executive enactments, primary drafting of the remedial plan by the defendants or by combinations of parties, and negotiated relief.<sup>75</sup> Lastly, as a means of enforcing decrees, courts strongly prefer less intrusive mechanisms, such as retention of jurisdiction and the setting of reporting requirements, to the more intrusive remedies involving discovery orders.<sup>76</sup> If forced to use remedial discovery, courts use devices like panels to obtain

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71. Pp. 101-02, 104-07.

72. Perhaps the theory of comparative institutional advantage should reckon with bureaucracies as a stabilizing, routinizing influence. See Clune & Lindquist, *What “Implementation” Isn’t: Toward a Framework for Implementation Research*, 1981 WIS. L. REV. 1044, 1091.

73. P. 204.

74. Pp. 59-60.

75. Pp. 61-62.

76. P. 63.

political participation.<sup>77</sup>

Even the supposedly prosaic process of finding facts shows judges as crafty politicians. Rather than deciding facts directly on the basis of evidence, courts just as often resort to "avoidance devices" which, in effect, defer to some other part of the political process. Deference might be to a legislature or to a higher court (excluding certain evidence as a matter of law or imposing some burden of proof), to the parties (accepting as "facts" dubious but uncontested statistics), or to the larger political process.<sup>78</sup>

### B. *Lapse of Political Representation: The Snares of Formalism*

One's admiration for the political skills of judges may extend so far that the only embarrassing moments, from the perspective of the admirer, seem to result from awkward fits of impractical formalism. The *Chance* litigation was repeatedly disrupted by bone-headed legalisms and refusals to acknowledge political realities. Judge Tyler at one point persuaded himself that he could not consider the "best" solution to a problem but should instead resolve the dispute by a metaphysical exegesis of some vague words in the final judgment.<sup>79</sup> At another point, the same judge first refused to do anything "political";<sup>80</sup> then, when he decided to act, he overcompensated by drafting the whole remedial plan himself, rather than relying on the defendants as most courts do in similar situations.<sup>81</sup> Just as we were taught in law school, the law is either there, controlling everything, or it is not there at all.<sup>82</sup>

But the grand prize for formalism goes to the Second Circuit, which snatched defeat from the jaws of victory and nullified years of delicate negotiations on the strength of two legalistic trip wires strung under the feet of the trial judges. Labeling affirmative action "reverse discrimination," the court of appeals suggested an alternative concept reeking of formalistic antiquity: the idea of "constructive seniority."<sup>83</sup> The more serious blunder of the appeals court terminated federal jurisdiction. Suffering perhaps from an institutional loss of memory, the court decided that since the lingering disagreements between the Board of Examiners and the Board

77. Pp. 64-65.

78. For example, courts have accepted a defendant school board's equity-oriented fiscal reallocations as an "admission" about the importance of money in education and have accepted a legislative determination that individualized identification of learning-disabled children was necessary for an appropriate education. P. 53.

79. P. 92.

80. Pp. 92-93.

81. Pp. 96-97.

82. See Clark & Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255, 264-76 (1961).

83. P. 97.

of Education about the details of an appropriate examination process were now all that was left of the case, there was no federal question and jurisdiction should be terminated!<sup>84</sup> Of course, having lost their federal right just one remedial detail short of a significant victory, the plaintiffs eventually came back to federal court after also beginning a state court action.<sup>85</sup> The Second Circuit was apparently less than instructive about why a disagreement between two of the defendants over how to satisfy a federal right should impair the right itself.<sup>86</sup>

### CONCLUSION

The neoconservative and neoliberal critiques of judicial activism,<sup>87</sup> which this book was designed to evaluate, emerge from it in shreds. At the level explicitly tested by the authors, courts emerge as faithful to “principle” (policies given priority by law), expert as fact finders, adroit at political representation, and effective and diplomatic in fashioning and enforcing their decrees.

From the perspective of comparative institutional advantage, courts discharge the task of compensating for flaws in the democratic process in a highly responsible manner. Indeed, the only failings of courts documented by the book are sins of passivism rather than activism. Judge Winner’s trial of the Colorado bilingual/bicultural lawsuit seems to be an example of a judge’s reinforcing flaws in the majoritarian process instead of compensating for them. The other passive failings are vices of formalism. In the New York litigation, having successfully gotten the parties to the point that they were willing to accept a compromise more favorable to racial minorities than the status quo, the courts paradoxically abandoned the project because it had become too “political.”

At an even deeper positive level—where we see in this book the sociology of social change in courts and legislatures—the idea of excessive judi-

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84. Pp. 100–01.

85. Pp. 120–22.

86. Beneath all the doctrine, the sympathies of the court apparently ran in three directions. First, the court seemed annoyed that the Board of Examiners had been reduced to a minor role. *Chance v. Board of Examiners*, 561 F.2d 1079, 1084 (2d Cir. 1977). Second, the court seemed to favor testing as a sign of merit. *Id.* at 1088, 1090. Finally, the court appeared to be opposed to affirmative action. *Compare id.* at 1087 (discussing *Washington v. Davis*, 426 U.S. 229 (1976)) with *Chance v. Board of Examiners*, 534 F.2d 993, 998–99 (2d Cir. 1976) (finding “reverse discrimination”). This final bias of the court suggests that some formalism is simply conservative politics in disguise. *See also supra* note 67 (asserted reliance on state constitution).

87. Purist liberals and conservatives define themselves in terms of philosophical or ideological positions on the appropriateness of governmental action. Neoconservatives and neoliberals define their opposition to governmental intervention in terms of cost consciousness and of disillusionment over the results and realistic potential of ambitious social programs. *See Goodman, Irving Kristol: Patron Saint of the New Right*, N.Y. Times, Dec. 6, 1981, § 6 (Magazine), at 90; Hitchens, *Minority Report*, 237 NATION 422 (1983); Lekachman, Book Review, 237 NATION 408 (1983).

cial activism or judicial tyranny emerges for what it truly is: conservative rhetoric designed to discredit small gains by minorities before they become too costly to the interests of the status quo. Remarks by Dr. Kenneth Clark along similar lines once made me uneasy.<sup>88</sup> But this book, along with close study of the details of so-called judicial activism in almost any context, cries out for such a verdict. The book sees courts as extremely cautious institutions. They do not stand in the vanguard of social change, but rather wait until social movements have achieved a high degree of legitimacy.<sup>89</sup> Decades after the first shocking demonstrations and state retaliations, when social movements have gained much recognition in culture and in law, courts step carefully forward. Even then, the factual record must be good and the court will probe and probe for a diplomatic, politic, negotiated solution. "Judicial activism" sounds credible because the status quo seems reasonable.

We must conclude from this book, in light of comparative institutional analysis and social change theory, that judicial activism is both safe and democratic. However, although the conservative judicial position is clearly discredited, nothing can specify the proper degree of judicial activism. Rebell and Block suggest at the end of the book that both courts and legislatures have the greatest difficulty in situations of "confrontational" social change and the greatest success in a cooperative milieu.<sup>90</sup> Comparative institutional analysis would accept this proposition as identifying the range of judicial capacity. A court can handle only so much resistance and sabotage from the other political branches. From a social change perspective, as the social legitimacy of a minority group increases, the majority's mistreatment of the minority becomes more obvious, leading to greater judicial mistrust of the majoritarian process. At the same time, resistance to any pro-minority judicial decree declines.<sup>91</sup> Thus, the potentially far-reaching judicial capacity to "give voice to the voiceless" is dampened by competing elements of social consciousness, prudence and expediency.

Any way we look at it, then, courts can be effective on behalf of minori-

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88. Dr. Clark spoke at a meeting sponsored by the National Institute of Education, February 17-18, 1976. See Clark, *Social Science, Constitutional Rights and the Courts*, in EDUCATION, SOCIAL SCIENCE AND THE JUDICIAL PROCESS 1, 3 (R. Rist & R. Anson eds. 1976) (discussing "neoliberal revisionism").

89. See Clune, *A Political Model of Implementation And Implications of the Model for Research, Public Policy, and the Changing Roles of Law and Lawyers*, 69 IOWA L. REV. 47, 87-93 (1983). I follow the theory of law and social change which says, in very simple terms, that the law generally gets positioned somewhere between contending social forces. See also Clune & Hyde, *Final Offer Interest Arbitration in Wisconsin: Legislative History, Participant Attitudes, Future Trends*, 64 MARQ. L. REV. 455 (1981) (describing instability of purely procedural solution to fundamental substantive conflict).

90. Pp. 213-14.

91. One might consider *Korematsu v. United States*, 323 U.S. 214 (1944), and *Plessy v. Ferguson*, 163 U.S. 537 (1896), in this light.

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ties only when the minority position gains some social credibility outside the courtroom. Courts can help a minority group if it is not too minor. Courts are capable of playing a role in progressive but not radical change. This should calm the fears of anyone with a vision of runaway, subversive activism and suggest to radicals that a transformation of society will require something considerably more than constitutional law and litigation.<sup>92</sup>

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92. This is what I take to be the general point of Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 694 (1980).