CHAPTER 1

Courts and Social Reform

This book is about judicial policymaking. In it, I argue that the role of the courts in the American system of government cannot be understood without seeing them as actors in a complex and dynamic struggle over public policy. Courts cannot command their fellow political actors to obey "higher" constitutional rules, but they are not powerless to influence others. Courts do not merely reflect larger political and social forces: they help shape those forces. I examine closely the influence of state supreme courts on public school funding equity to demonstrate this conception of the judicial role in American government. I focus on three case studies—in Texas, Kentucky, and North Dakota—which each show in a different way how court decisions altered the political environment in each state concerning a central political issue. After analyzing my data, I developed the theory that informs this book, that of courts as active and relevant participants in ongoing dialogues over policy.

In this chapter, I show how this theory fits into contemporary scholarship concerning judicial policymaking and further explicate the design of this study. In chapter 2, I discuss the public school finance equity reform issue in more detail. Chapters 3, 4, and 5 present the case studies. I analyze the results from these case studies in chapter 6, and then discuss the implications of these findings for future research on questions of court power.

The Place of Courts in American Government

The role for the judicial branch in the American system of "separated institutions sharing powers" (Neustadt 1960:29) has always been problematic. On the one hand, the judiciary is entrusted in the public mind to guard the most sacred symbol of political life, the

U.S. Constitution (and state constitutions by extension). The Constitution embodies the strong American faith in the rule of laws, not men. The function of the judiciary in the standard civic model, therefore, is to hold the Constitution above mere politics. The judiciary's role as protector of the Constitution is the major source of the judiciary's legitimacy.

On the other hand, this insulation (at least in theory) from the political process, the judiciary's greatest strength, is also its greatest weakness. The courts cannot claim the legitimacy that stems from popular election or the American principle of representative democracy, at least not as legislators or chief executives can. Even where judges are elected, this popular selection is not usually seen as a source of their power (that is, state judges do not usually argue, for example, that "I received a ninety percent retention vote in the last election, and therefore my interpretation of the law is the correct one"). Thus, courts that void legislative acts are always vulnerable to the charge of illegitimate usurpation of popular sovereignty. The seemingly endless debate over the propriety of judicial review encapsulates this tension between judicial authority to interpret law and the majoritarian will as embodied in legislative acts.

Furthermore, the division of power constructed by the U.S. and state constitutions provides the judiciary with few powerful weapons that could force coordinate political branches to comply with a court decision. The classic expression of this reality is Alexander Hamilton's observation in Federalist No. 78 that the judiciary "has no influence over either the sword or the purse" and therefore will be the "least dangerous branch" (Hamilton et al. 1961:465). The judicial branch must rely heavily on mere persuasion to ensure acquiescence with its rulings. The next logical question for judges and judicial scholars, therefore, is how courts can persuade most successfully.

Courts often must balance fundamental values to define their role in the American system of government. More specifically, they must reconcile the principle of the rule of law with that of popular sovereignty. And they weigh their view of what the law requires against what is politically possible to achieve, given the judiciary's near-sole reliance on the powers of persuasion. These balances are fundamental to the system of separated powers.

Scholarship on Judicial Power

Given these fundamental tensions concerning the judiciary's role in American government, it is unsurprising that academic work on the courts has focused on these conflicts. To generalize, this

work can be divided into two groups. The first concerns the normative question, "What *should* the courts do?" and the second regards the empirical question, "What *can* the courts do?" Of course, these questions are interdependent, and nearly every academic study of the courts takes some position, either explicit or implicit, regarding both of them. This division, however, at least helps to frame the particular contribution of my study to these debates.

The Normative Question: What Should *Courts Do?*

I argue that in the three school finance case studies, state supreme courts acted as policymakers. Some would argue, however, that these courts had no right to behave in this manner, and that their actions were inconsistent with their proper "role." The concept of judicial "role" often has been operationalized by drawing a distinction between "judicial activists" and "judicial restraintists" (Glick 1971). "Judicial activists" see their function as that of promoting the common good (however defined) through law. Often they justify this goal-oriented behavior by stressing the impossibility of interpreting the laws in any other way than as a modern observer would (Brennan 1985). "Judicial activists" do not necessarily confine their activism to the discovery of constitutional wrongs, either; these judges are more likely to devise expansive remedies for these violations. The rise of "public law" litigation (discussed below in more detail) was spurred by activist judges using their equitable remedy powers to address significant social problems thought to be solely under legislative and executive control. Judges supervised prisons, schools, and mental health facilities, ordered large sums of money raised and spent, and dictated policy when they perceived any deviation from constitutional standards that the judges themselves set. In other words, judicial activism of interpretation and judicial activism of remedy are part and parcel of the same view of the judicial role.

"Judicial restraintists," on the other hand, view the judicial function as interpreting the law and applying it as closely as possible to the case at hand. According to this philosophy, finding the "plain meaning" or "original intent" of laws is not as impossible as judicial activists would like to believe. Judicial restraintists further fault judicial activists for substituting their own policy judgments for those of the democratically elected officials whom the courts second-guess. Judicial restraintists do not see the courts as qualified or legitimate to make independent policy choices (Berger 1977; Bork 1990). This view extends to questions of appropriate remedies

for constitutional violations. "Judicial restraintists" have been much more critical of "public law" litigation as breaching the separation of powers, among other faults. Judges are not competent or empowered to manage state institutions normally left under the care of executive authorities. The proper judicial role for restraintists is to hear a case, issue a final judgment, and move on to the next case. Extended supervision of compliance with the court order should not be necessary and can easily lead to difficulty.

Until recently, the judicial activism/restraint debate contained a strong ideological element as well. Political liberals tended to favor greater activism, as in the Warren Court decisions of the 1960s. Political conservatives decried these "public law" decisions and trumpeted the virtues of judicial restraint. As the U.S. Supreme Court has become more politically conservative, however, these conservative justices have discovered the advantages of judicial activism as well, muddying the waters of the debate considerably. For example, in the 1997 term, despite the relatively small number of decisions issued, the Court voided four Acts of Congress, including parts of such major legislation as the Brady gun control bill and the Communications Decency Act on Internet pornography (Lewis 1997).

Furthermore, in some of these decisions, conservative justices began to sound activist themselves. For example, in the Brady decision (*Printz* 1997), Justice Antonin Scalia, even though he cited historic practice as justification for voiding federal commandeering of state and local law enforcement agents, did not rely on any one constitutional provision to support this view. Instead, he asserted that the act was "fundamentally incompatible with our constitutional system of dual sovereignty (ibid.)." This reasoning drew sharp criticism from the bench from Justice John Paul Stevens, who asked whether the conservatives were now embracing the method of constitutional interpretation that produced the "penumbras" of rights leading to the right of privacy in *Griswold v. Connecticut* (1965) (Greenhouse 1997). The recent decisions on state sovereign immunity (for example, *Alden v. Maine* (1999) continue this debate, with a conservative majority finding in favor of this immunity even though it is never explicitly mentioned in the Constitution.

It is true that Supreme Court conservatives have not yet issued comprehensive orders concerning state institutions in the spirit of "public law" litigation, but perhaps one only needs to wait a while. In any event, it seems clear that politics has a great deal to do with the identities of judicial "activists" and "restraintists." The roles themselves, I would argue, are still distinct in the view judges have

of their capabilities and legitimacy as policymakers, and their view of the capabilities and legitimacy of their coordinate constitutional branches.

This debate over the nature of the judicial role is seemingly eternal. In the second chapter, I will present an alternative typology of judicial roles from a more empirical perspective, specifically tied to the experience of state supreme courts with school funding equity litigation. For now, though, I will discuss the question of "judicial role" in normative terms.

The three case studies display courts engaging in behaviors which, depending upon one's view, could be characterized as "activist" or "restraintist." In general, I define "activism" as a court giving orders to the legislature and executive with which the political branches must comply, and "restraint" as the absence of such orders.

For example, in Texas the state supreme court repeatedly voided the state's public school funding system on constitutional grounds. On each occasion, the court refused to specify fully what a constitutionally legitimate system would look like, but offered suggestions as to what policy solutions would pass constitutional muster. The court could argue that its unwillingness to mandate its own plan demonstrates its commitment to "judicial restraint." The back-and-forth negotiation between the legislature and the court over constitutional principles also could be viewed as quite "activist," however. In Kentucky, the supreme court not only declared the state school financing mechanism to be unconstitutional under the state constitution, but found the entire state school system to be invalid. The court promulgated a list of goals for the new system and a set of ability standards that a graduate of the new public school system must meet. This court ruling seems clearly activist. On the other hand, the Chief Justice justified his opinion with the language of judicial restraint, arguing that "we (do not) intend to substitute our judicial authority for the authority and discretion of the General Assembly. We are, rather, exercising our constitutional duty" (Cases Cited: Kentucky 1989:189). And the Kentucky court issued only one strong opinion and did not negotiate and compromise with the political branches, as the Texas court was forced to do. In these ways, the Kentucky decision was more "judicially restrained."

The North Dakota study also shows a court acting with a mixture of judicial activism and restraint. It narrowly upheld the state's school financing system from constitutional challenge. But the Chief Justice none too subtly threatened in his decisive opinion to change sides and declare the funding system unconstitutional if

the legislature did not correct its problems. One could argue that the court exhibited "judicial restraint" by declining to overtly enter the battles over school funding that the court clearly felt were better fought in the popularly elected legislature. On the other hand, threatening to change a vote if action is not taken is hardly within the usual dictates of judicial restraint. Thus, the Chief Justice was also "judicially activist."

As these examples suggest, the normative question of the proper role of courts in American government is difficult to answer in practice. But ambiguity, intended or otherwise, does not foreclose normative judgments. Nearly everyone I interviewed for this project had some view as to whether his or her state supreme court was acting legitimately in dealing with the political branches on the school finance issue, and this normative outlook helped to shape responses to the court rulings. Conservatives in Texas, for example, did not just oppose redistribution of district wealth, but felt it was illegitimate for the court to reinterpret the state constitution to require it. On the other hand, supporters of the low-wealth districts in all three states saw the court's proper function as that of intervening when the political branches were not living up to a constitutional mandate of school finance equity, which these activists viewed as quite clear.

Even though the normative outlook of the participants in the school finance debates helped shape their responses, many other factors contributed. Political calculation of benefits and costs, public opinion, interest group response, leadership vs. followership, and the like, all played roles in the decision-making. It is difficult to say what the outcome in each state would have been if legislators voted only upon their normative beliefs. What one can attempt to measure, though, is the multitude of considerations that affected these participants in the debates as they happened. Therefore, this study, although mindful of normative considerations, will focus primarily on empirically ascertaining the factors that led or did not lead to court effectiveness in producing public school finance reform. Readers are invited to make their own judgments concerning the normative questions. In all likelihood, both "judicial activists" and "judicial restraintists" will find ample support for their arguments.

What Can *Courts Do? The Empirical Question*

As the social activism of the 1960s recedes in the public consciousness, "hard-headed realists" skeptical of government effective-

ness in improving society challenge its tenets. One of the most recent core 1960's beliefs to come under attack is the notion that courts can produce social change through far-reaching declarations of rights and strict orders to enforce those rights. Using *Brown v. Board of Education* (1954) as the model, scholars have championed this type of "public law" decision (Chayes 1976) or scoffed at courts futilely trying to make the rest of society listen to them. The latter group claims that society and, more specifically, popularly elected officials generally ignore courts, acting only when political self-interest requires (Horowitz 1977; Rosenberg 1991). This debate between defenders and skeptics of judicial effectiveness and capacity can be divided into two closely related but conceptually distinct arguments. The first of these contests, begun in the 1960s, concerns the question of court capacity. How effective are courts and legal processes at producing sound implementation policies, as compared with legislatures and executives? The second and more recent debate over judicial power deals with the utility of legal action for activists in producing social change, as the goals of judges and reformers might differ. Is use of the courts just a "hollow hope," or does it produce unique and worthwhile benefits to political entrepreneurs?

"Judicial Impact" Studies

Studies of the impact of judicial decisions on other political institutions and society as a whole began in earnest in the 1950s and 1960s, mostly as a result of the Warren Court's increasing activism concerning civil rights and liberties issues. The U.S. Supreme Court in this period challenged long-established societal practices, such as racial segregation, school prayers, and often harsh treatment of criminal suspects. The Court's new position as would-be leader of public opinion rather than follower intrigued many judicial scholars who questioned how effective the Court could be in that role. Therefore, numerous studies focused on implementation of the Court's rulings. These works are often referred to as "gap" studies because their usual finding was that there was a large "gap" between court decision and implementation (Sorauf 1959; Peltason 1961; Muir 1967; Becker and Feeley 1969; Dolbeare and Hammond 1971). This gap stemmed from a number of reasons, including lower-court resistance to the Court's readings of the Constitution, political unpopularity of the rulings with the general public and local elites, the complexity of devising appropriate and effective remedies, and lack of clarity in the Court's rulings themselves.

As the Warren Court and then the Burger Court of the 1970s progressed, federal courts, concomitant with the trend toward judicial leadership in social change, increasingly became involved in a variety of so-called "public law" or institutional reform cases. Courts issued orders concerning school desegregation, mental health facility conditions, prison overcrowding, and welfare administration, just to name a few. Federal courts cast aside traditional boundaries of federalism and separation of powers to supervise a wide range of state institutions (Feeley and Rubin 1998). The judicial presence in American life was extensive and ongoing, to a greater extent than ever.

This increased role of courts represented a departure from the traditional view of the courts as passive dispensers of law. Under the more traditional model, judges were neutral arbiters in a litigant-driven adversary system (Fuller 1978). A case involved just one plaintiff and one defendant. The issue was relatively simple and discrete, such as the enforcement of a contract or a property boundary dispute. The judge's role was to allow each side to present its case fully, and then to make a ruling on the claim of right. If the plaintiff was upheld, a money judgment against the defendant was the most likely outcome, with the judgment paid summarily. There was no ongoing judicial supervision of either side or of the disputed issue. With the advent of the "public law" litigation of the 1960s and 1970s, however, nearly every element in this formula changed (Chayes 1976). First, cases were no longer confined to a single plaintiff versus a single defendant. Courts increasingly allowed so-called "class actions," in which all persons similarly situated regarding a claimed injury by a defendant could be lumped together for purposes of a lawsuit. Furthermore, courts were increasingly willing to let multiple parties join cases to represent their own interests, as in Lon Fuller's "polycentric" case (Fuller 1978).[1]

For example, in the Texas school finance case, responsibility for arguing that the state's school funding system was unconstitutional was divided between the original plaintiffs, mostly from predominantly Hispanic urban school districts, and a group of "plaintiff-intervenors" representing mostly low-wealth white rural districts. Similarly, on the defense, it was often difficult to tell who was the real respondent: the state whose school financing system was being challenged or the wealthy suburban and oil districts that benefited most from that system. Often the interests of these parties diverged, especially because the putative state defendant, the Texas Education Agency, also had a natural interest in securing more funding for the state school system. The wealthy districts, however, were mostly concerned with protecting their tax base.

Courts became increasingly willing to accept these complex multiparty arrangements because the issues that the judiciary now was attempting to resolve were much more complicated than the traditional bipolar disputes. The federal courts in particular used such flexible terms as "due process" and "equal protection" to find previously undiscovered constitutional violations in state institutions. The traditional model of adjudication would shy away from these types of cases on the grounds that they were "political questions" better left to the legislative and executive branches, but the newer theories of adjudication were not willing to accept court incapacity to change conditions in these state institutions (Horowitz 1977). The theme in this expansion of judicial role was that of basic "fairness." Judges began to view their function as that of guaranteeing a minimum level of protection, or a "safety net," for the clients of these institutions, whether these were schoolchildren, prisoners, welfare recipients, or the mentally disabled. Often the assumption was that these people could not adequately protect themselves through the normal political process, building upon the theory that the courts should be particularly solicitous of the claims of so-called "discrete and insular minorities" that would never exercise real political power for one reason or another (*Carolene Products* 1938:152). Courts attempted to right that balance by requiring institutions to follow fixed procedures before taking action that would harm these "clients," such as hearings and rights of response before termination of welfare benefits (*Goldberg* 1970). As we shall see, much the same impulse motivated school funding equity decisions by state supreme courts. These courts did not necessarily mandate absolute equality between rich and poor public school districts, but wanted to ensure that the poorest districts were adequately protected from the vagaries of politics. Poor districts populated by racial minorities (Texas) or economic underdogs (Texas and Kentucky) could not take care of themselves politically, so the courts were obligated to intervene.

Another judicial tactic was to create minimum standards of decent treatment for institutionalized persons, like prisoners and mental health patients, and declare these living conditions to be constitutionally required (*Wyatt* 1971). One might criticize judges for willfully taking the Constitution into their own hands. However, the conditions that the courts were asked to remedy often were so execrable, with little possibility of self-improvement, that many judges could not close their eyes to the failures of these institutions to insure humane treatment of the populations that state officials were charged with serving (Johnson 1976). Again, there are parallels

in school finance litigation, with many courts allowing some funding variation as long as an "adequate" education is provided to all schoolchildren.

Another consequence of this quiet revolution of public law cases was the widening and lengthening of the remedial process. No longer were remedies confined to merely a monetary judgment. As noted above, courts that found violations of constitutional rights in state institutions often required broad equitable remedies, such as rules, procedures, and standards implemented to cure these legal defects. Consequently, compliance with court orders became more problematic. Legally required reforms often cost money that was not always under the defendant's control (*Missouri* 1990). For example, corrections officials charged with reducing inmate overcrowding had to persuade the state legislature, which was not necessarily a party to the litigation, to appropriate the funds to build more prisons (*Estelle* 1976). Other court-ordered changes met obstacles such as union rules over working conditions or general bureaucratic inertia (Diver 1979). Furthermore, in many instances opposition to the court orders could become a source of political capital, as in school desegregation (Peltason 1961).

For these reasons and others, the implementation necessarily would have to be lengthened in time, exemplified by the U.S. Supreme Court's phrase in *Brown v. Board of Education* requiring compliance "with all deliberate speed" (*Brown* II 1955). Judges would have to play an ongoing role in supervision of their orders. Courts would have to issue multiple orders, often repetitive, on a range of issues to ensure that their constitutional dictates were met (*Clements* 1989). Again, school finance fits this model, as many state high courts, including the Texas Supreme Court, were forced to adjudicate the issues involved again and again.

This alteration of the legal landscape in the "public law" cases could not help but affect the role of the judge. Far from the traditional position as passive arbiter, judges were now required to take an active role in all facets of litigation. At the outset, judges had to determine which of many parties had sufficient interests at stake in the case to be allowed to intervene, unlike in the traditional bipolar cases in which the parties and interests were easily discernible. As litigation proceeded, the discovery process became more complex, as the "facts" found increasingly turned on interpretations of dense and sometimes speculative social science evidence.

Most important, though, the question of compliance with the court order, as noted above, became problematic. Judges now were

forced to make increasingly political judgments as to how much reform of these state institutions was practically possible to achieve. Fashioning a remedy and determining its extent became a "complex and contingent exercise in prediction" (Diver 1979:62). Instead of the traditional source of judicial authority, coercion of private individual parties backed by state force, courts were forced to rely upon negotiation and bargaining, in no small part because the targets of the negotiations were the state authorities themselves. Colin Diver referred to this new role of the judge as that of "political powerbroker" (Diver 1979).

As the name "powerbroker" suggests, judges had certainly expanded their scope of influence beyond the constraints of the traditional passive arbiter conception of judging. Courts were making important policy decisions concerning the direction of key elements of the new welfare state institutions of the twentieth century. Arguably, judicial protection of individual rights significantly aided the people that the courts attempted to protect, such as prisoners, mental health patients, and juveniles. At a minimum, judges curtailed most of the worst institutional abuses. Such success, however, might have come at the price of a degree of judicial legitimacy. As noted in this chapter, courts derive a great deal of their power from the social perception that judges are neutrally and fairly applying law, not just imposing their own personal political opinions. To the extent that the new "public law" litigation moved judges away from their role as passive impartial arbiters and toward the position of "political powerbrokers," court legitimacy was potentially endangered. In this way, the very source of the judge's political power was ultimately its limitation (Diver 1979:104).

There is some evidence that judges themselves, even when deciding these institutional reform cases, were quite aware of this constraint on their authority. While requiring state bureaucracies to make significant changes in their operating procedures, many judges referred to their role as mere interpreters of law and not as legislators. Courts remained quite conscious of the principle of separated powers even when pushing its boundaries. This built-in constraint often limited judges in the reforms they were willing to require. For example, judges were usually quite reluctant to issue contempt citations to foot-dragging officials. For this reason, Colin Diver argued, "instititutional reform litigation almost invariably must fall far short of its goal" (Diver 1979:105). One sees this hesitance in the U.S. Supreme Court's more recent pullback from far-reaching remedies for desegregation violations (*Freeman* 1992; *Missouri* 1995).

As time passed, this pessimistic note regarding judicial capacity sounded in the academic community with increasing volume. Perhaps the single most influential work in this regard was Donald Horowitz's 1977 book *The Courts and Social Policy*. Horowitz summarized the new trends toward institutional reform litigation and then attempted to measure court efficacy in producing successful policy in these cases. He focused on four case studies of federal court decisions regarding citizen participation in the Model Cities program, school finance equity in Washington, D.C., juvenile court procedures, and law enforcement requirements concerning evidence seized without warrants. In all these case studies, Horowitz found serious defects in the judicial response. Courts were ill-equipped to handle these complex social policy cases, and their involvement, when not just irrelevant and time-consuming, often exacerbated the existing problems. Underlying these claims was the argument that institutional reform was better left to legislative and executive action.

The problems with judicial involvement in these cases, Horowitz argued, began at the top, with the judge him/herself. Judges are trained to be generalists, not policy specialists. Instead of finding "legal" facts, they were forced to ascertain "social" facts turning on questions of interpretation of social science statistical data. Few judges had any experience with this kind of evidence. The more complex the litigation, the more judges would be asked to make decisions with very little knowledge of the possible consequences of their rulings. Problems with court involvement in social policy cases went far beyond issues of judicial training, though. According to Horowitz, the very nature of the legal process severely handicapped the courts in formulating good public policy. The nature of law, Horowitz argued, centrally concerned questions of rights and obligations. These rights and duties, once found, were supposed to be distinct and absolute within their sphere. There was no room for compromise and balancing; right was present or it was not. The process of institutional reform litigation, however, forced courts to negotiate and compromise, as noted above. This dualism created an inevitable tension and often led to courts using a blunt rights-oriented approach when compromise would have led to a much more effective policy.

Furthermore, according to Horowitz, the legal process of finding rights and duties was most effective when dealing with questions of past conduct. The discovery process was ideally suited for ascertaining facts after they occurred. But in social policy cases,

past conduct was less important, especially in the remedial phase, than future conduct in implementation of a solution. The adjudicative process possessed few tools to aid judges in formulating a prospective plan of action. One of the primary reasons why judges were handicapped in constructing a remedy was that they could not control all the parties that would have to take action in response to a court order. The more complex the litigation, the greater number of interests that would be affected. It would be impractical and legally questionable to order testimony from all possible targets of the litigation on the defendants' side. On the plaintiff's side, the nature of the judicial process raised the question of whether the litigants were truly representative of the persons adversely affected by institutional conditions. If these plaintiffs were atypical, a solution devised in response to their claims could backfire when applied to the "normal" case.

The inability to control the litigants also pointed to the final serious defect in court involvement in social policy cases noted by Horowitz. The judicial process, unlike the legislative process, is not self-starting. Courts have to wait for a case to be brought before taking action, and cannot ensure that the case before them was truly the most all-encompassing example of the policy problem. Furthermore, if plaintiffs want to drop the litigation and pursue relief by other means, there is nothing courts can do to stop them, no matter the stage of the remedial process. More likely, though, even if plaintiffs wanted to keep the case alive, judicial monitoring would have to be haphazard. Aside from the issue of overflowing dockets, structural legal constraints made it quite difficult for courts to hold hearings whenever problems emerged in the implementation. The length of time necessary for full discovery also limited the efficacy of legal action in remedying complex and quickly changing social conditions. For all these reasons and others, Horowitz claimed, the trend toward judicial involvement in institutional reform litigation was potentially destructive, not only to good public policy, but to judicial legitimacy itself. The appropriate response for the courts was to remove themselves from these types of cases and direct the parties to the legislative and executive policy-making processes, which were better equipped to deal with their concerns.[2]

As might be expected, not everyone in the judicial politics academic community shared Horowitz's views. A number of smaller studies followed soon after *The Courts and Social Policy* was published. They attempted to cast doubt upon its pessimistic conclusions (Fair 1981; Reedy 1982; Youngblood and Folse 1981). Specifically,

some scholars highlighted the use of "special masters" or "monitoring commissions" to avoid some of the problems with judicial fact-finding and ongoing supervision that Horowitz identified (Fiss 1979; Aronow 1980; Sarat and Cavanagh 1980). Others pointed to the benefits that legal action still possessed for the litigants themselves even if courts were ineffective in constructing solutions, but that debate will be dealt with in the next section of this chapter.

One of the most direct and comprehensive responses to Horowitz's work was Michael Rebell and Arthur Block's 1982 book *Educational Policy Making and the Courts*. Rebell and Block decided to test Horowitz's thesis that the courts were incapable of handing complex institutional reform litigation in two ways. First, they gathered a database of sixty-five cases concerning a range of education policy issues, excluding school desegregation. For each of these "caselets," they contacted the attorneys involved and used publicly available information in order to get thumbnail sketches concerning the capacity issues Horowitz discussed. They found that Horowitz's concerns were generally overstated, at least regarding the vast majority of cases. The discovery process, for example, tended to be effective and uncontested. There was no pattern of social fact distortion, usually because judges found ways to avoid having to decide these complex issues of interpretation. Furthermore, concerning implementation, the defendants often participated in constructing the remedies, and the courts emphasized the least intrusive means of monitoring. Contempt citations were extremely rare. One may ask whether this harmony was useful for realization of the plaintiffs' goals, but at least Rebell and Block did not observe the horror stories that Horowitz cited in support of his arguments.

Second, Rebell and Block specifically compared judicial effectiveness with legislative effectiveness concerning similar education policy issues in two states, New York and Colorado. Somewhat surprisingly, they found little difference between the legislative branch and the judiciary in terms of the availability of information, the outside participants involved, and the construction of a solution. In both the legislature and the courts, the authors argued, "the structure and details of far-reaching education policy reforms are likely to be formulated largely by negotiations among interested parties" (Rebell and Block 1982:195). The only difference was that courts tended to negotiate over what Rebell and Block call "principle," while legislatures negotiated over political concerns. Rebell and Block concluded, therefore, that Horowitz's concerns over judicial capacity, at least regarding education policy issues, were somewhat

overstated. The authors specifically exempted school desegregation, though, arguing that the issues were so uniquely confrontational that courts would likely struggle in devising appropriate remedies.

Jennifer Hochschild reached a somewhat different conclusion in her 1984 book *The New American Dilemma*, an analysis of school desegregation policy, and at least implicitly, a response to Horowitz. In her survey of twenty years of school desegregation, Hochschild noted a strong tendency toward incremental, or slow, small, piecemeal solutions to this vexing social problem. Incrementalism is the most common American method of problem-solving, as it fits best with the system of separated institutions sharing powers noted earlier in this chapter. Incrementalism also possesses the advantages of adaptability and, usually, popular input into construction of remedies for problems.

In the case of school desegregation, however, Hochschild argued that incrementalism had failed on a grand scale. First, letting desegregation policy develop slowly allowed time for resistance to develop on a massive scale. Second, the usual incremental bias toward implementation over a small area meant that "white flight" could completely foil any effective race-mixing. In addition, to the extent that desegregation was still possible, the white areas bearing the "burden" of busing, and so forth, were disproportionately working-class, not wealthy suburbs, again maximizing resistance from those who felt they were lab rats in someone else's social experiment. Third, the incrementalist value of popular input before action tended to slow effective reform, because the majority of the community were placed in the position of defending their power and privilege against its potential dilution. Popular input in this case could do little good in devising solutions that would effect real change.

Hochschild argued that policymakers were faced with three options in their attempts to produce racial equity in the schools. First, one could give up on the goal of desegregation and allocate resources to other issues, such as finance equity, housing policy, or affirmative action, which might prove more effective in achieving reform. Second, one could continue along the same slow, incremental path to school desegregation, although with little hope of success. Third, one could implement more far-reaching desegregation through the courts.

Hochschild cited a number of studies to support her claim that although incremental school desegregation had largely failed, "full desegregation" might succeed. Full desegregation would involve a

large-scale busing plan involving cities, suburbs, and whatever other areas are needed to involve both rich and poor. Change would be rapid, would involve all grade levels, and would be carried out with little/no popular input. However counter-intuitive this plan might be from the standpoint of liberal democracy, Hochschild argued that it had the greatest chance of success in moving toward a desegregated society.

The courts would have to be the primary implementers of full desegregation, according to this plan, because they would be the least likely swayed by incrementalist arguments and popular pressure. Hochschild acknowledged the criticisms of judicial capacity made by Horowitz and others, but asserted that if it were not for courts, virtually no desegregation at all would have occurred. In addition, with greater experience, judges were becoming more skilled at handling school desegregation cases. Therefore, the courts represented the best hope for the achievement of the near-universally supported goal of racially mixed schools. One can compare Hochschild's prescription of "full desegregation" to the Kentucky Supreme Court's decision declaring the entire Kentucky public school system to be unconstitutional—a rejection of incrementalism.

But, the U.S. Supreme Court did not share Hochschild's expansive view of its power to effect school desegregation. In a series of 1990s cases, the Court limited lower federal court authority in constructing desegregation remedies and maintaining judicial supervision over school districts (*Missouri* 1995; *Freeman* 1992; but see *U.S. v. Fordice* 1992). For example, in *Board of Education of Oklahoma City v. Dowell* (1991), the Court ruled that a school district that had been following judicial orders for over a decade could be removed from supervision, even though the district itself was still highly segregated. It is likely that concerns over judicial capacity to effect more far-reaching remedies for these complex social problems played a role in these decisions limiting judicial power.

Since the work of Horowitz, Rebell and Block, Hochschild, and others, judicial impact scholarship per se (leaving aside the Rosenberg/McCann debate on utility of legal action) generally has blunted its ideological edge. Charles Johnson and Bradley Canon's *Judicial Policies: Implementation and Impact* was a good example of this trend. Johnson and Canon were less interested in making a normative argument for or against judicial involvement in social policy cases than about constructing a comprehensive model of judicial impact. In this model, they distinguished five different implementing "populations" for court decisions and sketched out various psychological

and social theories to explain how impact might occur on each of these groups. Their conclusion, rather unsurprisingly, was that court impact was complex, variable, and difficult to measure.

Joel Grossman's article "Beyond the Willowbrook Wars: The Courts and Institutional Reform" also presented a more balanced perspective regarding judicial involvement in public law litigation (Grossman 1987). Grossman argued that neither the judicial activist stereotype of courts swiftly and surely avenging social wrongs nor Horowitz's picture of court ineptitude and disaster was correct. Instead, "a more accurate picture is of a loose policymaking partnership held together by the threat of judicial sanction and various political forces mobilized by the litigation, from which judges can remain relatively insulated" (Grossman 1987:256). A "semicyclical pattern of crisis and equilibrium" characterized judicial involvement in these complex cases (ibid.:258).

Most recently, Malcolm Feeley and Edward Rubin's (1998) study of prison reform litigation built on Grossman's notion of a "policy-making partnership" to argue that modern courts can be likened to policy-making administrators in "public law" cases. Courts identify a problem, look for a theory to apply to the problem, try a solution, and, if the solution is ineffective, give up or implement another solution, just as an administrator would. Regarding the prison cases, Feeley and Rubin argued that courts were neither more nor less capable than legislators and executives in remedying the terrible conditions in many prisons across the country. Feeley and Rubin's conception of courts as players, although not dictators, in policy-making is very similar to the argument I will make in subsequent chapters concerning school funding equity.

The debate between those who believe that courts can effectively make social policy, even in "public law" cases, and those who are skeptical of the wisdom and efficacy of court intervention in these areas, continues to the present day. Another concern is whether the litigation was useful for the plaintiffs themselves.

The Utility of Legal Action

The use of litigation by organized interest groups battling for social change is a relatively recent phenomenon in American history. In earlier times, most notably in the nineteenth century and the early twentieth century, going to court was the preferred option for interests that wanted to slow or halt social reform, such as large

industrial concerns, with only limited exceptions. The role of courts in the progress of social movements began to change after World War II, however.

The use of courts to advance social reform was sparked by Thurgood Marshall and the National Association for the Advancement of Colored People (NAACP). Marshall and fellow NAACP lawyers filed case after case against all aspects of segregation, fitting their arguments to the issues at hand and to the federal courts' increasing willingness to hear such cases (Tushnet 1994). The eventual result of this strategy was the decision in *Brown v. Board of Education of Topeka* (1954, 1955), which invalidated racial segregation in public schools across the nation. On paper and as a symbol, the *Brown* decision was a great victory for Marshall and his allies. The reality was more complex, however. Full implementation of *Brown* did not take place in the South until well over a decade after the decision, at least partly because of Supreme Court reluctance to order swifter change. Furthermore, even today, many schools are de facto racially segregated, although no longer de jure segregated. This potential gap between legal victory and political change leads one to ask whether litigation is a useful strategy for movement activists.

Stuart Scheingold's *The Politics of Rights* (1974) provided the first comprehensive treatment of this question. Earlier studies had focused on single issues (Wirt 1970; Sax 1970), but Scheingold set forth a synthesis and extension of that previous work. *The Politics of Rights* centered on two main concepts, the "myth of rights" and the "politics of rights."

The "myth of rights," according to Scheingold, is the American idea that all citizens possess a set of basic fundamental rights. These rights encompass all that is truly important, such as life, liberty, and property. They are inalienable—neither government nor any other actor can deny them to anyone—and the law is designed to protect these rights. Little further monitoring, supervision, or input by citizens is needed because the legal system will "go of itself." People believe in this idea of rational ordering and structure, even if the reality is much different.

This "myth" fed into the "politics of rights" for Scheingold. The American conception of rights and legal order in fact is a myth because it conceals the underlying politics involved in seemingly neutral processes. First, according to Scheingold, the framework of government and rights under the U.S. Constitution clearly envisioned a limited government devoted to the protection of free-market entrepreneurial capitalism and a general individualistic ethos. There-

fore, arguments based on rights found in this document are unlikely to provide the basis for fundamental social change toward a more socialistic or community-based society in which greater attention is paid to needs than rights.

Second, legal forms often divide and conquer social movements by encouraging small incremental change and differentiation of the movement. Incremental change is often accomplished through legal reliance on precedent or stare decisis. In effect, attorneys have to argue for change by claiming that there is no change in the status quo, merely a new application of traditional principles to modern facts. Differentiation of cases occurs because some legal arguments that benefit certain members of the social movement are more likely to succeed in court than others. Therefore, certain elements of the coalition are excluded from the fruits of success, likely fracturing the alliance if litigation persists.

Third, and perhaps most important, powerful actors often can block implementation of the few and limited victories that social movement attorneys win in court through their control of the levers of power in the "political" branches—namely, the legislature and executive. The momentum of the movement stops once the court decision is issued, leaving plenty of time for forces resistant to change to regroup and attack implementation of the ruling. Moreover, as noted in the previous section, courts are often limited in their resources and willingness to force compliance with their decisions, especially in the types of "public law" cases about which social movements are likely to care the most.

There is a glimmer of hope in Scheingold's work: he argued that legal action can be effective if coupled with a strategy of political mobilization. The "myth of rights" might actually help in this regard, because if the activists can successfully tie their claim to some preexisting fundamental American value, the target population might well respond to the perceived denial or unfairness that they had assumed the legal system would remedy by taking political action. In addition, rights can be useful in lobbying policymakers because activists can threaten to take legal action if change does not occur. Policymakers sometimes take such threats seriously because of the time, effort, and cost of litigation; furthermore, they might even believe the "myth of rights", and wish to avoid a judgment that they had violated those rights. But, this strategy is not sufficient in and of itself; it needs to be coupled with serious grassroots mobilization. In this way, rights are less like a trump card than a bargaining chip (my terms.) Scheingold was not optimistic about the frequency of this occurrence, however, because of

the training of lawyers to believe in the "myth of rights" (although this may be changing), the structure of the legal profession, which discourages such work, and the difficulties of implementation noted earlier.

If Scheingold was skeptical about the general utility of legal action for social movement leaders, Gerald Rosenberg was positively despairing. In *The Hollow Hope: Can Courts Bring About Social Change?* (1991), Rosenberg compared two views of courts, labeling them the "Dynamic Court" model and the "Constrained Court" model. The "Dynamic Court" model posits courts as powerful leaders of social change and avengers of injustice. By contrast, the "Constrained Court" model sees courts, in Hamilton's phrase, as the "least dangerous branch" (Hamilton et al. 1961:465). Constrained courts rarely push for radical social reform, and when they do, the political branches and other implementers are likely to ignore them. Rosenberg tested these models by examining landmark the U.S. Supreme Court decisions, such as *Brown v. Board of Education, Roe v. Wade*, and *Baker v. Carr*, on the assumption that if any decisions support the Dynamic Court model, it should be these. In all these cases, Rosenberg comes to the somewhat surprising conclusion that the decision had little impact on policy, so the Constrained Court view fits better with the reality of Supreme Court policymaking.

In the case of *Brown*, for example, Rosenberg argued that compliance with the court decision was not achieved until Congress and the executive branch, particularly the Justice and Health, Education, and Welfare departments, decided to make school desegregation a priority nearly ten years after *Brown* and used aggressive strategies to induce school districts to comply. Also, Rosenberg claimed that *Brown* had little impact, even indirect, on public opinion or movement-building.

Regarding *Roe*, movement activists received scant benefit from legal action as well, according to Rosenberg. First, the number of legal abortions was increasing even before the Court decided *Roe* in 1973. The court's action, in Rosenberg's view, merely ratified a movement toward liberalized abortion laws. Second, the consequence of the Court's intervention, paradoxically, was to reduce the momentum of the pro-choice forces, who believed that the fight was over, and to galvanize the anti-abortion movement into active opposition. The effect of *Roe*, Rosenberg argued, was to decrease the number of hospitals and doctors providing abortions because of the renewed anti-abortion backlash, regardless of the expanded legal