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The Perils of Judicial Policymaking: The Practical Case for Separation of Powers

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The judicial process is too principle-prone and principle-bound—it has to be, there is no other justification or explanation for the role it plays. It is also too remote from conditions, and deals, case by case, with too narrow a slice of reality. It is not accessible to all the varied interests that are in play in any decision of great consequence. It is, very properly, independent. It is passive. It has difficulty controlling the stages by which it approaches a problem. It rushes forward too fast, or it lags; its pace hardly ever seems just right. For all these reasons, it is, in a vast, complex, changeable society, a most unsuitable instrument for the formation of policy.

Alexander Bickel[1]

Critics of the judiciary's ever-growing role in American politics usually focus on how it erodes self-government or, most severely, leads to judicial tyranny. If, as James Madison argues in *Federalist* No. 47, the accumulation of legislative, executive, and judicial powers in the same hands "is the very definition of tyranny," these concerns are well founded. With the courts determining public policy on everything from abortion to obscenity to public displays of the Ten Commandments, there is no shortage of evidence on display.

Exhibit A for anyone making a case against judicial policymaking, however, would have to be *Missouri v. Jenkins*.[2] This case, which reached the Supreme Court three times, witnessed a federal judge, Russell Clark, mandating tax increases on those living in the Kansas City, Missouri, School District (KCMSD) in order to pay for educational programs and facilities. Almost all schools in the district were turned into magnet schools with special themes such as Slavic studies, performing arts, classical Greek, and agribusiness. But such programs required special facilities and instructors, so the KCMSD was lavished with, among other things, petting zoos, climate-controlled art galleries, and a model United Nations with simultaneous translation capability. One high school was so finely appointed that it became known as the "Taj Mahal."

Judge Clark's goal was to lure white students from the suburbs into the district while simultaneously improving the quality of education for Kansas City's minority children. The judge failed.

After more than $2 billion had been spent and the minutest details of the school district's operations had been regulated, suburban white students stayed away, and the academic performance of the students trapped in the district declined—a difficult feat considering the district's already abysmal test scores.

[1] Alexander M. Bickel, *The Supreme Court and the Idea of Progress* (New Haven: Yale University Press, 1978), p. 175.
[2] *Missouri v. Jenkins*, 515 U.S. 70 (1995).

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Missouri v. Jenkins therefore illustrates something other than pure judicial tyranny at work. It illustrates judicial incompetence. While the taxpayers of Kansas City doubtless have opinions about living under a court's enlightened rule, what is most striking and significant is that after seizing all of that power, the court accomplished so little. Granted, elaborate buildings and programs were constructed, but they were just means to an end. How could the exercise of so much power leave the court no closer to, and arguably further away from, its primary goals than when it started?

The evidence from *Missouri v. Jenkins* indicates that courts are ill-equipped to make public policy, whether judges act tyrannically or have benign intentions. Thus, there appear to be two different types of arguments, principled and practical, against judicial policymaking. The first appeals to the Constitution: Judges should avoid making policy because it violates the principle of separation of powers. The second avoids criticizing the legitimacy of judicial policymaking and instead questions the capacity of courts to achieve their policy objectives.

But the two arguments are closely related since it appears that separation of powers, even though it is a principle, has practical outcomes. Typically, it is considered simply a check on tyranny. What is often neglected[3] is its role in creating good government.

It might be more effective to consider the capacity of judges to make public policy than solely focusing on principle to limit judicial policymaking. Once again, the *Federalist Papers* are instructive. If, as Publius asserts, relying on "the weaker springs of the human character" is imprudent, perhaps focusing on the consequences of policymaking will do more to restrain judges than can be accomplished by appealing to their duties.[4] If judicial policymaking expeditions end up in a morass, accomplishing little or nothing at all after decades of oversight, judges might shy away from such adventures out of self-interest. Appealing to principle is unlikely to persuade those who believe that separation of powers is an antiquated notion from a less enlightened era, but they might be persuaded by appeals to interest.

For my book on *Missouri v. Jenkins*, I chose the title *Complex Justice*. This title seemed apt because, as perhaps the Supreme Court's last statement on desegregation, the case contrasted with Richard Kluger's famous and remarkable book on *Brown v. Board of Education*, *Simple Justice*. In *Brown*, the remedy was obvious: Let children attend the school closest to their homes. In *Missouri v. Jenkins*, things had obviously gotten more complicated, but the case history and the remedies imposed by the courts were complicated. Thus, before addressing what the case tells us about the criticisms of judicial policymaking, it will be useful to outline briefly its history.

MISSOURI V. JENKINS: CASE HISTORY

In 1977, the Kansas City School District became the first and only school district to file a desegregation suit. The school board accused suburban school districts, the State of Missouri, and multiple federal agencies of adopting policies that had the effect of concentrating minority students in the KCMSD.

Judge Clark made his first preliminary ruling on the case in 1978. He took the surprising step of ruling that the KCMSD should not be a plaintiff and realigned the district as a defendant. His rationale was that the district was bringing the suit only for monetary reasons (which was true) and thus could not be trusted to be a reliable advocate for the constitutional interests of the students of the school district.

However, this put the school district in a perverse situation. It could win only by losing and lose by winning. It could receive the remedies for which it initially sued only if the court determined that it was unconstitutionally segregated; if it won the case, it would not receive the remedies. After 1978, the district consistent-

[3] Happily, not in the Heritage *First Principles* series; see Charles R. Kesler, "What Separation of Powers Means for Constitutional Government," Heritage Foundation *First Principles* No. 17, December 17, 2007, *http://www.heritage.org/Research/Thought/fp17.cfm*.

[4] *The Federalist* No. 34, in *The Federalist*, ed. Jacob E. Cooke (Hanover, N.H.: Wesleyan University Press, 1961), p. 212.

ly argued that it was unconstitutionally segregated—a position it had consistently opposed before.

The case finally came to trial in 1983. A young, white, liberal attorney, Arthur Benson, had come forward to represent the students of the KCMSD. In 1984, Judge Clark ruled that the KCMSD was unconstitutionally segregated and held the district and the state of Missouri responsible, but he dismissed the case against the suburban districts and federal agencies. In the following years, Judge Clark ordered massive improvements in the district and decided to mandate tax increases to pay for them.

In 1990, the Supreme Court created a distinction without a difference, ruling that Judge Clark had exceeded his power by mandating a specific level for his tax increase but simultaneously holding that he could raise taxes as long as the offending party (the school district) determined what tax rate was necessary to pay for the remedial plan.[5] In 1995, the Court finally addressed the scope of the plan and ruled that it was an *inter*district remedy for an *intra*district violation, which violated the Court's precedent in *Milliken v. Bradley* (1974).[6] After this decision, the case died a slow death, finally expiring in 2003.

THE INSTITUTIONAL NIHILISM OF LEGAL REALISM

Understanding the practical argument against judicial policymaking requires knowing what it was responding to: "legal realism." Legal realism rose to prominence in the 1920s and 1930s. Among its most prominent advocates were Karl Llewellyn, Thurman Arnold, Max Radin, and Jerome Frank, but it had as its intellectual forbears Justice Oliver Wendell Holmes, Jr., and Roscoe Pound.[7]

In *The Common Law*, Holmes had famously argued that:

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[8]

This position was echoed in legal realism's central empirical claim: Judges do not make decisions based on legal materials or legal reasoning. Instead, they make decisions based on how the facts of a case strike them. That is, judges make up their minds about the proper outcome of a case and then create the legal reasoning as a diversionary adornment. According to this theory, political ideology plays a far greater role than constitutions or statutes in determining the outcome of cases.

The upshot of legal realism is that the law as we normally think of it does not exist at all. If judges make decisions in this way, they are really just deciding what they think is the best policy. The law becomes nothing but public policy. In the parlance of legal realism, the law is "indeterminate," which means that it is insufficient for determining the outcome of cases. Thus, judges just do what they think is best. Or, more bluntly, the law is whatever judges say it is.

Legal realism (at least in the view of some of its proponents) was not content with making this empirical claim, so it advanced a normative one as well: If the law is nothing more than the policy preferences of judges, then judges should not aspire to make legally correct decisions, but simply to make good policy. Given good

[5] In 1989, the Supreme Court dealt with a relatively minor issue concerning attorney's fees.

[6] *Milliken v. Bradley*, 418 U.S. 717 (1974). In *Milliken*, the Court struck down a metropolitan-wide busing plan from Detroit.

[7] Roscoe Pound and Karl Llewellyn famously disputed the claims of legal realism, leading many to overestimate the disagreement between realism and Pound's "sociological" jurisprudence. One is tempted to credit their dispute to the narcissism of minor differences.

[8] Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown, and Co., 1881; reprinted 2004 by the Lawbook Exchange), p. 1.

preferences, or at least the tools to learn how to form them, they will make good public policy.

To do this, legal realists recommended a complete revamping of legal education so that the law would reflect the political ideology of lawyers and judges. Lawyers and future judges needed training in the social sciences such as political science, sociology, economics, and even Freudian psychology.

Peter Edelman, the former aide to Robert Kennedy, recently gave a shockingly candid example of how legal realists thought judges should make decisions. He recalled that when he was clerking for Justice Arthur Goldberg, Goldberg's "first question in approaching a case always was, 'What is the just result?' Then he would work backward from the answer to that question to see how it would comport with relevant theory or precedent."[9]

In other words, Justice Goldberg did not try to determine the outcome of the case based on the law. He tried to make his desired outcome determine what the law should be.

There is an obvious constitutional implication that flows from realism's normative position: If judges are simply to make good public policy, the effect must be to erode the boundaries among institutions. The judiciary necessarily becomes another legislative branch. Institutionally, anything goes. Nothing really separates what courts do from what elected branches do. In fact, some legal realists explicitly called for judges to be "social engineers."

It would be inaccurate simply to label legal realism the jurisprudential twin of political Progressivism, but one notices striking similarities between the two. Both obviously shared many of the same sentiments toward political and social reform. Most notably, legal realism shared the Progressive movement's goal of replacing politics with government by enlightened experts. In this case, however, the experts were to be judges. Likewise, their dispositions toward the Constitution were strikingly similar.

For instance, the most important legal realist, Karl Llewellyn of Columbia Law School, called America's reverence for the Constitution "real" but "blind," a sentiment certainly shared by many Progressives. The Constitution functioned as a great symbol of security for Americans, but like all symbols, it could be manipulated.

Llewellyn also derided what he called "orthodox" constitutional interpretation for asking questions such as "Is this within the powers granted by the Document?" This question for him addressed the "nonessential" and "accidental," by which he meant "what language happens to stand in the document." He contrasted orthodox interpretation with "sane" interpretation, which instead of consulting the text consults an "ideal picture." Thus, his "sane theory would utterly disregard a Documentary text if any relevant practices existed to offer a firmer, more living basis for the ideal picture." Ultimately, for Llewellyn, the important constitutional questions facing judges were not clearly answered by the text but instead were "penumbra-like," and the penumbra, he said, "will always be in flux."[10]

Many legal realists, such as William O. Douglas and Thurman Arnold, made their way to Washington in the 1930s to assist in designing and implementing the New Deal—with Douglas eventually making his way to the Supreme Court. Few exemplified political decision making on the Supreme Court more than Douglas, whose "breezy" "polemical" opinions, Jeffrey Rosen has observed, seem "unconcerned with the fine points of legal doctrines" and "read more like stump speeches than carefully reasoned constitutional arguments."[11] Echoing Llewellyn, Douglas also blessed us, in his majority opinion in *Griswold v. Connecticut*, with the hopelessly obscure

[9] Tim Wells, "A Conversation with Peter B. Edelman," *Washington Lawyer*, April 2008, at *http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/april_2008/legends.cfm* (September 4, 2008).

[10] Karl N. Llewellen, "The Constitution as an Institution," *Columbia Law Review*, Vol. 34 (1934), pp. 1–40.

[11] "Courting Trouble," *The Washington Post*, March 9, 2003, p. T5.

declaration "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[12]

Undoubtedly, there is some truth to the empirical claim of legal realism. The political preferences of judges obviously affect their voting behavior. Any advocate submitting a brief to the Court would certainly consider the political preferences of the justices when crafting his or her arguments. Today, if you want to predict how judges will decide cases, the best way to do so is to get some measure of their ideology.

The "attitudinal" model, which "holds that judges decide cases in light of their sincere ideological values juxtaposed against the factual stimuli presented by the case,"[13] marshals powerful statistical evidence for its position. Even the most casual observer of the Supreme Court notes the dreary, even banal, predictability of its splits into liberal and conservative blocs in cases raising divisive social and political issues. Of course, many of these cases hinge on how factual stimuli will strike the ever-mercurial Justice Anthony Kennedy.

The question is whether we must be resigned to this arbitrariness or whether there is instead some method of judicial decision making, such as originalism, which holds that the Constitution's meaning was established at the time it was written and can bind judges to something other than their political preferences. It is also reasonable to ask whether legal realism was a self-fulfilling prophecy: Perhaps telling judges that they should be social engineers led judges to embrace social engineering.

While legal realism faded from prominence after the 1940s, its effects are still obviously with us. This is most apparent in the debate over judicial policymaking. The most able defenders of judicial policymaking explicitly reject, as they must, separation of powers:

> We have invested excessive time and energy in the effort to define…what the precise scope of judicial activity ought to be. Separation of powers comes in for a good deal of veneration in our political and judicial rhetoric, but it has always been hard to classify all government activity into three, and only three, neat and mutually exclusive categories.[14]

Others have gone even further and said that judges have been willing to "engage in policy making" and violate "the long-standing principles of federalism, separation of powers, and the rule of law" because "there is something seriously wrong with all three principles." Separation of powers in particular is simply a relic of Newtonian science and "no longer operationally relevant."[15] This language, of course, harkens back to another critic of separation of powers, Woodrow Wilson, who also derided the Constitution for relying on Newtonian principles of physics and wanted to move us beyond such constitutional fetishism.

THE CRITIQUE OF JUDICIAL POLICYMAKING

Legal realism's celebration of judicial policymaking did not go unchallenged. In response to its anything-goes attitude, scholars such as Lon Fuller, Henry Hart, Herbert Wechsler, John Hart Ely, and Alexander Bickel developed the "legal process" school, which was skeptical of the idea that courts had the capacity to make effective public policy. This school, to be sure, did not embrace originalism or the idea that separation of powers should be maintained because the Founders enshrined this principle in the Constitution, but its criticisms amounted to a powerful practical defense of maintaining institutional boundaries against legal realism's contention

[12] *Griswold v. Connecticut*, 381 U.S. 479 (1965), 484.

[13] Jeffrey Segal, "The Attitudinal Model," *Empirical Legal Studies*, July 13, 2006, at *http://www.elsblog.org/the_empirical_legal_studi/2006/07/the_attitudinal.html* (June 4, 2008).

[14] Abram Chayes, "The Role of the Judge in Public Law Litigation," *Harvard Law Review*, Vol. 89 (1976), p. 1307.

[15] Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (New York: Cambridge University Press, 1998), pp. 20, 345.

that judges should actively make policy according to their preferences.

At the core of the legal process school's critique was the notion of "polycentrism."[16] Whether confronting legislatures or administrative agencies, according to this view, most policy problems are polycentric, which at its simplest means that there are multiple parties with multiple interests. In contrast, traditional litigation is binary. With polycentric problems, as opposed to legal disputes about (for instance) whether Party A violated a contract made with Party B, there is no obvious solution because of the diffuse nature of the interests involved. But the authority and legitimacy of courts hinges on their ability to offer a reasoned argument in justification of their decisions. Hence, the rational decision-making process of courts will likely not lead to a satisfactory policy because legal reasoning cannot lead to answers for problems based on *interests*.

For example, budgetary decisions about how much to spend on law enforcement, education, sewage facilities, or road construction are poorly suited to judicial determination. Instead, different groups have different interests, and the best way to reach a decision is through a process of deliberation and compromise in an elected body where the different interests can sort themselves out. Instead of reasoning through to a decision, one can at best make a prudential judgment after considering all of the interests at stake.

The legal process school also fell out of favor among legal scholars, largely because it cast doubt on the efficaciousness of some of the favored judicial innovations of the 1960s and 1970s. Nevertheless, skepticism about judicial policymaking persisted and grew into a more detailed critique that hinged on three points: Courts have inadequate information, their actions lead to harmful unintended consequences, and they must deal with issues in isolation that are merged in the real world.[17]

The Problem of Inadequate Information

While the adversarial legal process creates incentives for each party to generate massive amounts of information for judicial consumption, there are problems with both the reliability of that information and the ability of judges to process it. Judges are generalists and do not have specialized training in the often highly technical areas of the physical and social sciences that are central to the issues they are being asked to resolve. Moreover, in many of these disputes, there is no consensus within the scientific discipline, so it is unreasonable to expect a judge to be the arbiter of these complex disputes.

Because they are so ill equipped, judges must rely on expert witnesses who are invariably partisan and therefore produce partisan information. Making effective public policy, however, requires that those who make it have access to accurate information and the ability to comprehend what the information means. Lacking this ability, judges are left to the partisan perspective of "experts."

Of course, legislators also receive partisan and biased information from interest groups, but legislatures are open institutions with specialized committees and attendant staff, and they solicit and receive information from a variety of interested parties. Also, if a legislator relies on inaccurate information from an interest group, others have incentives to expose those inaccuracies. In contrast, lawsuits are largely closed processes and rely primarily on information produced by the two parties involved in the litigation. If a biased expert witness gives unreliable information, that fact will have little effect on his or her ability to serve as a witness in a trial somewhere else.

[16] Polycentrism was outlined in an essay by Lon Fuller originally written in the 1950s but published posthumously as "The Forms and Limits of Adjudication," *Harvard Law Review*, Vol. 92 (1978), pp. 354–409. Fuller adapted the notion of polycentrism from the work of Michael Polyani.

[17] The most comprehensive analysis of these problems is still Donald L. Horowitz, *The Courts and Social Policy* (Washington, D.C.: Brookings Institution, 1977).

An additional problem with the information judges receive is that it is excessively theoretical and insufficiently practical. For example, in disputes over education policy, the expert witnesses are nearly always university professors who generally have little experience actually teaching children or managing schools.[18] These activities, despite the ambition or pretensions of schools of education, cannot be codified in a manual.[19] They require knowledge that comes only with experience and practice. Therefore, in a judicial policymaking regime, those who have the most practical experience and knowledge necessary for effective implementation will have the least influence on public policy.

The Problem of Unintended Consequences

Closely related to the problems created by inadequate information are litigation's unintended consequences. Both litigation and legislation produce unintended consequences, but because litigation produces less reliable information, courts know less about the potential second-order consequences of a particular policy.

Moreover, litigation limits the ability of the government to react to these unintended consequences. The remedy in litigation is designed to restore a right or fulfill a government obligation and thus cannot easily be modified. If a legal proceeding has determined that the judge's ordered program is the proper remedy for the proven violation, modifying the remedy raises questions about the court's judgment and also raises the appearance that the modification has deprived someone of a right the initial judgment was intended to restore. If the legally determined remedy is not working, perhaps the court's decision about the violation was questionable as well.

Perhaps the most striking example of judicial policymaking unleashing unintended consequences was in *Wyatt v. Stickney*, a case involving the reform of Alabama's mental health facilities.[20] In this case, Judge Frank Johnson imposed reforms that, because of the significance of the case, had the effect of deinstitutionalizing thousands of seriously ill patients across the country. Raymond Fowler, who was later director of the American Psychological Association, illustrated this problem when reflecting on what happened. "Certainly," he said, "one can't imagine that Judge Johnson thought this would happen. But it's not his job to try to predict what the effects of an order will be. It's my understanding that he's obligated to determine what the Constitution requires and then to order it."[21]

The Problem of Isolated Issues

This, then, leads to the final problem of isolated issues. Courts can address policy problems only in a "piecemeal" fashion. Because they can address only the legal question before them, judges cannot consider other issues related to the problem, which nevertheless might be essential for solving it. For instance, poverty clearly affects educational performance, but when considering whether a state adequately funds education, a court must focus only on educational spending. It cannot ask whether a change in welfare policy, low-income housing, job-training programs, or crime-reduction efforts would be necessary for improving educational outcomes in poorly performing schools.

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[18] This problem is highlighted in Nathan Glazer, "Should Judges Administer Social Services?" *The Public Interest*, Vol. 50 (1978), pp. 64–80.

[19] This point is a real-world application of an argument made by Michael Oakeshott in *Rationalism and Politics* (Indianapolis: Liberty Fund, 1991). Oakeshott says that rationalist politics has two unfortunate features: uniformity and perfection. "The essence of rationalism," he says, "is their combination." *Ibid*., p. 10. This is a problem because political problems often cannot be pigeonholed into uniform solutions, and the solutions often cannot be perfect. The essence of the problem is that the rationalist privileges technical knowledge over practical knowledge. Technical knowledge is that which can be written down and read. Practical knowledge can be learned only through action.

[20] *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972).

[21] Quoted in Jack Bass, *Taming the Storm* (New York: Doubleday, 1993), p. 302.

Not considering the context of different policy problems breeds irrational public policy. Since courts discuss policy in the language of rights and duties, they do not take opportunity cost into account. If a right has been violated, it must be remedied regardless of the cost, but rational policymaking requires consideration of opportunity cost. One must consider whether a dollar spent on policy X would be better spent on policy Y. But Courts cannot consider whether a dollar or $2 billion spent to improve education would be better spent on roads, police, prisons, public health, or nothing at all.

Are Courts Too Weak to Make Policy?

While the legal process school and its descendants offered the most nuanced treatment of the shortcomings of courts, Gerald Rosenberg offered a more recent and attention-grabbing critique in *The Hollow Hope*.[22] In it, he argued that courts are generally powerless to create social change, relying particularly on evidence from desegregation. *Brown v. Board of Education*,[23] he argued, had little effect on desegregation. It was not until the Civil Rights Act of 1964 that desegregation really began. The courts influenced public policy only when they had the support of other institutions.

Thus, Rosenberg highlighted another constraint on judicial policymaking: primarily, the inability of judges to compel others to take actions necessary for accomplishing judicial goals. The courts, he argued, could overcome their constrained position only under certain very narrow conditions. There must be public support (or at least low levels of resistance from the public), support in the other two branches of government, and ample legal precedent in order for the courts to accomplish social change.

Studying the courts' attacks on segregation and enforcement of abortion rights on a national level, Rosenberg found that the courts have been unable to bring about social change on their own. In fact, he argued, the courts seem quite powerless without the help of Congress and the executive branch to bring about social change.

At first glance, Rosenberg's thesis appears to confirm a constitutional truism. The fact that courts need the support of other institutions is a testament to separation of powers, federalism, and representative government. His argument then provides a powerful verification of *The Federalist*.

However, while Rosenberg's evidence, particularly on desegregation, is powerful and deployed persuasively, there seems to be something incomplete in his analysis. Primarily, he ignores the possibility that courts can cause harm while trying to promote laudatory social programs. In other words, the pursuit of worthy and admirable policies by courts might actually lead to unintended and deleterious second-order effects—obviously a significant consideration of the legal process school.

The effect of criticisms by the legal process school and Rosenberg has been to severely undermine academic faith in the effectiveness of judicial policymaking. In fact, today, few scholars working on judicial policymaking, if any, subscribe to the naïve optimism of legal realists. Instead, what has been called the "new legal process" school accepts many of the criticisms leveled against judicial policymaking but argues that, in some situations, the courts might be the "least worst" branch.

In essence, this school admits that the courts do a poor job of making policy but then accuses legislatures and executives of doing no better, and even worse.

MISSOURI V. JENKINS AND JUDICIAL POLICYMAKING

What, then, does *Missouri v. Jenkins* tell us about the judiciary's capacity to make public policy? First, we must note that it does not verify Rosenberg's thesis from *The Hollow Hope*. In fact, at least in Rosenberg's sense, the court hardly seemed constrained at all. Citizens and other political institutions offered little resis-

[22] Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change* (Chicago: University of Chicago Press, 1993).
[23] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

tance, or at least little effective resistance, and were easily compelled to follow the court. The court provided positive incentives to induce compliance and imposed costs for not complying. Finally, those responsible for implementing the court's decisions, such as the school board, district administrators, and court-appointed monitors, were willing to act and use the court to leverage additional resources.

But when considering the legal process school's critiques, *Missouri v. Jenkins* appears to be the archetype of failure that they envisioned. It failed on all three counts that are raised by the legal process school against judicial policymaking:

- The court received biased and extravagantly incorrect information;
- The court's policies caused a storm of unintended consequences; and
- The court isolated a large, complex area of public policy from areas that are obviously related and essential to it.

However, while the case illustrates many of these concerns, these concerns do not, by themselves, explain why the court failed. Instead, the case shows that courts are constrained by an additional and often neglected burden that is built into their institutional structure: the constraints of precedent.

Inadequate Information

The list of examples of inadequate or blatantly incorrect information given to Judge Clark by expert witnesses is too vast to document here, so I will focus on just two.

First, during the 1970s, when the district was under investigation by the Department of Health, Education, and Welfare for being unlawfully segregated, it employed expert witnesses who testified that the district was in full compliance with the law. However, when the district supported the case being brought against it in the 1980s, those same expert witnesses changed their testimony and argued that the district was in violation of the law. The district correctly expected that losing would lead to an infusion of money.

The implications are obvious. Expert witnesses will change their testimony to suit the desires of their client. How can judges rely on information coming from the legal equivalent of mercenaries?

Second, these experts believed that they had formed a plan to save the school district, which was mired in problems far beyond their comprehension. They advised Judge Clark that if the court approved the remedial plan, the average achievement of students in the KCMSD would rise to national averages within four to five years.

These educational experts were steeped in the "effective schools" movement, which had emerged in the 1970s. This movement claimed that successful schools possessed certain "correlates," or common attributes, such as strong instructional leadership, a strong sense of mission, demonstrated effective instructional behaviors, high expectations for all students, frequent monitoring of student achievement, and a safe and orderly environment. But it is one thing to observe the rather obvious point that strong instructional leadership makes for an effective school and quite another to make strong instructional leaders out of the very people who manifestly had been failing to provide that leadership.

The expert witnesses believed that the chronically failing teachers and principals of the KCMSD could be transformed into effective ones if their recommendations were adopted. Needless to say, nothing of the sort happened. In fact, the plaintiff's attorney, Arthur Benson, later explained that no one who crafted and implemented the remedial plan "understood the problems of scaling something up to a district wide remedy."[24] The expert witnesses simply had no grounds for making such assertions.

Unintended Consequences

One amateurish mistake made by the court that a legislature undoubtedly would have considered more carefully was an income tax surcharge on the income

[24] Joshua Dunn, interview with Arthur Benson, Kansas City, Missouri, January 17, 2001.

made within the boundaries of the KCMSD. Judge Clark decided that while the state of Missouri should pay for most of the remedial plan, the people of Kansas City should bear some of the burden. Most of this was done through his infamous property tax increases, which more than doubled to pay for the plan, but he also wanted those who perhaps had left the KCMSD to escape the schools but still worked within the district to pay for the plan's cost.

The problem was that imposing a 1.5 percent tax on those who worked within the school district's boundaries, while it sounded simple, was all but impossible for a court to implement in practice. What if someone worked part of the day in the KCMSD and part of the day elsewhere? What about a savings account opened at a bank branch in the KCMSD by a person who lived and worked outside of the district? What about those who worked for companies headquartered within the KCMSD and whose salary officially came from company headquarters but who worked outside the district?

The difficulties were obvious to everyone as soon as the court tried to impose the tax. In fact, the difficulties were so obvious that it was clear that the tax would eventually be struck down. (Incidentally, it was the only one of Clark's major orders that was struck down by the Eighth Circuit.)

The most important unintended consequence, however, was the alienation of Kansas City's black community. Obviously, when Judge Clark lavished billions of dollars on an overwhelmingly black school district, his goal was not to anger the recipients of his largesse. Yet anger them he did. Most important, and at the recommendation of the plaintiff's attorney, he established a rigid quota system for the district's magnet schools; but some schools were more desirable than others, and when the predicted wave of suburban white students never came, the result was to exclude black students from the district's most attractive schools.

The quota system required that for every six black students, there had to be four white students, and it was based on total enrollment in a school rather than on the total number of seats. Hence, if a school had 1,000 seats and 240 white students, only 400 black students could attend that school. Because the district could not come close to filling all of the "white" seats in the magnet schools, many black children could not attend the magnet school of their choice even though space was available in the school. The system was so rigid that in the middle and high schools, which were all magnet schools, the district became concerned about being able to find space for all of its black students. At one point, the district had over 7,000 black students on waiting lists for magnet schools even though there were thousands of available seats. Many black parents became so exasperated that they decided to list their children as white in order to enroll their children in a preferred magnet school.

Judge Clark refused to relax the quotas until after the damage had been done. His rationale was that the policy had been adopted by the court as an essential component of the desegregation plan. By dropping the quota requirement, he would admit that the plan was not working, that it was not going to work, and that he had issued the wrong remedy. Hence, it is not surprising that he stubbornly refused to relax the requirement until after everyone else, including the plaintiff's attorney, had recommended abandoning it. It is one thing for a legislature to shift policy as more evidence is accumulated, but quite another for a judge to change a ruling and the legal rights and obligations of the parties involved.

The perception—and often the reality—was that the plan made white students more valuable than black students. The black community's dissatisfaction with the court's remedial plan led to the creation of a black civic association premised on opposition to the plan. This group created a coalition that took over the school board, ended the magnet school plan, and returned the district to neighborhood schools. Had the plan actually achieved its objectives, it would be hard to imagine significant opposition arising in the black community, but when the plan failed to deliver on its promises, the black community began to chafe under the burdens that the court was forcing it to bear.

Isolated Issues

The court also could not confront the problem that it faced in a comprehensive manner. The educational failure of the KCMSD was only the symptom of many other illnesses facing the district.

For instance, both the plaintiff's attorney and the court-appointed monitor acknowledged that a significant percentage of the district's teachers were woefully unqualified, but this problem was related to a variety of other problems including the quality of individuals attracted to teaching in the KCMSD, the quality of programs in schools of education where teachers are trained, and the difficulty in removing underperforming teachers. Judge Clark's solution to these problems was a dramatic increase in teachers' pay, but this did nothing to clear out bad teachers and in fact provided incentives for them to stay with the district.

Perhaps most important, Judge Clark was powerless to improve what happened outside of school and in the home. Each year, large numbers of the KCMSD's students changed residences. Creating a bond between the school and the home was remarkably difficult. The school district also had a policy of allowing parents to promote their children to the next grade even if the child did not fulfill the requirements to pass. Each year, thousands of KCMSD students were promoted to the next grade under this policy, reflecting a profound lack of parental interest in the education of their children. But these problems were symptoms of broader social problems related to family breakdown and urban decay.

INFLEXIBLE PRECEDENTS AND JUDICIAL POLICYMAKING

The preceding problems certainly do not speak well of the judiciary's ability to make public policy, but they cannot explain *why* the court failed. It was clear that Judge Clark had more than ample information indicating that the plan would fail; that, while many consequences might have been unintended, they were not unforeseeable; and that Judge Clark must have known that that the educational problems in the KCMSD were largely symptoms of broader problems.

Most tellingly, Judge Clark had surveys conducted to determine what themes would be most attractive to white private school and suburban parents. The results showed that the magnet school themes were universally unpopular and that, regardless of the theme, white parents would be largely unwilling to send their children to the KCMSD. In short, his own evidence showed that his plan would fail. Likewise, members of the black community showed ambivalence and even antagonism toward the magnet school plan from the beginning. They contended (correctly) that the plan would actually damage the quality of education in the district.

Finally, the state of Missouri presented substantial expert testimony that improving the quality of education in the district would require improving the educational atmosphere of students' homes. This was also the contention of the black parents who mobilized to oppose the plan, but Judge Clark repeatedly ignored their claims.

The question one must ask is why, in the face of his own evidence, would Judge Clark assert that the plan would in fact draw thousands of white students into the school district? When one considers all of the evidence, the only explanation that makes sense is that he was compelled to do so.

In general, Judge Clark was not an activist judge, prone to imposing radical social experiments from the bench. The reason we are left with is that he was following the precedents from desegregation cases handed down by the Supreme Court. The argument of *Complex Justice* is that this case illustrates a distinction between *mature* and *emergent* areas of judicial policymaking.[25] Thus, to understand the results of *Missouri*

[25] In emergent areas, doctrines—if they exist—are likely to be more flexible, allowing lower court judges some discretion when trying to solve the problems of particular cases. However, the problems with judicial policymaking identified by the legal process school are likely to be in evidence in these areas. In mature areas, such as desegregation by the time of *Missouri v. Jenkins*, there is a heightened risk that precedents will ossify into a set of inflexible and possibly contradictory rules ill-suited for policymaking in the real political and social world.

v. Jenkins, it is necessary to untangle the doctrinal constraints placed on Judge Clark.

Judge Clark faced a set of Supreme Court precedents that made sense in isolation but were confused as a whole. In the late 1960s and early 1970s, an emboldened Supreme Court began to strengthen its attack on segregation. The result of three decisions—*Green v. New Kent County School Board* (1968),[26] *Swann v. Charlotte-Mecklenburg* (1971),[27] and *Keyes v. Denver School District* (1973)[28]—was to:

- Create an affirmative duty to desegregate,
- Allow statistical racial disparity as proof of segregation,
- Blur the distinction between *de facto* and *de jure* segregation, and
- Extend the obligation to desegregate beyond the South.

But the Court retreated in *Milliken v. Bradley* (1974), ruling that suburban school districts could not be included in desegregation remedies unless they had actively contributed to the violation. One can argue that each case on its own made sense, but together they created a doctrinal Gordian knot. How could judges create integration in overwhelmingly minority school districts without compelling suburban participation?

The solution the courts hit upon was voluntary desegregation plans built around magnet schools. Given the precedents under which he was operating, Judge Clark believed that he had to rule that the KCMSD was unconstitutionally segregated, and he also had to try something that had not already been shown to be a failure. Virtually the only option available was a large magnet school plan combined with a complete physical rehabilitation of the entire district.

Hence, the failure of *Missouri v. Jenkins* was an institutional failure. It cannot be written off as the excrescence of an idiosyncratic robed tyrant. There were ample opportunities for higher courts to overturn Judge Clark, but they did not do so until it was too late. The case shows that doctrine matters for lower court judges. Supreme Court judges may, as legal realism argues, feel free to ignore doctrine or to make it up as they go along, but trial court judges, who face the ignominy of being overruled, have incentives to follow precedent. Judge Clark, who fastidiously followed the Court's precedents, was largely going where the legal doctrines led him.

In short, judicial policymaking is not only a problem in the one prominent case that garners substantial attention, like *Missouri v. Jenkins*. Often, the ground is already laid for these problems in less visible but no less dangerous decisions. This lesson applies to court cases in policy areas across the board, which shows the need for legislators to pay close attention to developing court doctrines in order to preempt and prevent the ill effects of judicial policymaking.

CONCLUSION

Desegregation was the judiciary's largest, most concerted foray into public policy. That it ended in *Missouri v. Jenkins* is telling. What started with ending the obvious injustice of legally enforced segregation in *Brown v. Board of Education* ended with petting zoos and programs in Slavic studies.

Missouri v. Jenkins illustrates that courts have immense power to command but often little power to change. Judge Clark commanded that taxes be raised, and they were raised. He ordered that buildings be built, and they were built. But those commands did little to change the quality of education in Kansas City. This reveals that courts are by nature unwieldy institutions for designing and implementing public policy. As the U.S. Supreme Court was muddling through desegregation in the early 1970s, it certainly could not have envisioned that its decisions would create the catastrophe of *Missouri v. Jenkins*.

Similarly, when the Court grafted the unwieldy and inaccurate metaphor of separation of church and state onto the Establishment Clause in *Everson v. Board*

[26] *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).
[27] *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).
[28] *Keyes v. Denver School District No. 1*, 413 US 189 (1973).

of Education (1947),[29] the justices did not envision that it would lead to the vertigo-inducing set of Establishment Clause precedents we have today. In applying the metaphor, the Court famously ruled in one case that it is constitutional for the government to provide religious school pupils with books but ruled in another that the government could not provide such pupils with maps.[30] This absurdity led to Senator Daniel Moynihan's incredulous query about the status of atlases under the Court's doctrine. Even more recently, in 2005, the Court decided that it *is* constitutional to display the Ten Commandments on public property in *Van Orden v. Perry*—except when it is *not*, in *McCreary County v. ACLU of Kentucky*.[31]

One would suspect that if the courts are drawn into other areas of public policies, we will see similar results. Today, interest groups are asking judges to approve their favored policies on everything from global warming to the precise amount of educational spending per pupil. Each of these and countless other areas would require constant and clumsy judicial oversight, with each decision creating a myriad of unintended consequences that would only create further legal disputes requiring judicial resolution.

We would be well advised to consider Alexander Bickel's caution about looking to the courts to settle our most divisive and complicated political issues: "In dealing with problems of great magnitude and pervasive ramifications, problems with complex roots and unpredictably multiplying offshoots—in dealing with such problems, the society is best allowed to develop its own strands out of its tradition."[32] This point was in fact unwittingly illustrated by *Missouri v. Jenkins*. While the court forced unsound and bizarre experiments on the children of Kansas City, educational common sense was restored by the political action of minority parents.

For those who do not believe that the idea of self-government has outlived its usefulness, this is as it should be.

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[29] *Everson v. Board of Education*, 330 U.S. 1 (1947).
[30] *Board of Education v. Allen*, 392 U.S. 236 (1968) and *Wolman v. Walter*, 433 U.S. 229 (1977).
[31] *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005).
[32] Bickel, *The Supreme Court and the Idea of Progress*, p. 175.