Indiana Law Journal

Volume 57 | Issue 3 Article 4

Spring 1982

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The political dimensions of class actions pervade both the scholarly discussion of such litigation and the strategies and outcomes of the cases themselves. While the debate over the legitimacy and capacity of judicial handling of questions of institutional reform continues, the political significance of class actions stands out. For example, in 1981, more than forty-eight percent of all appropriations for the city of Boston were subject to judicial supervision; these appropriations covered the operations of city schools, police and fire fighters, city jails, and city housing through the Boston Housing Authority.[1] State care of the mentally retarded, administration of prisons in more than one-half the states, and operation of numerous state bureaucracies are subject to judicial supervision. The studies in this volume provide additional examples of attempts to reform—through class action litigation—services provided by public schools[2] and by public hospitals.[3] The purpose of this comment is to suggest how certain issues and questions raised by political scientists may be applied to analysis of class action litigation, with particular attention to the articles in this symposium.

Observers of this public law litigation frequently criticize court intervention in so-called "political" matters. From the perspective of a political scientist, however, this criticism is curious and puzzling. The study of politics, after all, is the study of the authoritative allocation of values: in Harold Lasswell's famous definition, the study of who gets what, when, and how.[4] It is hard to imagine an analysis of any court case which did not acknowledge the political nature of the judicial activity involved.[5] Public values are allocated by judges with every decision favoring a creditor over a debtor, a husband over a wife in a divorce, or an injured plaintiff over a negligent defendant. When discrete, individual events and relationships are rephrased into legal language for the purpose of court action, values of society are inevitably involved through the very con-

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[1] Turner, *Governing from the Bench*, Boston Sunday Globe, Nov. 8, 1981, Magazine, at 12.

[2] Rosenberg & Phillips, *The Institutionalization of Conflict in the Reform of Schools: A Case Study of Court Implementation of the PARC Decree*, 57 IND. L.J. 425 (1982).

[3] Paul-Shaheen & Perlstadt, *Class Action Suits And Social Change: The Organization And Impact of the Hill-Burton Cases*, 57 IND. L.J. 385 (1982).

[4] D. EASTON, THE POLITICAL SYSTEM 119-24 (1953) (citing H. LASSWELL, POLITICS: WHO GETS WHAT, WHEN, HOW (1936)).

[5] *See, e.g.*, Shapiro, *From Public Law to Public Policy, or the 'Public' in 'Public Law'*, 5 P.S.: POL. SCI. 412 (1972).

cepts and rules of law applied.[6] Judges may define standards of "reasonable care" in tort cases or of "adequate support" in marital support cases in the same way that they provide substantive definitions of "adequate treatment" or "appropriate education" in cases involving public institutions. One seems no less political than the other.

One difference in these recent court cases is said to lie in the legislative nature of their decisions.[7] This very recent debate over trial court involvement in institutional reform thus continues the discussion of twenty years ago over the lawmaking aspects of Supreme Court decisions[8] (a discussion which itself invokes the writings of the legal realists of the previous generation). However, there has been a significant shift in the nature of the dialog away from questions of the *legitimacy* of court actions in overtly political issues and toward a focus on the *capacity* of courts to handle these matters and on the consequences of their doing so. This shift is evident in the studies of the Pennsylvania Association for Retarded Children (PARC) litigation in Philadelphia[9] and the Hill-Burton cases.[10] Conclusions in these papers emphasize the limits and weaknesses inherent in courts as they attempt to handle problems in complex institutions, with a variety of parties involved, and without the resources to secure compliance with their decisions.

But courts, as political actors, must be understood in the broader context of policymaking in this country. While the distinction between lawmaking, adjudicative, and executive functions is clear in theory, as well as on organizational charts of American government, empirical studies of policymaking suggest that these functions tend to converge and overlap in practice.[11] Given federalism and decentralization of power, policies are shaped by the continuous interaction and negotiation among various governmental bodies and private interest groups. The question then is: What is the role of the courts in these negotiations? An understanding of the role of lower courts may be reached by considering arguments raised about the Supreme Court's role and the role of lawyers in effecting political change.

COURTS AND POLICYMAKING

A well-known characterization of the Supreme Court's role in policymak-

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[6] This point is developed more fully by Mather & Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 LAW & SOC'Y REV. 775 (1980-81).

[7] *See, e.g.*, Rosenberg & Phillips, *supra* note 2; D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).

[8] *Compare* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962) *with* M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT (1964).

[9] Rosenberg & Phillips, *supra* note 2.

[10] Paul-Shaheen & Perlstadt, *supra* note 3.

[11] For discussion of this convergence and overlap, see recent American government textbooks which emphasize this interaction—for example, D. SULLIVAN, R. NAKAMURA & R. WINTERS, HOW AMERICA IS RULED (1980).

ing is Robert Dahl's portrayal of the Court as supporter and legitimator of policies conceived by the dominant national political alliance of Congress and the President.[12] The Court, Dahl argued, participates actively in policymaking but only "within the somewhat narrow limits set by the basic policy goals of the dominant alliance."[13] Dahl pointed to the inevitable politics of judicial recruitment to help explain why Supreme Court actions would ultimately not override the wishes of the President and Congress, concluding that "[b]y itself, the Court is almost powerless to affect the course of national policy."[14] This is the same conclusion reached by Rosenberg and Phillips in their study of the Philadelphia schools case: the courts alone, "without the support of government officials, elite groups and public opinion," do not have the power or resources to secure the rights of disadvantaged minorities.[15] There is unquestionably support for this position, as evidenced by the careful study of negotiations in the PARC case. What must be remembered, however, is that other governmental bodies operate in precisely the same position. The Pennsylvania legislature, for example, acting alone, without the support of the Governor, courts, elite groups, or public opinion, would face tremendous difficulties establishing complete educational programs for the mentally retarded. The legislature could pass a law, and override a Governor's veto, but legislators would need additional political and public support for implementation. Jonathan Casper made this point in an important critique of the Dahl argument, in which he noted that no institution is really capable of the decisive role that the Court is said to lack.[16]

Casper's analysis also suggested other difficulties with the critical, limited role Dahl assigned to courts in protecting minority rights. The entire framework of the relative influence of courts vis-a-vis other branches of government, with clear winners and losers emerging from policy debates, is too narrow.[17] In Massachusetts, for example, some elected officials have welcomed successful lawsuits against their own institutions because these class actions allow the politicians to avoid dealing with controversial issues.[18] When hospital officials privately support the plaintiffs who are suing them, then it is hard to assign winner or loser positions to the outcomes. A broader conception of policymaking recognizes three points. First, policy results from a complex interaction of different institutions and groups.[19] Second, outcomes at any one time provide ten-

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[12] Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

[13] *Id.* at 293-94.

[14] *Id.* at 293.

[15] Rosenberg & Phillips, *supra* note 2, at 449.

[16] Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50, 60 (1976).

[17] *Id.* at 61-62.

[18] Turner, *supra* note 1, at 13.

[19] Casper, *supra* note 14, at 62.

tative resolutions to conflicts, but policy will continue to be fashioned and refashioned through succeeding elections, administrative orders, lawsuits, and so forth.[20] Third, and perhaps most important for assessing the role of courts in policymaking, policies are made in ways other than through direct court orders or passage of laws. Casper has suggested:

> Providing effective access to participants who wish to take part in decision making, placing issues on the agenda of public opinion and of other political institutions, providing an imprimatur of legitimacy to one side or another that may affect its ability to attract adherents, mobilize resources, and build institutions—these are all important parts of the policy-making process that may get lost if we pay attention only to winners and losers.[21]

The greater power of the Philadelphia Association for Retarded Children (Philarc) illustrates how representatives of the interests of the mentally retarded gained formal and informal access to policymaking within the Philadelphia schools as a direct result of the litigation process.[22] While the other groups in the plaintiff class, speaking for the more severely retarded pupils, did not fare so well,[23] that fact should not diminish the increased status of the group representing the majority of the retarded pupils.[24] That this organized group, Philarc, was legitimated and afforded greater power vis-a-vis the schools through the class action process suggests an important way in which class actions can facilitate change. That is, the assertion of legal rights can strengthen the political bargaining position of an organized group.

Professor Garth, in his introductory essay, notes problems in the assumption that class action suits plus lawyers will lead to enforced legal rights.[25] Scheingold also discussed this assumption in more general terms, calling it the "myth of rights"; the myth is premised on a direct linkage between legal rights, formal litigation which attempts to realize these rights, and resultant social change.[26] The myth is, however, only a myth, largely unsupported as an empirical proposition but extremely important as an ideological symbol for Americans. In contrast, thinking about a "politics of rights" leads to clearer explanations of the linkage between rights, litigation, and change.[27] Specifically, legal rights can be seen as political resources to be used in a process of political mobilization. Rights can aid in activating people to question the existing order, in organizing

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[20] *Id.*
[21] *Id.* at 63.
[22] Rosenberg & Phillips, *supra* note 2, at 445.
[23] *Id.* at 446.
[24] *Id.* at 445.
[25] Garth, *Introduction: Toward a Sociology of the Class Action*, 57 IND. L. J. 371 (1982).
[26] S. SCHEINGOLD, THE POLITICS OF RIGHTS 5, 13-79 (1974).
[27] *Id.* at 6-9.

collective political groups, and in promoting a realignment of political forces.[28] By using legal rights in politically astute ways, groups can improve their chances for securing meaningful change. This strategy, however, requires sensitivity to realities of political negotiation and the need for collective organization, an awareness of other political groups with which to join forces, and an understanding of ways in which legal activity is like—rather than unlike—political activity. Thus, this "politics of rights" has implications for class actions.[29]

CLASS ACTIONS AND DISPUTE TRANSFORMATION

Whenever a grievance or quarrel becomes a claim at law before a third party, a critical process of transformation is under way. This process redefines the events or relationships in question into terms of a normative framework shared by a wider group than just the two parties.[30] Typically, dispute tranformations narrow issues into established categories, thus preserving and reinforcing the political order through the process of litigation. However, some transformations attempt to challenge the established order by redefining issues or persons in unconventional ways, and it is in these cases of expansion that one can see potential for broad change.[31] The development of potential for change through expansion may depend in part upon the role of the audience to the proceedings because audience mobilization may be critical to sustained acceptance of any new or altered definition of issues.[32] Another important consideration is language or other symbols used to define issues.[33] In several instances dramatic images have aided in a process of dispute transformation which challenged the established order.[34] Combining these ideas on dispute expansion with the concept of the "politics of rights," one can see why the health care cases described by Paul-Shaheen and Perlstadt did not lead to broad change, despite the significant rule changes in some of the cases.

Consider, for example, the relevant audience for the lawyers and judges handling the various Hill-Burton cases. The audience appears to have been the network of other health-specialist lawyers, along with administrators directly responsible for the hospital construction funds that were distributed under the Hill-Burton Act—that is, a narrow, highly specialized public. In addition, the language in which the cases were couched was

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[28] *Id.* at 131-48.

[29] For a discussion of certain class actions in the context of the "politics of rights," see text accompanying notes 30-39 *infra*.

[30] Mather & Yngvesson, *supra* note 6, at 783-88.

[31] *Id.* at 797-818.

[32] *Id.* at 782, 797-801.

[33] *Id.* at 780-81.

[34] *Id.* at 810-17.

limited and technical. The argument that certain hospitals should provide health care to the poor was persuasive, based on the specific, legal grounds of the Hill-Burton Act.[35] Because of its highly technical and restricted nature, however, the argument lacked a link with a broader conceptual framework. What was needed—and was lacking here—was a framework which would directly invoke the basic issue of hospital care for the poor. The lawyers in these Hill-Burton cases placed their significant energies in realizing the legal rights for their clients. Had they placed more energy into using those rights as political instruments to mobilize people, they perhaps might have been more successful overall in effecting change. Lawyers on the whole, however, would disparage such a suggestion. Their training, expertise, and inclination lead to a focus on specialized legal channels rather than political organization.[36]

A third study, on farmworkers' litigation in California, provides a contrasting example of class action with greater resultant change.[37] The lawyers involved in this case were sensitive to the need to reach a broad public, rather than just a specialized legal public. The case, advanced by lawyers at California Rural Legal Assistance (CRLA) in the late 1960's on behalf of farmworkers, challenged the growers' insistence on use of "El Cortito," the short-handled hoe.[38] This type of hoe was, according to farm management, a more efficient and accurate instrument than the long-handled hoe.[39] But workers challenged its alleged efficiency and pointed instead to its use as a means of supervision and control; the short-handled hoe was an oppressive employer tool which also led directly to severe back injuries among the workers.[40] The hoe became known as El Cortito, a symbol of the exploitation and hardship of farmworkers in California, and workers' protests against the hoe were futile.[41]

The litigation challenging the use of El Cortito began at a time of increasing organization of farmworkers and a 1960's social climate in California that was sympathetic to the workers' demands.[42] How did the CRLA lawyers succeed in their efforts to abolish use of El Cortito? Clearly they worked hard at gathering relevant evidence on worker productivity and on medical dangers of the hoe. They also planned their legal challenges carefully to fit within parameters of an administrative code which prohib-

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[35] Paul-Shaheen & Perlstadt, *supra* note 3, at 390-92.

[36] SCHEINGOLD, *supra* note 26, at 140-41.

[37] Murray, *The Abolition of El Cortito, The Short-Handled Hoe: A Case Study In Social Conflict And State Policy In California Agriculture*, 30 SOC. PROB. ____ (1982) (article to be published in October). The studies by Paul-Shaheen and Perlstadt, by Rosenberg and Phillips, and by Murray were presented in the same panel to the American Sociological Association at its meeting in Toronto in August of 1982.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

ited use of "unsafe" tools.[43] The state bureaucracy, however, was dominated by interests sympathetic to agribusiness; the farmworkers thus had an uphill battle to convince state interests to intercede on their behalf against farm employers. Significantly, CRLA lawyers worked to reach a wide audience with their cause. Using the dramatic imagery of stoop labor with El Cortito, the lawyers redefined the issue into one of basic conflict between underdog and oppressor.[44] The media publicized the case extensively, adding legitimacy to the CRLA side and focusing public attention on the case.

By the time the case reached the California Supreme Court, the CRLA lawyers had gathered evidence to support their humanitarian argument for abolition, to demonstrate the existence of a viable economic alternative in the long-handled hoe, and to appeal to taxpayers concerned with minimizing payments for disability and unemployment (payments needed for workers injured by the use of the short-handled hoe). These arguments "successfully linked the case with a broader constituency by appealing not only to their moral sensibilities but their economic interests."[45] The CRLA won a favorable ruling from the California Supreme Court in 1974 abolishing the use of El Cortito.[46]

In this case a legal right (for employees to be protected from unsafe tools) was used through a class action lawsuit to cause significant change in social practice. The legal doctrine covering occupational safety was expanded in this case to apply to an agricultural implement which was not "unsafe" in the conventional statutory interpretation. The wide audience mobilized in support of the CRLA position played a crucial role in sustaining this expanded definition. Thus, this case illustrates an important possibility for change through class actions: the potential for mobilizing a relevant public to support an issue. Other cases that have similarly performed this role include those by women employees challenging their salaries in comparison to men's salaries, focusing on the issue of equal pay for work of comparable value.[47] A view of class actions that emphasizes their organizing potential, especially through the symbolic politics surrounding the case,[48] suggests a possibility for at least some resultant change.

The Philadelphia schools case illustrates another aspect of this mobilizing potential. Through the process of litigation, an organization was strengthened and legitimated as an important participant in the

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[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *See* Lemons v. City and County of Denver, 17 FAIR EMPL. PRAC. CAS. (BNA) 906 (D. Colo. 1978), *aff'd*, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980); Mather & Yngvesson, *supra* note 6, at 808-09.
[48] *See, e.g.*, M. EDELMAN, THE SYMBOLIC USES OF POLITICS 152-71 (1964).

policymaking process. This conclusion to the symposium thus emphasizes the possibilities for change through class actions rather than the constraints inherent in such litigation. Such change will be limited and incremental, contingent to an extent on the political strength of those supporting the change; change will not be of a major, fundamental nature simply through one lawsuit. But such a limit exists as well for lawmaking in administrative and legislative arenas. Therefore, successful use of class action litigation for change requires sensitivity not only to the intricate legal argument and procedure, but also to the ways in which the case itself can be used to increase political support for a cause and to change the very terms and framework of the debate in the wider political environment.