

FROM SCHOOLHOUSE TO COURTHOUSE

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The Judiciary's Role in American Education

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editors

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Foreword

Primary-secondary education is scarcely the exclusive realm of increased litigation and court involvement in social policy, much less the only field in which the fruits of such litigation have sometimes turned out to be rotten. It is most assuredly not the only sphere where policy disputes and reform initiatives—and resistance to these—have been fought out in courtrooms as well as legislative corridors and voting booths. In the three decades since Donald Horowitz penned *The Courts and Social Policy* (Brookings, 1977), many forests have been cut down to produce the paper on which were inscribed hundreds of thousands of court decisions in countless areas of domestic affairs. (Consider, just as a beginning, disability law, family law, welfare, health, immigration, housing and, of course, law enforcement.)

Our principal concern at the Thomas B. Fordham Institute, however, is primary-secondary education and its improvement, above all the strengthening of academic performance by students and the expansion of quality schooling options for needy families and children. Fordham is an education-policy think tank focused on what it takes to revitalize American schools and reduce obstacles to the reform enterprise.

These obstacles take myriad forms, many but not all of them governmental. We've examined, for instance, the extent to which teacher union contracts constrain the capacity of principals to make crucial personnel decisions for their schools, the malign effect of statewide “caps” on the power of charter schools to

afford decent educational alternatives to youngsters who need them, and the way that some of the compromises built into the federal No Child Left Behind act (NCLB) have attenuated standards-based reform at the state level.

Although we have ample company in studying the executive and legislative branches of government, both state and federal, in relation to K–12 education, we—and most other analysts—have sorely neglected the judicial branch. We simply did not know enough about it—and neither, so far as we could tell, did anybody else.

To what extent, we wondered, is court involvement an obstacle to desired reforms in primary-secondary education in twenty-first century America? To what extent is it a distraction? Might it possibly turn out to be an asset?

We could easily recount several famous decisions, particularly by the U.S. Supreme Court, that seemed to advance important education reforms (such as *Brown* and *Zelman*) and could point to others (especially state court rulings on school finance) that tended to push in the opposite direction, particularly by emphasizing resources over results and uniformity over diversity and choice. A 2003 book by Richard Arum had highlighted the courts' tendency to exacerbate the challenges of school discipline and a 1997 book by Mark Kelman introduced us to the gnarly complexities of special education law.

But all of this was piecemeal, addressing specific facets of K–12 schooling and their interaction with the judiciary rather than mapping this entire rocky landscape. To find a reasonably comprehensive treatment of the whole topic, one had to look back to 1978, long before many key developments in education policy. Over the past thirty years, as best we could tell, nobody had surveyed these questions from 30,000 feet. Yet there was so much that seemed important to find out. Is education litigation still on the rise? In which policy spheres? Federal or state courts? Constitutional, statutory, or regulatory? In what domains might judicial activity be fostering needed reforms and in which is it retarding them—or consuming so much attention and resources as indirectly to have that effect? What about the hot-button issues of segregation, special education, school discipline, and No Child Left Behind?

This was important territory for Fordham to explore, but we needed our own Lewis and Clark to lead the expedition. So we turned to two of the ablest young education-policy scholars and political scientists in the land, Harvard University's Martin West and Joshua Dunn of the University of Colorado at Colorado Springs.

They set out to recruit a stellar cast of chapter authors for this volume, while we at Fordham set out to determine which outside funders might help smooth the way for its creation. To our delight and lasting gratitude, the Searle Freedom Trust and the Achelis Foundation came through with most of the financial assistance needed for this ambitious project.

In the end, besides the eleven terrific chapters that readers will find in these pages (including a perceptive overview and introduction by the coeditors), the project incorporated a stimulating, packed-house conference at the American Enterprise Institute, where drafts were discussed by a well-chosen cadre of astute and constructive critics, then prepared for review and publication by the Brookings Institution Press. Accustomed as we are to organizing our own Fordham events and publishing our own studies, we are honored to have brought this project across the finish line with Washington's two most highly regarded think tanks as teammates.

What, exactly, have we learned from this undertaking? Four points strike me as particularly noteworthy.

First, some areas where we expected to find enormous amounts of litigation (notably special education and NCLB) reveal far less than anticipated, even as others (such as school choice and free speech) display more than we imagined—and as a few domains that once dominated the field (desegregation, school finance) appear to be approaching something like a steady state if not dormancy.

Second, several realms where it briefly seemed that a climactic Supreme Court decision might clear the air and settle the matter (for example, the *Zelman* holding that properly structured voucher programs do not violate the establishment clause) have instead remained fraught with lawsuits, showing how a controversial resolution under the federal Constitution does not quash the ability of agitated interest groups to continue litigating in state courts.

Third, as Mr. Dooley noted of the Supreme Court in Finley Peter Dunne's classic fin de siècle works, judges do follow the election returns—and they also possess policy minds of their own, including ideological predilections and sometimes a sense of superior wisdom. Litigation in education, as in other domains, is not something that arises in outside-the-courtroom disputes between rival interests and views, then enters the courtroom for objective resolution by disinterested and Olympian jurists. Too often, alas, it is the work of judges seeking particular policy (or political) outcomes and finding (or crafting) legal pathways to their desired destinations.

Fourth and finally, while judges are surely adept at finding and pursuing such pathways, the consequences for education are frequently mischievous if not downright damaging. The multiple roles assumed, and decisions issued, by state and federal courts in this domain in recent years add up to a large, mixed bag of influences, many of them malign, on the K–12 education enterprise and earnest efforts to reform and renew it. Most jurists know plenty about the law, but few know much about schools and the conditions in which those responsible for teaching in and leading them are most apt to succeed. As a result, the outcome of education litigation often works better in the courtroom than in the classroom or principal's office.

A few judges seem to have figured this out and to be stepping back from efforts to micromanage schools and state or local education systems from the bench. But they are still outnumbered by jurists willing to conspire with litigants and their attorneys—there is no dearth of either—to enact (or block) policies and programs via the courtroom when they cannot prevail in the legislative or executive branches of government. We ought not to be so dazzled by some of the great, transformative court rulings of yesteryear—*Brown* above all—as to suppose that any large fraction of the 7,000 or so education-related decisions now being rendered annually by federal and state judges are having a salutary effect on American schools or children’s learning.

If this volume serves only to illuminate and document that vexing conclusion, it will more than match our high hopes for it.

CHESTER E. FINN JR., President
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