

Nova Law Review

Volume 10, Issue 1

1985

Article 4

In the Interest of Children: Advocacy, Law Reform, and Public Policy

Laurence M. Hyde*

*

Copyright ©1985 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

Mnookin, Robert H., *In the Interest of Children: Advocacy, Law Reform, and Public Policy*, New York: W. H. Freeman and Company, 1985. 527 pp.

Reviewed by Laurence M. Hyde, Jr.*

This well-conceived and provocative book undertakes to answer the question: "Is test-case litigation a sensible way to promote the welfare of children?" The book delivers more than it promises. It quite thoroughly deals with the complex issue undertaken, but at the same time, it provides an unusually clear look at American courts and the role they play in the making of public policy, including the strengths and weaknesses of policy-making through litigation. While the focus is on test-case litigation brought by public interest groups as class actions, many of the insights are equally applicable to other kinds of cases.

Mnookin has used the vehicle of well-selected cases as a means of examining the following problems:

1. *The enigma of children's interests.* Neither the public interest group nor the court can reliably determine the best interest of children as a class or of an individual child. It is difficult to forecast the impact of a policy decision on a child or on many children. The difficulty is compounded because one must predict the consequences of alternative policies of children in different circumstances. It is compounded because a policy that benefits some children hurts others.

2. *The dilemma of the legitimate role of courts.* In a democracy, public policies are made by popularly elected representatives. However, the language in which a policy is enacted may well be open to more than one interpretation, and even if the language is clear with respect to situations the legislation envisioned, cases often present situations not contemplated by the legislature. Thus, courts cannot resolve these questions without making policy. While this is true of other kinds of policy, it has special importance in the field of children's policy, because children lack political power.

3. *The paradox of child advocacy.* Children need advocates because they cannot speak for and defend their own interests. Yet, since

* Professor of Law, Nova University Law Center, Fort Lauderdale, Florida. J.D., University of Mississippi at Columbia, 1952; A.B., University of Mississippi at Columbia, 1950; Member, Missouri and Nevada Bars.

this is true, how can the advocate know for certain what those interests are? How can the advocate, the public interest agency, or the court know that the interests being pressed are not those of the advocate, the agency, or the parents, since the nominal client is not able to control the litigation?

4. *The debate over judicial competence.* To what extent is the judicial branch of government the appropriate branch for policy decision-making, considering the inherent limitations of the adjudicative process? "Courts, simply because they are courts, may not be able to evaluate policy issues adequately. They are captives of the parties"

The book examines these issues by means of a detailed analysis of five public policy cases. They are:

1. *Smith v. Offer*, brought by the New York Civil Liberties Union to determine whether foster parents have a right to an administrative hearing prior to removal of children placed in their care under contract.

2. *Bellotti v. Baird*, in which the medical director of an abortion center and two pregnant, unmarried minors brought suit to challenge the Massachusetts statute requiring the unmarried minor to secure the consent of both parents in order to obtain an abortion, or, in the alternative, to have a parental refusal overridden by a state court judge.

3. *Halderman v. Pennhurst State School and Hospital*, brought to complain about conditions in a state residence for mentally retarded children. The case became a wholesale attack on the very existence of institutions for mentally retarded people, and sought the dispersal of the residents to small, community-based facilities.

4. *Roe v. Norton*, a case brought by Connecticut Legal Aid lawyers on behalf of welfare mothers in relation to governmental efforts to pursue child support rights against the fathers of their "illegitimate" children.

5. *Goss v. Lopez*, a class action against the Columbus, Ohio School Board to determine the rights to a hearing prior to suspension of children involved in racial disturbances.

Mnookin's issues are carefully examined by the contributing writers who deal with these issues in relation to each of these cases, demonstrating the issues' applications to the several cases. Each case, in varying degrees, contains the enigma, the dilemma, the paradox and the issue of competence. Therefore, each case demonstrates that there is a serious question as to whether we can determine the successes achieved by test-case litigation, even though the public interest litigant wins, and the win involves considerable impact upon the rights, services, agencies

and clients.

The book is a valuable reference to anyone interested in children's issues, but beyond that to anyone seriously interested in how courts function as problem solvers, reform agents and policymakers. One of the serious problems that courts face in their essential task of maintaining public confidence is the lack of understanding of inherent limitations of courts in ways so clearly shown by this book.

In discussing the dilemma of public policy decisions being made by courts, Mnookin makes the point that, since all federal judges and many state judges are appointed for life and not elected by the public and are not subject to recall by the public for unpopular decisions, they are not an ideal democratic policymaker. This reviewer was disappointed that Mnookin did not further explore the issue of whether this removal of courts from the direct control of the popular will was desirable in the overall political scheme under which our nation functions. However, in spite of leaving that important question untouched, the book is intellectually satisfying and well worth careful and serious attention to readers concerned with issues of how our various branches of government interact and how they deal with important issues.

Schrag, Philip G., *Behind the Scenes: The Politics of a Constitutional Convention*. Washington, D.C.: Georgetown University Press, 1985. 252 pp., \$19.95.

Reviewed by Ronald Benton Brown*

A constitutional convention occurred in 1982, but it went unnoticed by the people of the United States. It did not deal with amendments to the federal constitution, a topic much in the news lately, but it did deal with matters of national concern. This convention was called to draft the constitution for a new state, a state which the convention chose to name "New Columbia" because it would encompass the present District of Columbia.¹

Shocked readers may wonder if the above announcement is fiction, like Orson Wells' announcement of the martian invasion in the legendary "War of the Worlds" broadcast. Rest assured it is not. The convention did occur. Miraculously it did produce a state constitution and, even more miraculously, that constitution was ratified by the voters. However, New Columbia has not yet become, and may never become, a state.

The motivations for seeking statehood are simple enough. Many District residents feel that they are the victims of colonialism and racism. They are ruled by a foreign power, the United States,² which exercises nearly total control over the District, particularly its finances. The residents of the Districts have no voting member in the United States' legislature, the Congress, only an envoy.³ The District residents have been deprived of the fundamental right of citizenship in a democ-

* Professor of Law, Nova University Law Center, Fort Lauderdale, Florida. LL.M., Temple University, 1976; J.D., University of Connecticut, 1973; B.S.M.E. Northeastern University, 1970.

1. The District of Columbia also will be referred to hereafter as "the District" or "D.C."

2. P. SCHRAG, BEHIND THE SCENES: THE POLITICS OF A CONSTITUTIONAL CONVENTION 9-10 [hereinafter cited as *Schrag*].

3. The envoy is the District's one nonvoting member of Congress. However, D.C. voters have cast votes for the President and Vice President since the twenty-third amendment to the Constitution was ratified in 1961. Also, by statute, D.C. voters do elect the Council of the District of Columbia and the District's Board of Education.

racy, the right to choose their own government.⁴ What makes this "colonialism" feel even more oppressive is that the residents of the District, unlike the members of Congress or their constituents, are primarily black and poor.⁵ Statehood would mean the right to elect two Senators and at least one member of the House of Representatives.⁶ Statehood would also free the District from the control of Congress on local matters.

The procedure for admitting a new state is very simple. It involves only a simple legislative act.⁷ Absent a veto by the President, a majority vote in both houses of Congress could admit the new state. But there lies the difficulty. Statehood for D.C. would deprive Congress of a prerogative it now enjoys; controlling its working environment which includes patronage opportunities. Statehood is also resisted because it

4. Congress passed a proposed amendment to the Constitution of the United States which provided for voting representatives for D.C. residents, but not statehood. The amendment would become effective only if ratified by three-fourths of the state legislatures within seven years. Some of the opposition to the statehood movement was apparently based on the fear that statehood was unattainable and the agitation for it would jeopardize any chance the amendment would be ratified. On August 22, 1985, the seven-year period expired and the unratified amendment died.

5. Moreover, an affluent District resident will generally maintain a voting residence in one of the states and, consequently, be able to vote for senators and representatives.

6. There are arguments against statehood, such as: 1) the area is too small to function effectively as a state; 2) it does not have an adequate tax base; and 3) the seat of national government should be controlled by the national government, not by a state. Schrag does not attempt to thoroughly analyze or refute these. *See generally, Provision for the Admission of the State of New Columbia into the Union: Hearing on H.R. 3861 Before the Subcomm. on Fiscal Affairs and Health of the House Comm. on the District of Columbia*, 98th Cong., 2d Sess. (1984) [hereinafter cited as *Hearing*].

7. Under article IV, section 3, clause 1, of the United States Constitution, this is all that is required for the admission of a state. The admission of the District as a state may, however, present special problems because the existence of the district is specified in the Constitution. Article I, section 8, clause 17 gives the Congress exclusive legislative power ". . . over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States . . ." Also the twenty-third amendment specifies that the District shall appoint electors for the office of President and Vice President.

Senator Ted Kennedy asserted that the District of Columbia could be admitted as a state by the regular means, that a constitutional amendment is not necessary. Not everyone may share his certainty and this may prove to be another impediment to the achievement of statehood. *See, Hearing* at 31-32. *See also*, S. 5740. 98th Cong., 2d Sess. (1984) (speech by Senator Kennedy introducing S. 2672, the NEW COLUMBIA ADMISSION ACT).

might cause a shift in the balance of power in Congress.⁸ Statehood's proponents have nothing with which to bargain for the needed votes.⁹

Philip Schrag is a Georgetown University law professor. He became interested in the statehood issue when the question of whether to hold a constitutional convention appeared on the ballot. In a moment of innocent curiosity, he inquired about the progress of the convention. A short time later, he was campaigning for election as a delegate.

Based on his credentials, Schrag would seem to be an ideal convention delegate. He received an excellent formal education at Harvard College and Yale Law School. He served as Assistant Counsel to the N.A.A.C.P. Legal Defense and Education Fund and as New York City's Consumer Advocate; all ideal opportunities to learn about the problems of poverty and racial discrimination, problems which afflicted the District. He also served as Deputy General Counsel to the United States Arms Control and Disarmament Agency and was a teacher of legislation (as well as other subjects). His background in government, politics and diplomacy seemed complete.

Schrag's prime motivation for becoming a delegate was his belief that his skills and knowledge would be an asset to the convention. However, before declaring his candidacy, he consulted a respected but unidentified advisor. His mysterious advisor warned that his education and his professional status would be viewed with suspicion and hostility by the other delegates. Living in an affluent white section of the District, and being white, male, Jewish, and a teacher at a private Catholic university would all be obstacles to his effective participation in the constitution-making. "Don't do it [seek election as a delegate]," my Source says. "It could be a disaster for you It doesn't matter if you lose [the election]. The headache is winning."¹⁰ What follows could

8. This has been expressed by the phrase, the "Four Too's;" i.e., a congressional delegation from the District would be "too liberal, too urban, too Democratic and too black." This phrase was used by supporters of the proposed constitutional amendment (*supra* note 4) to explain the rejection of that amendment by the states.

News/Sun-Sentinel, July 21, 1985, §A, at 10, col. 1. The point is that any proposal which would give the District voting representatives in Congress, e.g. statehood, would be subjected to extraordinary scrutiny by a hostile Congress.

9. In its defense, Congress might point out that it did approve the proposed amendment which would give the District voting representatives. However, it has been suggested that it was an empty gesture and that the Congress approved the proposed constitutional amendment only because of the certainty that the amendment would never be ratified by a sufficient number of state legislatures.

10. *Schrag* at 42.

well have been entitled "The Education of Philip Schrag."

Schrag could have given us a sterile report about what the convention did, and where the mistakes were made, and why. But he goes far beyond that. He reports the twists and turns of the real convention, including his own errors, from the unique vantage point of a participant. We suffer along with Schrag as he learns, and sometimes re-learns, the lessons of group dynamics, politics and race. We experience, along with Schrag, the discomfort of an educated white liberal who finds himself a member of the racial minority and even, for a moment, a reluctant participant in a "white caucus." Schrag sets an example by his willingness to seek advice which he carefully weighs before acting. His openness to learning from his experiences reminds the reader that the learning process must continue forever, regardless of the strength of one's resume. As we enjoy his triumphs, however minor, we appreciate the value of his perseverance.

Professor Schrag also provides us with an interesting introduction to the District's politics and history, particularly through his portrayals of the individuals involved. As he discusses the convention itself, he alternates between chapters of his personal reminiscences of the convention and chapters of formal history which chronicle the official events, debates, motions, committee reports, speeches, and the votes. The contrast gives even the most trusting reader doubts about the validity of determining the true legislative intent from a legislative history. While the chapters on the formal history do become a bit dry, the reader knows that an interesting real-life-story chapter is not too many pages away. The sum of the two together is really more than either read alone. The juxtaposition adds something because of the contrast, and because while reading the dry history, one's appetite is whetted for the real dirt which is to follow.

However, there are a few surprises in the book. Schrag is considered an innovator in legal education, a pioneer in clinical teaching, who designed and implemented a legislation simulation to give law students an appreciation for the legislative process. Law students could have participated in the convention as members of the legislative staff or as aides to the delegates, receiving an exceptional educational experience. But, law students are seldom mentioned. The frequent complaints about the lack of convention staff makes their absence particularly conspicuous. It is possible that no law students were interested, but that seems unlikely considering the huge number of law students in the

D.C. area.¹¹ No explanation is given.

The lack of media coverage of the convention and the New Columbia constitution it produced is also surprising. The opposition to statehood by the District's power structure may explain the minimal coverage by the local press, but statehood for the District should be a matter of national interest, and there is no explanation for the lack of meaningful national coverage. Only the opening and closing ceremonies seemed to attract very much attention. Perhaps statehood is not an interesting topic. Perhaps even a newsworthy event needs a public relations professional to get it into the news, and the convention lacked the appropriate staff. It seems unlikely that something more sinister was afoot.

The constitution produced by this convention is a monument to the spirit of the delegates. Underfunded, understaffed, lacking facilities and support, hampered by the lack of formal preparation and a ninety-day deadline, and peopled by political amateurs who also had to hold down full time jobs, the convention seemed doomed from the start. Somehow a constitution was produced.¹² While it seems unlikely that this constitution will ever become effective,¹³ it may be an important step in the evolution of the government of the District of Columbia or its successor. Serious readers, however, may prefer to study the law review article, which was the predecessor of this book, because in that version the footnotes appear on the bottom of each page rather than at the end of the chapter.¹⁴

Schrag's narrative is easy to read and comfortable, but something is missing. It seems too restrained when he describes his own experiences. When he describes anger or frustration, he just does not sound angry or frustrated. His training as an academic, may have made his unemotional reporting inevitable, or he may simply have exceptional

11. In addition to the students at Georgetown, law students from American University, Antioch, Catholic University, George Mason University, and Howard University are in the D.C. area.

12. The Constitution of the Proposed State of New Columbia is reproduced in its entirety in *Schrag* at 257 app. B.

13. For a criticism of the proposed constitution see Oulahan, *The Proposed New Columbia Constitution: Creating a "Manacled State,"* 32 AM. U.L. REV. 635 (1983) which contains negative criticism of the preamble and the bill of rights by a delegate who was a member of the Judiciary Committee of the Convention. *See also, Hearing,* particularly the statement of Senator Spector at 43-48.

14. Schrag, *By the People: The Political Dynamics of a Constitutional Convention,* 72 GEO. L.J. 819 (1984).

emotional control. That minor flaw may deprive Professor Schrag of a popular audience and this book will probably not become the basis of a major motion picture, although it is easy to imagine Alan Alda in the lead role. However, for the lawyer, for the student, or for the citizen, Professor Schrag has provided lessons about civics,¹⁵ humility, politics, group psychology, race, poverty, religion and education. That is quite an accomplishment.

15. *E.g.*, do you know which state has a unicameral legislature and what the arguments are both for and against a unicameral legislature? Do you even know what a unicameral legislature is?