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Book Review

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HOW COURTS GOVERN AMERICA. By R. Neely. Yale University Press. 1981.

REVIEWED BY ALAN D. HORNSTEIN*

Because of the great number of books published each year, more are likely to be ignored than reviewed and, ordinarily, books like this one are better left to perish quietly. When, however, the book concerns the role of the courts in the governing of America and the author not only graduated from a prestigious law school but also became, as the book's jacket attests, "the youngest judge of a court of last resort in the English-speaking world," served on that court for seven years and is now its Chief Justice, the publication ought not go unremarked.

Despite its title, this is not a book which describes or analyzes the methods by which courts govern America; it is rather about why Chief Justice Neely of the Supreme Court of Appeals of West Virginia believes they should. Given the book's message, it is perhaps fortunate that its weaknesses are so transparent.

The book is largely an attempt to demolish the strawman the author erects in his Preface: "the assertion that courts are a uniquely undemocratic institution in an otherwise completely democratic society."[1] It is not difficult to demonstrate the falsity of that assertion. I know of no moderately intelligent or educated person who would agree with it. Nonetheless, the courts are the least democratic of the three branches of government. (That the legislative and executive branches are not instantly or totally responsive to day-by-day changes in public sentiment does not alter the case.)

By demonstrating that the other branches of government are not particularly democratic, the book seeks to refute the argument for judicial restraint that rests on the undemocratic nature of courts. Chief Justice Neely attempts to support his position, however, on the citizen's failure to assert the power with which the democratic ideal provides him. The power of money, incumbency, bureaucracy, the political machine and, perhaps most important of all, inertia undeniably influ-

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* J.D., 1970, Rutgers University School of Law (Newark); Associate Professor of Law, University of Maryland.

1. R. NEELY, HOW COURTS GOVERN AMERICA xi (1981).

ences the American political process. Yet, to view this as proof that democracy has perished is to view civic lethargy or dim-wittedness as endemic and the citizen as a manipulable tool of entrenched power.

To say that popular control of the political system is rare is not to say that the citizen is impotent or even that the system is undemocratic. The choice not to exert power but to defer to established mechanisms may be as much an exercise in democracy as the more obvious exhibition of political energy. Moreover, recent events — the decision of President Johnson not to run in 1968, the resignation of Richard Nixon as a result of the Watergate affair are perhaps the most obvious examples — demonstrate that at some point the citizenry does voice its concerns. Voluntary acquiescence is not equivalent to lack of power.

Neely remarks upon the closed-door, secret machinations of the legislative and executive branches and contrasts this with the visible, public activities of the courts, urging that the greater visibility of judicial action adds a measure of safety to judicial power. It surely is true that much legislative and executive activity takes place in cloakrooms and private offices. Yet, despite Neely's assertion that everything courts do is public,[2] plainly the most important work of appellate courts — the decision-making process — also proceeds behind closed doors and under the strictest security. Nor, as Neely admits, does the written and published opinion always record the reasons underlying the decision.[3] Indeed, when Neely discusses his own court's decision striking down the structure of state juvenile control as unconstitutional,[4] he tells us: "What I reasoned about the case myself and what I wrote in the court's opinion were two entirely different things."[5]

Of course, not everything contained within a judicial opinion precisely represents the views of its author; and this especially applies to majority opinions. The collegial nature of appellate courts and the consequent need to accommodate others' views may result in an opinion reflecting compromises within the court rather than the position of only the writer.[6] Yet Neely clearly is not referring to this sort of incon-

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2. *Id.* at 193.

3. *See, e.g.*, W. DOUGLAS, THE COURT YEARS 1939–1975, at 8 (1981); B. WOODWARD & S. ARMSTRONG, THE BRETHREN *passim* (1979).

4. State *ex rel.* Harris v. Calendine, 233 S.E.2d 318 (W. Va. 1977). Among the many irritants in this book is the absence of any notes or references to sources, making it more a chore than need be to verify the author's information. Although extensive references may not be as appropriate in a volume aimed at the general reader or for non-technical or heuristic material, *cf.* Hornstein, *The Myth of Legal Reasoning*, 40 MD. L. REV. 338, 338 n.* (1981), it does not seem much to ask that at least minimal references be provided.

5. R. NEELY, *supra* note 1, at 15.

6. *Cf.* Davis & Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59.

sistency between his view and his opinion. Rather, he seems to say that he fabricated the opinion to sustain the myth that courts apply principles of law to factual situations, while in reality Neely believed it desirable to force the legislature to rethink the problem of juvenile justice. He does not tell us if his colleagues on the court shared in the mendacity or whether they agreed with the reasons adumbrated in the opinion.

Chief Justice Neely points out that courts serve two functions in American society: the day-to-day function of resolving conflicts for private litigants, in which he claims they do not work very well,[7] and the political function of ordering the economic, social and political structure of the nation, in which he maintains they perform fairly well.[8] Because it is not subject to legislative change, constitutional law is the primary vehicle of judicial governance, and, as such, the principal subject of the book.[9] Courts govern in a political sense, according to the author, because "constitutional law is not 'law' " in any intelligible sense: "[r]eal law involves rules which are immediately intelligible to anyone trained in the profession of law and which can be applied consistently to any set of facts by most people so trained. . . . [G]iven a legal principle and a set of facts to which that principle could be applied in order to reach a legal resolution of a dispute, nine out of ten [lawyers] would arrive at the same answer."[10] Under this test, the Supreme Court of the United States certainly is not in the "real" law business; but then no appellate court is or could be.

Litigation is expensive. Ordinarily, although subject to exceptions more publicized than numerous,[11] frivolous claims are not brought to court. Of those that are, fewer yet are appealed. Cases in which the law is clear may go to trial because the facts are disputed. Appeals, however, are not taken to resolve factual disputes; nor are they taken where the law and its application is clear to nine out of ten lawyers. Those cases are settled. Thus, it is not only constitutional law that is not "real" law under Neely's definition but almost all law that appellate courts are called upon to declare. To define law as Neely does is to put virtually all appellate courts out of the law business. But then Neely's distinction between courts as arbiters of law in private dispute settlement and courts as participants in the political process loses its utility.

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7. R. NEELY, *supra* note 1, at xiii, 195.

8. *Id.* at 195.

9. *Id.* at 5.

10. *Id.* at 4 n.2.

11. *See* Friedman, *The Six Million Dollar Man: Litigation and Rights Consciousness in Modern America*, 39 MD. L. REV. 661 (1980).

That what Karl Llewellyn called "leeways"[12] exist in constitutional adjudication makes the enterprise no less "law" than, for example, commercial litigation in which there are similar "leeways." The differences lie not so much in the legitimate differences in judges' views of the law as in the sorts of questions with which the litigation is concerned. Constitutional determinations usually touch more deeply on fundamental questions of value.

The uncertainty — the lack of "real" law — is simply more easily perceived in constitutional litigation. First, the communications media tend to focus what little attention they pay to the workings of the judiciary on constitutional adjudication. Additionally, because the issues frequently involve fundamental questions of value rather than more clearly technical matters, the general public feels more competent to evaluate constitutional decisions and to comment with an apparent appreciation of the problems and their solutions. The public speaks with greater assurance on questions of abortion, the death penalty or school prayer, for example, than on questions involving such issues as the desirability or application of the parol evidence rule or the hearsay rule. Yet there is likely to be substantial disagreement about the legal principles involved in the latter as well as in the former.

This conception, however, permits Neely to declare, "Sketching the grand design of the law is the social equivalent of architecture. . . . [U]nfortunately not all the members of [the appellate] courts are architects — many are simply craftsmen. Unlike the architect, who is always searching for the better material, more functional design, and more energy-efficient construction, the craftsman is concerned with executing the old designs."[13] The difficulty with this position is similar to that noted by a colleague of mine with respect to Justice Douglas:[14] Judges are obliged to decide cases agreeably to the Constitution and laws. Justice Douglas, and apparently Chief Justice Neely, decide "as if all there was to it was to do justice agreeably to his conscience."[15] Chief Justice Neely admits to this: "[I]f one has power, what is it for except to do good things?"[16]

The book is replete with assertions either patently false or unsupported by any evidence: "[A]ll judges except magistrates must be lawyers";[17] "[i]t often happened that when the police came to search a

12. K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).
13. R. NEELY, *supra* note 1, at 166.
14. Isenbergh, Book Review, 30 AM. U.L. REV. 415, 416 (1981).
15. *Id.*
16. R. NEELY, *supra* note 1, at 187.
17. *Id.* at 205.

house in the 1960s, their routine procedure involved turning out dresser or desk drawers, making holes in the wall, ripping apart all the beds, tearing up the pillows, kicking down the doors . . .";[18] "[p]olice officers routinely lie . . ."[19] and so forth. Neely charges Justice Frankfurter[20] with a theory of judicial restraint the alleged inconsistencies of which are exaggerated at best. "According to [his] theory, it was all right for courts to intervene in the political process through imaginative interpretations of the Constitution in defense of human or civil rights, but not to preserve the status quo in the economic system."[21] Though such theories undoubtedly exist, it is difficult to ascribe them to Justice Frankfurter in light of his opinions in cases such as *Gobitis*,[22] *Dennis*,[23] *Wolf*,[24] *Adamson*[25] or his dissents in *Capitol Greyhound*,[26] *Mapp*,[27] or *Baker v. Carr*.[28]

Even more inexcusable than his misstatements of fact and law is his transparent speciousness of argument. In a chapter devoted to illustrating his criteria for judging the propriety of judicial intervention,[29] Chief Justice Neely argues that criminal law reform, particularly that undertaken by the Warren Court in the 1960's, is the nearly perfect example of appropriate judicial governance . Apart from minor factual errors that merely annoy the reader — *Escobedo v. Illinois*,[30] for example, was decided in 1964, not 1963 as Neely asserts[31] — the chapter exhibits the sophistry of the book as a whole.

The need for the "revolution" in criminal due process[32] resulted, according to Neely, from the wholesale violation of the rights of the accused. "[The system] resembled some of the more unpleasant features of Nazi Germany or modern Russia . . . ."[33] The courts had to

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18. *Id.* at 156.

19. *Id.*

20. It has not been a good period for Justice Frankfurter. *See, e.g.*, H. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER (1981); B. MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION (1982).

21. R. NEELY, *supra* note 1, at 2-3.

22. Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

23. Dennis v. United States, 341 U.S. 494, 517 (1951) (Frankfurter, J., concurring).

24. Wolf v. Colorado, 338 U.S. 25 (1949).

25. Adamson v. California, 332 U.S. 46, 59 (1948) (Frankfurter, J., concurring).

26. Capitol Greyhounds Lines v. Brice, 339 U.S. 542, 548 (1950) (Frankfurter, J., dissenting).

27. Mapp v. Ohio, 367 U.S. 643, 672 (1961) (Harlan & Frankfurter, J.J., dissenting).

28. Baker v. Carr, 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting).

29. *See* R. NEELY, *supra* note 1, ch. VI.

30. 378 U.S. 478 (1964).

31. R. NEELY, *supra* note 1, at 151.

32. *See* C. LYTLE, THE WARREN COURT & ITS CRITICS 77 (1968).

33. R. NEELY, *supra* note 1, at 155.

respond because reform of criminal procedure was not on the legislative agenda — criminals being a rather ineffective pressure group. Several aspects of this are noteworthy. First, it certainly was true then and, probably to a lesser extent remains true today, that treatment of the criminally accused is less than entirely humane; indeed it may sometimes be brutal. To say that, however, is a far cry from equating it with Nazi Germany's. Second, although he deals superficially with the problem of separation of powers — why the judiciary rather than the legislature was the appropriate forum for realizing reform — Neely pays virtually no attention to the problem of federalism — why the national judiciary was a better forum than the state courts for effecting change.[34] Finally, he justifies judicial action by claiming that other branches of government will not or cannot act.[35] That justification, however, does not become valid on the basis of repetition.

For Neely, the lynch-pin of criminal law reform was the complex of exclusionary rules prohibiting the introduction of evidence obtained in violation of the rights of the accused. This "ingenious doctrine," "a new, judge-made, constitutional remedy,"[36] was necessary according to Neely because no other remedy would assure the correction of the institutional abuses. Private damage actions against offending public officials, for example, were unlikely to be effective at least in part because "[p]olice officers routinely lie."[37] Again, several facts warrant comment: The exclusionary rule was hardly an invention of the Warren Court. The federal courts had used it since 1914.[38] What was new about the Warren Court's approach was that it applied the rule to the states and, as noted, Neely ignores the problem of federalism necessarily implicated in that application. Additionally, although much has been written on both sides of the question,[39] whether the exclusionary rule in fact deters institutional misconduct remains unsettled. Moreover, if other remedies are ineffective because of official perjury, it is difficult to comprehend why the incidence of perjury should decrease if the remedy is to free the criminal defendant. If "[p]olice officers routinely lie,"[40] one would think they would be as likely to do so when the

34. *Cf.* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

35. R. NEELY, *supra* note 1, at 103.

36. *Id.* at 156.

37. *Id.*

38. Weeks v. United States, 232 U.S. 383 (1914).

39. *Compare, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968) (Warren, C.J.) *with* Burger, *Who Will Watch the Watchmen?*, 14 AM. U.L. REV. 1, 11–12 (1964). *See generally* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

40. R. NEELY, *supra* note 1, at 156.

subject matter of their testimony has to do with, for example, whether a suspect voluntarily waived his rights or consented to a search.

Ignoring these difficulties as well as the lack of evidence to support his statements, Chief Justice Neely asserts, "The streets began to swarm with released criminals."[41] The Supreme Court, he declares, reversed hundreds of convictions and released the defendants. To reverse this process, law enforcement officials began to abide by the rules.[42] In fact, he cites no evidence to indicate that the rate of convictions changed significantly following these decisions. However, the number of petitions filed for post-conviction relief increased dramatically,[43] so perhaps these decisions merely increased the number of cases filed in federal court. Similarly, whatever the increase in civility during the past several years, it is at best difficult to ascribe it to the decisions of the Supreme Court.

Neely views the Warren Court's contribution to criminal procedure in the 1960's as the equivalent of his own court's contribution to juvenile justice in 1977. Given his attitude toward the judicial function, it comes as no surprise that he claims there is a high correlation between "good judging and extensive political background."[44] (It is perhaps unfair to note Neely's own marginally successful political background.) Chief Justice Neely's primary example, again not surprisingly, is Earl Warren.[45] Now whatever one may think of Warren's contribution, as a *judge* his performance was simply dismal. The judges' judges — Holmes, the second Harlan, Judge Friendly of the Second Circuit come to mind — are not known for their political background. Their opinions evidence craft, not architecture.

Neely's view of the unimportance of craft is perhaps best illustrated by the book's general level of sloppiness. Let one example suffice. In describing the sorts of instances in which courts may substitute for legislatures, Chief Justice Neely suggests what he calls "legislative oversight, that is, failure to flesh out remedies necessary to implement a legislative policy."[46] His example is what he sees as the Supreme Court's implication of private causes of action under section 504 of the

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41. *Id.* at 157.

42. *Id.* at 157–59.

43. *Developments in the Law — Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1041 (1970). It is at least equally likely that the increase resulted from decisions making access to federal post-conviction relief more widely available. *E.g.*, Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

44. R. NEELY, *supra* note 1, at 215.

45. *Id.*

46. *Id.* at 68.

Rehabilitation Act of 1973[47] which prohibits discrimination against otherwise qualified handicapped individuals in any federally funded program or activity.

What is remarkable about this, of course, is that the Court had *not* implied a private cause of action under the Rehabilitation Act;[48] indeed, the Court specifically declined the invitation to do so on two occasions.[49] What is one to make of errors of this kind by the Chief Justice of a court of last resort in the context of an apologia for an activist judiciary? Surely it is not too much to ask that one seeking greater power on the grounds of the institutional merits of the courts at least take the pains demanded by accuracy. When one is out to reorganize society — to be an architect rather than a craftsman — the details of craft apparently become insignificant in the light of the grand design. Yet without craft as a foundation, the result of social architecture is likely to be jerry-built indeed.

The danger in Neely's view of the appropriate judicial role might be analogized to that presented by an automobile with a powerful motor but no steering mechanism or brakes. His perception of the judge's power and role — his institutional conceit — is breathtaking: "At this point in our political development American courts are like the Zeus of the Prometheus legend; they are young, immature gods with limitless and inadequately understood power."[50] After noting Polybius' idea that pure forms of government devolve into their negative analogs — democracy into anarchy, aristocracy into oligarchy and so on[51] — Neely admits puzzlement over the ultimate result if his prescription for

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47. 29 U.S.C. § 794 (1976), *as amended by* Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, 29 U.S.C. § 794 (1979).

48. The Court's approach to the implication of private causes of action under federal statutes is substantially more grudging of late, *see* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Reddington, 442 U.S. 560 (1979); Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977); Cort v. Ash, 422 U.S. 66 (1975), than had once been the case, *see, e.g.*, J.I. Case v. Borak, 377 U.S. 426 (1964). *But see* Cannon v. University of Chicago, 441 U.S. 677 (1979) (interpreting Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1976)). Nonetheless several courts of appeals have found an implicit private remedy under the Rehabilitation Act. *See, e.g.*, N.A.A.C.P. v. Medical Center, Inc., 599 F.2d 1247 (3d Cir. 1979); United Handicapped Fed'n v. Andre, 558 F.2d 413 (8th Cir. 1977); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977); Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977).

49. University of Tex. v. Camenisch, 101 S. Ct. 1830, 1835 (1981); Southeastern Community College v. Davis, 442 U.S. 397, 404–05 n.5 (1979). Although *Camenisch* may have been decided contemporaneously with the publication of this book the Court's grant of certiorari in the case, 442 U.S. 404 (1980), had made plain that the question remained open.

50. R. NEELY, *supra* note 1, at 11.

51. *Id.* at 216. Although Neely credits Polybius with this insight, Aristotle had noted the categories and their "deviations" long before. ARISTOTLE, POLITICS Bk. III, ch. 5, Bk. IV, ch. 2 (H. Rackham trans. 1972).

judicial government is followed: "What happens when Plato's millenium of the philosopher kings actually arrives, I am not sure. Polybius never told us what pure rule by judiciary would eventually degenerate into."[52]

Chief Justice Neely does not suggest that the judiciary exercise unlimited power. On the contrary, he suggests criteria to determine the sorts of issues appropriate for judicial determination[53] and criteria to determine those inappropriate for such treatment.[54] What is frightening is the basis from which he derives these criteria. "[T]he limits on court power in government are not set by either constitutional theory or discoverable law, but rather by the tolerance of the countervailing powers."[55] Put more simply, the limits on the exercise of judicial power are defined not by principle but by what one can get away with.

To entrust this power to judges, especially given Neely's view that "every conceivable issue known to government can be phrased in constitutional terms [in] an opinion justifying almost any result . . .,"[56] is to abdicate to a single institution more power than prudence dictates. When those who staff that institution believe themselves god-like, the risks become unacceptable. And when these new gods are contemptuous of even the forms of restraint, they become downright dangerous.

One might understand if not agree with the notion that constitutional adjudication cannot be based upon neutral principles or reasoned analysis. Yet, as one reveiwer of two other recent works on the legitimacy of judicial review has noted: "The conceit of Justices expressly imposing their own values rests on the mistaken notion that because judges *do* make law, they *ought* to do so. A result oriented jurisprudence does not follow inexorably from the insights of legal realism."[57] A comparison of Neely's book with the recent works of Professors Choper[58] and Ely[59] is embarrassing. Whatever the shortcomings of these works, they take seriously the notion that neutral and intellectually defensible principles define the courts' role in American society.

Chief Justice Neely, on the other hand, is condescending toward the notion of constitutional law as a discipline subject to intellectual

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52. R. NEELY, *supra* note 1, at 217.
53. *Id.* at 168.
54. *Id.* at 188–89.
55. *Id.* at 217.
56. *Id.* at 10.
57. O'Brien, Book Review, 48 U. CHI. L. REV. 1052, 1080 (1981).
58. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980).
59. J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

analysis. Such aggressive anti-intellectualism from one in his position is astonishing. He finds it naive or just plain silly to expect reasoned explication of legal principles. "Lawyers, certainly, who take seriously recent U.S. Supreme Court historical scholarship as applied to the Constitution also probably believe in the Tooth Fairy and the Easter Bunny."[60] Neely's rebuke is not directed at the basis on which he believes courts render decisions but at the expectation that they might play straight. Thus, it becomes a mark of honor to be able to say, "It is a sad fact that I earned a 'C-' from the great Alexander Bickel in constitutional law, because I could never understand what was going on in his course."[61]

It is sadly ironic that this volume was published in the centenary year of the publication of *The Common Law*,[62] in which Holmes attempted to demonstrate that "the law was worthy of intelligent men,"[63] and that it "could furnish food for philosophical minds."[64] Darwin, perhaps, was wrong.

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60. R. NEELY, *supra* note 1, at 18.
61. *Id.* at 2.
62. O.W. HOLMES, THE COMMON LAW (1881).
63. Speziale, *Oliver Wendell Holmes, Jr., William James, Theodore Roosevelt, and the Strenuous Life*, 13 CONN. L. REV. 663, 663 (1981).
64. *Id.* at 674.