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HOW COURTS GOVERN AMERICA. By *Richard Neely*. New Haven, Conn.: Yale University Press. 1981. Pp. xvii, 233. \$15.

Although the debate over the proper role of courts and judges in a constitutional democracy has raged for decades, no consensus has yet emerged. Nor, if the recent literature is indicative,¹ have original contributions been precluded by the sheer vastness of the existing commentary. In *How Courts Govern America*, Richard Neely, Chief Justice of the West Virginia Supreme Court of Appeals, draws on his experience as legislator and judge² and makes a contribution that is original in several respects. After exposing the structural deficiencies

4. Lay readers will find Wishman's careful and simple description of criminal justice and procedure to be a refreshing look at the court system.

1. See, e.g., J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); J. ELY, *DEMOCRACY AND DISTRUST* (1980); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

2. Neely views this work as a reflection of his own experiences as a legislator and appellate judge. He dispenses with footnotes as "redundant" for the scholar. P. xiv. In the text itself, he makes few references either to other theories or to analyses that support his argument.

Neely would have improved his somewhat wandering arguments if he had discussed these other theories or analyses. At times the text degenerates into strings of anecdotes, with digressions on the Reagan economic plans, pp. 71-72, democracy in the third world, pp. 139-44, and the importance of a liberal education, pp. 223-26.

of the executive and legislative branches, he argues that politically active courts make democracy work. The institutional deficiencies of the other branches can produce undemocratic tendencies, such as bureaucratic power grabbing. By offsetting these tendencies, policy-making courts preserve our democracy. Courts, therefore, should make public policy and do so openly. Neely's conclusions are not new, but his often cynical, street-wise perspective leads him to some interesting arguments for judicial activism.

Neely's analysis begins with legislatures. These bodies, he notes, are slow and cumbersome. Bicameral structures, numerous committees, and powerful committee chairmen often combine to delay and defeat proposed legislation even before the bills reach the floor for a vote. Because well-funded special interest groups can block or force passage of specific measures, legislatures can reach undemocratic results. Popular measures might never pass, while unpopular policies win legislative approval (pp. 47-68). These indictments of popular assemblies, of course, are not novel.³ But Neely's explanation of the reasons underlying the defects in the legislative process is intriguing. That process, he argues, is consciously designed to offset the power of special interest groups. Legislators want to kill as many bills as possible without voting. More votes of record, even for popular causes, would subject each legislator to almost certain defeat because of the sheer number of special interests offended (pp. 54-58).⁴ Legislatures will remain cumbersome, Neely asserts, because legislators want them to be cumbersome (p. 56).

Perhaps because his experience lies primarily in the legislature and the judiciary, Neely's analysis of the executive branch is less insightful. Any bureaucracy, he argues, seeks power and influence (p. 102),⁵ and will engage in overreaching conduct to attain those ends. Elected officials, moreover, cannot restrain or control the enormous bureaucracies nominally at their disposal (p. 80). The President and Vice-President, for example, are the only elected officials supervising the millions of federal executive employees. As a result, the execu-

3. Political scientists have discussed these defects for years. *See, e.g.,* W. KEEFE & M. OGUL, *THE AMERICAN LEGISLATIVE PROCESS* 484-87 (1968); Heard, *Reform: Limits and Opportunities*, in *STATE LEGISLATURES IN AMERICAN POLITICS* 154 (A. Heard ed. 1966). Legal theorists, in analyzing judicial activism, have also noted these defects. *See, e.g.,* J. CHOPER, *supra* note 1, at 16-25, 38-45.

4. Others have noted these undemocratic features without explaining why they exist in almost all American legislative bodies. *See, e.g.,* J. CHOPER, *supra* note 1. Keefe and Ogul, noting the inability of legislatures to pass popular measures, have suspected that procedural complexity is used to shield legislators from voting on the record. W. KEEFE & M. OGUL, *supra* note 3, at 484 n.14. Neely's insight lies in treating these features as systemic rather than aberrational in nature.

5. Neely refers those who would desire a more detailed analysis to other writers. *See* J.K. GALBRAITH, *ECONOMICS AND THE PUBLIC PURPOSE* (1973); C. REICH, *THE GREENING OF AMERICA* (1970).

tive branch, in contrast to the legislature, tends to be overly active (p. 113).

His analysis of the executive and legislative branches leads Neely to two conclusions. He argues first that an activist judiciary performs a valuable balancing function: Activist courts can offset the institutional defects of the other branches of government. Courts can make policy where the legislative process has broken down, and restrain public agencies where the elected officials have not. Judges should thus try to reach the results that the democratic institutions would reach if they worked flawlessly (pp. 113-14).

Neely then refers back to his institutional analysis to suggest conditions under which courts should play this democracy-enhancing role. He concludes that judicial power is not unlimited and attempts to present criteria that courts can apply openly. Drawing on his experience on the bench, he argues that courts should intervene where (1) the general good, as opposed to a special interest, is at stake; (2) a majority of the public agree on the desired objective, but institutional defects have frustrated this majority; (3) the beneficiaries of the intervention are powerless because of the institutional defects;⁶ and (4) the judicial intervention will not force judges to become administrators (pp. 77-78, 168, 188-89). It is doubtful that beleaguered trial courts will find these vague guidelines helpful.

The lack of institutional checks on the courts makes the open-endedness of Neely's guidelines even more troubling. Only if effective institutional restraints limit judicial power can courts perform a democratic balancing function. Without such restraints, judges could ignore their theoretical balancing function and impose their own political goals.⁷ But Neely fails to persuade the reader that effective constraints exist. He argues that because courts are sensitive to legislative control of the judicial budget, they will limit their activism to avoid antagonizing the legislature (pp. 145-49).⁸ He also asserts that a strict code of ethics (pp. 193-96) and a natural desire to do as little as possible (pp. 201-02) both discourage judicial interven-

6. This requirement differs from the second requirement. A majority of the population, for example, might support increased state aid for poor school districts. Neely would not support intervention here, even in the face of frustrating institutional defects, because the beneficiaries of the intervention are very powerful. Teachers' groups and the education lobby incessantly ask for more aid for education. These groups are not the hapless victims of institutional breakdowns. Pp. 170-89.

7. Lower courts are subject to appellate review. Restraints are needed, then, on appellate courts. Professor Choper reduces this problem further by restricting his analysis to the restraints on the Supreme Court. See J. CHOPER, *supra* note 1, at 47-59.

8. Neely admits this budgetary power is less significant at the federal level. Individual congressmen cannot accumulate the institutional power to retaliate against judges for decisions. Individual state legislators can gather this power. P. 60 n.2. Furthermore, under *United States v. Will*, 449 U.S. 200 (1980), Congress cannot reduce the salary of federal judges. P. 201.

tion beyond a balancing role. Neely never explains, however, why these checks have not stemmed the tide of judicial activism in recent years,⁹ and thus offers no means to ensure that courts will adhere to his proposed guidelines.¹⁰

Because Neely cannot identify effective institutional restraints on the judiciary, his argument that courts make democracy work fails. His insights are interesting and should further the debate on the proper role of courts and judges, but *How Courts Govern America* does not supply any answers. The book may, as Neely hopes, ultimately be more useful as a "primary source" for other scholars (p. xii) than as an attempt to justify judicial activism.

9. In the chapter on judicial restraints, Neely only mentions that courts are asked to solve problems today that would not have been brought to courts twenty years ago. P. 202. This indirect reference is used to illustrate the increase in the judicial workload; Neely does not consider how this increase in workload undercuts his proposed restraints.

10. In his analysis of the judicial balancing function, Neely implicitly assumes that courts can decide when to intervene. Horowitz, in an empirical study, concluded that courts are particularly unfit to make this threshold intervention decision. Horowitz found courts poorly suited to judge the consequences of policy-making, hence poorly suited to decide when to intervene. D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 257-97 (1977).

Neely also overlooks the views of others in his analysis of restraints on the judiciary. Professor Choper notes that the basic restraints on the Supreme Court are impeachment and constitutional amendment. Neither of these restraints looms large as a practical matter. Because of this lack of external restraints, the Supreme Court at times has held to positions that are highly unpopular. J. CHOPER, *supra* note 1, at 47-55.

Others have disagreed with Choper and Horowitz. See Chayes, *supra* note 1, at 1307-09; McGowan, Book Review, 79 MICH. L. REV. 616 (1981). Neely, however, does not attempt to refute their arguments.
