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Only Judgment: The Limits of Litigation in Social Change

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ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE. By *Aryeh Neier.* Middletown, Conn.: Wesleyan University Press. 1982. Pp. 265. $17.95.

Until recently, some issues were never resolved in the courts. Racial discrimination, capital punishment, and the like were seen as exclusively legislative issues, and the judiciary avoided what it considered unwarranted policymaking of its own. But this era ended with *Brown v. Board of Education*[1] and its progeny, in which the Supreme Court unanimously reached out to declare, in effect, an entire social order unconstitutional. Since *Brown*, advocates of causes ranging from mental-health reform to Vietnam War protests have turned to litigation as a means of winning battles considered unwinnable in the legislatures.[2]

As former National Executive Director of the American Civil Liberties Union, Aryeh Neier helped lead the charge to the courts. Now he has stepped back from the fray to examine the successes and failures of cause litigation from the perspective of a law professor. The result is a thought-provoking account in which Neier balances his sympathy for the claims of the litigants against his concern that some groups are using the courts to achieve results they could not have attained through fair competition in the marketplace of ideas.

1. 347 U.S. 483 (1954).

2. Obtaining judicial review may itself win the battle. For example, even unsuccessful challenges to a power plant license can delay completion of the plant for many years and force the utility to spend millions of dollars fighting the challenge, to the point where the utility decides it will be better off dropping the license application entirely. *See* pp. 213-16.

Neier begins his analysis with "the civics text model of pluralist American democracy" (p. 10), in which each constituency makes itself heard at the polls and society's leaders must listen in order to remain in power. But special care must be taken to protect the rights of those "discrete and insular minorities" unable to protect themselves through the political process: the mentally ill or the retarded, for example.[3] These groups exist apart from the rest of society, which is content to warehouse them as cheaply as possible with little concern for their well-being. On the other end of the spectrum are diverse, more politically influential constituencies such as environmentalists or Vietnam War protesters, which suffer "from no handicaps in pursuing their goals through the political process" (p. 152). Having fought their battle and lost,[4] they should not be given the same second chance accorded those unable to fight for themselves, argues Neier. Since judicial authority and legitimacy depend largely on judicial self-restraint,[5] lending the prestige of the courts to these challenges diminishes the courts' ability to protect the otherwise defenseless.

Most groups using litigation as a means for social change, however, fall somewhere between the helpless mental patient and the politically influential environmentalist. As examples, Neier discusses litigation in the fields of race discrimination, voting rights, sex discrimination, abortion rights, welfare rights, government secrecy, political surveillance, and capital punishment. He critiques the successes and failures in each field, often pointing out tactical errors or mistaken assumptions that prevented the litigators from achieving their goals. One major shortcoming has been a misreading of public opinion. Early opponents of capital punishment were heartened by declining public support for the death penalty and a declining number of executions (p. 198), but they failed to press their advantage in the legislatures. Later, public opinion swung back in favor of

3. The phrase "discrete and insular minorities" originates in Justice Stone's famous dictum in United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938). This dictum has given rise to a process theory of constitutional law exemplified in J. ELY, DEMOCRACY AND DISTRUST (1980). The notion that minorities are protected by participation in a pluralist democratic process can be traced to James Madison's political theories. *See* THE FEDERALIST No. 10 (J. Madison).

4. Judicial review of the warmaking power illustrates the courts' increased willingness to hear the claims of those represented in the political process. In Korematsu v. United States, 323 U.S. 214 (1944), the Supreme Court deferred entirely to an executive determination of the existence of a threat to national security in upholding the internment of tens of thousands of Japanese-Americans without any showing of actual danger. By Vietnam, courts were evaluating the merits of claims that the entire war was unconstitutional. *See, e.g.,* Orlando v. Laird, 317 F. Supp. 1013 (E.D.N.Y. 1970), *affd.,* 443 F.2d 1039 (2d Cir.), *cert. denied,* 404 U.S. 869 (1971); pp. 143-52.

5. For a detailed treatment of this thesis, see A. BICKEL, THE LEAST DANGEROUS BRANCH (1962). *But see* C. BLACK, THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 34-55 (1960) (arguing that judicial legitimacy depends on the Court's active willingness to limit the other branches).

the death penalty, and states simply replaced invalidated statutes with new ones. The litigators were thus left to start over from scratch.

Another shortcoming of cause litigation has been overinclusiveness. Advocates often assume that all members of the putatively benefitted class desire the benefit, without checking to see if this is so. Hence feminists were unprepared to respond when a grassroots women's movement led by Phyllis Schlafly blocked passage of the Equal Rights Amendment. Overinclusiveness can be even more dangerous in litigation, where one adverse precedent can set back a cause for years. For example, a number of convicts facing execution have disavowed all efforts to save them, placing the cause litigator in the uncomfortable position of arguing against the expressed wishes of his client. Not surprisingly, the nine-year moratorium on executions has ended, and the adverse precedent derived from these cases may mean that within the next few years many prisoners who *do* want their sentences commuted are likely to die.

In *Only Judgment*, Neier focuses quite narrowly on the role of the court in effecting social change. The reader must often rely on his own knowledge of the changes in American society to understand why the courts have played an assertive role. Neier relates how increased awareness of the inequities of segregation, coupled with powerful Southern opposition to civil rights legislation in Congress, made *Brown v. Board of Education* inevitable (pp. 31-33), but he does not explain why a society that had ignored mental patients for years came to defend their right to treatment. Additional background information would help the reader understand how and why certain groups are perceived as worthy of the special protection of the courts while others are not.

Neier's reassessment of his own role in the growth of advocacy litigation illustrates a dilemma faced by many public-interest attorneys. They see an injustice and want to correct it as swiftly as possible. Should they be concerned with abstract propositions of judicial restraint? In practice, most cause litigators invite the courts to decide all cause-related disputes, trusting the courts to find their own limits. Neier's arguments suggest that cause litigators should assume responsibility for the consequences of turning to the courts to solve all of America's ills — including both reduced respect for judicial pronouncements and delayed resolution of all disputes as a result of the increased volume of litigation.[6]

6. Shortly after Neier stepped down as director of the American Civil Liberties Union, the ACLU began a constitutional challenge to draft registration. *See* CIVIL LIBERTIES, June 1980, at 1, col. 1. Under Neier's analysis this issue is not properly for the courts to resolve, since eighteen-year-old males as a class suffer no special political disadvantages. Neier's logic apparently did not persuade his successors.

Due to the success of persons like Neier, many Americans have come to expect judicial review of any government action as a matter of right. This increased reliance on cause litigation has significantly affected the way we view our government — and, thanks to decisions like *Brown*, the way we view each other. *Only Judgment* offers an expert insider's perspective on the growth of cause litigation, and provides both critics and supporters of judicial activism with much to think about.