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Courts and the Government

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COURTS AND THE GOVERNMENT

Richard Neely: *How Courts Govern America*. (New Haven: Yale University Press, 1981. Pp. 226. \$15.00.)

The media have given more notice to Neely's book than to most of the books that are reviewed in this journal, so I should like to begin by saying that it has been misrepresented. The book has been presented as an apology for an "activist judiciary." If it were, it wouldn't be worth reading; but it isn't.

Neely is not an "activist," or at least not in the contemporary sense of that word. Most of our contemporary proponents of activism also believe in the efficacy of law and judicial power, that is, they believe that judges can change institutions, bring fairness into the marketplace, ease some of the pains of race and poverty, and so forth. With respect to efficacy, Neely has some hopes, but he is definitely among the modest. For example, I would think that the "litmus test" for activism is a willingness to intervene in school finance cases, but Neely has a whole chapter in which he explains why he voted against judicial intervention in school finance. In this chapter, he displays a modesty about power that is not a feature of what we call "activism." In short, he is more "activist" than some judges, less so than others.

A rather different ground for a faith in activism is a strong belief in rights. Human rights (or civil rights, or natural rights) are thought by many to be "trumps" in the political process; for these theorists, the process of bargaining and the assertion of a majority will must never sacrifice our rights. But with respect to rights, Neely seems to be a skeptic. Of course, he does believe in "decency" and "compassion," but philosophical theories about rights are altogether ignored in his book. The best evidence for Neely's "rights-skepticism" is a four-paragraph footnote on pages 72-73, in which he discusses some statutory restrictions on the political activities of deputy sheriffs. Neely voted to sustain the restrictions, and his grounds were a rather genial version of *realpolitik*; the rhetoric of his discussion is miles removed from the standard rhetoric of First Amendment rights.

I have corroborated this reading of the book by examining three volumes (267-269) of the current series of the *Southeastern Reporter*. This sampling yielded 53 cases from West Virginia, of which 49 were unanimous. Neely dissented in 2 of the 4 cases in which there was a dissent. In both cases (267 S.E.2d 736, 268 S.E.2d 590), one could characterize Neely's votes as a protest against the excessive activism of his colleagues. (In one case, his colleagues rewrote the postconviction bail statute to make it more liberal; in the other, they struck down a statute that gave cities a special taxing power to finance convention centers, and they did so because it limited this privilege to the two largest cities in the state.) In short, if we judge Neely by either his book or his votes, he is not the most activist of judges; but he is one of the most candid.

Instead of urging activism, Neely wants to describe its consequences (and also the consequences of nonactivism). So far as description goes,

he wants to elucidate two things: the operation of our political system, and the way that judicial intervention in politics affects the system. His evaluative thesis is that judicial intervention can sometimes help to keep the system work the way it is supposed to work (according to our official ideology), and thus make the system more democratic, not less so.

A philosopher or theorist of politics can find the book interesting for reasons identified by Wittgenstein, that is, that the "main cause of philosophical disease" is a "one-sided diet . . . of examples." I would suggest that Neely's book might be relevant to some of the current philosophical theories about justice.

For better or for worse (I think it is for the worse), the academic debate about theories of justice has been self-described by its participants as a debate between the utilitarians (or related versions of consequentialists or teleological theses) and the deontologist (or related theses such as contractarianism). As the participants debate, they test their theories against examples, but this procedure is worthless unless the examples are significant and not oversimplified.

Unfortunately, the examples that are prominent in this debate have tended to be "the quandary" (decision for the single case), and so the debate has often featured elaborate casuistry. I prefer to have the sort of examples that illuminate what it would be like to live according to the competing theories. The decision for a single case may test our intuitions, and help us make them explicit, but it won't tell us much about the pattern of life that would be shaped by these intuitions over the long run. Neely does approach, though not achieve, this type of exposition.

In addition to giving us "examples" that are more than "the single case," Neely gives us a version of "consequentialism," and he manages to make it look attractive. This too is a contribution to the current debate, since I gather that the consequentialists are on the defensive nowadays. The "consequence" that Neely is interested in is the effect of judicial activity on the political system.

Our judges have the power to veto the actions of legislators, bureaucrats, and political machines. Neely's thesis is that the prudent exercise of this power can make our polity more democratic rather than less so. For example, legislators have elaborate procedures that are designed to prevent action. Neely approves, since he believes that inaction is the normal way for a legislator to protect the general public from the predatory legislation of special interests. However, one of the consequences of a judicial veto can be the forcing of a topic onto the legislative agenda, and Neely tries to show how the careful exercise of this power can have prodemocratic rather than antidemocratic consequences.

Of course, this thesis is only as good as Neely's theories about politics and the way in which judicial action interacts with the rest of the polity. I would be willing to criticize, but I have chosen to focus this review in another way (on the misreading of this book by others). Despite my own dissent on the substance, I still recommend: he has firsthand experience; he translates what is currently known as "the economic analysis of politics" into colloquial English.

—L. H. LARUE