Notre Dame Law Review

Volume 57 | Issue 3 Article 8

1-1-1982

Book Notes

Michael J. Collard

BOOK NOTES

HOW COURTS GOVERN AMERICA. By Richard Neely. New Haven: Yale University Press. 1981. Pp. xvii, 233. $15.00.

Constitutional scholars have produced numerous works attempting to justify judicial activism. Justification seems necessary because the notion that appointed judges with life tenure can overturn any executive or legislative act seems inconsistent with government by majority will. In *How Courts Govern America*, Justice Richard Neely of the West Virginia Supreme Court of Appeals argues that a working democracy requires judicial review and proposes several novel criteria for deciding when judicial activism is desirable.

In the book's first chapter, the author sweepingly asserts that courts can use traditional constitutional law principles to justify any result in any particular case (p. 10). He also contends that, although decisions are not determined by the "legal principles" recited in the opinions, law is not unprincipled. Neely uses a myth system/operational system analysis to derive the principles that he claims actually control decisions. The myth system of government is the democratic ideal.[1] The operational system is, according to Neely, how things really work. It differs from the myth system because of human weakness and the myth system's inherent inconsistencies and defects.[2] Neely's focus is thus on the legislative and executive branches' nondemocratic aspects, which occur where the operational system deviates from the myth system. The author asserts that the courts' responsibility is to balance these deviations from the myth system.

Neely draws upon his experience as a state representative to show why legislatures fail to pass needed bills, leaving gaps that the courts must fill. To insure reelection, a legislator is pressured to introduce special interest legislation beneficial to politically potent

1 Unfortunately, Neely never precisely defines the term "myth system," a phrase he attributes to W. Michael Reisman (p. 12 n.4). Reisman defines the "myth system" as the "official picture"—how our society says the government *ought* to behave. W.M. REISMAN, FOLDED LIES 15-18 (1979).

2 Neely claims that "there are always design defects in the myth system which make it *impossible* to construct a real edifice on the plan given by the myth" (p. 12). His argument would have been stronger if he had given concrete examples of these defects. He also states that, since the myth system has generally worked well, we are reluctant to tamper with it to remove its inconsistencies (p. 13).

groups in his district. If all bills were automatically brought to the floor for a vote, much "predatory" special interest legislation would pass because of political pressure rather than true majority approval, Neely says. To prevent this, "[l]egislatures have intentionally designed a cumbersome procedure for themselves in comparison to the fairly streamlined procedure of the courts, because they wish to frustrate the passage of special interest legislation" (p. 49). As an example, the author describes how he once introduced a bill to help the elderly, received favorable publicity, and then quietly had the bill killed when he concluded that it was not a good idea.

This cumbersome system of procedural safeguards leads Neely to the first of three criteria he uses to determine when courts should take an active role: The courts should act when such safeguards trap bills that legislatures would act upon in the myth system, where no such safeguards exist. Under this criterion, he finds that *Baker v. Carr*[3] presents the best case for judicial activism (p. 14). There the Supreme Court of the United States struck down the apportionment of state senate seats by geography rather than by population. Since the senators would not pass any bill changing the apportionment plan under which they were elected, the state legislature's bicameral structure completely frustrated the majority will of the rapidly-growing urban population. In contrast, the worst case for judicial activism would be where no safeguards exist; for example, a challenge to a municipal law passed at a New England town meeting, where every adult participates (p. 49).

Neely's second criterion for judicial activism is the existence of a popular consensus regarding a problem's solution. A purely democratic process could not solve a problem lacking a consensus solution any better than a real legislature; therefore the courts should not interfere. Inflation, for example, lacks a consensus solution. The author points out several ways in which the courts could develop a constitutional law of inflation fighting (p. 70).[4] Without a consensus solution, however, they are not likely to do so. Neely contends that courts should not act if no consensus solution exists.

A case decided by Neely's own court[5] illustrates a third criterion for appropriate judicial review: lack of access to the legislative pro-

3 389 U.S 186 (1962).

4 For example, courts could consider expansion of the money supply a deprivation of property in violation of the due process clauses, or could curtail inflation-causing governmental regulations on the ground that they impair the obligations of contracts in violation of article I, section 1 of the Constitution.

5 *Pauley v. Kelley*, 255 S.E.2d 859 (W. Va. 1979).

cess by the affected groups. The plaintiffs in that case challenged West Virginia's school financing system because some rural schools were poorly financed. Although he considers this a close case, Neely dissented from the majority decision striking down the financing system.[6] He believed the legislature had actively worked to reconcile the various, well-represented interests. Because he thought that no group was denied access to the political process, Neely believed this was an improper case for judicial activism (pp. 176-77).

Like the legislative branch, the executive branch is also prone to disparities between the myth and operational systems. A few democratically elected officials cannot directly control huge numbers of bureaucrats. Instead of responding to the majority will, Neely asserts, bureaucracies respond to their own institutional goal of expansion (pp. 90-95). Neely argues that courts must therefore compensate for bureaucracies' tendency to over-regulate, just as they must compensate for legislatures' tendency to under-legislate. The judiciary can be trusted to oversee bureaucrats because it does not share the same institutional bias; since judges must do their own work, they lack incentive to expand. Neely also argues that judges are more likely than career administrators to understand the political system and appreciate different sides of an issue. Judges come from a wide range of backgrounds, while senior bureaucrats spend most of their lives in one organization (pp. 110-11). Neely's argument falters here, however, because he does not develop any principled limitations on when the courts should overule administrative agency decisions. His theory apparently relies on judges' heavy workloads as the only limit on their power to overturn any executive decision they consider unwise.

Written in a lively, unpedantic style, Neely's book contains many examples showing keen insight into our political institutions. In applying his analysis to criminal procedure reform, for instance, he describes some abuses in the criminal justice system and convincingly explains how reforms like the exclusionary rule alleviate them (pp. 150-69).

Unfortunately, the book suffers from organizational problems that detract from its cohesiveness. Neely's excursions often stray too far from his main argument. He devotes one chapter to an interesting commentary on abuses in the American electoral process and an analysis of democracy in South Africa, none of which he satisfactorily relates to his central theme (pp. 115-44). Although the book's gen-

6 *Id.* at 897-900.

eral tone is optimistic—courts are capable of compensating for the problems of legislatures and bureaucracies—it ends with a pessimistic apology for Neely's failure to provide any grandiose schemes for reform (pp. 218-26).

Few constitutional scholars will likely accept the author's postulate that traditional constitutional law principles impose no genuine limits on courts. This book is valuable nonetheless, because considerations drawn from the nondemocratic aspects of the legislative and executive branches do play some part in judicial decisionmaking, even though they may not be expressly set forth in the opinions. Neely believes that trying to understand these considerations, instead of ignoring them, will help us use them intelligently (p. 13). *How Courts Govern America* offers a stimulating view of our legal institutions that should provoke much thought among lawyers and nonlawyers alike.

Michael J. Collard