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Judicial Reform: Setting the Prairies Afire

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JUDICIAL REFORM: SETTING THE PRAIRIES AFIRE

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A BLUEPRINT FOR JUDICIAL REFORM. Edited by *Patrick B. McGuigan* and *Randall R. Rader*. Washington, D.C.: Free Congress Research and Education Foundation, Inc. 1981. Pp. ix, 382. $10.95.

In November 1981, the Free Congress Research and Education Foundation[1] announced the publication of a collection of essays entitled *A Blueprint for Judicial Reform*.[2] Paul Weyrich, the president of the foundation, stated that the publication of this book marked the beginning of a public campaign by his organization to seek limitations on the power of the federal judiciary.[3] Mr. Weyrich, described by the media as a "New Right" activist,[4] stated, "Even if we do not succeed in changing the law or the Constitution, we will change the nature of the judiciary by making this a hot political issue."[5] He added, "My business is to light the fire. If you have a real prairie fire, some reform will be adopted, either self-imposed or imposed from the outside."[6]

Mr. Weyrich's remarks suggest that *A Blueprint for Judicial Reform* is not a product of detached, objective scholarship. Indeed, measured by the most generous scholarly standards, *Blueprint* is a work of dubious merit.[7] Nevertheless, the legal community should not instantly dismiss this book. *Blueprint* is the product of a vocal political faction; circumspection urges an appraisal of *Blueprint* in the context of its goals.

As Mr. Weyrich's incendiary allusions indicate, *Blueprint* is first and foremost a work of partisan advocacy that seeks fundamental changes in the federal judiciary. Its editors recognize a general discontent with the American judicial system, a discontent that is shared within and without the courts.[8] In publishing *Blueprint*, they attempt to promote radical, politi-

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1. The Free Congress Research and Education Foundation is a tax-exempt research organization. According to its own description, it "analyzes U.S. House and Senate elections," "studies current political trends," "analyzes important local and state ballot measures," and "focuses on trends affecting the stability and well-being of American family life." P. 382.

2. Broder, *New Right Sounds Attack on Courts*, Washington Post, Nov. 22, 1981, at A3, col. 2 (final edition).

3. Sniffen, *Conservatives Seek Curbs on Federal Judges*, Associated Press, Nov. 9, 1981.

4. *Id.*

5. *Id.*

6. *Id.*

7. *See* text at notes 22-37 *infra*.

8. Certainly, this discontent is not a new phenomenon; lawyers have frequently pointed to

cally motivated reforms. Since the editors' goal is reform, *Blueprint* deserves evaluation as a vehicle for change. So viewed, *Blueprint* seems a certain failure. But in this regard it is an instructive failure that provides some revealing insights regarding the use of books to achieve institutional change.[9]

A Blueprint for Judicial Reform is a compilation of twenty-two essays that ostensibly critiques the role played by the federal courts in American government. However, the title is misleading. The book does not provide a carefully drafted, schematic approach for altering the structure of the federal judiciary. Instead, the book garners under one cover a series of short, unconnected essays on a wide range of special topics, many of which are only tangentially related to the structure, power, and authority of federal courts.[10] The essays are composed in a cursory fashion, each averaging about fifteen pages in length. With only a few exceptions,[11] they are bereft of the careful documentation and footnote support that underpins academic articles. Typographical errors and editorial lapses abound.[12] In sum, rather than resembling a blueprint, the book seems more akin to a collection of disparate sketches doodled upon a desktop blotter.

The contributing authors include congressmen, congressional staff members, professors, state officials, and members of various political organizations.[13] These contributors all share the view that the federal courts have overstepped constitutional limits in cases involving such controversial issues as busing, school prayer, and abortion.[14] To the extent that these divisive issues today define the terms "liberal" and "conservative," the contributors are uniformly and extremely conservative.

Blueprint is organized into six sections. The first contains two introductory essays attacking the federal courts in general terms.[15] Part Two in-

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the failings of the courts in serving the needs of society. *See, e.g.*, J. FRANK, AMERICAN LAW: THE CASE FOR RADICAL REFORM (1969). More recently, even the Supreme Court Justices have suggested the need for some types of institutional reform. *See Justices Propose Varying Solutions to Supreme Court Overload*, The Third Branch, Sept. 1982, at 1.

9. In fairness to the authors, I believe that their goals should define the proper purview of my commentary. Since I understand *Blueprint* as an attempt to promote change in the courts, I evaluate it strictly in that sense. I neither challenge nor endorse the philosophical and moral premises that underlie the arguments in *Blueprint*, nor do I call into question the political partialities reflected throughout its pages.

10. For example, the topics include critiques of affirmative action, p. 63, the Legal Services Corporation, p. 79, the Federal Election Commission, p. 143, and the American Bar Association, p. 281.

11. *See, e.g.*, Jordan & Rubin, *Government Regulation and Economic Efficiency: The Role of Conservative Legal Foundations*, p. 241.

12. A typical example is found at page 165, where, in a single paragraph, quotation marks are omitted, the quotations are incorrectly transcribed, and the quotations are attributed to the wrong source.

13. Noticeably absent from among the contributors are any members of the federal judiciary or, for that matter, any active judges.

14. Their views are succinctly summarized in the Foreword to the book, which states: "In place of the values of family, faith and freedom, enshrined in a Constitution under God, many federal judges now support a movement toward humanism and social change, designed to transform our schools, homes, libraries, media and culture into vessels of socialism, sexual liberation, atheism and amorality." P. vii.

15. Ervin, *Judicial Verbicide: An Affront to the Constitution*, p. 3; Rice, *Judicial Supremacy*

cludes four essays that argue for greater oversight and control of the federal courts by Congress[16] and two essays that fustigate specific nonjudicial programs.[17] Part Three consists of four works on the operations of administrative agencies,[18] while Part Four provides a catch-all category for favorite "New Right" causes.[19] Part Five contains two essays on religious free-

and the Balance of Powers, p. 17. The first essay argues that the courts have failed to interpret the Constitution according to its "true meaning," p. 8, while the second claims that the Supreme Court's self-proclaimed supremacy in the interpretation of the Constitution has upset the balance of power among the three branches of the government.

16. East, *The Case for Withdrawal of Jurisdiction*, p. 29; Stanmeyer, *Governing the Judiciary*, p. 37; Hammond, *Congressional Oversight of the Federal Judiciary*, p. 95; Grassley, *Judicial Nominations and the Senate's "Advice and Consent Function,"* p. 107. The authors suggest various means whereby Congress can achieve greater control over the courts, including the congressional withdrawal of federal court jurisdiction over selected matters, pp. 30, 98, improved statutory draftsmanship, p. 101, a more aggressive questioning of judicial nominees with respect to their interpretation of specific provisions of the Constitution, p. 109, and more exacting oversight of court activities, p. 98. Mr. Stanmeyer also suggests a constitutional amendment providing for congressional review of judicial decisions. The amendment would permit the Congress to overturn Supreme Court opinions by a two-thirds majority vote in each House, and to overturn lower federal court and state court decisions by a simple majority vote in each House. P. 57.

17. Hatch, *The Son of Separate But Equal: The Supreme Court and Affirmative Action*, p. 63; Jenkins, *The Legal Services Corporation and the Poor: Does It Meet Their Needs?*, p. 79. The first essay attacks affirmative action programs, labeling them "immoral" and "unconstitutional," p. 75, while the second argues for the replacement of the Legal Services Corporation with tax incentives for private lawyers who engage in *pro bono publico* work, p. 91.

18. Sowell, *Knowledge and Decisions: Administrative Agencies*, p. 119; Momboisse, *Reform of Administrative Procedures*, p. 127; Rothenberg, *Government by Bureaucracy: The Role of the Federal Election Commission*, p. 143; Mandelman & Simpson, *Intervenor Funding: Recommendations for Reform*, p. 163. Mr. Sowell's essay is primarily descriptive, suggesting that, in exercising regulatory powers, federal agencies are able to enact, enforce and interpret law in a manner constitutionally forbidden to other organs of the government, p. 123. Mr. Momboisse suggests a number of administrative procedure reforms which would decrease the discretion exercised by regulatory agencies. For example, the reforms include increased oversight and review of agencies by Congress and other agencies, pp. 128-30, increased pre-notice, notice, and record requirements in rulemaking proceedings, pp. 132-37, and elimination of the legal presumption that the agency has acted within its authority. Pp. 138-39. Mr. Rothenberg specifically criticizes the activities of the Federal Election Commission in regulating political campaigns, recommending the elimination of contribution limits and FEC "quasi-judicial" powers, while retaining financial disclosure requirements. Pp. 155-60. Senator Simpson and Mr. Mandelman suggest limitations on the government funding of intervenor activities in agency proceedings, pp. 176-77, including "an affirmative requirement that at least one-third of any intervenor funding money allocated to a given proceeding must go to the groups or firms that would have to comply with the proposed rule." P. 177.

19. Doolittle, *The Resurrection of the Tenth Amendment: Restoring Balance to the Federal System*, p. 183; Harvey, *A Proposal for Reform of Federal Judiciary and Federal Regulatory Agencies: A New Beginning*, p. 195; Ashcroft, *Possible Alternatives to Forced Busing*, p. 209; Gerard, *A Proposal to Amend Article III: Putting a Check on Antidemocratic Courts*, p. 217; Jordan & Rubin, *Government Regulation and Economic Efficiency: The Role of Conservative Legal Foundations*, p. 241; Rice, *The Role of Legal Education in Judicial Reform*, p. 273; Rees, *The American Bar Association: Its Cause and Cure*, p. 281. The reforms recommended in these essays range from the gradational to the transilient. For example, Mr. Doolittle's essay presents a familiar argument for the increased judicial recognition of the tenth amendment as an affirmative limitation on federal power. In contrast, Mr. Gerard's piece suggests a radical rewriting of Article III of the Constitution. The proposed amendment would eliminate lifetime tenure for federal judges, p. 229, provide for retention elections held at least once every six years, p. 227- 30, and permit Congress to remove judges who are "incompetent or who misconduct themselves." P. 227. Under this "short-form impeachment" power, p. 230, "mis-

dom,[20] while the final section consists of a single concluding essay by the editors.[21]

As this brief outline indicates, the editors have attempted to cover a wide spectrum of topics. Across this spectrum they have selected essays arguing for radical reform of the structure, operation, and identity of the federal courts. Yet it seems that they have given little thought to the role of books as a medium for advocating institutional change. Books are of limited value in inciting revolutions; if the editors expect their efforts to be effective, they must do more than simply publish a laundry list of complaints. They must pursue some strategy of persuasion.

A book, properly employed as a persuasive device, offers a number of opportunities for institutional reform. If the institution is receptive to reason, a book can encourage change through the presentation of thoughtful analysis. If the institution is subject to popular pressure, a book can promote change by consolidating or focussing the public's discontent. Courts, by nature of their institutional role, are responsive to both reasoned analysis and, at least indirectly, to popular opinion.[22] Yet *Blueprint* fails to harness effectively either of these forces in arguing its case for judicial reform.

Blueprint's essays contain little in the way of thoughtful analysis. Instead they consistently advance depthless arguments in attacking the federal courts. For example, they repeatedly complain that federal courts misconstrue the Constitution,[23] quarrelling with the courts' interpretation

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conduct" would include "establishing broad social policies on the basis of values that cannot be derived from the language, structure or history of the Constitution." P. 225. Recommending statutory reforms that are equally revolutionary, Mr. Harvey suggests that, in providing for the review of agency actions, Congress should vest state courts in the region most economically affected by a federal regulation with exclusive jurisdiction over all legal challenges to the regulation. P. 196. For example, the author envisions Indiana, Ohio and Michigan state courts exercising jurisdiction over all questions involving federal automobile safety and emission standards. P. 196. Mr. Ashcroft recites the familiar litany of evils that result from the use of busing in integration remedies, p. 210, but despite the title of his essay, does not suggest any alternatives. The final three essays argue, respectively, that litigation by conservative legal foundations can promote efficient regulation, p. 264, that law schools should deemphasize case law in teaching constitutional law courses, p. 275, and that the American Bar Association does not adequately represent the interests of its members. Pp. 288-89.

20. McClellan, *The Making and the Unmaking of the Establishment Clause*, p. 295; Ball, *Religious Liberty: New Issues and Past Decisions*, p. 327. The first essay presents an historical analysis of the Establishment Clause and concludes that recent decisions are not consistent with the framers' intent. The second essay considers emerging religious liberty questions, such as tax exemption for, pp. 330-31, and regulation of, pp. 335-39, private religious institutions.

21. McGuigan & Rader, *Judicial Oligarchy: Have the People Ceased to be Their Own Rulers?*, p. 353. The editors charge that the federal judiciary has usurped the legislative functions of Congress and the States. Pp. 355-61. They cite various opinion polls to bolster their claim that the viewpoints and reforms suggested in *Blueprint* have the support of a majority of the American people. Pp. 361-66.

22. The conscientious judge certainly pays attention to the scholarly analysis provided by law reviews, as *Shepard's Citations* for law review articles might suggest. His decisions are also informed by his everyday experience, of which public opinion plays a part. Moreover, he is aware that institutions must be responsive to public opinion if they are to remain viable. Indeed, as one commentator has noted with regard to the Supreme Court, "it is hard to find a single historical instance when the Court has stood firm for very long against a really clear wave of public demand." R. MCCLOSKEY, THE AMERICAN SUPREME COURT 224 (1960).

23. *See, e.g.*, Doolittle, *supra* note 19, at 185; East, *supra* note 16, at 34; Ervin, *supra* note 15, at 7; Gerard, *supra* note 19, at 217; Grassley, *supra* note 16, at 107; Hammond, *supra* note

of the terms "establishment of religion,"[24] "due process,"[25] and "equal protection."[26] However, the essays do not attempt to provide a meaningful analysis of the meaning of these terms,[27] nor do they address the attempts by scholars to arrive at principled definitions.[28] Various contributors simply assert that these terms reflect their moral values, citing the "true" (pp. 8, 107) "plain" (p. 39) and "natural" (p. 40) meaning of the Constitution. Such conclusional statements hardly provide convincing arguments that judges have misinterpreted the Constitution.

If these contributors have a reasoned basis for arguing that judges have misconstrued the Constitution, they do not advance it, nor do they provide a principled theory of interpretation[29] that will lead to the results they advocate. Instead, one contributor simply states that "the words of the Constitution must be understood to mean what they say" (p. 7). Another dismisses attempts by the courts to develop coherent theories of constitutional law as "an unfortunate judicial propensity to replace common sense by scholastic theorizing about abstractions" (p.41). In making these statements, the contributors seem to suggest that the Constitution should govern disputes not through the rule of articulated reasoning, but rather through the fiat of autocratic words such as "common sense."[30]

The essays display a similar shallow approach in condemning various examples of "judicial activism."[31] They make no attempt to develop con-

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16, at 98; Hatch, *supra* note 17, at 63; McClellan, *supra* note 20, at 318-19; Stanmeyer, *supra* note 16, at 39-42.

24. *See, e.g.*, McClellan, *supra* note 20, at 295.

25. *See, e.g.*, Stanmeyer, *supra* note 16, at 42-44.

26. *See, e.g.*, Hatch, *supra* note 17; Ashcroft, *supra* note 19.

27. Instead, the authors tend to support their interpretations by citing "eternal" or "everlasting truths," pp. 4, 5, 13, "fundamental political ideals," p. 74, and their own subjective versions of morality, pp. 75, 211. Senator Hatch goes a step further, introducing a remarkable historical perspective in opposing affirmative action. He states, "The idea of a 'color blind' Constitution, as referred to by the elder Justice Harlan in his classic *Plessy* dissent, now seems more remote than during even the most entrenched days of Jim Crow and Theodore Bilbo." P. 63. Notwithstanding Senator Hatch's apparent views to the contrary, I suspect that the elder Justice Harlan would find the present approach to equal protection preferable to that applied in 1896.

28. *See, e.g.*, Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982); Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979).

29. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST (1980); Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981): Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

30. In order to remedy the court's alleged misinterpretation of the Constitution, the contributors suggest that either the power of interpretation be assumed by other branches of government, pp. 18, 33, 38, or that the identity of the courts be altered to make them responsive to political pressures, p. 217. But the contributors fail to recognize that the question of who should decide constitutional issues is inextricably linked to the question of how constitutional issues should be decided. The question of how constitutional issues should be decided requires some theory of constitutional interpretation, and as previously noted, *see* text at note 29 *supra*, the contributors develop none. Thus, *Blueprint* fails not only to establish its assertion that judges have misconstrued the Constitution, but also to provide judicial reforms that are responsive to the asserted problem.

31. *See, e.g.*, East, *supra* note 16, at 33; Gerard, *supra* note 19, at 217; Grassley, *supra* note 16 at 107; Hatch, *supra* note 17 at 64-65; Rice, *supra* note 15, at 17; Stanmeyer, *supra* note 16, at 37-38. The most frequently mentioned examples of "activism" are collected in Mr.

sistent and principled arguments addressing the proper role of the courts in American government.[32] Again, the authors simply analyze court decisions on the basis of whether the results conform with their particular social values. The authors attack as "activist" decisions that provide rights of abortion (pp. 39-42) and remedies for racial discrimination (pp. 354-57). Yet the authors condemn judicial "restraint" in cases involving the rights of the unborn (pp. 39-42) and affirmative action (pp. 68, 70, 76).

This inconsistency is highlighted in the various authors' discussions of *Brown v. Board of Education*.[33] The authors generally approve of the Supreme Court's *Brown* decision to desegregate public schools, notwithstanding the Court's overruling of the long-standing precedent of *Plessy v. Ferguson*,[34] and notwithstanding the dearth of constitutional language justifying the Court's results.[35] Yet the authors provide no principled basis for distinguishing this species of "activism" from the "activism" they find objectionable. Likewise, many of their proposals to curtail "judicial activism" are not aimed at defining the role of the courts in American government but instead at reaching certain results in specific cases.[36] In sum, the authors fail to develop a convincing theory of the scope and powers of the federal courts and, under the guise of curtailing "judicial activism," simply seek to overturn specific cases they deem wrongly decided.

The contents of *Blueprint* clearly demonstrate that the book is not an exercise in considered legal analysis. As a scholarly product, *Blueprint* might charitably be described as an embarrassment. It pales in comparison to recent insightful works by conservative scholars.[37] *Blueprint* stands scant chance of effecting judicial reform from within; it will be summarily discarded by members of the legal community who approach law as a reasoned discipline.

Of course, reason is not a prerequisite for reform. As previously mentioned,[38] *Blueprint* might achieve change from without the legal community if it can effectively arouse public opinion. However, *Blueprint* is unlikely to effect change through this route as well. It is no easy task for a book to capture the public's eye; absent a scandal, books rarely incite the public to

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Stanmeyer's essay. *See* Roe v. Wade, 410 U.S. 113 (1973) (abortion); Engel v. Vitale, 370 U.S. 421 (1962) (school prayer); Green v. County School Bd., 391 U.S. 430 (1968) (integration).

32. With the exception of some brief asides from Mr. Stanmeyer, pp. 45-50, the authors ignore the ongoing discussion among legal scholars on the proper role of the courts in effecting social change. *See generally*, A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (2d ed. 1978); C. BLACK, DECISION ACCORDING TO LAW (1981); J. Ely, *supra* note 29.

33. 347 U.S. 483 (1954).

34. 163 U.S. 537 (1896).

35. *See* Stanmeyer, *supra* note 16, at 41; Hatch, *supra* note 16, at 63; McGuigan & Rader, *supra* note 16, at pp. 355-56. Indeed, McGuigan & Rader seem unwittingly to argue a position more "activist" than the Supreme Court itself took in *Brown*. They suggest that the Supreme Court should have simply overruled *Plessy* rather than engage in "sociological theorizing." P. 356. But this would have resulted in the desegregation of all public facilities in the South in a single step. Clearly, the Supreme Court took a more cautious route, striving for a rationale that would limit its decision to public education as a first step in the dismantling of Jim Crow.

36. *See* East, *supra* note 16, at 29-36 (elimination of federal court jurisdiction over selected issues); Ashcroft, pp. 209-15 (elimination of forced busing).

37. *See, e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY (1977).

38. *See* text at notes 21-22 *supra*.

seek radical change.[39] More often, they give identity and focus to a preexisting discontent, intensifying emotions while broadening and consolidating the base of public support.[40] Even in this limited regard, *Blueprint* seems an unlikely candidate for inciting public opinion. It fails to meet the most basic criteria for catching the public's concern.

If a book is to enlist public support it must first capture the public's attention; at a minimum, it must be readable. Kindly stated, *Blueprint* is not a book one cannot put down. *Blueprint* drones and meanders through 382 pages of disjointed argument. It lacks the terse thematic structure familiar to successful revolutionary tracts.[41] *Blueprint* simply is not a book that lends itself to widespread public attention. Indeed, it would be an act of allegiance to *Blueprint*'s goals for any reader to plow through its pages.

Those members of the public who do read *Blueprint* are unlikely to be swayed by its call for judicial reform. Certainly, *Blueprint* fails as an emotional appeal for change. As Mr. Weyrich's pyric remarks forewarn,[42] *Blueprint* does attempt to inflame its audience.[43] However, it lacks the sort of moving oratorical style that calls the public to action. Instead, *Blueprint* casts its arguments in familiar phrases that have long since lost their glow. *Blueprint*'s rhetoric does not incite emotions, nor can it replace the need for a focused and specific theme.[44]

The editors of *Blueprint* cite statistics purporting to show broadly based public dissatisfaction with the courts (pp. 361-65). The statistics, however, suggest that this discontent is generally of low intensity and distributed across a wide spectrum of issues. If the contributors expect to harness public opinion, they must focus and direct this vague and diffuse discontent

39. Perhaps the paradigm example of the use of scandal to effect change is Upton Sinclair's work, *The Jungle* (1906). The book, intended as an attack on working conditions in the Chicago stockyards, aroused public concern over the quality of processed meat and encouraged the passage of food inspection laws. No such similar scandal has arisen in the judiciary. The most scandalous account of the courts is perhaps *The Brethren*, which hardly stirs the heart or stomach. *See* B. WOODWARD & S. ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979).

40. Familiar examples in this regard might include William Lloyd Garrison's abolitionist newspaper, the *Liberator* (1831-65) or Alan Paton's novel, *Cry, the Beloved Country* (1948).

41. Compare, for example, the pithy arguments of Thomas Paine's *Common Sense* (1776).

42. *See* text at notes 4-6 *supra*.

43. *Blueprint* relies heavily on overstated rhetoric. For example, a contributor describes judges appointed by Presidents Nixon and Ford as "upper class liberal sharpies." P. vii. Another interprets the Supreme Court's decision regarding religious observance in public schools as "the expulsion of Christianity" and the *"de facto* 'establishment' of Secular Humanism as the country's 'official religion.'" P. 40.

44. Indeed, some authors seem to get swept away by their own slogans and lose sight of their arguments. For example, in Harvey, *A Proposal for Reform of Federal Judicial Review and Federal Regulatory Agencies: A New Beginning*, p. 195, the author apparently attempts to develop the theme that the federal courts have failed properly to police federal agencies. However, this theme quickly dissolves into a vague, rambling discussion of the abuse of political power, including an irrelevant digressionary attack on the democratically elected president of France. President Mitterrand is described as "thoroughly anachronistic and demogogic," "a committed socialist in the mold of Lenin" who "seeks or craves" total power. P. 206 n.14. He is portrayed as leading a "march, eventually, to the socialist camps at Auschwitz and the Gulag," p. 200. Having expounded at some length on Mr. Mitterrand's qualifications for political office, the author offers no explanation of how this lecture pertains to the role of the federal courts in reviewing the actions of administrative agencies.

into political support for change. Instead, *Blueprint* pursues a spectrum of topics as broad as the asserted discontent, without concentrating or intensifying the felt dissatisfaction. If the collection of essays were more narrowly focused on a particular deficiency of the courts, or simply devoted to an attack on the judiciary alone, *Blueprint* would stand a better chance of achieving its announced goals. Instead, by pursuing a scatter shot attack on all things federal, *Blueprint* fails to identify a specific, recognizable target at which to direct a public outcry. Furthermore, if *Blueprint* expects to galvanize and consolidate public discontent into broadly based support, it must show some inclination toward moderation and some receptivity toward diversity of opinion. However, in addressing a broad range of topics, *Blueprint* withholds a corresponding broadmindedness. The contributors approach each of twenty-two topics in a vehemently conservative fashion, displaying consistent and uncompromising rigidity. In attempting to gore twenty-two distinct oxen with the same dull blade, the editors of *Blueprint* forego the opportunity to build a coalition of support. Such a coalition seems crucial to their cause: I doubt that public discontent can ever be mobilized on a grand scale by a call to arms that is so broadly directed and yet so radically doctrinaire.[45]

In sum, *Blueprint* fails as a vehicle for achieving meaningful change in the judiciary. It fails both as an appeal to reason and as an attempt to mobilize public discontent. Members of the legal community who thoughtfully have considered the deficiencies of our courts, so-called "liberals" and "conservatives" alike, will discern that *Blueprint* provides less than half a dialogue and consequently will dismiss the book as a poorly drafted harangue that adds only decibles to the debate. Members of the general public who manage to finish *Blueprint* will be unmoved by its clamoring, desultory call for change.

In my evaluation of *Blueprint* as a vehicle for change, I have proceeded along a "result-oriented" path. I have attached no normative preference to the application of reasoned analysis and the incitement of public discontent as potential mechanisms for promoting institutional reform. In this regard, I conclude with a modest suggestion. Our courts serve society first and foremost as institutions of reason. Change in our institutions is inevitable as our culture evolves, and advocates of change are free to choose their mechanism for achieving reform. They can approach judicial reform through a careful, considered and persuasive analysis of the role of the courts in American government. Or they might pursue a less disciplined path, attempting to generate a public demand for change in the judiciary because of specific decisions reached by the courts on inherently divisive and controversial issues. I believe that public discontent with an institution is a symptom of the need for change. However, the function of courts as institutions of reason suggests that reasoned analysis provides the preferred

45. I suspect that many persons who support the editors' conservative stand on a highly visible, isolated issue, such as forced busing of school children, have no interest or enthusiasm in supporting calls for reform of the American Bar Association, p. 281, or the Federal Election Commission, p. 143. It seems likely that only dedicated extremists will be interested in joining a coalition of extremes. Indeed, I suspect that many of *Blueprint*'s authors who express deeply conservative convictions on particular issues do not endorse the views of their co-contributors on other topics.

mechanism for their reform.[46] In this regard, I return to the conflagrant statements of Mr. Weyrich. He declared that the goal of *Blueprint* was to start a "real prairie fire" and to make judicial reform a "hot political issue."[47] Perhaps he should reconsider the uses of fire. Flames kindled for light, rather than heat, might better serve the interests of judicial reform.

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46. In the words of Learned Hand:

> So you will see that a judge is in a contradictory position; he is pulled by two opposite forces. On the one hand he must not enforce whatever he thinks best; he must leave that to the common will expressed by the government. On the other, he must try as best he can to put into concrete form what that will is, not by slavishly following the words, but by trying honestly to say what was the underlying purpose expressed. Nobody does this exactly right; great judges do it better than the rest of us. It is necessary that someone shall do it, if we are to realize that we can collectively rule ourselves. And so, while it is proper that people should find fault when their judges fail, it is only reasonable that they should recognize the difficulties. Perhaps it is also fair to ask that before the judges are blamed they shall be given the credit of having tried to do their best. Let them be severely brought to book, when they go wrong, but by those who will take the trouble to understand.

L. HAND, *How Far is a Judge Free in Rendering a Decision?*, in THE SPIRIT OF LIBERTY 109-10 (1952).

47. *See* text at notes 4-6 *supra*.