



**Review: [Untitled]**

Reviewed Work(s):

*How Courts Govern America* by Richard Neely  
David J. Garrow

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Civil War, "Judicial Subjectivism" (1900 to 1937), "The Modern Era," the Warren Court period, and the Burger Court.

Mott makes no attempt to provide a history of constitutional interpretation. Thus, one does not expect to find the breadth of Kelly and Harbison's text *The American Constitution* (Norton 1976). However, Mott's "focusing on major areas of concern within defined periods" (p. vii) fails to provide sufficient depth for an appreciation of the Court's historical role. Too often, we are asked to draw conclusions based on a discussion of one or two leading Supreme Court decisions. In discussing the activism and liberalism of the Warren Court, for example, it is hard to disagree with Mott when he asserts that "an accurate portrayal" (p. 179) of the period is possible by examining four major areas: free speech, race discrimination, voting equality, and criminal justice. Yet it is unlikely that the historical significance of the period can be appreciated by basing the analysis on one landmark decision in each area. The Warren Court's liberal approach to the dissemination of sexual expression is not demonstrated by focusing solely on the proctors decision in Roth-Alberts. As a result, Mott provides no basis for his conclusion that "[t]he net result has been a strengthening of the case for free speech" (p. 184). Other important free speech problems, e.g. prayer, libel, sit-ins, etc. are simply not discussed. In the area of voting equality, an analysis based on *Baker v. Carr* offers little insight into the Court's liberal activist policy when no mention is made of later decisions and the one man-one vote standard. In short, there is simply an insufficient amount of constitutional law in this volume, and too many important problems (e.g., affirmative action, the civil rights movement, the incorporation debate) are not discussed at all.

A more serious problem is the lack of a critical framework or theoretical perspective. Although Mott promises to present the Court in "distinctly human and political dimensions" (p. vii), he often resorts to the "heroic" model when describing its role in the American political system. The Court is portrayed as a "powerful and majestic institution" (p. viii) which often reaches for "what is noble" (p. 252). The responsibility for reconciling the conflict between the ideals of popular sovereignty and limited government is seen as offering the Supreme Court "its opportunity for greatness" (p. 252). In his view, the Court has erred on few occasions, most notably in the *Dred Scott* and *Korematsu* cases.

Mott's attempt to find a common thread which explains the effect of the political environment on the Court's exercise of judicial review is inconclusive. While cognizant of outside forces, the Court does not always act in accord with its "political

milieu" (p. 251). At one point, he suggests "national discontent and uncertainty" (p. 250) make unlikely consensus and a strong policy direction on the Supreme Court. While he says that this applies to the Burger Court period, Mott does not explain why similar circumstances did not produce unpredictability during the Marshall Court period. Without acknowledging his debt to Robert Dahl or Robert G. McCloskey Mott assures us that "the Court has seldom lagged far behind or forged far ahead of the national community surrounding it" (p. 251).

RODNEY A. GRUNES

*Southwestern At Memphis*

**How Courts Govern America.** By Richard Neely. (New Haven, Conn.: Yale University Press, 1981. Pp. xvii + 233. \$15.00.)

Richard Neely, the forty-one-year-old Chief Justice of the West Virginia Supreme Court, has written an anecdotal and autobiographical book which attempts to elucidate the political role of American appellate courts. Neely's basic theme is that "American courts . . . are the central institution in the United States which makes American democracy work" (p. xi), and that "The courts provide an institutional supervisory role which responds to the abuses of other institutions" (p. 137).

Neely states in the preface that the book is "my own analysis of what I do as an appellate judge" (p. xiv), but the subsequent chapters contain only occasional references to Neely's own judicial experiences or to his actual exercise of judicial decision making. Instead, Neely paints a broad and sweeping picture of the American political system, with heavy emphasis on what he regards as "the legislative process's inherent negativism" (p. 75) and the abuse of administrative discretion by executive-branch bureaucrats. He argues that these two conditions largely shape the behavior of courts: "in their interactions with the legislative branch, the courts [are] generally *positive*, to compensate for the inherent negativism of a legislature, in their interactions with the executive branch they are basically negative, to compensate for that branch's inherently *positive* orientation. The essential mission of the courts . . . involves supplying balance" (p. 113).

Neely makes no reference at all to any of the scholarly literature on judicial behavior and gives little more attention to recent constitutional scholarship. He confesses that much of his training at Yale Law School "seemed nonsense to me" (p. 2), and that he was elected a supreme court justice at the age of thirty-one "only because my grand-

father, who had been a United States Senator from West Virginia and governor, had many friends" (p. 1).

*How Courts Govern America* actually tells us very little about courts, but much about Neely's personal political opinions. He sets forth—often at some length—his views on current economic policies, nation building in developing countries, political corruption in West Virginia, and racial conflict in South Africa. Only in the latter third of the book does Neely actually focus on the work of courts. In one chapter on court-mandated reforms in criminal procedure over the last twenty years Neely presents an extremely persuasive defense of the exclusionary rule. Although generally an advocate of judicial activism, Neely identifies the limitations of judicial policy making in a discussion of school funding cases. His effort to use these two substantive examples to explicate a ten-point "scale of appropriateness for court involvement" (p. 149) in different policy areas is vague and incomplete, however.

Neely's purposeful frankness in admitting that he and many other judges "manipulate the existing rules to achieve preconceived ends" (p. 167) is coupled with a pronounced weakness for the outrageous generalization, e.g. "police brutality is an everyday occurrence everywhere" (p. 152). Despite his glib and wide-ranging comments on the American political system, Neely sees no severe problems and recommends no particular reforms—"all that I can suggest is careful tinkering with the machinery" (p. 221). While he advises law students of the benefits of a broad, liberal education and calls for "imagination and creative thinking" in the judiciary (p. 223), he has no other prescriptions for the system in which he occupies such a prominent role. Unfortunately, Neely's book tells us far more about his own individual biases and limitations than about those of the institution in which he serves.

DAVID J. GARROW

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**The Congressional Budget Process after Five Years.** Edited by Rudolph G. Penner. (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1981. Pp. xiii + 199. \$14.25, cloth; \$6.25, paper.)

Contained here are papers, commentaries, and summaries of discussions presented in October 1979 at an American Enterprise Institute conference on the congressional budget process. Though this subject is vital to students of federal policymaking, it receives spotty treatment indeed

in this volume. Its selections are both too few and too topically scattered and bear little evidence of careful editorial work.

In spite of this, the collection does contain 2 papers of high quality. Allan Schick has written an excellent retrospective on the first five years of the congressional budget process. Schick notes the process has resulted neither in stern budgetary discipline desired by conservative advocates of the 1974 Budget Act nor in a revamping of national priorities sought by the Act's liberal supporters. The salience of the budget process has instead varied with the mood of Congress—when retrenchment is in order, budgeters gain credence, but when fiscal expansion seems desirable, they have only a weak market for their point of view. Schick outlines two possible uses of the budget process in the current "age of fiscal scarcity." Congress could impose stringent budget resolutions with tough reconciliation requirements. This in fact occurred in 1981. Congress also could undertake "escapist budgeting," passing artificially low spending targets and then later revising them upward as the fiscal year progresses. Such was the pattern in 1980, and probably will also obtain in 1982—both being election years.

Louis Fisher presents a meticulously researched piece on the 1974 Act's impact on the ability of Congress to control and direct agency implementation of programs. Fisher examines in detail congressional actions concerning presidential impoundments, reprogramming of funds, OMB-imposed personnel ceilings, and OMB's absorption policy for pay increases, and demonstrates a record of congressional activism in all of these areas. Statutory controls are supplanting non-statutory controls and good-faith agency efforts because of a growing distance between agencies and Congress resulting from staff turnover and layering. Thus legislators now tend to write statutes providing less flexibility and direction for bureaucrats in reprogramming, absorption, and personnel ceilings.

The other selections in this volume are much less satisfying. Tim Wirth of the House Budget Committee all too briefly describes his perspective of the budget process. Joel Havemann provides a sound journalistic account of the intermittent conflicts between budget and taxation committees from 1974 to 1979 but fails to thoroughly explore the implications of these conflicts for the future of the process. The role of the Congressional Budget Office (CBO) is directly addressed only in a critique of CBO policy analysis written by two economists of the rational expectations school. CBO staff members then voice harsh criticism of the quality of research evident in this critique. So much for the role of the CBO. Though Alice Rivlin attended the AEI conference, she appears