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## How Courts Govern America

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## BOOK REVIEW

H. JOHN ROGERS\*

HOW COURTS GOVERN AMERICA. By Richard Neely. New Haven: Yale University Press, (1981).

There is a tendency, albeit understandable, for individuals as well as nations to place themselves at the center of the universe. Ethnocentricity and chauvinism are words generally used to describe this phenomenon in nations. In *How Courts Govern America*, the senior Justice of the West Virginia Supreme Court of Appeals falls into this slough.<sup>1</sup> Justice Neely may have, perhaps by inadvertance, created a minor school of jurisprudence, *i.e.* judicial chauvinism.<sup>2</sup> However, the very title of his opus sets forth a premise which many would question, namely, *do* courts govern America, as opposed to the Fortune magazine "500," the eastern establishment, the Tri-Lateral Commission, etc. Many theorists eschew the obvious explanations and look for hidden sources of

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<sup>1</sup> "The slough of despond" entrapped the wayfarer in John Bunyan's PILGRIM'S PROGRESS (1678).

<sup>2</sup> Perhaps, if his theories take hold, Justice Neely may attain the immortality accorded Nicholas Chauvin, Napoleon I's legendary defender. Of course, Chauvin was a monarchist whose notoriety was based upon his unyielding attachment to a lost cause. It remains to be seen whether the sun is rising or setting on "Neelyism."

For those who have more than a passing interest in the all but forgotten world of jurisprudence, see R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); L. FULLER, *THE MORALITY OF LAW* (1964); H.L.A. HART, *THE CONCEPT OF LAW* (1961) [Hereinafter cited as HART].

The movement in jurisprudence has, as in philosophy, been nearly headlong towards positivism, which is, roughly put, that the focus of inquiry should be upon what the law *is* rather than what it *ought* to be. Beginning law students are quickly disabused of the notion that what is right, as opposed to what is legal, is of much import. What the courts and legislatures have done is the subject of the discussion. What they should have done is a subject to be pursued after hours at some local r athskeller.

Justice Neely falls rather easily into the jurisprudential mainstream, with the exception, discussed more fully below, of the emphasis he places on the way the personal "attitudes" of judges inform their decisions.

power. "What you see is what there is," does not seem to satisfy either the overly or underly intellectual.

Of course, Justice Neely's vantage point is slightly different from the usual writer on the subject. One of his stated purposes is a back-handed slap at "academic lawyers." He proposes to set the record straight, *i.e.*, the law of West Virginia is precisely what he and at least two of his colleagues on the West Virginia Supreme Court of Appeals say it is. Nothing less. Nothing more. "*L'etat, c'est moi*," revisited.

The English-speaking world's legal system differs from many other systems in that we spawn judges and lawyers in the same pool. In some other systems, one elects at the beginning whether he or she will be trained as a judge or an advocate.

The differences between "academic lawyers" and jurists is long-standing and most understandable. No judge relishes the evisceration of a prized opinion by someone who, to paraphrase former Governor Wallace of Alabama, has never even tried a chicken thief. Also, the process of writing a law review article is very different from producing a judicial opinion. The typical article usually divides the relevant decisions into the majority and minority rules, analyzes them, and then either opts one way or the other, *or*, quite frequently, concludes with some amalgam conceived by the author who, in the process demonstrates his or her literary contempt of all courts and proudly proclaims "This is what the law should be!"

Judges rarely have the opportunity to strike back at "academic lawyers." The normal allusion to a law review article in a judicial opinion is a footnote supporting a position taken by the judge in the text. The closest that most "academic lawyers" can come to "making law" is pure adhesion, not unlike a barnacle, on the frigate of a judicial decision. Thus, the traditional mutual scorn of the "doer" and the "theorist" continues to flower and thrive in the legal world.

Alexis de Toqueville concluded that one of the unique features of the American experiment was its legalism.<sup>3</sup> Under our form

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<sup>3</sup> In his most perceptive and prescient book, *DEMOCRACY IN AMERICA* (1835), de Toqueville observed that in America every political or social question is, or can become, a legal question. One need only look at the litigation surrounding the impeachment of President Nixon as a fairly recent example of de Toqueville's thesis. The impeachment process, would appear, under the Constitution, to be the exclusive function of the Congress, as the power to pardon is the exclusive

of government, the courts are the final recourse of the aggrieved and are often the supreme arbiters of social,<sup>4</sup> moral,<sup>5</sup> and politi-

function of the President. See *Schnick v. Reed*, 419 U.S. 256 (1974).

<sup>4</sup> The decision in the *Dred Scott* case, 60 U.S. (19 How.) 393 (1857), and in the school busing cases, would seem to be prime examples of what might be called social decisions.

Many historians contend that the *Dred Scott* decision made the Civil War inevitable. General Grant supports this theory in his memoirs.

Slavery was an institution that required unusual guarantees for its security wherever it existed; and in a country like ours where the larger portion of it was free territory inhabited by an intelligent and well-to-do population, the people would naturally have but little sympathy with demands upon them for its protection. Hence the people of the South . . . saw their power waning and this led them to encroach upon the prerogatives and independence of the Northern States by enacting such laws as the Fugitive Slave Law. By this law every Northern man was obliged, when properly summoned, to turn out and help apprehend the runaway slave of a Southern man. Northern marshals became slave-catchers, and Northern courts had to contribute to the support and protection of the institution.

This was a degradation which the North would not permit any longer than until they could get the power to expunge such laws from the statute books. Prior to the time of these encroachments the great majority of the people of the North had no particular quarrel with slavery, so long as they were not forced to have it themselves. But they were not willing to play the role of police for the South in the protection of this particular institution.

U. GRANT, *PERSONAL MEMOIRS*, 584 (1885).

With regard to the school busing cases, few legal scholars would still argue that the Supreme Court did not have the power under the Fourteenth Amendment to decide whether the public school system in the south could pass basic constitutional muster. The Court did decide. Both ways. Compare *Plessey v. Ferguson*, 163 U.S. 537 (1896), with *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

However, *de facto* segregation, which exists in many places to this day, presents a much stickier problem from the standpoint of constitutional adjudication. Although it may have played into the hands of those favoring "massive resistance," one could argue that the courts should have contended themselves with striking down specific state plans rather than creating equitable solutions, as it were, of whole cloth.

In a 1967 television interview conducted by Eric Severeid, Justice Black was asked if there was anything he would have done differently, during his years upon the Supreme Court. He said that, in light of the protracted litigation built around the phrase "all deliberate speed" in *Brown*, he would have argued for its elimination and would have had the court order the immediate desegregation of the Topeka schools, letting each subsequent case work its way through the courts to the same denouement.

<sup>5</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Roe v. Wade*, 410 U.S. 113 (1973), support Justice Neely's thesis. This assumption is reinforced by the strained reasoning in those opinions necessary to the results and to advance a *ratio decidendi*, of sorts, in each.

cal<sup>6</sup> questions. Thus far Justice Neely's premise is on sound footing.

Unfortunately, the by-product of this theory is an anti-democratic elitism in which the minions and ministers of the judicial branch of government have a vested interest in preserving their sovereign turf. The *quod erat demonstratum* of this theory is that only those who have undergone the rigors of three years of the more or less Socratic indoctrination in the law are somehow fit to govern America. The fact that admission to the bar in nearly all jurisdictions now requires an undergraduate degree and graduation from an American Bar Association approved law school rather than self-tutoring and "reading law" in some barrister's office has taken the inherent elitism of this school of thought to its zenith, or its nadir.

Justice Marshall's court arrogated this governing power to itself.<sup>7</sup> Justice Holmes, a legal realist like Neely, was more modest. He concluded that it was not essential to our form of government that the Supreme Court have the power to overturn acts of Congress.<sup>8</sup> However, in order to preserve the Union, Holmes argued that it was essential for the Supreme Court of the United States to have the power to supersede the decisions of the legislatures of the states and of their chief executives.<sup>9</sup>

Justice Holmes was, of course, right. England's functional equivalent of our Supreme Court<sup>10</sup> is chosen by the House of Com-

<sup>6</sup> The decisions hardest to justify are probably those relating to the reapportionment of the state legislatures. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

Few would seriously contend that the intent of those who passed and ratified the Fourteenth Amendment to the United States Constitution was to permit and authorize the federal judiciary to dictate the composition of state legislatures. Further, it is especially difficult to rationalize a decision which requires the 50 state senates to be apportioned in accordance with population when the United States Senate is not.

<sup>7</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

<sup>8</sup> O. W. HOLMES, *COLLECTED LEGAL PAPERS*, 295-96 (1920).

<sup>9</sup> *Id.* In a constitutional system such as ours, there must be a mechanism to resolve disputes between the various branches of government. An independent judiciary would, arguably at least, appear to be the more desirable locus of this power if for no other reason than the judiciary normally can view such matters with more detachment because of its more attenuated interest in the outcome and, because of the leisure and distance afforded it, the judiciary is probably more likely to come to a dispassionate conclusion.

<sup>10</sup> Under the English arrangement, the last judicial word rests with the House of Lords in Extraordinary Session. Consequently, it would be theoretically possi-

mons and could be “packed” by a simple vote of parliament. An elitist oracle is by no means essential to constitutional government. Whether the courts are better suited than the legislature or the executive to police the inherent difficulties of a Constitutional Government is debatable. However, most would concede that a federal—as opposed to a confederate—government requires a final, compulsory authority.

“John Marshall made his decision. Let him enforce it,” President Jackson is supposed to have said when asked about what he perceived to be the excesses of an arrogant judicial decree.<sup>11</sup> This perhaps apochryphal statement does illustrate one of the chief difficulties with the government by judicial decree. Except for its own limited palace guard,<sup>12</sup> the judiciary must depend upon the voluntary acquiescence of its subjects to even unpopular decrees. There is little difficulty with negative decisions, *i.e.*, those which remove government restrictions. The abortion decision<sup>13</sup> simply restored the *status quo ante*. Enforcement of this type of decision would not require the aid or assistance of any other branch of government. The courts could easily quash any prosecution mounted by a “pro-life” member of the executive branch.

However, decisions which require positive action by the executive or legislative branches of government are much trickier for an activist judiciary. The early judicial abhorrence of “political” questions was, most likely, founded in pragmatism. After all, how *would* Justice Marshall have enforced his decision?<sup>14</sup> There is some

ble for the House of Commons to create additional Lordships sufficient in number to override an undesired lower court decision. Whether the English, with their more finely tuned sense of restraint, would deem this ‘cricket’ is quite another matter.

<sup>11</sup> President Jackson’s statement was in response to Marshall’s opinion in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

<sup>12</sup> In point of fact, the U.S. Marshal’s Service is an agency of the U.S. Department of Justice and consequently subject ultimately to the direct control of the executive. The state sheriffs or their deputies, who provide security in most courtrooms, are similarly divided in their loyalties.

The power of the courts to punish for contempt is their trump card, but it is difficult to see how the courts could maintain their authority—to use the vernacular—if push came to shove. *See* Premier Stalin’s legendary question to President Roosevelt and Prime Minister Churchill during a World War II conference: “How many divisions does the Pope have?”

<sup>13</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>14</sup> The earlier reluctance of courts to decide “political” questions may well have been grounded in this pragmatic—perhaps primal—fear. Justice Frankfurter was one of the more forceful proponents of this non-interventionist philosophy.

speculation that President Eisenhower hesitated before he ordered federal troops into Little Rock, Arkansas, in the first substantive test of the court's decision in *Brown v. Board of Education*.<sup>15</sup> A more political chief executive may have sought to avoid such a drastic measure, but the American military has been well schooled in its ultimate fidelity to the commander-in-chief.<sup>16</sup> After all, did not Alexander Haig advise Archibald Cox that the so-called "Saturday night massacre" was the work of the commander-in-chief? Haig was, most likely, simply reverting to type.<sup>17</sup>

Consequently, as suggested above, on the first level Justice Neely's book simply begs the question, *i.e.*, *do* courts govern America? Thus, having created his straw man, Justice Neely sets him about "to strut and fret his hour upon the stage. . . ."<sup>18</sup> If one accepts Justice Neely's thesis, then his book makes some sense. Our American judges are a mixture of philosopher-kings<sup>19</sup>

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This is somewhat surprising in light of a long involvement with matters political, both before his elevation to the court and subsequently. *See, e.g.*, P. KURLAND, *MR. JUSTICE FRANKFURTER AND THE CONSTITUTION* (1971); B. MURPHY, *THE BRANDEIS FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES* (1982).

<sup>15</sup> D. EISENHOWER, *Waging Peace* 163-73 (1965).

<sup>16</sup> Fortunately, the armed forces of the United States of America have never seen themselves as guardians of the civil order, as do some of their peers in Latin and South America. Since Justice Neely apparently sees the courts in the role of America's *guard civile*, then, perhaps, he might not be unsympathetic to yet another *deus ex machina*, designed to protect the people from themselves.

<sup>17</sup> The order delivered by then-Secretary of State Haig, did not in point of fact emanate from the commander-in-chief of the armed forces. At least, one should hope that it did not. President Nixon by executive order created the Office of Special Prosecutor and by a similar civil measure was clearly empowered to legally remove the Special Prosecutor.

<sup>18</sup> W. SHAKESPEARE, *MACBETH*, "Life's but a walking shadow, a poor player that struts and frets his hour upon the stage and then is heard no more. . . ."

<sup>19</sup> Socrates, as does Justice Neely, assumes that society is best governed by a self-perpetuating elite.

Until philosophers are kings, or the kings and princes of this world have the spirit and power of philosophy, and political greatness and wisdom meet in one, and those commoner natures who pursue either to the exclusion of the other are compelled to stand aside, cities will never have rest from their evils—no, nor the human race, as I believe—and then only will this our State have a possibility of life and behold the light of day.

THE REPUBLIC, book V, 473-C (reprinted in THE GREAT ANTHOLOGY) (J. Mackail ed. 1906). To put it bluntly, if one takes Justice Neely's argument to its logical conclusion then only five of the 2,700 so members of the West Virginia State Bar are fit to govern the State. Or so Justice Neely would seem to be contending.

and seeming connivers.<sup>20</sup> Court politicking is, at least, as sleezy as the legislative variety and Justice Neely's conclusions are about as startling to the initiated as Margaret Fuller's "I accept the universe."<sup>21</sup>

Justice Neely has apparently only discovered legal realism. Holmes was most likely right, when he said that the law is simply a prediction of what the courts will do in a given case.<sup>22</sup> A rational criminal defendant would ask only his or her chances of acquittal, the likelihood of reversal on appeal if convicted and—if truly rational—the best plea bargain that can be cut.<sup>23</sup> Guilt or innocence, under our system is simply another, and not necessarily paramount, factor.<sup>24</sup>

Justice Neely's one substantial contribution<sup>25</sup> to this school

<sup>20</sup> See, e.g., R. WOODWARD & S. ARMSTRONG, *THE BRETHERN* (1979) [Hereinafter cited as *THE BRETHERN*].

<sup>21</sup> "By gad, she'd better," was the rejoinder of another transcendentalist, Thomas Carlyle.

<sup>22</sup> Justice Holmes said that the law is simply a prediction of what the courts will do in a given case. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897).

Later legal positivists viewed the legal data, i.e., constitutions, statutes, and court decisions, as amorally and dispassionately as an archeologist would look upon the shards of pottery from a long-vanished civilization. See, e.g., J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1954); HART, note 2 *supra*.

The position of Justice Holmes would seem to contain Justice Neely's concepts. In addition to the amoral data of the past, we should as well consider the "attitudes" of the current inhabitants of the bench as we strive to predict what the courts will do.

<sup>23</sup> The manifest difficulties for the practicing attorney of predicting what judges will do are miniscule when compared to the difficulties inherent in predicting what juries will do with a given factual situation. Further, once the case has been tried it is usually too late for an aggrieved party to do much of anything other than take his or her chances on appellate reversal. Also, the recommendation of a reasonable plea or financial settlement is one of the hardest decisions a trial attorney has to make. A criminal defendant's slight leverage in plea-bargaining matters is more than compensated for by the prosecutor's ability to over-indict.

<sup>24</sup> See J. RAWLS, *A THEORY OF JUSTICE* 86 (1971). Rawls argues in essence that there can be no perfect system of procedural justice since it is impossible to design the "rules" so as to always produce "the correct result." He says: "Imperfect procedural justice is exemplified by a criminal trial." *Id.*

Laymen, and sometimes lawyers, confuse the difference between legal and moral guilt. The second is not a criminal attorney's primary concern. He or she does not ask what the client did, but simply what the prosecution can prove.

<sup>25</sup> See *A Woman in the Dunes*, a Japanese film of the early 1960's, wherein the protagonist, in justifying his earlier life, says, "It is better to be a footnote in a book on small bugs than to appear in no book at all."

of thought is the idea that the courts are called upon to resolve questions that the other two branches of government, for whatever reason, do not want to confront. He utilizes two prime judicial examples: the school desegregation cases and abortion decisions.<sup>26</sup> Neely hypothesizes that “[i]f a majority of the Supreme Court had graduated from Notre Dame or Bob Jones University, *Roe v. Wade*, (the abortion decision) would have been decided differently.”<sup>27</sup>

Perhaps. Perhaps not. A *political* realist, and Justice Neely is nothing if not a political realist, might well argue that, given the mores of the political process that *elevates* attorneys to the federal bench, “the true believers”<sup>28</sup> are systematically culled out and that a theoretical product of the law school of Bob Jones University or Notre Dame<sup>29</sup> could well, as a legal if not moral<sup>30</sup> matter, endorse the decision in *Roe v. Wade*.

The simple fact is that the courts receive the detritus of the political process. Justice Neely correctly notes that, during his term in the state legislature, more time was devoted to horse and dog racing than to the conditions in and maintenance of the state’s mental hospitals and penal institutions.<sup>31</sup> However, simply because

<sup>26</sup> See *Roe v. Wade*, 410 U.S. 113 (1971); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

<sup>27</sup> R. NEELY, *HOW COURTS GOVERN AMERICA* 44-45 (1981).

<sup>28</sup> See E. HOFFER, *THE TRUE BELIEVER* (1951).

<sup>29</sup> Justice Neely’s hypothetical to the effect that a lawyer trained at Notre Dame University or Bob Jones University would, as a judge, be less likely to adhere to his oath to support the constitutions and laws of the United States and/or one of the fifty states than, say, a lawyer trained at Yale, Harvard, or West Virginia University, smacks of elitism. There is no reason to *assume* that such a lawyer would be less faithful to the concept of principled decision-making.

<sup>30</sup> “The Relationship between Law and Morality” was the subject of this reviewer’s third year paper in law school. The conclusions in that unpublished piece were few and quite tentative. As the years pass, they grow fewer and more tentative. Perhaps the relationship was best summarized by a Public Defender who once said to the author, “The thing with most lawyers and judges is that somewhere, way in the back of their minds, they still have a concept—maybe inchoate—of justice. They’ve got used to the world but they still remember a little bit of what they learned in law school. And, way down deep, they want to do the *right* thing. You just have to convince them.”

<sup>31</sup> As a former member of the West Virginia House of Delegates, Justice Neely should—and probably does—realize that the basic function of the legislative branch is to levy taxes and dispense them. It is certainly one thing to increase gasoline taxes in the hope that there will some day be better roads, since the relationship between the user and the payor is relatively direct. However, as

a legislative body abstains from involvement with non-revenue producing enterprises in favor of activities which bring money into the state treasury is no reason to assume that the power over asylums and prisons was involuntarily vested in the judiciary. As anyone knows who has observed the legislative process even from a distance, the interests of lunatics and convicts are simply not represented in the lobbying process, except insofar as they coincide with the interests of the executive branch of government.

Justice Neely's other point is that the sharp breaks with prior judicial decisions, *e.g.*, the school desegregation cases and the famous "switch in time that saved nine" in 1937,<sup>32</sup> support his contention that ours is a government of judges and not of laws.

This argument has a superficial plausibility, but upon closer scrutiny, it would appear that Justice Neely's mighty strainings have produced little more than the proverbial mouse. Of course, prior decisions are sometimes overruled. "The sun also rises and goeth down," although one who stands at midday might question the wisdom of *Ecclesiastes*. Further, the court upon which Justice Neely has served since 1973 could well hold the record for the least fidelity to *stare decisis*.<sup>33</sup>

However, to premise a judicial philosophy on such a foundation is, simply put, to confound the familiar with the necessary. Or, to meet Justice Neely's argument head-on, one could easily contend that these are merely the exceptions which *prove* the rule.

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a fiscal matter, lunatics and convicted felons only make fiscal demands on the legislature. Their only advocates in the legislative process are their keepers and the few who operate from humane considerations. The former, for the most part, chiefly contend for salary increases and more splendiferous institutions and perquisites. It should not be necessary to point out that the interests of the keepers and the kept do not always perfectly coincide.

<sup>32</sup> Legend has it that Chief Justice Hughes spoke with Justice Roberts prior to the change in his voting pattern, thereby causing President Roosevelt to abandon his "court-packing" plan. Justice Roberts denies this. See Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 311 (1955).

<sup>33</sup> For the unfamiliar, the shift in judicial philosophy on the West Virginia Supreme Court of Appeals began with the election of Justices Neely and James M. Sprouse, now a judge of the U.S. Court of Appeals for the Fourth Circuit, in 1972. The judicial transition was completed in the election of 1976 when Chief Justice Miller and Justices Harshbarger and McGraw were elected, thereby effecting one of the more momentous transfers of power in the state's history. In that election, to paraphrase President Kennedy's 1961 inaugural address, the sword was passed to a new generation of West Virginia lawyers.

The fact that an overturned precedent normally creates waves in both the popular press and in the legal community should be proof enough that even an activist court, such as the present West Virginia Supreme Court of Appeals, still honors *stare decisis*, far more often in the obedience than in the breach. Or, at any rate, a break with past legal precedents normally produces, at the very least, a lengthy if not satisfying opinion—a rationalization if not an agreeable rationale. William Allen White's legendary dictum still holds: It is *news* if the man bites the dog.<sup>34</sup>

Finally, Justice Neely's stressing the importance of the personal "attitudes" of judges in the legal process is little more than an acknowledgement of Dr. Dooley's statement that the Supreme Court follows the election returns. *So what else is new?* Felix Frankfurter and Arthur Goldberg both occupied what was once called "the Jewish seat" on the Supreme Court, but their religious affiliation could hardly explain their most different judicial philosophies. And one could safely assume that if President Carter had appointed the first woman to the high court, her judicial philosophy would have been somewhat different from Justice O'Connor's.

Even if judges are not directly elected, as they are in most states, they still come out of the political *ethos*, and *The Brethren*<sup>35</sup> gives us a rare glimpse into the politicking and log-rolling which is inherent in any process wherein three, five, seven, or nine

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<sup>34</sup> "When a dog bites a man that is not news, but when a man bites a dog that is news." The original source of this quotation would seem to be John B. Bogart, the city editor of the *New York Sun* from 1873-90. See THE HOME BOOK OF QUOTATIONS: CLASSICAL AND MODERN (B. Stevenson ed. 1967). White appears to have simply passed it along.

It is interesting to note, in passing, that one of the most substantive decisions of the Supreme Court of the United States went almost entirely unnoticed. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), changed the adjective law with regard to all cases in which a party invoked diversity of citizenship as the basis for federal jurisdiction. This decision was rendered on April 25, 1938, but the first public attention came with a later *New York Times* article. *New York Times*, May 4, 1938, at 22, col. 5. See C. WRIGHT, THE LAW OF FEDERAL COURTS, 255 n.12 (3d ed. 1976). Later, a plethora of law review articles appeared.

<sup>35</sup> THE BRETHREN, note 20 *supra*. Many, if not most lay readers, were astounded, at the very least, by this account of the machinations of the process of judicial decision-making. Few lawyers of this reviewer's acquaintance were nonplused. The irreverence toward, and evisceration of, the so-called "the law of the land" endemic to a formal legal education early predisposes one to the notion that beneath the black robes are ordinary mortals.

diverse and strong willed individuals strive towards decision.<sup>36</sup>

The "attitude" paradigm reaches its *reductio ad absurdum* in the "breakfast" theory, *i.e.*, whether the eggs were overdone and/or the nature of the morning's marital conversation are what really *counts* in judicial decisions, simply is another instance of Justice Neely's belaboring the obvious. Of course, it is *a* factor in the law, as in any other human endeavor. The question is how much of a factor it is in the law and how much it differs, if at all, from teaching, psychiatry, or coal mining. He simply passes over this question. He posits the "attitude" theory with no effort to quantify, qualify, explain, or analyze.

Perhaps Justice Neely is only saying that the president, when he appoints a federal judge, or the electorate, when they cast their ballots, should consider the merits of the judge's spouse and/or chef. Fine. Few psychologists would dispute that a well-fed judge dwelling in an atmosphere of domestic tranquillity would probably be more content than some refugee from the legal equivalent of Dostoyevski's underground. Whether he or she would be a better judge in terms of what one considers to be the more subtle judicial virtues, *e.g.*, creativity, insightfulness, vision, is another question. For example, one might prefer a "workaholic" jurist who spends long hours at night reconciling disparate precedents and considers it recreation to stare at the wall and think of Justice Holmes' "brooding omnipresence of the law." Such a judge may be less than a satisfactory spouse and, perhaps, a trifle brusque with friends and associates, but, in the final analysis, a professional is, or ought to be, judged on his or her professional accomplishments, rather than being denigrated for human idiosyncrasies and personal failings.

In a conversation some months ago, Justice Neely advised this reviewer that he is presently working on a sequel to *How Courts Govern America*. According to the jurist, this book will explain

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<sup>36</sup> It would seem to this reviewer that appellate courts could eliminate many of their problems if all decisions were simply made *per curiam*. The Delphic Oracle, after all, spoke with but one voice. If we are to endow our courts with this mystique, then, perhaps, their pronouncements should be anonymous. This modest proposal would do much to alleviate the present cults of judicial personality, which promotes the crassest sort of speculation by practitioner, academic, and lay person. The appellate judges might even welcome this suggestion since it would, in some small part, mitigate against the nearly ceaseless speculations about how justice so-and-so might vote on a given issue.

why the courts do not work. If Justice Neely proceeds with his second book—and perseverance is one of his many personal qualities—then the Q. E. D. of opus II will be that America is not governed at all. Thus, the black flag of anarchy will be raised—but, one would trust, most assuredly not advocated—by one who once was, and perhaps still is, the youngest appellate judge in the English-speaking world. And by one who is generally viewed as the most conservative member of the West Virginia Supreme Court of Appeals. To borrow a phrase from the poet Robert Frost, this is indeed most “passing strange.”

The book is quite well written and interesting throughout. Justice Neely is highly opinionated, in the best sense of the word, and even if one does not concur in his opinions, he is in print, as in person, a most provocative thinker and protagonist. One could do worse than spend a day or two before the hearth perusing *How Courts Govern America*. As Robert Frost wrote in “A Considerable Speck,” “No one will know how glad I am to find/On any sheet the least display of mind.”

# West Virginia Law Review

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