ANOTHER BRIEF FOR BUSINESS

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Richard Neely. *Judicial Jeopardy: When Business Collides with the Courts*. (New York: Addison-Wesley, 1986). xvi + 182 pp. Notes. $19.95.

Book-length ruminations by sitting judges on judicial practice and reform are rare, and convention dictates that we greet them with the indulgence accorded Dr. Johnson's upright dog. Distinguished entries in the genre aside,[1] the bulk are praised for simply being—their existence taken, irrespective of their contents, to evince a reflective soul in the judicial machine.[2] Richard Neely, a justice of the West Virginia Supreme Court of Appeals, has written an undistinguished book that falls four-square into this exceptional canine category. But one is reluctant to treat it so generously, since its own spirit is so mean. In addition to throwing much darkness on an important subject—the relation and respective roles of business and courts in the United States—*Judicial Jeopardy* displays a disturbing enthusiasm for "rationalizing" business dominance of American politics, even as it recognizes such dominance as an enemy of democracy. Glib and tendentious, this book has a nasty bite.

Neely's announced purpose in *Judicial Jeopardy* is to improve business' performance in courts. The criteria for "improvement" are uninformed by any criticism of existing business goals. Neely simply wants business to win more often than it does. His motivation for making this argument is obscure, and its elaboration is often contradictory, but the central claims are these:

First, Neely asserts that courts are not only very important political institutions but also the "preeminent governing force" (p. 63) in the United States; moreover, a "legal/political revolution" (p. 10) now in progress will increase this preeminence in the future. Second, he argues that judges recognize and welcome their new powers, accept the "thesis of the legal realists that judges are simply powerful politicians" (p. 66), and now weigh into policy disputes with relish. As they do so, however, they are more confident than competent. Lacking adequate input from business, they are prone to an antibusiness bias in their decision making. Courts

[1] See, for example, Cardozo, 1921; Friendly, 1967; Coffin, 1980; and, always a somewhat special case, Posner, 1985.

[2] In accord with the well-known motto: "I am, therefore I think."

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have become "like so many loose cannons sliding around the legal deck," and pose a "hazard to business . . . that is qualitatively different from anything business has faced in the past" (p. 9). Third, Neely believes business has thus far failed to recognize the importance of courts and the dangers they pose. It lacks a strategic sense of the legal system and of how best to influence it. Fourth, he thinks it vital that business correct this problem by both sharpening its tactics inside courtrooms and lobbying judges outside them. "Courts must be perceived for what they are—both lawmakers and administrators—and business must gear itself up to be as successful in the court political forum as it is in Congress, the state legislatures, or the administrative agencies" (p. xvii).

Each of these claims is preposterous. I consider them in turn.

First there is the matter of the judiciary's status relative to other governing institutions, such as the legislature, the executive, and the bureaucracy. I will dwell on this claim at greater length than the others, both because it provides the key premise for the rest of Neely's argument, and because his views on this matter are probably less idiosyncratic than his views on other things.

At the outset I grant Neely the obvious point that the judiciary—while it lacks a taxing power, an army, or a mass constituency of its own—is relatively prominent in the United States. The chief reason for this is that other governing institutions are relatively less so. America is a famously liberal and fragmented society (Hartz, 1955), if not by destiny then at least by institutional design and history.[3] It features an elaborate constitutional scheme, described by John Quincy Adams (1839: 115) as founding "the most complicated government on the face of the globe"; a "weak" and divided central state,[4] and a corresponding air of "statelessness" (Nettl, 1968); a political party system—occupied by two of the oldest and least programmatic parties in the world, with weak vertical linkages between elites and masses—that promotes a "politics of heterogeneity" and division (Burnham, 1974); an "exceptional"

[3] Hartzian accounts (including Hartz's own) may be faulted for overestimating the importance of the early national experience in explaining the persistent vitality of liberalism. While such experience (the absence of feudalism and the extension of the suffrage before heavy industrialization) was indeed important, liberalism is a social practice and view that needs to be continually reproduced. A related problem is their underestimation of the vitality (and suppression) of alternative notions of social order at various moments in American history.

[4] The term "weak" is used as shorthand, and risks misunderstanding. The point is not that the legislature and executive were somehow "inadequate" to tasks of governance, but that the degree of central state capacity shapes the organization and focus of political demands. On adequacy, see Neumann (1957: 8):

> No greater disservice has ever been rendered political science than the statement that the liberal state was a "weak" state. It was precisely as strong as it needed to be in the circumstances. It acquired substantial empires, waged wars, held down internal disorder, and stabilized itself over long periods of time.

lack of worker organization, both in parties and secondary associations; an equally exceptional, and related, level of abstention from mass politics among the lower income classes; and a notably fractious and divided, but overwhelmingly dominant, business community. In institutional terms, this combination of complexity and political disorganization has led American politics to be characterized less by either ongoing bargaining among encompassing institutions or the competition of programmatic mass organizations, than by a concatentation of discrete deals cut between relatively narrow groups of (usually well-off) players. Deals come unstuck, and when they do, given the relative absence of political organization, Americans have traditionally looked to courts for the resolution of disputes (whether they get inside them is another matter). The often remarked prominence of the judiciary in the United States can thus be thought of as a natural correlate of the liberalism and fragmentation of American political culture.

This granted, Neely's claim that the judiciary is newly "preeminent" and that its dominance over other institutions will inexorably increase is by turns overstated, wrong, and dubious.

It is overstated in its suggestion that courts are now more powerful than they have ever been. As compared to their role in the nineteenth century's "state of courts and parties" (Skowronek, 1982), during the bad old days of economic substantive due process, the importance of the courts as governing institutions has rather clearly declined, not increased. To be at all sensible, Neely's claim of increased judicial power must take as its benchmark a presumed Golden Age of Statutes, beginning around the time of the New Deal and its immediate aftermath, when the judiciary deferred more fully to the other governing institutions than it does now. This is a distinctly narrower claim than his language about an "unprecedented" judiciary-led "revolution" would suggest.

Even this narrower claim, however, is wrong on the substantive changes in the *relative* importance of courts as governing institutions during the period considered. Consider the most evident changes in domestic and foreign affairs over the last fifty years. In the domestic arena, the post-New Deal era is centrally identified with the increased administrative regulation of private exchange and the rise of a minimal welfare state. This regulation (both economic and "social") did not stop with the New Deal surge; there was another famous surge in the 1960s, and yet another in the early 1970s. Its effect on the relative position of governing actors has been twofold, both detrimental to the position of the courts.

First, a huge number of policy determinations, once left to the statement of common law, were taken from courts by the legislature and codified in statutes. Of course the replacement of the common law regulatory system with a system of substantive administrative law was not complete; the law of products liability, almost entirely a judicial creation, is but one example of the judici-

ary's continued use of common law as a source of regulatory power. Nor, clearly, were the definiteness and internal consistency of statutes such as to preclude important judicial policy choices in the courts' "interstitial" interpretation and elaboration of them. Just as clearly, however, the range and tolerance of court power were importantly restricted. However inventive they may have been in interpreting the rulings of the FTC on consumer protection, the CAB on service obligations and air space rights, the SEC on financial disclosure and brokerage, the EPA on environmental controls, and the OSHA on work-place safety, courts no longer exercised the heady powers they once enjoyed in declaring the common law of property, contract, and tort. Somewhat more subtly, even their most independent assertions of a positive governing role within the administrative milieu—including "hard look" doctrine, the creation of private rights of initiation or action, and other efforts (Stewart, 1975; Stewart and Sunstein, 1982)—were critically informed and framed by that milieu, which was not of their creation. On the most expansive and sympathetic reading of such judicial efforts, they are designed "to facilitate identification and implementation of the values at stake in regulation" (Sunstein, 1984: 178)—not to substitute the views of the judiciary itself.[5]

Second, and if anything more obvious, administrative regulation and the welfare state have helped generate a new and powerful set of nonjudicial governing actors—the bureaucracy charged with administering these programs. To be sure, the growth of bureaucrats, like the growth of statutes, has given the courts new things to do. In addition to reviewing the behavior of the legislature and executive, they must review the behavior of the bureaucracy. But what is more significant here than the increment (if such occurred) in the quantity of judicial supervision is the expansive growth in the power of that which is supervised—supervised, it might be added (despite "hard look" and other innovations), with both distinctly limited powers of review and, particularly in the welfare area, all of "administrative law's sure instinct for the capillary" (Mashaw, 1983: 19). To insist otherwise, as Neely does, mistakes the flea for the dog.

Then consider foreign policy. Here what stands out during the post-New Deal period is a qualitative rise in the importance of foreign affairs to the operation of the American state, in particular

[5] This somewhat flatfooted view of the role of the common law in the age of statutes does not address some of the most interesting recent work on what that role is or should be (see, for example, Calabresi, 1982; Macey, 1986). My broad conclusions would not be altered by such engagement; their defense would only become more complicated. But this aside, and apart from the constraints of space, such inattention may be excused by the fact that Neely's argument, the subject of this review, proceeds at a much lower level of sophistication, and does not raise the issues or concerns explored in this recent work.

the growth in the importance of the "defense" function attendant on the United States's ascension to global dominance. Clearly, however, the chief institutional beneficiary of the new commitments to high military budgets, a nuclear capability, and a nearly continuous resort to force as an instrument of foreign policy[6] was the chief executive, not the courts that routinely excused or failed to inspect his antics. In sum, the major changes in American public policy over the past fifty years do not indicate a growth in the relative power of courts but a decline.

Let us now move back to the future, and consider Neely's claim that the judiciary's importance will grow ineluctably over the next generation (assuming, happily, that there is a next generation). While I loathe as anyone to making predictions, and cannot in any case show Neely to be wrong about events that have not taken place, I am quite dubious about this claim. Despite the slowdown in overt regulatory initiatives in the past several years, it seems most unlikely that the legislature is done with the common law. The much publicized discussion of "tort reform," for example, seems almost sure to issue in further statutory restriction of judicial discretion in this area, as regards both the award of damages and the development of doctrine. A more comprehensive regulation of the environment and at least some forms of high-risk production also seem likely (whatever the trade-offs made to concerns about economic growth). Like regulation in the past, this too will tend to diminish the courts' relative position.

More speculatively, the general "statelessness" of American political life seems likely to be challenged by the increasing impact of international behavior on the domestic welfare. However drowsy and inattentive it may be, the American state stands as guard between the international and domestic systems. To the extent that a response to the international environment is demanded by domestic actors, then it will likely serve to increase the power of the central state. Signs of this dynamic are already evident in the hot debate over international economic competition and trade. Virtually all the responses to international pressures currently discussed—including neoliberal strategies for a competitiveness-oriented industrial policy, a gradually accreting protectionism (the current response), systematic protectionism, and efforts at politically managed trade—entail more, not less, state power and involvement in regulating economic and social life. And that implies less, not more, power for the judiciary in the future.

Neely's second and third major claims—that judges pose a ma-

[6] This last point is not rhetorical excess. Blechman and Kaplan (1978) report that between 1946 and 1975, the United States used military force as an instrument of foreign policy 215 times, or roughly once every seven weeks. Their calculation does not include the Korean or Vietnam wars.

jor threat to business and that business does not know it—are even weaker than his first, and can be dealt with more summarily.

Regarding the alleged judicial threat, I again grant him the obvious. It is indisputable that judges make law as well as "discover" it. And it seems true that judges are more prepared than they were fifty years ago to acknowledge this explicitly, and even to give credit for this insight to the legal realists. From this, however, it hardly follows that judges pose an "unprecedented threat" to business.

One reason for this is that the "realist" lesson taught in law schools is not threatening. The old realists emphasized that law was indeterminate and inconsistent, that (despite the rituals and rhetoric of formalism) judges' policy preferences strongly influenced their decisions, and that a democratic society could ill afford vesting social power in institutions beyond democratic control. This was clearly a debunking program. It aimed to show that Justice's blindfold was only a veil, confusing the observed more than the observer; and it presented a radical democratic challenge to legal authority that has yet to be successfully answered. Perhaps because of its frontal political challenge, however, legal realism was soon domesticated in American law schools.

A minority of scholars, appropriating part of the analysis (but almost none of the criticism) of judicial behavior as unscientific, set about converting law to policy "science"—either by arguing directly that neutral principles of public administration were discoverable, or by making neutral check lists of values that judges might consider. The most famous (albeit nonlineal and heavily mutative) descendant of this effort is the law and economics movement. Its effect, it seems fair to say, has not been detrimental to business interests.

The dominant response, however, which provided a point of departure for subsequent efforts in constitutional theory, attempted to press into focus a set of values sufficiently widely endorsed (by both judges and the surrounding community) to be "objective," while sufficiently meaty to provide a meaningful standard for assessing judicial behavior. Sometimes limited to the values of legal process or even "reason," sometimes more adventurous in their inclusiveness, such efforts often obscured their relation to realism by emphasizing a different aspect of its critique of judicial behavior—the analysis of courts as symbolic. With many missed steps along the way, this appropriation of the realist legacy emerged as a postrealist gospel of the courts as legitimating institutions, dispensing symbols to the deserving and giving voice and cachet to the most fundamental values of American democracy—including, among those most sensitive to the courts' "countermajoritarian difficulty," the "passive virtues" (Bickel, 1962) of judicial restraint itself.

This effort was fraught with difficulties (not the least its

premise of a relatively robust "community"), and amounted, as those who were law students anytime between the late 1950s and the middle 1970s may recall, to pretty thin gruel. It was also notably hard to square with the notably unreasonable, nonsymbolic, and undeserving things the courts did day to day. Until very recently, then, what survived of the realist legacy among most of the legal professoriate (and its students) was only a disabling cynicism. Knowing just enough not to believe in anything, let alone the objectivity of the law, "they were like a priesthood that had lost their faith but kept their jobs" (Unger, 1983: 675). This too posed little threat to business.

Another reason for business not to worry is that law schools do not exhaust reality. Whatever the goings on in the academy, out in the "real" world old-fashioned power relations still hold sway. And despite certain stirring insurgencies during the 1960s, predominately by black Americans, over the past generation the general position of business in society can hardly be judged to have been severely tested. As union membership continued to decline, mass abstention from voting continued to increase, and the political parties became even more evidently dominated by corporate elites, it is probably true that the judiciary, which for most of American history was totally dominated by the upper class, became slightly less so (although the most recent appointees to the federal bench, fully a quarter of whom are millionaires, qualify even this qualified claim). But it is difficult to see how this posed a significant threat to business, or capitalism, or even the distribution of wealth and income. Despite their increased demographic diversity, judges were still recruited from safe quarters and nourished by a deeply conservative and comparatively business-oriented bar (Howard, 1981; Nelson, 1985; Rueschemeyer, 1973; Shapiro, 1981). They still displayed a profound respect for private property and its prerogatives, finding insular minorities worthy of special solicitude but not poor people; expressing disquiet about bureaucratic discretion but preserving the right-privilege distinction; carving congressional seats from equivalent populations but limiting the control of campaign spending; permitting workers to use economic pressure to get better wages but not to control investment. They gave corporate speech new protection, and left foreign policy, that magical realm where private interests become the "national" one, untouched. And then the Court, and the courts, became more conservative.

In short, if courts have become neorealist "loose cannons," they still tend to shoot blanks at business. The 'haves' still come out ahead (Galanter, 1974). Neely should stop worrying, or at least find himself some evidence for concern.

It is equally hard to find much support for Neely's third claim regarding business ignorance of the role of courts and the dangers that they pose. His own argument for this is conclusory and un-

substantiated. Neely reports his impression that business could do better in court (couldn't we all?) if it thought more about it (for example, by making wider use of policy arguments to judges), from which he infers that business has not thought about the problem, from which he infers, *given* the gravity of the problem, that it (along with, presumably, its top lawyers, most of whom clerked for some judge or at one point worked for the government) is ignorant of the problem. He also offers an "estimation" (p. 133) that business spends only about 10 percent of its lobbying resources on the courts, a figure out of line with what *Neely* considers the share of business risks emanating from those bodies to be. How he arrives at this estimate, which relies on a questionable distinction between the effects of legislative and judicial business advocacy, is unclear. One presumes, however, that it does not include the billions business spends on general advocacy advertising in journals read by judges, or the tens of billions spent annually on legal talent, who must have *some* significant effect on judicial opinion.

Since Neely presents no real case for his assertions, it is difficult to argue against them. One can, however, note various bits of evidence and impressions that suggest business has a very high strategic sense of law in general and of Neely's *bête noire* in the legal world—regulation—in particular. First, there are the billions of dollars spent on the legal and other advocacy just noted. Second, while I remain unfamiliar with the quality of brief-writing in West Virginia's state courts, a fresh glance at several (admittedly completely unscientifically selected) briefs from other states (principally New York) and in federal settings confirms my longstanding (and, I had thought, unexceptional) impression that lawyers are quite adept and unbashful in making policy arguments, particularly in those very common situations that involve a regulatory statute, rule, or practice. Third, there exist well-developed networks of commercial newsletters, trade association watchdogs, and more informal groupings dedicated to monitoring legal developments nationwide in our decentralized legal system, keeping track of all those different "loose cannons." Fourth, there are numerous instances of extremely intense business organizing around particular legal and regulatory issues. In labor law, for example, it is hard to observe the activities of the Labor Law Study Group in the 1960s, or the Business Roundtable in the 1970s, or the National Association of Manufacturer's Council on a Union-Free Environment, or the National Right to Work Legal Defense Foundation, or a host of other business groups, and not conclude that business, contrary to Neely's assertions, is quite competent at pressing its interests as a corporate body. The proliferation of conservative "public interest" legal foundations, busy challenging all sorts of regulations in the courts, also might be noted. Fifth, there is the plain fact, scattered across the front page on a regular basis, that firms increasingly compete with each other through the use of regula-

tory law—using antitrust and securities regulation in defending tender offers, antitrust in gaining market share (consider MCI, a company practically built out of regulation litigation), FOIA in determining rivals' research and marketing strategies, consumer law in cutting insurance costs, and so on.[7] This suggests that business knows a lot more about the use of regulation than Neely gives it credit for, while also underscoring a point that perhaps should be made explicitly—as with market competition generally, so with competition through the law: The major legal threats to business come not from judges, but from other business.

This brings us, then, to Neely's recommendations. These are various, and include brief bits of advice on such matters as how to handle outside counsel, how to educate young lawyers and assign them to cases, and when to settle and when not to. The chief recommendation, however, and the one that best captures the spirit of this book, is Neely's suggestion that business lobby judges outside of court. Recall that his ultimate goal in this book is to make business "as successful in the court political forum" as it is in other governing institutions. What is striking about this ambition is that he characterizes those other institutions as profoundly undemocratic, and locates business domination of them as a chief source of their democratic failure. Neely repeatedly observes that the unrepresentative behavior of legislative representatives, for example, owes much to the fact that money talks to politicians and that business has the most to say—"business may not 'own' the legislatures, but business has a good long-term lease!" (p. 82); "business has money, and legislatures are easy to bribe" (p. 102). The suggestion that business improve its performance in court to a point equivalent to its performance in legislatures, then, is effectively a suggestion that business dominate courts as well in undemocratic ways.

The medium of dominance again is money. In assessing the potential for using it creatively, Neely's starting point is the observation that "judges are not very well paid, and so one of the things that judges and their wives [*sic*] do for recreation is attend judicial conferences and training sessions where [someone else] pays their expenses" (p. 152). If business wants to influence judges outside the courtroom, one obvious way to do so is to invite them on vacations. Neely's model here is a seminar on media and the law, a "luxurious three day vacation" (p. 150) at the elegant Greenbrier resort in White Sulphur Springs, West Virginia. This resort, he enthuses in embarassing detail, is:

> a particularly good place for conferences because almost the whole cost of a husband and wife's sojourn there is chargeable to the participant; the difference between a

[7] George Mundstock emphasized this point to me in a conversation about recent corporate litigation.

> single room and a double room—with two lavish meals a day, is only $20 (p. 152).

The Greenbrier affair was sponsored and paid for by the Gannett Corporation and the Ford Foundation. Its purpose, in Neely's view, was basic lobbying—giving the media the chance, in a congenial setting, to "explain its operational problems to judges" (p. 150)—but Gannett was clever enough to have invited some distinguished law professors along, and their banter contributed a "patina," "appearance," and "veneer" (p. 151) of objectivity and scholarship to the proceedings. While recognizing that the media is a special case, Neely sees no reason, so long as that appearance is preserved, why other industries could not do the same thing. "Training" sessions can abound. But there is no need to stop there. Industries should also consider subsidizing legal research and developing their own model law. "For example, one or more insurance companies might commission a foundation [note that appearances remain important] to craft model U.S. Supreme Court decisional law limiting causes of action and the type of recoveries in tort cases" (p. 180). After that, well, the sky's the limit.

Such suggestions, like this book, succeed in being both superfluous and offensive. They are superfluous in that, as noted above, business already does most of the things Neely recommends it do to improve its reception in court and elsewhere. It and its affiliate foundations, think tanks, policy research institutes, and yes, even legal education projects, already almost fully occupy the "marketplace" of "free" ideas that passes for public policy discussion in this country. One would think that even a casual observer of American politics in recent years would recognize as much. They are offensive in that there is something ugly about rejoicing in the distorted debate that ensues, and urging further distortion, particularly when the celebrant, like Neely, has literally nothing to say about why such furtherance would be desirable. We expect more of judges than the "cheerful cynicism" (p. 100) Neely ascribes to the business lobbyists whose ranks he joins in this book, and more than barely concealed envy of the corporate "gravy train" that feeds elected politicians. The judiciary, symbolic or not, should not simply egg on the victors in an already exceptionally business-dominated society. Whatever their sometimes inflated self-conception, judges are not the most important figures in American politics. But they do have considerable power. Let us hope they use it more responsibly than Judge Neely urges here.

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REFERENCES

ADAMS, John Quincy (1839) *The Jubilee of the Constitution*. New York.

BICKEL, Alexander (1962) *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. New York: Bobbs-Merrill.

BLECHMAN, Barry M., and Stephen S. KAPLAN (1978) *Force Without War: U.S. Armed Forces as a Political Instrument*. Washington, DC: Brookings Institution.

BURNHAM, Walter Dean (1974) "The United States: The Politics of Heterogeneity," in R. Rose (ed.), *Electoral Behavior: A Comparative Handbook*. New York: Free Press.

CALABRESI, Guido (1982) *A Common Law for the Age of Statutes*. Cambridge: Harvard University Press.

CARDOZO, Benjamin N. (1921) *The Nature of the Judicial Process*. New Haven: Yale University Press.

COFFIN, Frank M. (1980) *The Ways of a Judge: Reflections from the Federal Appellate Bench*. Boston: Houghton Mifflin.

FRIENDLY, Henry J. (1967) *Benchmarks*. Chicago: University of Chicago Press.

GALANTER, Marc (1974) "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 *Law & Society Review* 95.

HARTZ, Louis (1955) *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution*. New York: Harcourt Brace.

HOWARD, J. Woodford, Jr. (1981) *Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits*. Princeton: Princeton University Press.

MACEY, Jonathan R. (1986) "Prompting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model," 86 *Columbia Law Review* 223.

MASHAW, Jerry L. (1983) *Bureaucratic Justice: Managing Social Security Disability Claims*. New Haven: Yale University Press.

NELSON, Robert L. (1985) "Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm," 37 *Stanford Law Review* 503.

NETTL, J. P. (1968) "The State as a Conceptual Variable," 20 *World Politics* 559.

POSNER, Richard A. (1985) *The Federal Courts: Crisis and Reform*. Cambridge: Harvard University Press.

RUESCHEMEYER, Dietrich (1973) *Lawyers and Their Society: A Comparative Study of the Legal Profession in Germany and in the United States*. Cambridge: Harvard University Press.

SHAPIRO, Martin (1981) *Courts: A Comparative and Political Analysis*. Chicago: University of Chicago Press.

SKOWRONEK, Stephen (1982) *Building a New American State: The Expansion of National Administrative Capacities*. New York: Cambridge University Press.

STEWART, Richard B. (1975) "The Reformation of American Administrative Law," 88 *Harvard Law Review* 1667.

STEWART, RICHARD B., and Cass R. SUNSTEIN (1982) "Public Programs and Private Rights," 95 *Harvard Law Review* 1193.

SUNSTEIN, Cass R. (1984) "Deregulation and the Hard Look Doctrine," 1983 *Supreme Court Review* 177.

UNGER, Roberto Mangabeira (1983) "The Critical Legal Studies Movement," 96 *Harvard Law Review* 561.