Constitutional Cultures: The Mentality and Consequences of Judicial Review

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REVIEWED BY LEONARD P. STRICKMAN*

As is often the case when a new book crosses my desk, I read the dust jacket of Robert F. Nagel's book, Constitutional Cultures, which attempts to set out the thesis for his particular endorsement of judicial self-restraint by the United States Supreme Court. In his summarized views on the evils of judicial activism the dust jacket asserts "constant application of the artificial logic of legal doctrine diminishes public support for basic values...[,] in their ambitious efforts to give immediate effect to the Constitution, courts gradually undermine the very system they seek to protect." Later, the same summary concludes, "If constitutional law is to be wise and useful...[,] we must resort to it less often."

I could not help thinking, as I turned to the Table of Contents, "What about Brown v. Board of Education?" I was therefore delighted to find that Chapter I was titled "What About Brown?" and realized that Nagel, whose scholarship I have always found provocative, had hooked me.

What about Brown? Despite its tortured doctrinal analyses and problematic historical supports, there would appear to be a wide consensus amongst constitutional scholars and political scientists that this exercise of judicial activism, which was without precedent for its sweeping social consequences, was an appropriate exercise of judicial authority in the vestments of constitutional interpretation. Nagel does not disagree with this consensus but is compelled to justify its apparent inconsistency with his primary thesis:

Our political life had made available to the Justices a body of common experience about both segregation and integration. In the context of this experience, racial exclusion unmistakably involved acute insult and profound political injustice; in light of this experience, nondiscriminatory attendance policies stood, not as imaginable, but as familiar alternatives. Everyday perceptions grounded Brown in a morality that was both powerful and widely understandable.¹

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¹ R. Nagel, Constitutional Cultures 5 (1989).
This passage reflects an important part of the Nagel thesis. Constitutional meaning is to be derived more from culture—"common experience" and wide understanding—than from interpretation, the often anti-cultural device of lawyers. Further, because the constitutional cultures—widely shared assumptions about both governmental structures and public moral values—are more accurately identified by the political process than the judiciary, judicial intervention should occur only where there has been a departure from the clear prescriptions of the Constitution, or where, as in Brown, an aberrant regional political structure has acted in contradiction of national cultural norms. Negative consequences which flow from a more active judicial role are that:

1. opportunities for the evolutionary development of constitutional cultures are cut off by judicial pronouncements; and
2. overall respect for the law as an instrument of justice is reduced.

Nagel amplifies his basic thesis by examining the judicial role in three specific areas of constitutional adjudication: free speech, federalism and equal protection. He believes there is a constitutional culture which constrains the suppression of that free speech which is of political consequence, and that judicial interventions tend either to undermine that culture (for example, when reviewing the regulation of corporate political contributions, commercial advertising or nude dancing) by embracing within the concept activity not worthy of similar respect, or to cause suppression of political speech by carefully drawing lines about that which is protected, thus encouraging regulation or prohibition of that which is outside the line.

His stated assumption that "politicians . . . understand . . . the needs and values of a system of free expression . . . on which they depend" would appear naive, given that it is those who have achieved public office who make governmental decisions, and whose maintenance of power may be threatened by free expression. Moreover, in light of technological advances which permit government to more readily than ever suppress civil liberties, openly or surreptitiously, there is an argument that the need for judicial protection of first amendment values has actually increased in the second half of the twentieth century.

I surely accept Nagel's view that there is a social and political culture embracing free expression which is vital to the viability of the

2. Id. at 55.
first amendment, but I believe he dismisses too summarily the role that judicial interpretation has played in reinforcing that culture. It may be that nude dancing and commercial advertising are not at the core of the culture, but their protection by the Supreme Court provides an important buffer against the erosion of liberties more central to the maintenance of a democratic society. In other words, if we have our interpretive battles about nude dancing, we are less likely to have to confront issues of seditious libel. Rather than undermining the core values of the first amendment, judicial activism tends to reinforce them. While I cannot prove this proposition empirically, the health of those core values after a half century of judicial activism at the periphery would seem to refute Nagel’s concerns.

When one is arguing for judicial restraint as a matter of process, every bad judicial decision may be used as support for the general proposition. I agree with Nagel, for example, that Board of Education v. Pico,3 a Supreme Court case limiting the right of a local school board to decide which books should be purchased by a school library, was wrongly decided. Uniformly bad decisions might prove that courts should not make decisions, but it is simply fallacious to argue a process result by substantive illustration.4

Like most judicial restraint advocates of this era, Nagel makes an exception for judicial intervention on behalf of states’ rights, particularly in defending the result in National League of Cities v. Usery.5 Apparently theories of federalism provide justifiable occasions for judicial activism because they are based on historical understanding of the intent of the framers, rather than on more problematic and subjective judicial interpretation. Nagel’s suggestion that the states are not capable of protecting their presumed sovereignty from federal overreaching through the political process is probably correct; but his companion view that individual rights are likely to be protected by that same process is difficult to accept. In my view, National League of Cities was decided incorrectly, not because the Court should have foresworn decision-making on process grounds, but because principles of Constitutional federalism, as developed through the process of judicial interpretation, supported the validity of the Fair Labor Standards Act as applied to state and local governments. The framers might well have been shocked by such a result; but it is through the

4. Nagel cites school desegregation decrees to argue activist courts are likely to abuse the first amendment in the course of protecting more subjective constitutional values. See Nagel supra note 1, at 55, n.152.
process of interpretation and incremental change that our Constitution has had the capacity to respond to both technological progress (particularly in transportation and communication) and social need. Judicial interpretation, rather than defeating our Constitutional culture, has contributed to it. Nagel writes:

To see the purposes of judicial review almost entirely in terms of securing individual rights is to invert the priorities of the framers and ultimately to trivialize the Constitution. The framers' political theory was immediately concerned with organization, not individuals. Their most important contributions had to do with principles of power allocation . . . . Even the danger of local majoritarian excess—so frequently cited today as a justification for vigorous protection of individual rights—cannot reconcile the modern emphasis on rights with the priorities of the framers. 6

The Bill of Rights was essential to the adoption of the Constitution, notwithstanding its subordinate role in the eyes of the original framers, and the fourteenth amendment is entitled to no less recognition than Article I because of its late adoption. Indeed, the fourteenth amendment became a part of the Constitution after the full acceptance of the principles of judicial review, and was in large part a response to the exercise of constitutional interpretation by the Supreme Court in Dred Scott v. Sandford. 7

Nagel's discussion and critique of the Supreme Court's equal protection jurisprudence provides one of the most persuasive chapters in the book. His analysis of the cases in which the Court has applied the "mere rationality" test to strike down legislative classifications, demonstrates convincingly the absence of a conceptually sound theoretical basis for the Court's development of the law. Assuming, however, that the intent of the framers of the equal protection clause identified by the Slaughterhouse cases as exclusively concerned with racial discrimination was not the final word on the subject, the Court's troubled and unconvincing search for a sound analytical framework in which to consider equal protection claims is not a sufficient reason for denying the ultimate value of the process of interpretation.

Nagel questions effectively the employment of rationalism in constitutional judicial review. "Important social decisions," he states, "cannot be limited to those areas for which information is readily

6. NAGEL, supra note 1, at 64-65.
7. 60 U.S. (19 How.) 393 (1856).
available and susceptible to conclusive analysis."
Indeed he concludes:

Legislative "irrationality," . . . provides real advantages to a
democratic system. If values need not be formally articulated
and consistently pursued, legislators can serve many interests
at once.9

This is persuasive, except in those areas where the nature of the
classification demands that the values being furthered be examined
with closer scrutiny, as the Court does when it uses an elevated
standard of review. Rationalism is a device which may well be too
easily manipulated by reviewing courts when the presumption should
favor the political process, for example in the "mere rationality" test.
However, rationalism does provide useful interpretive tools appropri-
ate for judicial application where the presumption of deference is
overridden, such as when the legislature employs a suspect classifica-
tion.

In his final chapter, Nagel considers the characteristics of judicial
interpretation of the Constitution embraced by notions of standards
of review—as he characterizes them, the formulaic Constitution. His
primary criticism of the formulaic model is that "[i]t achieves organ-
izational control and intellectual respectability, to the extent that it
does so, by excluding the general public from the Court's audience
and impoverishing the Court's thought."10

Nagel suggests that the Court's formulaic style is addressed to its
clerks, lower courts and academics,11 and by excluding the public,
defeats the development of valuable constitutional cultures. Notwith-
standing their doctrinal shortcomings, he exalts the opinions of Chief
Justice Marshall in McCulloch v. Maryland2 and Chief Justice Warren
in Brown v. Board of Education3 for their inspirational, and non-
formulaic, rhetoric. I am not sure that the language of judicial
opinions was incorporated into a societal culture in either of these
cases, but I do believe that Nagel has given too short shift to the
importance of the Court's speaking to the players in the constitutional
scheme—lower courts, legislatures, government officials and the bar
which must advise its clients with respect to constitutional questions.

8. NAGEL, supra note 1, at 114.
9. Id. at 119.
10. Id. at 131.
11. See id. at 129.
While the formulaic approach has surely not created certainty regarding the resolution of hard constitutional issues, it has provided predictability and routineness in a great portion of the functioning of governmental institutions. To forego the effort to achieve analytical models which will provide predictability and guidance for actors in the constitutional system will, in my opinion, impair the ultimate viability of the system.

In any event, Robert Nagel has written a stimulating book, one worthy of serious attention by constitutional scholars. His critique of the Supreme Court is novel and challenging, although I would conclude that his attack on the process of judicial interpretation is, in the final analysis, unpersuasive.