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## Constitutional Cultures: The Mentality and Consequences of Judicial Review by Robert F. Nagel

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## BOOK REVIEW

CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW By Robert F. Nagel.\* University of California Press, 1989. Pp. 232, including index.

*Reviewed by Randolph J. May\*\**

Robert F. Nagel's slender new volume, *Constitutional Cultures: The Mentality and Consequences of Judicial Review*,<sup>1</sup> should be recommended reading for those interested in the always lively debate concerning the appropriate role of judicial review in our constitutional system. While much of the material contained in Nagel's book has been published previously as separate essays,<sup>2</sup> these essays, when brought together, present a strong case for what Nagel perceives as an encroachment by the United States Supreme Court on public policy decisionmaking that properly should be left to the other branches of the Federal Government or to the states.<sup>3</sup>

At bottom, Professor Nagel's thesis is that the "routinization of judicial power" over the past three decades is one of the main enemies of our nation's constitutional order.<sup>4</sup> As a result of this excessive exercise of judicial power, he believes a wide gap has developed in this country between what he calls the "legal culture" and the "political culture."<sup>5</sup> This gap has under-

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1. R. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* (1989).

2. Nagel lists these essays in his acknowledgements. R. NAGEL, *supra* note 1, at xi.

3. I say encroachment by the Supreme Court because, although Nagel's subtitle and some parts of his text might lead one to assume a broad scale concern with excessive judicial intervention at all levels of federal and state courts, in fact, his book focuses almost exclusively on decisions of the Supreme Court.

4. R. NAGEL, *supra* note 1, at 2-3.

5. *Id.* at 1. While the distinction between the so-called "legal culture" and the "political culture" is crucial to Nagel's thesis, and he uses these terms throughout the book, he never defines what he means by the two terms in any substantive way. He does provide a cursory explanation in the first two sentences of the book: "The meaning of the Constitution of the United States, of course, emerges from the adversarial arguments and judicial opinions that

mined popular respect for constitutional principles and the general health of our political system.

In Nagel's mind, the judiciary is now viewed as so antagonistic to the popular culture that "the courts' basic function has become that of critic and reformer of the general culture."<sup>6</sup> It was one thing for the Supreme Court to attack one aspect of what Nagel describes as "regional culture" in *Brown v. Board of Education*,<sup>7</sup> but, it is quite "another thing for the current Court to isolate itself from the general culture, retaining ties of language and intellectual approach only to an academic elite."<sup>8</sup>

Nagel finds it troubling that we turn to "a short, old legal document" to decide contemporary issues relating to family life, "the proper way to suspend a public school student, or . . . the correct relationship between the Congress and the executive agencies administering the welfare state."<sup>9</sup> If the issue of judicial intervention were fresh (as in the pre-*Brown* era) "it would seem so much simpler and more direct for courts to admit that the Constitution either does not bear at all, or bears only in complex and indeterminate ways, on most specific public issues."<sup>10</sup> In fact, Nagel argues that courts

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make up the legal culture. It is less commonly appreciated that the Constitution is also expressed in the institutions, behaviors, and understandings that form the general political culture." *Id.* For an insightful essay discussing the role of the Constitution as a unifying force in shaping a common political culture, see Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303 (1986). Karst takes a somewhat more sympathetic view of the judiciary's role in our constitutional system:

In our society, one of the most prominent bridges between ideology and behavior is the law, particularly constitutional law. It is fair to say that the Constitution today is our pre-eminent symbol of nationhood and that the doctrine of judicial review is a major practical support for both the attitudinal and the behavioral elements of the American civic culture.

*Id.* at 373 (footnote omitted).

6. R. NAGEL, *supra* note 1, at 155.

7. 347 U.S. 483 (1954). Nagel characterizes *Brown v. Board of Education* as "the fulcrum on which the world of judicial review was made to move decisively." R. NAGEL, *supra* note 1, at 4. He seems particularly concerned that *Brown* be satisfactorily reconciled with his thesis of excessive judicial encroachment. He argues that, although *Brown* "departed from powerful evidence regarding the intended consequences of the equal protection clause and because it rested on dubious and transient social scientific findings," the decision nevertheless was consistent with the prevalent political culture outside the South. *Id.* at 4-5. Unlike many of the other controversial Supreme Court decisions after *Brown* that, in Nagel's view, have assaulted the popular culture, "*Brown* confirmed and enforced the understanding of 'equal protection of the laws' held and practiced by the dominant national culture." *Id.* at 5. In light of the controversy engendered throughout the country by the progeny of *Brown* (for example, in the school busing and affirmative action areas), many might wonder whether Nagel's characterization of *Brown*'s consistency with the "dominant national culture" is a bit too simplistic.

8. R. NAGEL, *supra* note 1, at 155.

9. *Id.* at 3.

10. *Id.* at 3-4.

should refrain from holding unconstitutional the determinations of other branches of government, and instead reserve "the judiciary's power to invalidate the decisions of other institutions . . . for those special occasions when some aberrant governmental action is emphatically inconsistent with constitutional theory, text, and public understanding as expressed in prolonged practice."<sup>11</sup>

What is the underlying reason for the Supreme Court's supposed "assault" on our country's general culture? Or, as Nagel puts it, why has the Constitution come to be represented by hundreds of volumes of judicial interpretation that purport to set forth prudential and moral principles relevant to almost any public issue? Professor Nagel has no hesitancy in supplying the answer. Lawyers, who are nurtured by legal training that emphasizes argumentative skills, have made constant reinterpretation seem almost indispensable to our conception of the Constitution. Nagel claims that lawyers almost never seek simple and clear meanings; rather, in order to be successful, lawyers must possess acute sensitivity to the potential for intellectual uncertainty. Indeed, legal training emphasizes "interpretation" grounded in nuances. Lawyers necessarily will present arguments in a way that stretches existing "interpretation" to accommodate even the most extraordinary factual situations. In this manner, "the inhibition against disputing even core meanings begins to weaken."<sup>12</sup>

To Nagel, this continual "interpretation" and "reinterpretation" of constitutional meaning has serious implications for the stability of political order. To the extent that the Constitution's meaning is seen as constantly changing, the social consensus claimed to be embodied in the Constitution is weakened.

Nagel devotes a good deal of attention to first amendment cases to support his thesis about overreaching judicial review. He uses notorious cases such as *Cohen v. California*,<sup>13</sup> *Erznoznik v. City of Jacksonville*,<sup>14</sup> and *Miller v.*

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11. *Id.* at 3.

12. *Id.* at 20.

13. 403 U.S. 15 (1971). In *Cohen*, the Court overturned on first amendment grounds a breach of the peace conviction that was based on the wearing of a jacket displaying the words "Fuck the Draft." In criticizing the *Cohen* decision, Nagel describes the jacket message as consisting of "three tasteless and almost contentless words . . ." R. NAGEL, *supra* note 1, at 45. While most people might agree with Nagel's characterization of the message's taste, it is difficult to understand what he means by characterizing the message as "almost contentless." The vast majority of people probably would understand the message to mean that Cohen did not think highly of the draft.

14. 422 U.S. 205 (1975) (a town may not apply special restrictions to drive-in movies that show nudity).

*California*<sup>15</sup> to support his contention that "the judiciary's use of elaborate explanations and high-sounding principles to resolve specific cases, including many that are extreme and difficult, erects obstacles to an enhanced public appreciation of free speech."<sup>16</sup> Nagel asserts that these types of decisions will cause the public to begin to ask why, if "freedom of speech is so important, is it so often invoked to protect seemingly silly, unsavory, or dangerous activities?"<sup>17</sup>

Certainly, the Supreme Court's recent flag burning decision, *Texas v. Johnson*,<sup>18</sup> is one in which the Court's decision probably lacks widespread "public appreciation."<sup>19</sup> Professor Nagel would without doubt characterize the flag burning case, in light of the immediate public outcry that followed the decision, as another example of excessive judicial encroachment. In line with what Nagel believes the public has come to expect, Justice Brennan's opinion for the five-member majority contained a ringing exposition of the "high-sounding principles" upon which controversial first amendment cases are made to stand.<sup>20</sup> But, will most Americans disagree with the majority's assertion that Texas prosecuted Johnson because of the *content* of his message, rather than the particular *method* he chose to express his message, in light of the fact that many alternative modes of expressing his views were available to him?<sup>21</sup>

Perhaps many will disagree with the majority's view of the first amendment. Therefore, one may be quite sympathetic to Nagel's concern that decisions of this kind damage public understanding and appreciation for the principle of freedom of speech.<sup>22</sup> Nevertheless, despite this quite legitimate

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15. 413 U.S. 15 (1973). Although *Miller* dealt with the mailing of sexually explicit materials, Nagel concluded that "[n]ude dancing apparently is a protected activity . . . if it does not violate the obscenity standard set forth in *Miller*." R. NAGEL, *supra* note 1, at 45 n.108.

16. R. NAGEL, *supra* note 1, at 47.

17. *Id.*

18. 109 S. Ct. 2533 (1989).

19. Another example of a first amendment case decided this past term that most likely lacks widespread popular support is the dial-a-porn case, *Sable Communications of California, Inc. v. FCC*, 109 S. Ct. 2829 (1989) (Congress may ban dial-a-porn services that are obscene, but a total ban on indecent telephone messages violates the first amendment).

20. For example, Justice Brennan declared:

We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength. . . . It is the Nation's resilience, not its rigidity, that Texas sees reflected in the flag — and it is that resilience that we reassert today.

*Johnson*, 109 S. Ct. at 2547.

21. *Id.* at 2557 (Stevens, J., dissenting).

22. Cf. Hafen, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685. Dean Hafen argues that first amendment decisions that place too much

concern, Nagel's plea that generally avoiding judicial review in such cases may prevent further damage to the body politic seems draconian.<sup>23</sup> While Nagel acknowledges that protection of individual rights may require frequent judicial intervention,<sup>24</sup> he does not provide much guidance concerning the basis upon which courts should decide in a particular case whether to avoid review. The answer surely cannot turn upon the results of the latest, or even the most respected, public opinion polls, nor does Nagel suggest that it should.<sup>25</sup>

Nagel's critique of the Court's jurisprudence in cases involving federalism and equal protection issues is also forceful and, as in the first amendment area, supported by extensive discussion of the precedent that concerns him. He argues that the modern decisions reflect a strong bias in favor of protecting individual rights at the expense of the structural principles of federalism and separation of powers:

The frame of mind that is created by concentration on the direct, tangible protection of individuals does not easily appreciate the less determinate requirements of constitutional structure. A judicial system deeply engaged in achieving immediate justice for all individuals will not be sensitive to, or much interested in, the intellectual and emotional preconditions for political competition between sovereigns.<sup>26</sup>

As one might suspect, Nagel is critical of the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*<sup>27</sup> because of the

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stress on individual rights, to the exclusion of the institutional values embodied in the amendment, exact a toll on the cohesiveness of the political community. Moreover, Hafen states that the emphasis on individualism may have grown "cancerous" to the extent that it is undermining such institutions as family, church, and local community. *Id.* at 703. "[T]he American approach has become so individualistic and unbalanced that it has severed the connections between personal values and social values that European approaches have retained." *Id.* The first amendment must protect institutional as well as individual interests. These institutional interests sustain and nurture individual development and are the source of social and political continuity for our society. *Id.* at 704.

23. R. NAGEL, *supra* note 1, at 58.

24. *Id.* at 59.

25. It may be appropriate here to point out that while the premise of Nagel's book rests upon the asserted substantial divergence between what he calls the "legal" and "political" cultures, *see supra* note 5, he makes no attempt to provide any support for this proposition, either by way of empirical studies or even anecdotal evidence. For example, Nagel does not cite or rely upon any studies or other evidence to gauge public opinion on the controversial Supreme Court decisions he criticizes. Thus, he never establishes, or even attempts to establish, that the "legal culture" is out of step with the "political culture" to the extent assumed.

26. R. NAGEL, *supra* note 1, at 82.

27. 469 U.S. 528 (1985). *Garcia* overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976). The Court in *National League of Cities* held that the extension of the Fair Labor Standards Act's wage and hour provisions to most state employees was unconstitutional as a

Court's unwillingness to engage in the same type of case-by-case balancing process to protect the values inherent in federalism that it so often uses in the first amendment and equal protection areas.<sup>28</sup> According to Nagel, the *Garcia* Court's distaste for grappling on a case-by-case basis with the "traditional government function" test that had been set forth in *National League of Cities v. Usery*<sup>29</sup> is contrary to the Court's enthusiasm for applying equally ephemeral balancing tests in cases involving the protection of individual rights.<sup>30</sup> Nagel concludes that in its zeal to protect individual rights, the Court, as the prompt overruling of *National League of Cities* illustrates, has not been nearly as interested as it ought to be in protecting and maintaining the allocation of powers that the framers built into our federal system.<sup>31</sup>

Nagel's book constitutes an important contribution to the controversy about the Court's role in public policy formulation, particularly in light of cases such as the flag burning and abortion decisions<sup>32</sup> of this past term. One of the real virtues of *Constitutional Cultures*, aside from the fact that Nagel's prose is eminently readable, is the extent to which he has provided the reader with the authority upon which he relies for his critique. The book contains sixty-nine pages of notes,<sup>33</sup> a testament to the fact that Nagel almost never discusses a point without citation to specific authorities. Consequently, *Constitutional Cultures* will make a handy reference tool for the practicing lawyer, as well as the intended grist for the mill worked by constitutional scholars.

Despite Nagel's considerable achievement, ultimately his book is unsatisfying in one important respect. Having identified what he regards as the serious threat posed by the modern Supreme Court's jurisprudence, he offers very little in terms of concrete suggestions for change. In fact, he admits that "I have no definite prescriptions for what the Court's roles ought to be

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violation of the tenth amendment and would impair the State's ability to act effectively in a federalistic system of government. *Id.*

28. R. NAGEL, *supra* note 1, at 60-65.

29. 426 U.S. 833 (1976).

30. R. NAGEL, *supra* note 1, at 60-72. As Justice Powell pointed out in dissent in *Garcia*, "the luxury of precise definitions is one rarely enjoyed in interpreting and applying the general provisions of our Constitution." 469 U.S. at 561 n.4 (Powell, J., dissenting). Moreover, by refusing to engage in a balancing process that would take into account the asserted federal and state interests, Justice Powell charged that the majority "ignore[d] the role of judicial review in our system of government." *Id.* at 561.

31. R. NAGEL, *supra* note 1, at 83.

32. *Texas v. Johnson*, 109 S. Ct. 2533 (1989); *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989); see also *supra* note 18 and accompanying text.

33. See R. NAGEL, *supra* note 1, at 157-226.

or even how it should write its opinions.”<sup>34</sup> Although Nagel does offer a plea for the Court to abandon what he calls its “formulaic” style in favor of a communicative style that is more in tune with the prevailing political culture, he is vague as to how this change actually would be accomplished, or what it would mean as a practical matter. One is left with the feeling that Nagel is still pondering whether other ways exist, perhaps more substantive than stylistic, for requiring “that courts accomplish less.”<sup>35</sup> Hopefully once formulated, those ideas will be forthcoming in a work as provocative as *Constitutional Cultures*.

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34. *Id.* at 155.

35. *Id.*



