

## REVIEW

### Constitutional Cultures: Constitutional Law

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*Constitutional Cultures: The Mentality and Consequences of Judicial Review.* Robert F. Nagel. University of California, 1989. Pp xii, 232.

It's not easy to teach constitutional law. In the first part of the course, where the justifications for and the problems with judicial review are established, the arguments make some sense and the subject has some shape. The painful part begins with the examination of the actual case law of the United States Supreme Court. In area after area this requires explication of elaborate "tests" the Court has developed for deciding whether or not some challenged action is consistent with some part of the Constitution.

These tests have the appearance of precision and logic. Once mastered, they need only be applied to the particular activity at issue. If a state has treated children of married and unmarried women differently in distributing some public benefit, we apply the test for discrimination based on parental marital status or "illegitimacy." We ask whether the state's distinction is substantially related to the achievement of a proper governmental interest.<sup>1</sup> If so, the state's action is valid. If not, it violates the Equal Protection Clause of the Fourteenth Amendment. If a state has put restrictions on telephone sales solicitors, we apply the test for limitations of commercial speech. We ask first whether the expression regulated concerns unlawful activity or is misleading. If not, we must inquire whether the state's interest in restricting the expression is substantial, whether the limitations advance that interest, and whether they are no greater than necessary to serve that interest.<sup>2</sup>

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<sup>1</sup> *Pickett v Brown*, 462 US 1, 9 (1983).

<sup>2</sup> *Central Hudson Gas & Electric Corp. v Public Service Commission*, 447 US 557, 564

Answering all three questions affirmatively means there is no constitutional violation. If any of the three is answered negatively the restriction violates the First Amendment.

There are, of course, literally dozens of similar tests. Viewed in isolation, they yield a certain analytical satisfaction, even charm. The rub comes when we look at a range of cases ostensibly decided under the same test. Instead of finding a pattern of roughly similar cases dealt with in the same way, we often see almost random variations. Thus, according to the Court's rulings, a state denies equal protection to an illegitimate child if it requires that, in order for him to inherit from his father by intestate succession, the parents must have married and the father must acknowledge his paternity.<sup>3</sup> But a state does not deny equal protection to such a child if it conditions his inheritance on obtaining a declaration of paternity from a court during the father's lifetime.<sup>4</sup> Likewise, a state violates the First Amendment when it prohibits advertising that includes the prices of prescription drugs.<sup>5</sup> But Puerto Rico can constitutionally ban the advertising of legal gambling casinos to local residents.<sup>6</sup>

These illustrations could be multiplied many times. Anyone routinely examining the constitutional decisions of the Supreme Court is bound to come to the conclusion that the Court has succeeded in creating clear and coherent frameworks for constitutional adjudication in very few areas. The carefully designed tests and criteria turn out to be almost infinitely manipulable. Both the majority and the dissent can reasonably apply the same test and reach flatly opposite results. In practice the neat crisp formulas dissolve into doctrinal mush.

The reader of *Constitutional Cultures*<sup>7</sup> finds that Robert Nagel has made this distressing discovery. His book is, at least in part, a response to it. The book exposes with a cold and penetrating intelligence the foibles and fallacies of modern constitutional doctrine, which Nagel finds inconsistent, largely ineffective, and often trivial.

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(1980).

<sup>3</sup> *Trimble v Gordon*, 430 US 762 (1977).

<sup>4</sup> *Lalli v Lalli*, 439 US 259 (1978).

<sup>5</sup> *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc.*, 425 US 748 (1976).

<sup>6</sup> *Posadas de Puerto Rico Associates v Tourism Co. of Puerto Rico*, 478 US 328 (1986).

<sup>7</sup> Robert F. Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* (U Cal, 1989). All parenthetical page references in text and notes are to this book.

Much of modern academic writing on constitutional law is devoted to mere explaining and tinkering with the Court's doctrine. Nagel's wholesale assault is an important and bracing exception. Even more important, however, is Nagel's analysis of the underlying reasons things have gone awry. In large part, it emerges, the doctrinal confusion stems from the Supreme Court's simultaneous response to two contradictory impulses. On the one hand, the Court has set for itself the general task of improving, so far as possible by adjudication, the general welfare of society. Every case presents an opportunity to get a little closer to some postulated ideal. Nagel associates this mentality with what Michael Oakeshott has called "rationalism"—the belief, in this context, that the proper behavior of a public official consists entirely of solving problems. (p 109)<sup>8</sup> This strand has long been recognized in constitutional jurisprudence. It has many labels: "instrumentalism,"<sup>9</sup> the pursuit of "progress,"<sup>10</sup> and—less approvingly—"result-orientation."<sup>11</sup>

But this impulse to improve the general welfare is checked by another impulse, necessitated by the Supreme Court's status as a court of law. The Court senses the need to justify judicial actions not just by their intrinsic goodness, but by their conformity with some other external, legitimate standard.<sup>12</sup> This latter aim, if taken seriously, will inhibit the rationalist pursuit of the good society. Any external standard that is prior to the matter to be considered may, and inevitably sometimes will, fail to achieve the optimal social solution. No earnest social engineer can afford to have his hands tied by a rule created in ignorance of the actual state of society at the time the rule must be applied.

The Court has accommodated these conflicting needs (unconsciously, no doubt) by fudging. Sometimes it has invoked a standard in the constitutional text that it redefines at a level so abstract as to leave the Court more or less free to impose any solution it thinks fit. (pp 110-11)<sup>13</sup> Since such redefinition alone

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<sup>8</sup> For a general discussion of rationalism, see pp 109-20.

<sup>9</sup> See generally Morton J. Horowitz, *The Transformation of American Law, 1780-1860* 1-30 (Harvard, 1977).

<sup>10</sup> See Alexander M. Bickel, *The Supreme Court and the Idea of Progress* 13 (Harper & Row, 1970).

<sup>11</sup> This term, of course, has almost always been used pejoratively. See, for example, *Lewis v City of New Orleans*, 415 US 130, 140 (1974) (Blackmun dissenting); Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum L Rev 1, 3 n 18 (1983).

<sup>12</sup> See *United States v Butler*, 297 US 1, 62 (1936); John Hart Ely, *Democracy and Distrust* 43-72 (Harvard, 1980).

<sup>13</sup> For example, the First Amendment's ban on the enactment of laws abridging the

still leaves clear the Court's wide-ranging discretion, the Court further translates these abstract values into the complicated and apparently exact tests described above. The widespread employment of such devices has led to the creation of what Nagel calls the "formulaic constitution." (p 127)<sup>14</sup> Under this regime the "doctrine [appears to be] comprehensive and definitive. Only one answer can emerge from the machine." (p 141) But, in fact, it "promise[s] clarity or measurement where only judgment is possible." (p 139) We are left with a constitutional law that invokes standards for decision that appear solid, impersonal and conclusive but that, in fact, decide nothing.

The irony is that, according to Nagel, this elaborate camouflage serves no purpose. Not only does modern adjudication fail to conform to some restraining and legitimate external standard, it also fails to make the world into one that better reflects the values that the Court wants to foster. Mainly this is because the core constitutional ideals—freedom of expression, religious tolerance, racial equality, and so forth—are already well entrenched in the political and social ethos of society. They are, that is, already an essential part of the "constitutional culture." (pp 45, 112) That culture is defined by the uncoordinated decisions and actions of officials and individuals. (pp 12-17, 23) The discrete aberrational acts that tend to be the subject of constitutional litigation are unlikely to threaten it. (p 70) Courts end up adjudicating only cases at the disputed edges of the values invoked. They rarely find free expression threatened by the jailing of an unpopular newspaper editor. Instead they define the reach of the First Amendment by deciding whether a town may require a fence around a drive-in theater where films depicting nudity are exhibited.<sup>15</sup> Constitutional jurisprudence becomes dominated by matters that are either trivial or profoundly controversial. The result is that the basic values invoked are themselves brought into doubt or ridicule and society ends up further from, not closer to, the ideal. Nagel concludes, for example, that "the Court's program, taken as a whole, has done great damage to the public understanding and appreciation of the

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freedom of speech has sometimes been transformed into a general guarantee of a free flow of information to the public, resulting, for instance, in a constitutionally compelled right of access to criminal trials. See *Richmond Newspapers, Inc. v Virginia*, 448 US 555 (1980).

<sup>14</sup> The "formulaic style" implies that "the advantages of realism can be successfully combined with elements of formalism. The result is more conceptualistic than the 'grand style' admired by the realists but more elaborate and sophisticated than the formalism that they discredited." (p 130)

<sup>15</sup> *Erznoznik v City of Jacksonville*, 422 US 205 (1975). (pp 45 and 112)

principle of free speech by making it seem trivial, foreign, and unnecessarily costly." (p 58)<sup>16</sup>

In addition to offering this acute diagnosis, Nagel offers some suggestions for a more reasonable role for the judiciary in the constitutional and political culture. In this, however, he bears some resemblance to the "disappointed absolutist" described by H.L.A. Hart who, having "found that rules are not all they would be in a formalist's heaven . . . expresses his disappointment by the denial that there are, or can be, any rules."<sup>17</sup> The thrust of Nagel's analysis is that courts should radically reduce the role they play in public decision making. They should, of course, abandon their mission to engineer a perfect society. But they should also withdraw from their position as the principal and authoritative definers of the meaning of the Constitution. (pp 25-26, 155) Nagel objects to the idea that the Supreme Court has some monopoly on constitutional interpretation. Rather, he notes, continuous and spontaneous interpretations of the Constitution are made all the time, in varying situations, by other public officials and by private parties.<sup>18</sup> Everyone concerned would be better off if the Court displayed the modesty appropriate to its position as one among many legitimate interpreters. He counsels restraint and deference to the "customs and mores of the times," and to "the judgments of the other branches and levels of government." (p 25)

Beyond these general indications, however, it is not clear just how Nagel thinks the courts should behave. In his conclusion he declares that he has "no definite prescriptions for what the Court's roles ought to be." (p 155) At another point he says that he does not "intend to suggest that the courts can never have an important role to play." (p 59) But the weight of his argument is that courts—and especially the Supreme Court—should be doing less. In particular, they should be doing less in the way of holding unconstitutional the actions that are brought before them. (p 3)

In issuing this call, Nagel joins a long tradition. Perhaps the classic articulation is James Bradley Thayer's. Thayer, starting from rather different premises, concluded that a court should only hold a statute invalid "when those who have the right to make

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<sup>16</sup> The marginal importance of many litigated constitutional disputes is taken up in the text following note 31.

<sup>17</sup> H.L.A. Hart, *The Concept of Law* 135 (Oxford, 1961).

<sup>18</sup> On the variety of constitutional interpretations from non-governmental sources, see Robert M. Cover, *Foreword: Nomos and Narrative*, 97 Harv L Rev 4, 26-35, 46-53 (1983); Carol Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J Family L 741, 766-69 (1987-88).

laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question.”<sup>19</sup> Indeed, like Nagel, Thayer based this view in part on the need for the courts to respect the constitutional judgments of other official actors.<sup>20</sup> The most influential modern argument for judicial modesty, of course, is that of Alexander Bickel. Bickel argued that the Supreme Court should, where possible, decline to decide constitutional cases. This would limit “the occasions of the Court’s interventions, so that the times will be relatively few when the Court injects itself decisively into the political process.”<sup>21</sup> Such restraint would prevent the Court from arrogating to itself a decision making power which, in our society, can rarely be legitimate out of the hands of democratically-accountable officials.<sup>22</sup>

The policy of judicial restraint certainly looks even better after Nagel has exposed the contradictions and failures of modern constitutional doctrine. It is surprising, therefore, to find one rather significant exception to Nagel’s broad disapproval of judicial intervention. Nagel approves of one of the most widely criticized recent Supreme Court ventures, the short-lived reinvigoration of the doctrine of state sovereignty in *National League of Cities v Usery*. (p 61)<sup>23</sup> In that case the Court held that the extension of federal wage and hour legislation to employees of state governments contravened the Constitution’s allocation of powers between the state and federal governments.<sup>24</sup>

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<sup>19</sup> James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv L Rev 129, 144 (1893).

<sup>20</sup> See *id.* at 135.

<sup>21</sup> Alexander M. Bickel, *The Least Dangerous Branch* 128 (Bobbs-Merrill, 1962). See generally *id.* at 111-98.

<sup>22</sup> See *id.* at 16-23.

<sup>23</sup> 426 US 833 (1976), overruled by *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528, 531 (1985).

<sup>24</sup> In accord with subsequent cases, see, for example, *FERC v Mississippi*, 456 US 742, 758 (1982), Nagel states that the holding of *National League of Cities* rests on a “violation of the tenth amendment.” (p 60) Many other commentators share this view. See for example, Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L Rev 542, 545 (1983). I read Justice Rehnquist’s majority opinion as resting on an “affirmative limitation” implicit in the structure of the Constitution. He actually mentioned the Tenth Amendment only once, citing *Fry v United States*, 421 US 542 (1975), as recognizing the Tenth Amendment as “an express declaration of this limitation.” 426 US at 842. The implication is that the holding would be the same even if there were no Tenth Amendment. See also Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 Harv L Rev 1065, 1067-68 n 17 (1977).

Nagel’s attachment to the holding in *National League of Cities* is entirely in keeping with the preference for decentralized constitutional decision making, a major theme of his

Nagel's endorsement of *National League of Cities* contrasts with his skepticism concerning the Court's judgments defining and enforcing claims of individual rights. He thus appears to present a mirror image of the argument espoused by Jesse Choper that the Court should abstain from invalidating government actions based on federalism and separation of powers for the very purpose of preserving its ability successfully to develop and apply a constitutional jurisprudence of individual rights.<sup>25</sup> Nagel suggests that the Court and constitutional scholars, Choper included, have been unduly attached to vigorous judicial enforcement of the constitutional protection of rights and so have underappreciated the importance of the structural values of the Constitution. (pp 62-68)<sup>26</sup>

Yet Nagel does not argue for an active and rigorous judicial application of federalism and separation of powers principles. Indeed, Nagel dislikes some of the Court's other efforts on behalf of state autonomy. He disapproves of its attempt to develop some formulaic definition of the power granted to Congress to regulate commerce. (p 72) He finds objectionable the equally formulaic approach to setting limits on state activities based on the negative implications of the commerce power. (pp 146-47) Likewise, he criticizes the cases following and limiting *National League of Cities* that purported to reaffirm its basic themes, not so much for their holdings, as for translating its result into a technical multi-prong test. (pp 136-37)

Instead, the decision in *National League of Cities* appeals to Nagel because it touches base with the essential aspects of federalism without reducing it to a rule. Indeed, for Nagel, the actual result in the case is not very important. Another case might have even better illustrated the long-neglected "theory of federalism." (p 80) That's the most we can expect from the Court—to "illustrate" principles, to "richly [convey] a central lesson about our constitutional system," to "shape attitudes and comprehension [so as to be] educative." (pp 80-81) Nagel praises the opinion in *National League of Cities* for its "tentative and uncompleted quality," its "unusual departure from the formulaic style" and its "unstructured, but suggestive, examples, analogies, contrasts, and

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book.

<sup>25</sup> Jesse H. Choper, *Judicial Review and the National Political Process* 71-379 (U Chicago, 1980).

<sup>26</sup> This point did seem to be central to his earlier discussion of *National League of Cities*, on which the relevant chapter is based. See Robert F. Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 S Ct Rev 81.

phrases.” (p 135) Such an approach, he claims, is in fact truer to the Constitution, which contains unresolved questions and deliberate ambiguities. (pp 80-81) The Court should not replace the raw and unfinished values of the Constitution with a closed code of rules. It should only raise doubts, suggest, and remind.

Nagel praises the same qualities in *Brown v Board of Education*.<sup>27</sup> For him, that decision need not be justified as the application of a static rule of equality embodied in the Fourteenth Amendment. Rather, like *National League of Cities*, *Brown* was only a confirmation and reminder of a constitutional value—here “equal protection”—as (Nagel argues) it had developed and was widely held in the society. Such a reminder was an appropriate response to racial segregation, a deviant regional departure from the societal standard. (pp 4-5) *Brown* thus exemplifies for Nagel “a more usual role for the courts . . . to restrain departures from a core of settled meaning—settled both by the clear sense and history of the Constitution and by apparent public understandings.” (p 24)

This mnemonic function typifies the judicial approach that Nagel prefers. He contrasts it with the magisterial and unyielding style prevailing in the judgments of the modern Supreme Court. Nagel proposes, instead, a judiciary that is merely one participant in, and in some cases a facilitator of, the cultural process that gives meaning to constitutional values. The modern “formulaic” opinions cut off that process by claiming a (specious) certainty and comprehensiveness. (p 141) Rather than “disqualify” the reader, a court should attempt to establish with that reader a “common volition” by appealing to a shared and familiar constitutional experience. (pp 137-47)<sup>28</sup>

Given this outlook, it is not surprising that Nagel proposes no new and better ways for the courts to interpret the constitutional text. Nagel’s model of an ideal constitutional environment is not merely inconsistent with the mechanical, but substantively empty,

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<sup>27</sup> 347 US 483 (1954).

<sup>28</sup> Besides the judgments in *Brown* and *National League of Cities*, Nagel finds much to admire in *Burton v Wilmington Parking Authority*, 365 US 715 (1961), where the Court found that racial discrimination by a privately operated restaurant, located in space leased in a municipally owned and operated building, was “state action” violating the Fourteenth Amendment. Nagel describes this as a case “that uses no principles or rules.” (p 143) Rather, the Court explained in its opinion that the presence of state action “can be determined only in the framework of the peculiar facts or circumstances present.” 365 US at 726. (p 144) Nagel feels that *Burton*’s influence in subsequent cases is due to an “attention to particularized facts [that] was rich and emphatic, certainly more so than a mechanically stated rule.” (p 144)



formulas of the modern Supreme Court; it is fundamentally at odds with formulas of *any* kind. Formulas with bite, formulas that would not be as vulnerable to manipulation, would just as effectively shut out alternative understandings of the Constitution originating outside the judiciary. His preferences are strikingly summarized in the following terms:

A successful accommodation of realism and formalism, if it is possible, would require a style of communication far different from the formulaic style. Perversely, the task would sometimes require imperfection—evocation, incompleteness, tentativeness, and even a willingness *not* to explain. (p 131)

This approach is fundamentally unsympathetic to the idea of the Constitution as supreme *law*. That understanding supposes that the constitutional text consists of a set of static rules, created at discrete moments, that set the outer limits to the lawful use of governmental power. The chief virtue of a constitutional regime, so conceived, is the clarity and stability it creates for people who need to plan their lives without fear of public interference. Quite plainly it is a prerequisite of such an arrangement that one be able to trace a fairly clear line between the constitutional and the unconstitutional.<sup>29</sup>

Nagel is quite right that modern constitutional jurisprudence hasn't come close to achieving the goals associated with the rule of law. The modern constitutional tests he has dissected and exposed with such acuity have, if anything, subverted those values by creating a constitutional law devoid of the clarity and predictability that are critical to their realization. Stripped of much of their doctrinal paraphernalia, those tests reduce to varieties of "balancing." The value protected by the constitutional provision invoked is weighed against the interest of the state in taking the challenged action.<sup>30</sup>

Given the conflicting impulses besetting courts it is not surprising that their responses should take this form. The Constitution singles out for special treatment a few human activities and interests. The modern state is naturally concerned with a far wider range of needs and goals. A court bent on improving the world "in

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<sup>29</sup> Nagel recognizes the virtue of clarity in constitutional law. (p 59)

<sup>30</sup> Nagel himself appears to think "balancing" is a judicial technique distinct from the "formulas" that are the main object of his criticism. (p 148) On balancing, see generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L J 943 (1987). Aleinikoff concludes that the employment of balancing "is transforming constitutional discourse into a general discussion of the reasonableness of governmental conduct." Id at 987.

general" can't do a very good job if it only considers the values thought important by a handful of people two hundred years ago. The device of balancing admits into a court's consideration the constitutional values *and* all the other values that have become important in modern society. By manipulating the verbal formulas it employs, the Supreme Court can, in every instance, attempt to arrive at an outcome that will yield the maximum net advantage to society. Moreover, since the exact interests in each case will be slightly different, a court can appear to be consistent and still always come to the "optimal" result. This form of adjudication seems, especially after the rejection of Robert Bork as a Supreme Court nominee, to be the model for sensitive judicial behavior.<sup>31</sup> But, as Nagel's analysis reveals, its ad hoc quality is inconsistent with the stability and legitimacy that are vital to a constitutional rule of law.

Nagel's view of the proper role of the judiciary, however, is troubling on exactly the same grounds. Although he argues that leaving the Constitution "uninterpreted" will, in fact, lead to a more stable meaning (pp 18-22), the kind of minimalist adjudication he suggests will deprive individuals of opportunities to test the outer limits of constitutional rules. But the virtues of constitutional government consist precisely in the ability to liquidate those limits. Our regard for the value of free speech may somehow be

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<sup>31</sup> This understanding is evident in the remarks of many of the senators who voted against confirming Bork's appointment. See, for example, remarks of Senator Dodd, 100th Cong, 1st Sess (Oct 23, 1987), in 133 Cong Rec S14959 (Bork "looks for bright line answers as if he was solving a mathematical problem, and seems uncomfortable making judgments and distinctions that reflect the fundamental traditions and ideals of our people. . . . [He] fails to recognize the expansive and evolving nature of our rights and liberties."); id at S14985 (remarks of Senator Lautenberg) ("[T]he hallmark of our Constitution and our system of laws has been its flexibility, its vitality, its ability to adapt to changing times and expanding conceptions of liberty."); and id at S14923 (remarks of Sen. Levin) (Bork's preference for "these 'bright lines' [has] tended to blind him to the human consequences of his logical constructs. In the words of former Judge Shirley Hufstедler, Judge Bork has been marked by a determination 'to develop constitutional litmus tests' so he can 'avoid having to confront the grief and untidiness of the human condition.'") See also Erwin Chemerinsky, *The Constitution Is Not "Hard Law": The Bork Rejection and the Future of Constitutional Jurisprudence*, 6 Const Comm 29 (1989).

The same conclusions arise from the panegyrics for Justice Powell on his retirement. His case-by-case approach was consistently lauded. See generally *A Tribute to Justice Lewis F. Powell, Jr.*, 101 Harv L Rev 395 (1986) (collection of untitled essays by named authors). See specifically Richard H. Fallon, Jr., 101 Harv L Rev 399, 401 (like Aristotle, Powell "believed that the right actions in particular cases were prior to the principles that would explain their rightness."); Gerald Gunther, 101 Harv L Rev 409, 411 (Powell followed "the model of the judge committed to the fairminded resolution of particular cases."); and J. Harvie Wilkinson III, 101 Harv L Rev 417, 420 (For Powell "[t]he universe of each case was bounded by the record; what mattered most were facts.").

more secure if we never push it to extremes. But that value is less useful to people trying to plan their lives if they are unable to forecast, with some assurance, the circumstances in which the government may and may not penalize their expression.

Nagel dislikes judicial rhetoric that tries to foreclose further consideration of the constitutional issue by other actors in society. His attitude is, therefore, uncongenial to the formation of definite rules.<sup>32</sup> Under his preferred method, constitutional law is not the application and elaboration of a collection of superior legal rules defining and restraining the State. Rather, it begins to resemble constitutional law in the English sense, a complex of statutes, charters, conventions and traditions, written and unwritten, that pertain to the relations between government and individuals. It is open-ended, always open to revision from day to day and year to year. And it is the product of many sources—legislatures, courts, and other government actors—emerging from a multitude of uncoordinated actions.<sup>33</sup> This is in sharp contrast to the traditional American idea of a constitution that is not simply *about* the extent of public power but, is, itself, the source of, and ultimate constraint on, public power.

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<sup>32</sup> He writes:

As important as the words [of constitutional decisions] is the structure of the formulae. Their design suggests that all the relevant issues have been identified, separated, and answered. The doctrine is comprehensive and definitive. Only one answer can emerge from the machine. The vitriolic exchanges among the Justices that are becoming customary are not merely evidence of ideological cleavages. They result from the same excessive pursuit of certainty that is reflected in the form of modern doctrine. When only one answer is possible, disagreement even among members of the Court is treated as a sign of irresponsibility or obduracy. A fortiori, the formulaic style forecloses independent judgment by the wider publics that are affected by the decisions but that have no special claims to understanding or authority. (p 141)

See also Nagel's defense of Justice Roberts' famous dictum in *United States v Butler*, 297 US 1, 62 (1936), stating that a court's duty is merely to "lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former." This assertion is usually condemned as naive and mindless formalism. See Bickel, *The Least Dangerous Branch* at 90-91 (cited in note 21). Nagel notes that Justice Roberts conceded that "[a]ll the Court does, or can do, is to announce its considered judgment upon the question." This formulation concedes the obvious impossibility of executing the judicial duty by locating the single correct answer. (p 132)

<sup>33</sup> See John Alder, *Constitutional and Administrative Law* 22-34 (MacMillan, 1989); and E.C.S. Wade and A.W. Bradley, *Constitutional and Administrative Law* 12-35 (Longman, 10th ed 1985). The English legal system does place ultimate decision making authority in the Queen-in-Parliament. See Alder, *Constitutional and Administrative Law* at 63-67. In that respect it provides a more defined system of legal power than Nagel's, which posits no hierarchy among official decision makers and gives standing as well to private judgments. See text at note 43.

Nagel makes occasional and sometimes unexplained references to the constraining power of the constitutional text. Thus he regards *Brown* as an appropriate invocation of the "clear sense and history of the Constitution." (p 24) He argues that the text itself, without distorting interpretations, is a source of stable constitutional values. (pp 18-22) And he decries the judicial substitution of abstract values for the specific rules of the constitutional text. (pp 110-11) (Although by worrying about whether the Supreme Court has *really* promoted free expression and tolerance in applying the First Amendment, Nagel implicitly concedes the relevance of such abstract goods to the evaluation of judicial performance.) (pp 27-59) But these references constitute a distinctly secondary theme. They are pretty much swamped by his more obvious concern that constitutional meanings develop out of a continuing and largely undefined constitutional discourse. (pp 12-17)

There is a remarkable absence in *Constitutional Cultures*. It omits one topic that is surely expected in any book on American judicial review—an extended consideration of *Marbury v Madison*<sup>34</sup> and Chief Justice Marshall's argument that judicial review follows inevitably from the ordinary duty of a court. That decision has, in the past, provided a critical subject for such advocates of a restrained judicial role as James Bradley Thayer,<sup>35</sup> Learned Hand,<sup>36</sup> and Alexander Bickel.<sup>37</sup> Strangely, the case appears only twice in Nagel's book. Early in the text he notes its supposition that constitutional meaning is meant to be permanent. (p 6) More significantly, a quotation from *Marbury* appears as an epigraph to the book, paired with another from James Boyd White. The two quotations are important enough in illustrating the thrust of Nagel's approach to justify reproducing them. First, Marshall in *Marbury*:

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts. (p vii)<sup>38</sup>

And White:

Behind all the theoretical talk of government and legitimacy, behind the systems and projects, behind even the forms of

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<sup>34</sup> 5 US (1 Cranch) 137 (1803).

<sup>35</sup> See Thayer, 7 Harv L Rev at 139 (cited in note 19).

<sup>36</sup> Learned Hand, *The Bill of Rights* 6-16 (Harvard, 1958).

<sup>37</sup> See Bickel, *The Least Dangerous Branch* at 114-33 (cited in note 21).

<sup>38</sup> *Marbury*, 5 US (1 Cranch) at 176.

government itself, there is a culture, a living organization of mankind, upon which all the talk of system and mechanism depends, both for its intelligibility and for its effects . . . . In all its complexity and interconnectedness it is our substantive and actual constitution. (p vii)<sup>39</sup>

Here are two sharply contrasting views of the Constitution. In the first the Constitution is a set of supreme rules of law. (Marshall never even considers the possibility that the Constitution is no kind of law at all.) From this premise the idea of judicial review follows as an attempt to discover the meaning of those rules and to apply them to the cases before the courts. In the second the Constitution is a multifarious and changing amalgam of practices, institutions, and attitudes. No single judgment on contested acts of government can be derived from it, and a form of judicial review that tries to do so is futile and misguided.<sup>40</sup>

One has little doubt, after reading *Constitutional Cultures*, which of these views Nagel favors. His preference for a minimalist version of judicial review follows from his vision of the Constitution as something other than law in the sense of rules applicable by courts. The adoption of his view would alleviate some of the embarrassments of constitutional adjudication, but it would do so at the cost of abandoning the effort to secure the clarity and stability we seek in a rule of law. A regime characterized by the rule of law requires a human agency to apply the prior rules to the matters they were meant to govern. But it must be the abstract rules and not the human agents that decide those matters. Similarly, and particularly pertinent here, those agents must not be allowed to pass over any controversy governed by the constitutional rules. Otherwise the discretion that the rules are to control is reintroduced in the decision whether to apply the rules at all. So a corollary to Marshall's holding in *Marbury* that the Constitution is en-

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<sup>39</sup> Quoting James Boyd White, *When Words Lose Their Meaning* 226-27 (U Chicago, 1984).

<sup>40</sup> This is also the constitution of Karl Llewellyn. See K. N. Llewellyn, *The Constitution as an Institution*, 34 Colum L Rev 1, 39-40 (1934). For a criticism of scholarship advocating judicial participation in a "dialogue" to develop constitutional meaning, see Earl M. Maltz, *The Supreme Court and the Quality of Political Dialogue*, 5 Const Comm 375 (1988).

As I have indicated, see text at notes 33-34, Nagel makes occasional reference to some constraining influence from the constitutional text. But the thrust of his argument is that courts, as merely one participant in constitutional discourse, ought not to see their duty as immediately applying their best understanding of the text to the controversies brought before them.

forceable law is his dictum in *Cohens v Virginia* on the duty of courts to adjudicate:

With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.<sup>41</sup>

Rule-governed adjudication<sup>42</sup> is, therefore, an alternative both to the "rationalist" tendency of modern adjudication and to the kind of abstention that Nagel advocates. Under the constraint of rules courts do not seek to improve the world in a general way. Nor do they feel obliged to foster the set of values they find underlying the constitutional text. Rather, the judges are to apply a set of rules, created and committed to writing at a particular historical moment. The values those rules represent are promoted only as an incident of applying the rules. The rules themselves provide sufficient reasons for action.<sup>43</sup>

Whether a society is better off assigning only this rule-application role to the judiciary is clearly a contestable political question. To so limit the judicial function is to abandon the effort, encouraged by most commentators, to employ the judiciary to promote the unlimited moral improvement of society. It is also to deny the courts the opportunity to assume the even more modest role that Nagel suggests. In his ideal system, the judiciary is merely one contributor to the inexact process of defining constitutional meaning. His approach reduces—in a way mandatory rule application does not—the risk of drawing judges into the doctrinal quagmire that is so effectively criticized in *Constitutional Cultures*. Whether rule-governed adjudication would, in fact, provide much in the way of clarity and predictability, and what we would lose by foregoing social progress or by warping our social values, are basically empirical questions and exceptionally uncertain ones.<sup>44</sup> And whether those benefits of rule-based adjudication,

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<sup>41</sup> *Cohens v Virginia*, 19 US 264, 404, 6 Wheat 120, 181 (1821).

<sup>42</sup> This kind of adjudication is also (usually pejoratively) called formalism. For an intelligent discussion of it see Frederick Schauer, *Formalism*, 97 Yale L J 509 (1988).

<sup>43</sup> See Larry Alexander, *The Constitution As Law*, 6 Const Comm 103 (1989); Schauer, 97 Yale L J at 537 (cited in note 42). As to the capacity of constitutional rules to restrain, see Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw U L Rev 226 (1988).

<sup>44</sup> Nagel argues that the judicial process is inherently incapable of achieving any significant measure of certainty in the elaboration of constitutional rules. He notes especially the fact that these matters are resolved in a context of litigation where dispute and uncertainty

however we estimate them, are worth the losses, however measured, is a moral-political question that will depend on relative judgments of what is important in ordering our social existence.

To the extent we regard the virtues of the rule of law as crucial in defining the nature of constitutional adjudication, we might criticize the modern constitutional decisions not because they employ formulas, but because they employ the *wrong* formulas. Those formulas are not tied to the norms of the written Constitution<sup>45</sup> and, because they are so manipulable, they fail to provide serious restraints. The alternative suggested in *Constitutional Cultures*, however, also fails to bring us closer to a regime of legal rule, as it denies the possibility of authoritatively settling the limits the Constitution places on public action. What Nagel proposes amounts to a kind of laissez-faire constitutionalism: "You have your meaning. I have mine. The Court has its." With no definitive decision maker, no one's meaning has any higher standing than another's. In such circumstances there is no way, in the end, to distinguish between the authorized and the impermissible for government or for individuals. That comes down to having no constitutional *rules* at all, just a range of constitutional ideas. Perhaps individuals, groups, and governments really can coexist with the sole security of mutual good will and self-restraint. But that is a risky proposition—one our society seems to have rejected in seeking to establish a rule of law. Certainly there are attractions as well as risks in the kind of hopeful cooperative project of value formation and harmonization that Nagel envisions. But we could have that kind of constitutional culture with no Constitution at all.

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are inevitable. (p 11) But, at least in the sense of providing notice as to the limits of permissible government behavior, it is hard to believe that ongoing judicial rule application that is accompanied by explicit verbal justification does not provide *more* in the way of stability than the unstructured constitutional environment Nagel proposes. These judgments are always comparative.

<sup>45</sup> I pass over the question of whether those norms are to be understood in the manner intended by their enactors or in some standard sense of their language. I have explained why I find the former more consistent with the idea of the Constitution as law in Richard S. Kay, *Original Intentions, Standard Meanings and the Legal Character of the Constitution*, 6 Const Comm 39 (1989). A contrary view is expressed in Frederick Schauer, *An Essay on Constitutional Language*, 29 UCLA L Rev 797, 809-12 (1982). Supreme Court doctrine significantly departs from the constitutional rules in either sense. And although Nagel indicates that he favors adherence to the rules of the text in some "uninterpreted" form (p 24), his preference for allowing meaning to be settled by an evolving and ill-defined consensus, with only rare judicial intervention, would allow substantial deviation in practice from either conception of the rules.

