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POLITICAL CONSENSUS, CONSTITUTIONAL FORMULAE, AND THE RATIONALE FOR JUDICIAL REVIEW

Martin H. Redish*

CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW. By *Robert Nagel*. Berkeley: University of California Press. 1989. Pp. xii, 232. \$27.50.

Although the theory of judicial review has received a great deal of scholarly attention in recent years, much of it has articulated, in varying degrees, a so-called activist approach to constitutional law. Many of those writing on the subject have urged an extremely expansive role for the judiciary in matters of moral choice and social policy,¹ often in disregard of constitutional text or history.²

One of the leading counterexamples is Professor Robert Nagel, who, along with several others,³ has long been identified as a resister of extensive judicial involvement in the process of social choice through the vehicle of constitutional analysis. In his book, *Constitutional Cultures: The Mentality and Consequences of Judicial Review*, Nagel synthesizes his previous work⁴ into a coherent statement of his philosophy of judicial review. As such, the book stands as an articulate statement of a modern "conservative" approach to the issue of judicial review.

In the unlikely event that anyone questioned the fact previously, this book removes any doubt that Nagel is an important force in modern constitutional theory. But it is perhaps for that very reason that I find the book so deeply troubling. Of course, in light of my own largely "activist" bent,⁵ to a certain extent my disagreement with

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1. See, e.g., M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

2. See, e.g., M. PERRY, *supra* note 1; Brest, *supra* note 1; Levinson, *Law as Literature*, 60 TEXAS L. REV. 373 (1982).

3. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); R. BORK, *THE TEMPTING OF AMERICA* (1989); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

4. The book consists of essays Nagel has published previously elsewhere. P. xi.

5. See, e.g., Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

Nagel's analysis should come as no surprise. But my problems with his theory go considerably deeper than a simple difference in ideological outlook. For one thing, I find Nagel's analysis lacking in principled consistency.⁶ I have often found myself in substantial conflict with those scholars of a political bent similar to my own, who have called either for a sweeping judicial power to ignore textual limitations in invalidating majoritarian action⁷ or for an abdication of judicial review when the asserted constitutional challenge derives from a provision not in ideological favor.⁸ I have differed with these theorists, because I believe that while considerations of ideology cannot and should not be totally excluded from constitutional analysis, American political theory precludes them from being the sole factor. The unrepresentativeness of the judiciary dictates severe limitations of principle on the nature of the decision-making process.⁹ One might expect that an advocate of judicial restraint would share the same concern. However, close comparison of different chapters in Nagel's book reveals an ideological bias just as unprincipled as that manifested by those at the other end of the ideological spectrum.¹⁰

More fundamentally, I am troubled by what I consider to be Nagel's insensitivity to fundamental precepts of American political theory, and to the Supreme Court's role in that theory.¹¹ The perception of the normative ideal of the American political structure by which Nagel appears to measure the validity of modern judicial review¹² is very different from my understanding of the political values American society is designed to foster.¹³ Similarly, I find his characterization of the ideal performance of the judicial craft to be dramatically different from my own perceptions.¹⁴ In the remainder of this review, I will explain my understanding of Nagel's approach to these

6. See *infra* text accompanying notes 100-13.

7. See M. PERRY, *supra* note 1; Brest, *supra* note 1; Levinson, *supra* note 2.

8. See, e.g., J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); see *infra* notes 69-75 and accompanying text.

9. See Redish & Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 15-17 (1987); Redish, *The Federal Courts, Judicial Restraint, and the Importance of Analyzing Legal Doctrine*, 85 COLUM. L. REV. 1378, 1399-401 (1985).

10. See *infra* text accompanying notes 100-13.

11. See *infra* text accompanying notes 26-31.

12. I say "appears to measure" because at no point does Nagel attempt to posit a coherent vision of American political or constitutional theory. Hence, one can derive his views on such questions only by the process of "reverse engineering" — inferring his underlying normative theoretical precepts from his conclusions on narrower issues.

In part, this problem may derive from the fact that the book represents a synthesis of previously published articles, each of which focused on a specific application of judicial review theory. However, the book's failure to include one or more detailed chapters (beyond the minimal five-page introduction) providing an underlying theoretical overview and linking his somewhat narrower discussions is a serious structural defect.

13. See *infra* text accompanying notes 29-30.

14. See *infra* text accompanying notes 122-25.

two issues, and how I believe this approach differs from the normatively correct analysis of those issues.

I. NAGEL'S "CONFRONTATION" MODEL AND HIS CURIOUS CALL FOR CONSENSUS

Nagel undertakes his critique of the modern practice of judicial review by "recommending that the idea of judicial restraint be reexamined and reemphasized" and postulating that "[t]he essence of restraint is the admission that the Constitution does not apply to many public issues or, at least, that it does not apply in any determinative way" (p. 25). He concludes "that an unchecked urge to enforce [constitutional] norms through adjudication may in fact undermine the capacity for durable constitutional government" (p. 25).

Nagel reaches this conclusion first by pointing to the many "uninterpreted provisions" of the Constitution, over which there has traditionally arisen little controversy and which rarely have been the subject of judicial scrutiny.¹⁵ He then infers that there has been little controversy over these provisions *because* they have rarely been the subject of judicial scrutiny.¹⁶ The apparent implication of his logic is that if the courts had simply avoided interpreting such provisions as the due process and equal protection clauses, we would have developed a similar consensus about the meaning of those provisions. The obvious fallacy in Nagel's logic is that he has confused cause and effect. Controversy over the meaning of constitutional provisions does not arise because the courts have interpreted them; the courts have interpreted these provisions because real-life controversy exists about their meaning. Courts, after all, do not go out seeking cases to decide. In the first instance, at least, they function as passive institutions; cases are brought to them.¹⁷ Indeed, this is one important sense in which courts are distinguished from legislatures. When there is no controversy over the meaning of a constitutional provision, there is presumably no reason to bring the question of the provision's meaning to court.

The point is underscored by comparison of the provisions which have not been adjudicated by the courts with those that have been. While the former category includes such provisions as the age require-

15. See p. 14: "[A]lthough much scholarly and popular attention is focused on the complexities and surprises of constitutional interpretation, much of the constitutional order is consistently realized and desired from practice."

16. He suggests that "[p]erhaps uninterpreted meaning is both obvious and reflectively stable, not because of the special characteristics of certain provisions, but because of the special capacity of practice to sustain effective consensus." P. 17; see also pp. 19-22, 25.

17. See U.S. CONST. art. III, § 2 (extending the judicial power only to "Cases" or "Controversies"). See generally *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982).

ment for the presidency¹⁸ and the four-year presidential term,¹⁹ the latter category includes the first amendment right of free speech,²⁰ the due process clause,²¹ and the equal protection clause.²² A casual examination reveals that both the language and purposes of the provisions not reviewed by the courts are considerably less ambiguous than those that have been.²³ Even to the extent that the former provisions might be thought in some sense to be ambiguous (p. 15), they have not been the subject of interpretation largely because no real-life, significant dispute about their meaning has arisen. For example, Professor Tushnet may easily posit the hypothetical of a sixteen-year-old guru seeking the presidency who claims that he is in reality thousands of years old due to numerous reincarnations,²⁴ but the fact remains that there have been few, if any, serious challengers for the Presidency under the age of thirty-five. Similarly, while Nagel may suggest the possibility of argument about the definition of a four-year presidential term (p. 15), no real-life controversy over the meaning of that concept has ever developed.

Thus, Nagel lacks either logical or empirical support when he asserts that "practice has important and unappreciated advantages over interpretation for sustaining the sense of shared agreement that can eventually make a particular meaning seem plain or inevitable" (p. 18). He has presented no data to counter the reasonable intuition that courts do not interpret certain provisions because there exists a sense of shared meaning about them, rather than that a sense of shared meaning exists about those provisions because the courts have not interpreted them.

Nagel actually seems to be accusing the process of judicial interpretation of doing more harm than merely undermining the *linguistic* consensus that would otherwise exist. He also suggests that this process tends to undermine the attainment of *social* and *political* consensus, as well. While he believes that "[t]he limited, indefinite quality of informal meaning increases the likelihood that stable practices can develop" (p. 18), he contends that

[l]egal meaning, on the other hand, is verbal meaning. It is formalized in

18. U.S. CONST. art. II, § 1, cl. 4.

19. U.S. CONST. art. II, § 1, cl. 1.

20. U.S. CONST. amend. I.

21. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1, cl. 3.

22. U.S. CONST. amend. XIV.

23. The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I. The due process clauses prohibits state and federal governments from depriving individuals of life, liberty, or property without due process of law. In contrast, article II provides that the President "shall hold his Office during the Term of four Years," and that no person is eligible for the post "who shall not have attained the age of thirty five Years . . ." U.S. Const. art. II, § 1, cls. 1 & 4.

24. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 686-88 (1985).

written opinions, specified in holdings, and systematized in explanatory doctrines. Losers are identified and suffer reduced stature. . . . Every decision provokes a new argument, as those who stand to lose attempt to reverse or narrow its scope. [p. 19]

As empirical support for this assertion, Nagel points to the Court's decision recognizing a constitutional right to abortion,²⁵ which, he argues, "fiercely embittered the losers and raised the controversy to new levels of visibility" (p. 19). He concludes that "[s]table meaning does not easily become established at such levels of visibility and controversy" (p. 19).

Perhaps as well as any, the abortion example underscores Nagel's reversal of cause and effect. Does Nagel really intend to suggest that, but for the Supreme Court's involvement in the issue, there would have been no visible controversy over the abortion question? To the contrary, it was for the very reason that both sides felt so strongly about the issue that the question reached the judiciary in the first place. Ironically, it is probable that the Court's decision in *Roe v. Wade* actually prevented more widespread and intense public controversy on the question, since that decision largely removed the abortion issue from the battlegrounds of fifty state legislatures and Congress, at least temporarily.

The most troubling aspect of Nagel's analysis — in addition to his lack of empirical support and his apparent inversion of cause and effect — is his assumption that judicial action that undermines social, political, or textual consensus is somehow harmful. He asserts that "[i]f constitutional meaning is to be durable, it must seem to be plain to those who are governed by it" (p. 17). Therefore, "practice has important and unappreciated advantages over interpretation for sustaining the sense of shared agreement that can eventually make a particular meaning seem plain or inevitable" (p. 18). He often expresses fear about "destabiliz[ing] consensus" (p. 19), and seems to place great value on maintaining "the social consensus that permits durable, 'plain' meaning."²⁶ This fear leads him to conclude "that the judiciary ought not be in constant confrontation with society" (pp. 22-23). His concern about the costs of "the confrontation model" (p. 23) and of "a routinely pugnacious judiciary" (p. 23) leads him to conclude that [m]uch of the conflict, resistance, and instability that is evidenced in modern constitutional litigation is simply a predictable consequence of overemphasis on interpretation as the exclusive source of constitutional meaning. Stable realization of constitutional principles depends upon preserving the kind of tacit agreement that interpretation itself tends to break down. [p. 23]

25. *Roe v. Wade*, 410 U.S. 113 (1973).

26. P. 21; see also p. 22 (contending that "many of the attributes of judicial interpretation that most suggest stability and consistency . . . in fact work to make disagreement and instability the norm").

For all of these reasons, Nagel concludes "that judicial deference is an appropriate way to sustain the constitutional system" (p. 25). One could debate the extent to which judicial deference in constitutional adjudication is or is not advisable.²⁷ But the most puzzling aspect of Nagel's argument for such deference is his concern about what he finds to be the negative effect of the lack of such deference on some broad notion of societal consensus. It is true, of course, that no society can function if its citizens are constantly on the verge of civil war. But Nagel does not appear to have suggested — nor reasonably could he — that even at the height of judicial activism such has been the case in American society. The most he could be referring to, then, is the kind of strong political divisions that have accompanied the abortion debates. He appears to assume — so far as I can discern, without ever attempting first to put forth a coherent normative vision of American political theory — that the existence of such divisions is somehow evil or harmful.

Perhaps if one were to begin with the premises of the "civic republican" scholars that there exists an objectively ascertainable "common good," and that citizens should be encouraged to eschew what they perceive to be their own individual private interests in favor of the pursuit of this communitarian end,²⁸ then one might share Nagel's concerns about the existence of deep political or social divisions in American society. But as I have argued in more detail elsewhere,²⁹ such a view of American political theory dangerously ignores the basic premise of democratic thought that it is the individual members of society, rather than some external force, who are to determine what course of action is wisest. One who recognizes the important normative role that individuality and pluralism are designed to play in American democratic theory³⁰ would not fear the existence of even widespread political or social divisions. Nor would she be comforted by attainment of some stultifying, widespread political consensus of the type Nagel appears to desire.

An even more troubling mischaracterization of American political theory on Nagel's part is his disregard for the role which judicial review is designed to play in it. Thus, even if Nagel were correct in asserting that the widespread exercise of judicial review causes the un-

27. It is my position that the extreme judicial deference urged by Nagel is wholly inconsistent with the important countermajoritarian element of American constitutional democratic theory. See *infra* Part III.

28. See Siegal, *The Marshall Court and Republicanism* (Book Review), 67 TEXAS L. REV. 903, 916 (1989); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31-32 (1985).

29. See Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761 (1989).

30. See, e.g., Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 127 (S. Hampshire ed. 1978).

dermining of consensus, and even if he were correct in his contention that the absence of such consensus is necessarily harmful to our societal fabric, his conclusion that judicial review should be dramatically curtailed would ignore the substantial systemic costs of such a result. The next section will explore what I deem to be the appropriate rationale for the exercise of judicial review in American political theory — a rationale seemingly ignored by Nagel. Following that discussion, I will illustrate how Nagel's conclusion dangerously threatens that role by examining the application of his theory to the issue of free speech.

II. THE "COUNTERMAJORITARIAN" PRINCIPLE AND THE RATIONALE FOR JUDICIAL REVIEW

No one could seriously doubt that our system is far from a total or unlimited representative democracy. A carefully crafted, relatively detailed written constitution defines and limits the powers of the representative branches of government. This document, which established the organization and structure of our modern political system and continues to provide the legitimizing source of our government," is framed in a mandatory, rather than an advisory form, and provides for alteration only through resort to a difficult, formalized process requiring the consent of a substantial supermajority. Both practically and theoretically, then, the Constitution provides countermajoritarian (at least counter-*simple* majoritarian) limitations on democratic government.

For much the same reason that the judiciary should evince deference to the policy choices of the representative branches when those choices go constitutionally unchallenged, the courts must possess authority to adjudicate constitutional challenges to the actions of those branches. This, in short, describes what might reasonably be called the "countermajoritarian" principle.

Like Nagel, however, a number of respected scholars over the years have appeared to miss this basic point. "The root difficulty," Alexander Bickel wrote, "is that judicial review is a counter-majoritarian force in our system."³¹ To put the point in its simplest form, Bickel argued that "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it."³² That, Bickel noted, "is the reason the charge can be made that judicial review is undemocratic."³³ To be sure, Bickel ultimately accepted some form of the principle of judicial review.³⁴ But

31. A. BICKEL, *supra* note 3, at 16.

32. *Id.* at 16-17.

33. *Id.* at 17.

34. *See id.* at 23-28.

both Bickel's substantive constitutional analysis and his proposed jurisdictional structure appear to have been substantially influenced by what he called "the essential reality that judicial review is a deviant institution in the American democracy,"³⁵ based on the assumption that "[j]udicial review works counter to" the "distinguishing characteristic" of a democratic system — "the policy-making power of representative institutions, born of the electoral process."³⁶

When policy issues are not claimed to be controlled by the Constitution, Bickel's concern about the undemocratic character of judicial action is most certainly a legitimate one.³⁷ But it is both puzzling and disturbing that Bickel could seriously raise these concerns in the context of *constitutional* adjudication. The doubts Bickel raised about the democratic character of the federal courts³⁸ effectively beg the question when raised in the constitutional context. For by its nature the Constitution is unambiguously *not* a democratic document. While of course its content ordains and establishes a form of representative democracy, the limitations it imposes on the authority of the various branches are profoundly undemocratic.

If those who created our political system had intended an unfettered majoritarian system, they could easily have adopted a governing document that did nothing more than establish the procedural mechanisms for the operation of such a structure. In that case, the only policy choice removed from the will of a simple majority would have been the very fact of majority rule itself. Alternatively, they could simply have chosen not to adopt any single governing document at all, and instead allow the government to function on the basis of accepted tradition and periodic written edicts of fundamental values — much as the British system has.

Those who founded our system chose neither of these courses. While they wisely declined to adopt a highly detailed and extended code in a manner that would have been disturbingly similar to today's Internal Revenue Code, they did adopt a governing document that went considerably beyond either a simple declaration of basic values or a mere procedural structure designed to ensure majority rule. The Constitution provides a moderately detailed political blueprint, establishing both the mechanics of day-to-day governmental operation and the boundaries inside of which that government and its particular branches are to exercise power. We may debate the exact motivations for the various structural and political limitations imposed by the document. But two key points are beyond dispute: (1) these limitations — whether on the structure of the federal government, on the scope of

35. *Id.* at 18.

36. *Id.* at 19.

37. See Redish, *supra* note 29, at 762-64.

38. See *supra* text accompanying notes 31-36.

its powers, or on its authority to restrict individual liberty — are framed in mandatory, rather than advisory terminology, and (2) they are all subject to the stringent, supermajoritarian protections of article V's amendment process. Thus, there can be no doubt that by its terms the Constitution imposes substantial limitations on the outer reaches of the governmental power which it created, and that those limitations were placed beyond the power of a simple majority to modify or repeal. In its essence, then, the Constitution is very much a counter-majoritarian document.

It is, therefore, nonsensical to attack judicial review, as Bickel and others have done, as "counter-majoritarian" or as a "deviant" element within a democratic society.³⁹ Democratic theorists have made clear that a limited (or "constitutional") form of democracy is no less properly classified as "democratic" merely because it is limited.⁴⁰ In point of fact, historians agree that many of those who formulated the Constitution were far from radical democrats.⁴¹ While they obviously chose as their underlying political value a concept of fundamental popular sovereignty and self-determination — the necessary condition of any democratic system⁴² — they often expressed concern over the dangers of unlimited democracy.⁴³ More importantly, there can be little doubt that the political system they embodied in the Constitution — with its delicate structure of checks and balances,⁴⁴ its imposition of numerous hurdles to the enactment of legislation,⁴⁵ its dilutions of a

39. See A. BICKEL, *supra* note 3, at 16 ("The root difficulty is that judicial review is a counter-majoritarian force in our system."); cf. Chemerinsky, *The Supreme Court, 1988 Term — Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 46 (1989) ("For several decades, the scholarly literature about judicial review has been dominated by . . . a conviction that judicial review is a deviant institution in a democratic society.").

40. See J. PENNOCK, *DEMOCRATIC POLITICAL THEORY* 307-08 (1979) ("[C]onstitutionalism provides a useful, if not an essential, framework and set of constraints for the operation of social pluralism for democratic ends."). Because the Constitution is subject to amendment by a super-majoritarian process, a constitutional democracy effectively imposes what Pennock calls a "qualified majority" rule for those issues resolved by the Constitution. Such issues are those about which "the (generic) rational individual at the constitution-making stage would feel that the chances for relatively high external costs from such action were great. Accordingly, he would favor a restrictive voting rule (qualified majority) for [those] subject[s]." *Id.* at 394-95 (footnote omitted); see also D. HELD, *MODELS OF DEMOCRACY* 65 (1987). According to Held, "The 'tyranny of the majority,' as it has often been called, can only be forestalled by particular constitutional arrangements." *Id.* at 64.

41. According to one historian, the framers were concerned with avoiding "a democratic despotism." R. WIEBE, *THE OPENING OF AMERICAN SOCIETY* 12 (1984). As Madison argued in *The Federalist* No. 10, "instability, injustice, and confusion . . . have . . . been the mortal diseases under which popular governments have everywhere perished . . ." *THE FEDERALIST* No. 10, at 104 (Madison) (J. Hamilton ed. 1868). He noted that pure democracies "have, in general, been as short in their lives, as they have been violent in their deaths." *Id.* at 109; see also D. HELD, *supra* note 40, at 61-62.

42. See J. PENNOCK, *supra* note 40, at 7-8; D. HELD, *supra* note 40, at 2.

43. See *supra* note 41.

44. See U.S. CONST. arts. I, II & III.

45. These include primarily the Constitution's requirements of bicameralism, U.S. CONST.

direct representational system,⁴⁶ its formal insulation of the judiciary from majoritarian pressures,⁴⁷ and, in the Bill of Rights, its creation of extensive enclaves of individual liberty protected from governmental invasion⁴⁸ — was far from either a pure democracy or a system of simple majoritarianism.

Ironically, in developing his own rationale for judicial review in light of the straw man of a mythical pure American democracy, Bickel himself seriously endangered the very majoritarian values he initially exalted. Bickel rightly began his analysis with a

search . . . for a function which might (indeed, must) involve the making of policy, yet which differs from the legislative and executive functions; . . . which will not likely be performed elsewhere if the courts do not assume it . . . and whose discharge by the courts will not lower the quality of the other departments' performance by denuding them of the dignity and burden of their own responsibility.⁴⁹

His answer was that "courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess."⁵⁰ Thus, according to Bickel, to the extent that an issue may be decided on the basis of "principle" — in other words, by means of an analysis of long-range values⁵¹ — it is appropriate for final judicial resolution, despite the inherent tensions between judicial review and democratic theory. At no point, however, does Bickel appear to limit this judicial authority to the expounding of principles and values gleaned from the text, structure, or history of the Constitution. Since in a constitutional democracy the only justification for judicial review by an unrepresentative governmental organ is to ensure that the majoritarian branches adhere to the countermajoritarian limitations imposed by the Constitution, judicial invalidation of the exercise of majoritarian will on any other grounds erodes fundamental democratic principles. Yet, because of his unwarranted concern over the "deviant" nature of judicial review as an element of American democratic theory, Bickel would have significantly confined the judiciary's jurisdictional and substantive power in constitutional cases. Thus, Bickel's approach to judicial review somehow manages to be simultaneously over- and underinclusive.

art. I, §§ 1, 7, and presentment, U.S. CONST. art. I, § 7, cls. 2 & 3. *See INS v. Chadha*, 462 U.S. 919 (1983).

46. *See* U.S. CONST. art. I, § 3 (providing for selection of senators by the state legislatures, later altered by the seventeenth amendment to provide for direct senatorial election).

47. U.S. CONST. art. III, § 1.

48. U.S. CONST. amends. I-X.

49. A. BICKEL, *supra* note 3, at 24.

50. *Id.* at 25.

51. *See id.* at 24: "[M]any actions of government have two aspects: their immediate, necessarily intended, practical effects, and their perhaps unintended or unappreciated bearing on values we hold to have more general and permanent interest."

The fact that judicial review may not be inherently inconsistent with American political theory does not, of course, necessarily establish that the *absence* of judicial review is necessarily inconsistent with our prevailing political precepts. In other words, the fact that we logically *can* vest in the judiciary the final say as to the Constitution's meaning does not mean that we logically *must* vest such authority in the courts. Bickel, for example, raised the possibility that each branch be deemed the final arbiter of the meaning of the constitutional provisions governing its behavior.⁵² William Van Alstyne, in critiquing John Marshall's reasoning in *Marbury v. Madison*,⁵³ argued:

That the Constitution is a "written" one yields little or nothing as to whether acts of Congress may be given the force of positive law notwithstanding the opinions of judges, the executive, a minority or majority of the population, or even of Congress itself . . . that such Acts are repugnant to the Constitution. That this is so is clear enough simply from the fact that even in Marshall's time (and to a great extent today), a number of nations maintained written constitutions and yet gave national legislative acts the full force of positive law without providing any constitutional check to guarantee the compatibility of those acts with their constitutions.⁵⁴

Close analysis demonstrates, however, that both Bickel's suggestion and Van Alstyne's critique are wrong. We could not, as Bickel suggests, logically vest in each branch the final say as to the meaning of the constitutional provisions governing their authority, at least if we still intend to maintain a meaningful constitutional system. Nor is Van Alstyne's argument that judicial review is not logically inherent in a constitutional system, because other nations possessing written constitutions fail to provide for judicial review, dispositive of anything. No one, to my knowledge, has ever suggested that judicial review is a *physical* necessity of a constitutional system, only that it is a *logical* or *practical* necessity. That other nations decline to provide for judicial review at most establishes the former proposition; it says absolutely nothing about the latter. To the extent other nations with written constitutions fail to adopt a system of judicial review, they could simply be wrong — at least to the extent those nations desire a meaningful constitutional system. Certainly, since the time of the framers, our nation, in shaping its governmental structure, has never considered itself logically or normatively bound by the practices of other nations. In any event, many nations governed by a written constitution have, in fact, erected detailed systems of judicial review.⁵⁵

52. *Id.* at 7.

53. 5 U.S. (1 Cranch) 137 (1803).

54. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 17 (footnote omitted).

55. See J. BARRON, C. DIENES, W. MCCORMACK & M. REDISH, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICY* 13-15 (3d ed. 1987); see also Lobel, *The Meaning of Democracy: Representations and Participatory Democracy in the New Nicaraguan Constitution*, 49 U. PITT. L. REV.

A system that adopts an *unwritten* constitution is placing ultimate confidence in those in political power to act in good faith. Because both the existence and meaning of unwritten traditions are so uncertain, it would not be difficult for political leaders to argue persuasively that no such applicable tradition actually exists. Moreover, even a well-established tradition could be abandoned, as long as a simple majority chose to do so. This, of course, does not mean that a system premised on an unwritten constitution would necessarily degenerate into a political state of nature, but only that the system could not reasonably be deemed to be governed by a countermajoritarian constitution.

When a constitution assumes a *written* form, however, those establishing the government are manifesting considerably less trust of those who will exercise political power. This is particularly so when the constitution — as is true of ours — speaks in mandatory terms. It is even more true when that constitution — again, as does ours — in both its history and text openly manifests profound mistrust of those in power.⁵⁶ This mistrust, it should be noted, extends well beyond the political leaders themselves. Those who drafted our Constitution often expressed serious concern over the power of the electorate that puts those leaders in power.⁵⁷ That our Constitution was not structured merely as a means of protecting the interests of the electorate from abuse by those in power can be seen in article V's provision for constitutional amendment. If the sole goal of our constitution were to protect popular interests against governmental excess, then presumably amendments could have been authorized by a vote of a simple majority of the electorate. Instead, the framers adopted an amendatory structure under which it is possible that both political leaders and a simple majority of the electorate might desire to repeal or change a constitutional dictate, but would nevertheless be deprived of the legal authority to do so.

In light of these considerations, let us examine Bickel's suggestion (one to which he was not necessarily committing himself, it should be noted)⁵⁸ that each branch retain final say as to the meaning of the provisions regulating its own authority. It is not difficult to suppose that if the majoritarian branches were allowed to act as the final arbi-

823, 827-28 (1988) (quoting Edmond Randolph concerning the "follies of democracy," and Elbridge Gerry referring to democracy as "the worst of all political evils"); cf. Chemerinsky, *supra* note 39, at 65 (footnote omitted) ("The framers' distrust of majoritarian politics is well documented.").

56. See *supra* notes 38-48 and accompanying text.

57. See, e.g., THE FEDERALIST, *supra* note 41, at 109 ("[A] pure democracy . . . can admit of no cure for the mischiefs of faction.").

58. Bickel, it should be recalled, ultimately rationalized the exercise of judicial review on the ability of the courts to ascertain long-range guiding principles. See *supra* text accompanying notes 31-36.

ters of the countermajoritarian constitutional limitations on their authority, there will be no limitations at all, at least as a practical matter. This is simply a matter of common sense. Whether one conjures up Lord Coke's principle, "Nemo Judex in re sua"⁵⁹ (no man is to be a judge in his own cause), or merely the commonly accepted wisdom that one does not rely on the fox to guard the chicken coop, it would require the height of naïvete to believe that the majoritarian branches could, as a general matter, be trusted to sit objectively in final judgment on the constitutionality of their own actions.

It is, of course, conceivable that one majoritarian branch could be placed as the final arbiter of the constitutionality of the actions of the *other* majoritarian branch. In such an event, however, we would still be left with a situation in which a simple majority could, as a practical matter, effect an amendment of the Constitution. It is not by happenstance that, in structuring a largely representational democratic system, the framers formally insulated the members of one of the three co-equal branches of government from direct majoritarian pressure. It should not, then, require tremendous insight to see an inherent link between a countermajoritarian governing document, on the one hand, and that document's creation of a countermajoritarian branch of government, expressly vested in article III with the authority to adjudicate cases "arising under this Constitution," on the other.

The obvious problem with this analysis is that the judiciary, as much as the other two branches, is itself created, regulated, and controlled by the Constitution.⁶⁰ If, as I have argued, it is absurd to suggest that one branch could effectively sit as final arbiter of the constitutional provisions governing its conduct, one might reasonably ask how the federal judiciary may be allowed to sit as the final arbiter of the *entire* Constitution, including the provisions governing its own behavior.

At most, acceptance of this argument would mean that the judiciary should be deprived of its final authority to sit in judgment on its own actions; it in no way logically requires that the judicial branch cede to the other branches the power to determine the constitutionality of their own actions. Under such a system, Congress and the executive, through the legislative process, would sit as the final arbiter of the limited powers granted to the federal judiciary by article III.

It is possible, however, to suggest a rationale for reconciling the logic of the countermajoritarian principle with the judicial power finally to resolve the constitutional limits of its own authority. It is well established in the law of due process that, despite the enormous impor-

59. *Dr. Bonham's Case*, 77 Cong. Rep. 646, 8 Coke 114(a) (1610). See generally Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455 (1986).

60. See U.S. CONST. art. III.

tance of a disinterested and independent adjudicator, existence of an overwhelming and compelling interest — bordering on actual necessity — can justify reliance on an adjudicator who is not completely neutral.⁶¹ If the majoritarian branches retained final authority to determine the constitutional contours of the judicial power, those branches could easily employ that authority to undermine judicial enforcement of the constitutional limitations imposed upon them. When one realizes the potentially ominous consequences of entrusting to the majoritarian branches final say as to the constitutional limitations on the judicial power, then, it is not difficult to find that the vesting of such final say in the judicial branch itself rather easily fits within the contours of such a “necessity” exception. Thus, the seeming anomaly of allowing the judiciary to sit as final judge of its own powers becomes not only reasonable but actually essential in an instrumental sense, as a means of ensuring the judiciary’s effective performance of its central role within our political framework.

The constitutional system we adopted was not handed down from on high, nor was it the only form a democratic government could assume. It is, however, the system upon which our whole governmental structure has been both established and legitimized. The Constitution continues to retain the positivistic force of law; therefore, if the rule of law is to be valued, the directives of the Constitution must be obeyed, unless and until modified in the manner prescribed in article V, or until the system is openly rejected in favor of some new governing structure. If the countermajoritarian limitations imposed by the Constitution are to retain meaning, their final interpretation and enforcement must come from the countermajoritarian judicial branch.

At this point, it is necessary to make clear exactly what arguments I am *not* making in support of the countermajoritarian principle:

1. I am not arguing that a representational democracy necessarily cannot flourish without either a binding, written, countermajoritarian constitution or the practice of judicial review. The point, rather, is that a *limited constitutional* democracy cannot exist without a binding, written constitution, as a definitional matter, or without judicial review by an independent judiciary, as a practical matter. To the extent a democracy lacking these features is considered “limited,” it is only as a result of the good faith and self-imposed limitations of both those in political power and a majority of the electorate.

2. I am not arguing that judicial review is compelled by either the text or history of the Constitution. While Herbert Wechsler has attempted to ground a requirement of judicial review in the constitutional text,⁶² he has rightly been criticized for this attempt.⁶³ It is

61. See *United States v. Will*, 449 U.S. 200, 213-16 (1980).

62. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 3 (1959) (arguing that judicial review is prescribed by U.S. CONST. art. VI, cl. 2).

important to note, however, that while the Constitution's text may not *compel* judicial review, neither is the practice in any way extra- or counterconstitutional, as is made clear by article III's extensions of the federal judicial power to cases arising under the Constitution.⁶⁴ Moreover, while there is substantial historical evidence to support the framers' assumption of the existence of a judicial review power⁶⁵ — not the least of which is Hamilton's direct and eloquent statement in support of the concept in *The Federalist No. 78*⁶⁶ — my arguments in no way require such a historical foundation. I argue, rather, that to the extent the framers did not actually contemplate judicial review, they should have, because without it there is no way that the constitutional system which they adopted could realistically be expected to function in the manner they so obviously intended. Thus, while it might be difficult to declare certain attempts by the majoritarian branches to exclude judicial review to be unconstitutional,⁶⁷ my argument is merely that the concept is dictated by the logic of American political theory, not, at least as a general matter,⁶⁸ by the text of the Constitution. As such, this concept should guide and limit the decisions of the majoritarian

63. See A. BICKEL, *supra* note 3, at 49-65.

64. U.S. CONST. art. III, § 2, cl. 1.

65. See, e.g., R. BERGER, *CONGRESS V. THE SUPREME COURT* (1969); 1 J. GOEBEL, *THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES — ANTECEDENTS AND BEGINNINGS TO 1801* (1971); 2 G. HASKINS & H. JOHNSON, *THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES — FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15*, at 186 (1981). According to Bickel, "[A]lthough the Framers of the Constitution had failed to be explicit about the function of judicial review, the evidence of their deliberations demonstrates that they foresaw — indeed, invited — it." A. BICKEL, *supra* note 3, at 15.

66. Hamilton wrote:

The complete independence of the courts of justice is peculiarly essential in a limited constitution. . . . Limitations [on legislative authority] can be preserved in practice no other way than through the medium of courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

THE FEDERALIST, *supra* note 41, No. 78 (A. Hamilton), at 576-77.

Hamilton transformed the Constitution's textual silence on the necessity of judicial review from a problem into an asset. He did this by shifting the burden of production:

If it be said that the legislative body are themselves the constitutional judges of their own powers . . . it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. . . . It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.

Id. at 577.

67. To the extent that majoritarian action deprives an individual of life, liberty, or property, however, the exclusion of judicial review could arguably constitute a violation of the fifth amendment's due process clause, by depriving the individual of a constitutionally protected interest without a sufficiently independent adjudicator. See *Bartlett v. Bowen*, 816 F.2d 695 (D.C. Cir. 1987) (holding that Congress did not intend to bar judicial review of constitutional challenges to Medicare Act). See generally Redish & Marshall, *supra* note 59. However, it is generally assumed that such a requirement may be satisfied by the availability of a state-court forum, or possibly an administrative process.

68. See *supra* note 67.

branches to exclude the practice. Moreover, it should prevent the judiciary from erecting self-imposed barriers to the performance of its essential political role within the constitutional system.

3. Nor am I arguing, as have several respected scholars, that the concept of judicial review derives from the premise that "[t]he final aim of [our constitutional democratic] society is as much freedom as possible for the individual human being."⁶⁹ Such logic has led Dean Jesse Choper to urge judicial abstention on issues of both federalism and separation of powers in order to preserve the Supreme Court's preciously limited "institutional capital" for cases concerning individual constitutional liberties, where, he argued, performance of the judicial review function is crucial.⁷⁰ I in no way intend to derogate the vital role played by individual liberty within our political structure.⁷¹ But the fact remains that nothing in the constitutional text suggests that the provisions protecting individual liberty were the only provisions meant to bind the majoritarian branches, while the structural provisions, concerning federalism and separation of powers, were intended to be merely advisory. Indeed, when the framers simultaneously protected judicial independence and extended power to the courts over cases arising under the Constitution, the document included precious few protections of individual liberty.⁷² Most of those protections were, of course, added later in the Bill of Rights, which amended the original text. Thus, to the extent the constitutional structure contemplated judicial review, that power was apparently directed primarily at the very types of constitutional issues Choper wishes to exclude from the Court's province.

If the structural provisions of the Constitution were deemed merely advisory, it would be difficult to discern any textual basis for finding the provisions protecting individual liberty any less advisory. While scholars may argue that individual liberty protections are somehow more fundamental to our system, the alternative argument could be — and has been — made that in reality it is the constitutional protections of federalism, not those concerning liberty, that are central.⁷³ Moreover, it has been persuasively argued that the constitutional dictates concerning separation of powers were themselves fashioned in order to prevent tyranny.⁷⁴ Thus, it is difficult to discover any basis in either constitutional text or political theory to justify the distinctions

69. E. ROSTOW, *THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW* 149 (1962).

70. J. CHOPER, *supra* note 8, at 263, 275.

71. *See generally* Redish, *supra* note 5, at 601-05.

72. Among the few that did exist were the protection of habeas corpus, U.S. CONST. art. I, § 9, cl. 2, and the prohibitions on bills of attainder and *ex post facto* laws, U.S. CONST. art I, § 9, cl. 3.

73. *See* p. 73.

74. *See* *INS v. Chadha*, 462 U.S. 919, 946 (1983).

in the exercise of judicial review urged by Choper. Most importantly, the judiciary's function in our governmental system is to enforce and interpret the Constitution, not effectively to repeal provisions it views as unwise or outmoded. And there can be little doubt that, by abdicating its function of reviewing the actions of the majoritarian branches to ensure compliance with constitutional dictates, the Court would effectively repeal the constitutional provision in question; the majoritarian branches would be left free to ignore constitutional restrictions any time they so desired.⁷⁵

III. NAGEL'S DISREGARD OF THE "COUNTERMAJORITARIAN" PRINCIPLE: THE OMINOUS EXAMPLE OF FREE SPEECH

As already noted, Nagel's analysis of the negative effect of judicial review on the attainment of consensus completely ignores the systemic costs of a dramatic reduction in the scope and reach of judicial review. This disregard is nowhere more evident than in Nagel's analysis of judicial review's proper role in free speech cases.⁷⁶

Nagel begins with the unsupported and misleading assumption that "[t]he impulse underlying the modern judiciary's energetic efforts to enforce the first amendment is the desire to create a tolerant, open society" (p. 28). He then concludes that

[j]udicial review cannot be expected to have any important impact on many of the major causes of intolerance and censorship. . . . Informed speculation suggests that a wide range of factors coalesce to determine the amount of tolerance or intolerance. . . . Adjudication is an unlikely mechanism for controlling such large and complex factors. [p. 29]

Thus, by conclusorily assuming the validity of only one rationale for the protection of free speech — one that has been advocated as the sole justification for free speech by only one scholar⁷⁷ and is sorely

75. See *supra* text accompanying notes 59-60.

76. At the outset, it should be noted that while Nagel vigorously attacks the role of judicial review in free speech cases, see *infra* text accompanying notes 90-99, he emphasizes that he does "not . . . intend to suggest that the courts can never have an important role to play" in free speech cases. P. 59. But at no point does he describe the "rare occasions" (p. 59) on which they may do so in any detail. In a footnote, he suggests that "an insightful analysis that comes to a somewhat similar conclusion" appears in Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985). P. 183 n.170. However, Nagel is much too modest in his willingness to share the credit for his suggested dramatic reduction of the judicial role in free speech cases, for Nagel's version of that role is dramatically narrower than Blasi's version. Blasi's rationale in structuring his first amendment scope is the belief that "adjudication in ordinary times should be heavily influenced by the goal of strengthening the central norms of the first amendment tradition against the possibility of pathological challenges," the label which he applies to times of great political stress. Blasi, *supra*, at 458. See generally Redish, *The Role of Pathology in First Amendment Theory: A Skeptical Examination*, 38 CASE W. RES. L. REV. 618 (1987-88). Nagel, in sharp contrast, dismisses the notion that judicial enforcement of the first amendment should play any significant role in such times. See *infra* text accompanying notes —. Thus, Blasi's suggested judicial role is dramatically broader than that urged by Nagel.

77. L. BOLLINGER, *THE TOLERANT SOCIETY* (1986). Nagel attributes this theory to Justice Holmes' famed dissent in *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (Holmes, J.,

misguided in any event⁷⁸ — Nagel is able to complete his self-serving proof. However, had he acknowledged the primacy of any of the many other conceivable rationales for free speech — facilitation of the political process,⁷⁹ individual self-realization,⁸⁰ or the development of a marketplace of ideas⁸¹ — his conclusion would not necessarily have followed.

It is puzzling to see Nagel question the assertion “that adjudication can . . . be expected to protect the free exchange of ideas significantly” (p. 30). One need only look to the Court’s decisions in the areas of defamation of public figures⁸² or the opening of the “public forum” to free and open debate⁸³ to see how much the Court has done to ensure and encourage “the free exchange of ideas.” Moreover, while the Court’s record on the regulation of obscenity leaves much to be desired from a protectionist perspective,⁸⁴ the fact remains that the Court has at least curbed governmental censorship excesses in the extreme case.⁸⁵ And while most of the Court’s early decisions concerning regulation of the advocacy of unlawful conduct could hardly be described as protectionist,⁸⁶ at least its most influential modern statement on the issue assures that the free exchange of ideas may be curbed only in the presence of a real and immediate danger.⁸⁷ Thus, in what represents a disturbing pattern throughout much of his

dissenting), in which Holmes referred to the need for a “free trade in ideas” and rationalized free speech protection by an analogy to the capitalistic marketplace. 250 U.S. at 630 (Holmes, J., dissenting); see p. 28. But while any protectionist theory of free speech will of course require tolerance in the purely consequential sense (since the absence of such tolerance would mean suppression), such “tolerance” is relevant to Holmes only in this instrumental manner. No free speech theorist, other than Bollinger, has rationalized free speech protection solely or primarily as a means of developing tolerant attitudes in society.

78. The idea that the goal of free speech protection, adopted as a means of fostering free thought and individual intellectual integrity, should be perverted into nothing more than a means of governmental development of the equivalent of mind control, by fostering among the populace a uniform and unwavering attitude of tolerance, borders on the Orwellian.

79. See, e.g., A. MEIKLEJOHN, *POLITICAL FREEDOM* (1960); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

80. See, e.g., Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Redish, *supra* note 5; Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972).

81. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); J. MILL, *ON LIBERTY* (1859).

82. See, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

83. See, e.g., *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972); *Cohen v. California*, 403 U.S. 15 (1971); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

84. See Redish, *supra* note 5, at 635-40.

85. For example, in *Jenkins v. Georgia*, 418 U.S. 153 (1974), the Court overturned the obscenity conviction of a movie theater manager for showing the movie *Carnal Knowledge*.

86. See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951); *Gitlow v. New York*, 268 U.S. 652 (1925); *Schenck v. United States*, 249 U.S. 47 (1919).

87. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

book,⁸⁸ Nagel builds his theories on an empirically questionable foundation.⁸⁹

Once again, however, the most troubling aspect of Nagel's analysis is his disregard of the central role which an independent judiciary must serve as a check on majoritarian instincts. For example, he criticizes Thomas Emerson for "portray[ing] the courts as a wall standing against the floor of repression," because Emerson "failed to provide a single example of the destruction of a whole system of free expression after the imposition of a few limitations upon discussion"⁹⁰ In support, Nagel notes that "even systematic waves of suppression often vanish suddenly, jarring the democratic system but not destroying it" (p. 36). But should *that* be the test for determining the need for judicial protection of free speech? Should we be satisfied with the existence of widespread suppression of ideas and opinions, so long as the nation has not yet been consumed by a totalitarian structure as a result? Should we willingly suffer periods of widespread suppression, because we can rest assured that ultimately, they will "vanish" without judicial help? It is difficult to respond to Nagel's arguments here, because the value he places on the importance of a free or open society is apparently so much lower than the value that I (and, I believe, our constitutional system) place on it.

Nagel accurately notes that, on a purely descriptive level, "none of our most serious periods of repression was influenced significantly by judicial enforcement of the first amendment, yet each ended well short of destroying the system of free expression" (p. 37). But, as already noted, serious harm to the values of free speech may be — and clearly were — caused well short of a total destruction of the system. In any event, the question remains: Why should we be willing to suffer even the harms to free speech that Nagel acknowledges actually did occur? Could it be because such judicial action would have undermined attainment of some sort of prevailing social consensus?⁹¹ The very point of free speech protection is that such a consensus is unnecessary. Could it be because by invalidating majoritarian suppression the unrepresentative judiciary will be undermining democratic values?⁹² Such an analysis ignores the important countermajoritarian limitation inherent in our constitutional form of democracy.⁹³ Moreover, such a short-sighted view of democratic theory would ultimately lead us

88. See *supra* text accompanying notes 24-25.

89. In a classic illustration of a pot calling the kettle black, Nagel criticizes Professor Thomas Emerson, whose free speech theory was set out in T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970), for "support[ing] [his] conclusion with a series of unexamined assertions regarding the utility of judicial review" P. 32.

90. P. 35 (discussing T. EMERSON, *supra* note 89).

91. See *supra* text accompanying notes 27-30.

92. See *supra* text accompanying notes 31-33.

93. See *supra* text accompanying notes 31-75.

down the road toward the undermining, if not the total destruction, of that democratic system.⁹⁴

Much of Nagel's attack on the role of judicial review in free speech cases focuses on the argument that such judicial involvement may actually be "dysfunctional" (p. 28), or in other words, counterproductive to the advancement of free speech values. In fashioning this argument, he begins with the factual assumption that "[t]he modern first amendment consensus holds at least to some degree that 'expression must be protected against governmental curtailment at all points, even where the results of expression may appear to be in conflict with other social interests that the government is charged with safeguarding.'"⁹⁵ He contends that "the habit of intellectual discipline so necessary to the impartial application of the law is asserted to be the judiciary's major qualification for its present role" (p. 39). He then concludes that "[t]he difficulty is that, by definition, the use of principle requires courts to protect speech even in cases in which the immediate advantages are questionable and the social disadvantages are clear" (p. 39). He finally suggests that "[t]he judiciary implicitly acknowledges the dangers of principled decisions by creating exceptions" (p. 39), and rhetorically asks, "Is public acceptance and respect for the first amendment increased or decreased by the constant message sent out by principled adjudication?" (p. 39).

The fallacies in Nagel's logic are many. First, his argument that the Court ultimately undermines its credibility by beginning with an assumption of absolutism while simultaneously recognizing individual exceptions assumes factually inaccurate premises. Certainly, a majority of the Justices has never begun with the premise that free speech is to take precedence over all conceivable competing values.⁹⁶ Indeed, not even most scholars who could reasonably be described as protectionist fit that description.⁹⁷ Second, Nagel incorrectly assumes that the primary justification for the judicial role in free speech cases is the judiciary's adherence to principled adjudication. In fact, it is the judiciary's independence from both the majoritarian branches and the populace that justifies its role in free speech cases, under the logic of the countermajoritarian principle.⁹⁸ The courts' ultimate judgments may often be nothing more than the outcome of a balancing of com-

94. See *supra* note 40.

95. P. 38 (quoting T. EMERSON, *supra* note 89, at 17).

96. Justices Black and Douglas were the only members of the Court who have at any point purported to adhere to such an absolutist position. See, e.g., *Konigsberg v. State Bar*, 366 U.S. 36 (1961) (Black, J., dissenting) (joined by Justice Douglas).

97. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 792 (2d ed. 1988); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

98. See *supra* text accompanying notes 56-75.

peting social interests.⁹⁹ The key, however, is that the balance is struck by a governmental organ formally insulated from the very pressures which have given rise to the suppression in the first place.

IV. INTELLECTUAL CONSISTENCY VERSUS IDEOLOGICAL RESULT-ORIENTATION: NAGEL ON CONSTITUTIONAL FEDERALISM

As troubling as one may find Nagel's attitude toward the judicial role in free speech cases, one might at least reasonably expect that Nagel would apply his theory of extreme judicial deference consistently to all questions of constitutional interpretation. Nagel's analysis of the judicial role in issues of constitutional federalism refutes that expectation.

As already noted, early in the 1980s, Choper advanced the controversial theory that judicial review should be reserved solely for issues of individual liberty.¹⁰⁰ He feared that expenditure of precious limited judicial "capital" on issues of federalism and separation of powers would endanger the Court's ability to gain public acceptance for its potentially unpopular decisions protecting individual rights, and suggested that the constitutional interests of federalism and separation of powers did not require judicial protection in order to thrive.¹⁰¹ Other scholars who generally favor an "activist" judiciary followed suit.¹⁰² I have criticized Choper's logic,¹⁰³ and suggested that acceptance of his theory would amount to the Court's improperly picking and choosing which constitutional provisions it would enforce on the basis of stark political or ideological preferences.¹⁰⁴ Nagel also rejects attempts by the Court to abdicate the judicial review function in federalism cases.¹⁰⁵ However, the differences between his position on the issue and my own are striking.

Of initial importance is the fact that, while I rationalize the need for meaningful judicial enforcement of the precepts of constitutional federalism, on the basis of an attempt to avoid selective enforcement driven by a naked ideological result-orientation by the judiciary,¹⁰⁶ Nagel's urging of a highly activist judiciary in this one area is puzzlingly inconsistent with the philosophy of extreme deference he urges

99. See M. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 119-20 (1984).

100. J. CHOPER, *supra* note 8.

101. See *supra* text accompanying notes 69-75.

102. See, e.g., M. PERRY, *supra* note 1, at 37-60.

103. See Redish & Drizin, *supra* note 9, at 34-41.

104. *Id.* at 40.

105. P. 61. Nagel criticizes, for example, the Court's decision in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (holding that state interests are more properly protected by procedural limitations inherent in the federal system than by substantive limits on federal power).

106. See *supra* text accompanying notes 103-04.

in every other area of constitutional law.¹⁰⁷ In criticizing “the modern Court’s record of enforcing the principle of federalism” as “anemic” (p. 60), Nagel characterizes such a development as “one aspect of a widespread pattern that inverts the priorities of the framers: an obsessive concern for using the Constitution to protect individuals’ rights” (p. 61). The effect of such an inversion, he contends, is “ultimately to trivialize the Constitution,” because “[t]he framers’ political theory was immediately concerned with organization, not individuals” (p. 64). In choosing to focus on individuals rather than federalism, he argues, “modern judges and scholars have tended to shut themselves off from full participation in the great debates about governmental theory begun by the framers” (p. 65).

Such an analysis appears to ignore everything Nagel had said until that point about the judicial role in constitutional adjudication. Prior to his discussion of constitutional federalism, his criticisms of judicial activism had focused upon the supposedly negative impact that judicial constitutional interpretation has on attainment of political, social, and linguistic consensus.¹⁰⁸ Ironically, something approaching just such a national consensus appeared to have developed prior to the Court’s decision in *National League of Cities v. Usery*,¹⁰⁹ which asserted, for the first time in many years,¹¹⁰ a significant judicial role in the resolution of issues of constitutional federalism. Yet the bulk of Nagel’s commentary on the subject provides a defense of *Usery* (pp. 68-83), notwithstanding that decision’s arguably disruptive impact on national consensus. One would think that if attainment of national consensus on constitutional issues were deemed the primary goal — a conclusion which, I should emphasize, I categorically reject,¹¹¹ but one which Nagel appears to adopt¹¹² — one should logically decry *Usery* for rocking the consensual boat. However, in discussing the Court’s role in issues of constitutional federalism, Nagel appears to have forgotten his entire “consensus” analysis. Instead, without citing anything approaching dispositive historical evidence as to the framers’ understanding,¹¹³ and without ever explaining why their understand-

107. See *supra* text accompanying notes 100-05.

108. See *supra* text accompanying notes 15-30.

109. 426 U.S. 833 (1976).

110. For many years, the Court had employed an extremely deferential approach to federal regulation of matters that had previously been considered to be exclusively within the domain of the states. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that federal marketing quotas on wheat not intended for commerce fall within commerce power); *United States v. Darby*, 312 U.S. 100 (1941) (holding that maximum-hours and minimum-wage provision for goods intended for commerce fall within the commerce power).

111. See *supra* text accompanying notes 17-30.

112. See *supra* text accompanying notes 15-16.

113. To suggest, as Nagel does, that “[t]he framers’ political theory was immediately concerned with organization, not individuals” (p. 64) is at best misleading. What the framers of the original body of the Constitution wished tells only a part of the story, since the bulk of the

ing should today be deemed controlling in any event,¹¹⁴ he asserts that judges should seek to participate "in the great debates about governmental theory begun by the framers" (p. 65).

The problem, of course, is that unlike scholars, judges do not merely "participate in debates" about governmental theory.¹¹⁵ Rather, they consider such issues of governmental theory only as a prelude to possibly invalidating actions of the majoritarian branches. And it is recognition of this fact that renders Nagel's defense of *Usery* so strikingly inconsistent with his theory of judicial restraint.

The problems with Nagel's defense of *Usery* go considerably beyond the simple fact of inconsistency with his underlying theory of judicial review. While the federal judiciary's independence from majoritarian political pressures dictates a judicial obligation to enforce the provisions of the countermajoritarian Constitution,¹¹⁶ the same fact simultaneously dictates a judicial inability to overrule policy choices of the majoritarian branches that do not violate some constitutional provision. For absent a reasonable grounding in the text of the Constitution, the unrepresentative judiciary lacks any source of legiti-

Constitution's individual rights protections came in the Bill of Rights, added only after adoption of the original Constitution. Thus, the views of the original framers about the importance of individual rights are largely irrelevant to a determination of the importance that the nation intended to place on the individual rights protections in the Bill of Rights. If anything, the fact that its adoption was demanded by state ratifiers tends to demonstrate its enormous importance to many. Moreover, many of today's individual rights protections are derived from the limits imposed on state governments in the fourteenth amendment, adopted many decades after the first set of framers drafted the original Constitution.

There also exists both a logical and historical basis for questioning the artificially formal distinction Nagel draws between "organization" and "individuals." The two are not mutually exclusive. Contemporary sources indicate that for the most part, the particular governmental organization was chosen for the very purpose of assuring that individuals would remain free from tyranny. See *INS v. Chadha*, 462 U.S. 919, 957 (1983) (contending that separation-of-powers provisions "were intended to . . . protect the people from the improvident exercise of power"). To be sure, Nagel's argument does assist in refuting those who argue for an exclusive modern focus on individual rights protections, at the expense of the structural provisions. Cf. Redish & Drizin, *supra* note 9, at 35 (footnotes omitted):

[W]hen the framers simultaneously protected judicial independence and extended power over cases arising under the Constitution, the Constitution included precious few protections of individual liberty. . . . Thus, to the extent the constitutional structure contemplated judicial review, that power was apparently directed primarily at the very types of constitutional issues Dean Choper wishes to exclude from the Court's province.

But it does not follow that there should be a total reversal of the current hierarchy, as Nagel desires.

114. There has long been a spirited academic debate over the extent to which the framers' original understanding should bind modern constitutional interpretation. Compare Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445 (1984) and Brest, *supra* note 1 with Monaghan, *supra* note 3 and Perry, *The Authority of Text, Tradition and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551 (1985).

115. Cf. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (reasoning that the requirement of actual injury to make out standing to bring suit "tends to assure that the legal questions presented to the court will be resolved [in a forum that is] not in the rarified atmosphere of a debating society").

116. See *supra* text accompanying notes 31-75.

mate authority to contradict legislative choices in a basically democratic society. If representational democratic theory means anything, it means this much.

In light of this dictate of American political theory, *Usery* clearly constitutes an illegitimate judicial usurpation of legislative authority. That decision established a constitutional enclave of state governmental authority, protected from federal intrusion, even where article I, section 8 of the Constitution is normally construed to vest such regulatory authority in Congress.¹¹⁷ Yet the only conceivable textual source for such an enclave is the tenth amendment,¹¹⁸ which by its terms protects states from federal intrusion only when article I fails to authorize congressional power.¹¹⁹ Thus, *Usery* imposed limitations on federal legislative power solely on the basis of an ideology premised on the political values of federalism. It is difficult to conceive of a more illegitimate exercise of judicial activism.

Ironically, then, in the one area in which something akin to the judicial deference urged by Nagel throughout his book might actually be appropriate,¹²⁰ he ignores not only his own flawed rationale for such deference,¹²¹ but also the limited relevance of constitutional language. Thus, Nagel effectively deprives his theory of what would have been its only saving grace, its intellectual consistency.

V. THE STRUCTURE OF CONSTITUTIONAL FORMULAE

Undoubtedly the most forceful portion of Nagel's analysis is his critique of what he labels the "formulaic Constitution" (p. 121). He contends here that "a new style of opinion writing [has] emerged," which "emphasizes carefully framed doctrine expressed in elaborately layered sets of 'tests,' 'prongs,' 'requirements,' 'standards,' or 'hurdles'" (p. 121). He correctly perceives that this style is part of a "modern effort to combine realism and formalism" (p. 131), but criticizes it for achieving "a specious definiteness" (p. 142), for "analyz[ing] endlessly" (p. 129), and for "objectify[ing] ideas" (p. 129).

To a limited extent, Nagel's criticism is well taken. There can be little doubt that constitutional formulae "often create[] a specious sense of certainty" that "promise[s] clarity or measurement where only judgment is possible" (p. 139). In the free speech area, for exam-

117. *National League of Cities v. Usery*, 426 U.S. 833, 836, 842-43 (1976).

118. See U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

119. See Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 701-02 (1974); Redish & Drizin, *supra* note 9, at 10-12.

120. See *supra* text accompanying notes 15-30.

121. See *supra* text accompanying notes 15-30.

ple, both the Court and commentators have often sought a simplicity of analysis which fails to comport with the real complexities of the individual case.¹²² It does not follow, however, that we should accept Nagel's criticism that "much of the Justices' intellectual energy is not directed at the actual resolution of cases at hand [but is instead] directed at the difficult, complex, but preliminary issue of determining the proper test to be applied in a defined class of cases" (p. 148). We must keep in mind that Supreme Court decision making is unique. The Court does not select for resolution so few cases among the many presented for review, merely to resolve the case at hand. Rather, the cases are generally chosen for the very purpose "of determining the proper test to be applied in a defined class of cases." Surely, the Court would not be put to its highest and best use if it were confined to resolving cases in a manner similar to television's Judge Wapner, without regard to how future cases might be affected by the decision.

Nagel argues that

neither the content nor the shape of modern formulae communicates clarity and constraint. The formulae are demands — multiple, repetitive, shifting, and sometimes inconsistent. The style reflects intellectual embarrassment about the existence of judicial discretion, but is designed to assume plentiful opportunities for its exercise. . . . Rather than binding, the formulaic style frees the Court, like some lumbering bully, to disrupt social norms and practices at its pleasure. [p. 157]

While Nagel's criticism is no doubt applicable to a number of the Court's constitutional formulae — not the least of which is the *Usery* doctrine, of which Nagel is so enamored¹²³ — it is by no means clear that the fault is in any way inherent in the use of a formulaic style. There are good constitutional formulae, and there are bad constitutional formulae. But because Nagel focuses his attack on the very institution of the constitutional formula, he neglects to provide useful criteria by which to measure the validity of individual formulae.

Even if Nagel were correct in his criticism of the use of constitutional formulae, he has failed to suggest even a single reasonable alternative mode of constitutional analysis. Presumably, the only conceivable alternatives to the formulaic style are either a totally fact-based, subjective, case-by-case analysis, or some sort of a direct application of constitutional text to specific fact situations. Of course, neither of these alternatives provides a feasible method of constitutional decision making. Indeed, it is the first alternative, rather than the formulaic style, that gives rise to the dangers of unprincipled judicial "bullying."¹²⁴ The second alternative, on the other hand, would,

122. For a more complete examination of the point, see generally Redish, *The Warren Court, the Burger Court, and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031 (1983).

123. See *supra* text accompanying notes 109-14.

124. See *supra* text accompanying notes 122-23.

in most cases, be absurdly unrealistic.

Recognition of the proper rationale for judicial review¹²⁵ actually dictates the Supreme Court's use of constitutional formulae. While it would be naïve to believe that the ideology of individual Justices must play no role in constitutional decision making, fundamental precepts of democratic theory prescribe that the Court approach its constitutional decisions in a manner qualitatively different from the manner in which a legislature decides issues of social policy. The Court's decisions must be reasonably grounded in constitutional text, must provide workable, predictable, and "generalizable" standards for future courts to follow, and must avoid inconsistent or unprincipled decision making. It is difficult to imagine how these ends could be achieved, absent the use of some form of constitutional formulae. To be sure, the Court has often adopted specific formulae that fail to meet one or more of these criteria. But Professor Nagel's frontal assault on the Court's use of constitutional formulae per se is both misguided from the perspective of constitutional democratic theory and counter-productive as a mode of constructive constitutional criticism.

CONCLUSION

Any advocate of judicial activism today has to recognize Robert Nagel as a formidable adversary. Nevertheless, one can find major flaws in his analysis. Nagel's theoretical framework places undue emphasis on the need to attain social consensus, fails to come to terms with the logical and historical rationales for judicial review within a constitutional democratic system, and ignores the serious systemic harm caused by majoritarian suppression of fundamental constitutional rights. Moreover, by mounting a puzzling and unjustified attack on the generic use of constitutional formulae without providing a hint of what should replace them, Nagel squanders an opportunity to make a valuable contribution by exploring the criteria by which specific formulae might be measured. Thus, despite Nagel's obvious talents as a constitutional scholar, one leaves his book with a good deal less than complete satisfaction.

125. See *supra* text accompanying notes 31-75.