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Book Review

JUDICIAL POWER AND AMERICAN CHARACTER: CENSORING OURSELVES IN AN ANXIOUS AGE.

Robert F. Nagel.¹ New York: Oxford University Press. 1994. Pp. x, 188. Cloth, \$29.95.

Mark A. Graber²

Judicial Power and American Character is a thought-provoking book that often provokes the wrong thoughts. Robert F. Nagel deftly portrays the pathologies of a legal culture³ that can neither endorse in theory nor deny in practice the political nature of judicial review. That culture is indicted for failing to examine the actual consequences of legal doctrines, engaging in any abusive practice necessary to retain control of the judiciary, holding the American people in contempt, and ignoring valued, but inarticulate, political traditions. Nagel makes a strong case for each count. Unfortunately, his examples implicitly lay the blame for these contemporary judicial vices almost entirely at the door of liberal jurists and scholars.⁴ As a result, rather than further common efforts to improve the quality of political and legal discourse, the rhetoric of *Judicial Power* may promote complacency on the right and recriminations on the left. Moreover, by identifying, often correctly, the defects of only one side to a political struggle, Nagel overlooks the ways in which questionable liberal

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3. Although entitled *Judicial Power and American Character*, the main body of Nagel's work concentrates on the foibles of contemporary legal culture and on how that culture perceives American character. As discussed below, Nagel's brief discussion of more general features of contemporary political culture is both superficial and flawed.

4. Only in the last chapter does Nagel clearly indicate that his targets are "progressive intolerance," "progressive censorship," and "reformers." Robert E. Nagel, *Judicial Power and American Character: Censoring Ourselves in an Anxious Age* at 141-43 (Oxford U. Press, 1994) ("*Judicial Power*"). By comparison, his introduction specifically describes the failings of contemporary culture in "the first person plural," indicating that these failings are features of the general society rather than of any particular group. Id. at 6.

claims and behaviors are responses to questionable conservative claims and political behaviors.

Nagel's discussion of how elite professorial attitudes warped the Bork hearings demonstrates the power of his cultural eyesight and exposes substantial deficiencies in the contemporary judicial confirmation process. Rather than side with either Robert Bork or his critics, *Judicial Power* documents the common ground that unites academic originalists and non-originalists. Some commonalities concern tone. "A very large number of law professors," Nagel observes, "criticize uninhibitedly, and generally write with a degree of authority to which we are not entitled."⁵ As a result, the stakes in the Bork hearings were artificially inflated because the academic participants who engaged in those rhetorical practices too often described their rivals as radicals or extremists,⁶ rather than, as would be more accurate, fellow scholars with theories that seemed, on balance, somewhat inferior to their own. More significantly, Nagel justly complains that contemporary academic writing, whether by Bork or Laurence Tribe, exhibits "an attachment to theory that subordinates the wisdom of experience and the weight of practice."⁷ All parties to the Bork hearing would blithely disregard decades of legal precedent to implement their pet theories of judicial review, theories that are rarely grounded in any empirical understanding of how judicial decisions actually influence political practices.⁸ Indeed, hardly any classic of contemporary constitution interpretation is informed by the substantial literature in political science which discusses the capacity of courts as social policymakers.⁹

This commitment to arcane legal reasoning has descended from the legal professorate to Congress. During the Bork hearings, Nagel points out, representatives aped (and were praised

5. *Id.* at 32.

6. *Id.* at 31-39.

7. *Id.* at 39.

8. *Id.* at 33.

9. See Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (U. of Chi. Press, 1991); Charles A. Johnson and Bradley C. Canon, *Judicial Policies: Implementation and Impact* (CQ Press, 1984); Donald L. Horowitz, *The Courts and Social Policy* (Brookings Institute, 1977). Significantly, while Rosenberg reports that the "old dead horse of judicial efficacy rears up with a vengeance" whenever he discusses *The Hollow Hope* in legal forums, Gerald N. Rosenberg, *Hollow Hopes and Other Aspirations: A Reply to Feeley and McCann*, 18 *Law and Soc. Inquiry* 761, 776 (1993), some political scientists complain that "Rosenberg's skeptical position [on judicial power] very much flows with, rather than against, prevailing scholarly currents." Michael W. McCann, *Reform Litigation on Trial*, 18 *Law and Soc. Inquiry* 715, 730 (1993). See Malcolm M. Feeley, *Hollow Hopes, Flypaper and Metaphors*, 18 *Law and Soc. Inquiry* 745, 751 (1993).

for aping) the legal academy. Rather than use the confirmation process as an opportunity to review "the actual effects of the Supreme Court's doctrines and decisions," senators asked "learned questions on textualism, judicial restraint, the place of *stare decisis* in constitutional law, and other matters of legal philosophy."¹⁰ This learned practice seems astonishing given that most voters are probably more concerned with the state of their schools or crime in their neighborhoods than with the latest fad in semiotics.¹¹

Nagel explains this strange proclivity of senators to behave like academics rather than persons charged with making public policy when confirming judicial nominees by noting our political culture's tendency to avoid moral discourse. "[M]any Americans," he declares, "would have found it unnerving to have their representatives openly and directly confront issues of value and consequence."¹² The rise of such movements as the Christian Coalition and feminism, however, suggest that many citizens do want elected officials to make fundamental ethical choices. The problem representatives face is that, in the absence of any clear consensus on what values the people prefer, making any decision on abortion, race or related issues may be a political loser. Hence, elected officials have special reasons not to "confront issues of value and consequence." By keeping their questions at a high level of abstraction, the people's representatives imitate statespersons while foisting off to the judiciary the responsibility for various political hot potatoes.¹³

Nagel brings his discussion of the confirmation process to a close by condemning contemporary struggles to control the federal judiciary for losing all sense of propriety. "During the Thomas hearings," he notes, "procedural fairness seemed . . . [an] almost ridiculous presence patently subordinate to large political forces and objectives."¹⁴ Such concerns with the confirmation process are widespread. Stephen Carter has similarly observed that "nobody is interested in playing by a fair set of rules that supersedes the cause of the moment."¹⁵ Nagel, however,

10. *Judicial Power* at 40-41 (cited in note 4).

11. See Stephen L. Carter, *The Confirmation Mess: Cleaning up the Federal Appointments Process* 57 (Basic Books, 1994).

12. *Judicial Power* at 43 (cited in note 4).

13. This argument is laid out at length in Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *Studies in American Political Development* 35 (1993).

14. *Judicial Power* at 27 (cited in note 4).

15. Carter, *The Confirmation Mess* at ix (cited in note 11). See generally, *Symposium, Confirmation Controversy: The Selection of a Supreme Court Justice*, 84 *Nw. U. L.*

presents a more partisan analysis than Carter. Carter notes "how much right and left have come to resemble each other in the gleeful and reckless distortions that characterize the efforts to defeat challenged nominations."¹⁶ Nagel's discussion of the Thomas hearings, by comparison, focuses almost exclusively on the sins of the opposition.

Judicial Power correctly labels as a "smear" Senator Howard Metzenbaum's unsupported allegation that John Doggett, a witness for Thomas, was guilty of sexual harassment.¹⁷ The book, however, fails to acknowledge or even mention the hatchet job Senator Arlen Specter did on Anita Hill, Senator Alan Simpson's McCarthy-like insinuations of secret evidence discrediting Hill or, for that matter, President Bush's dubious claim that Clarence Thomas was the best qualified American to fill Thurgood Marshall's seat on the Supreme Court.¹⁸ Nagel criticizes Anita Hill and her confidants for refusing to reveal her claims of harassment,¹⁹ but says nothing about how White House aides almost certainly suborned perjury when they advised Thomas to tell the Senate that he had never thought about whether abortion is a constitutional right.²⁰

This one-sided analysis weakens Nagel's critique of the Thomas hearings. Supporters of liberal judicial activism when confronted with "what about Metzenbaum" are more likely to respond "what about Simpson" than acknowledge their responsibility for the present confirmation mess. Only when both sides confess error will progress likely be made toning down debates over Supreme Court nominees. A more balanced approach might also better address the causes of improper practices. Much abuse during contemporary confirmation processes may stem from real grievances with the other side's performance. Anita Hill can be treated unfairly because Clarence Thomas is perceived as being unfairly treated. John Doggett can be treated unfairly because Anita Hill is perceived as being unfairly treated. More generally, "the sudden stridency in Senate opposition to a

Rev. 832 (1990); *Essays on the Supreme Court Appointments Process*, 101 Harv. L. Rev. 1146 (1988).

16. Carter, *The Confirmation Mess* at ix (cited in note 11).

17. *Judicial Power* at 25 (cited in note 4).

18. For a good survey of these and related grievances by supporters of Anita Hill, see Toni Morrison, ed., *Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality* (Pantheon Books, 1992). See also Roger J. Miner, *Advice and Consent in Theory and Practice*, 41 Am. U. L. Rev. 1075, 1080 (1992).

19. *Judicial Power* at 20-21 (cited in note 4).

20. See Miner, 41 Am. U. L. Rev. at 1083-84 (cited in note 18).

variety of judicial appointments," Carter observes, "is sometimes defended as a response to what has been described, fairly or not, as an unprecedented effort to pack the court with ideological soulmates."²¹ Nagel's obsession with the transgressions of one side in this environment seems more a call for unilateral disarmament than the first steps towards a negotiated settlement.

Nagel's analysis of the intellectual snobbery underlying liberal judicial activism exhibits the same combination of acute insight and partisan distortion as his treatment of the confirmation process. *Judicial Power* bluntly declares that contemporary legal decisions are championed by "elites [who] see the recalcitrance of others as a sign of personal deficiencies" and "do not believe that their fellows can even face up to problems honestly, let alone exercise the civic-spirited discipline necessary to solve them."²² Nagel's class-based characterization of American judicial culture extends a distinguished tradition in American political thought. More than eighty years ago, Edward Corwin declared that "fear of popular majorities . . . lies at the very basis of the whole system of judicial review";²³ Jennifer Nedelsky has similarly noted how the Federalist concept of judicial review rests on "a general suspicion of the people."²⁴ Remarkably, proponents of liberal activism often acknowledge this "fear of popular majorities." Prominent defenders of *Roe v. Wade*, for example, have written under the heading "The Political Process: Not to be Trusted."²⁵

Still, few contemporary champions of liberal judicial activism state their low regard for the constitutional fidelity of the average citizen as bluntly as Nagel does, and Nagel's tone is warranted. To reshape schools, election districts, prisons and other institutions as courts are doing requires real confidence that one is attacking constitutional evils. One's foes, in this world view, cannot simply have an alternative vision of the constitutional order. Rather, liberal justices and their supporters must believe

21. Carter, *The Confirmation Mess* at 72 (cited in note 11). For a superb general treatment of the political forces underlying recent confirmation battles, see Mark Silverstein, *Judicious Choices: The New Politics of Supreme Court Confirmations* (W.W. Norton & Co., 1994).

22. *Judicial Power* at 142 (cited in note 4).

23. Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 9 Mich. L. Rev. 643, 670 (1909).

24. Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* 6 (U. of Chi. Press, 1990).

25. Susan R. Estrich and Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. Penn. L. Rev. 119, 150 (1989). See also, Carter, *The Confirmation Mess* at 117 (cited in note 11) (describing "the Court as an important bulwark against majority tyranny").

that democratic majorities have no commitment to constitutional values and will subvert them if given the opportunity. Much contemporary constitutional law, Nagel neatly demonstrates, can be explained only by a tacit assumption that “the public and its officials do not sufficiently appreciate the constitutional values enunciated by the Supreme Court and are—if left to their own devices—likely to take unacceptable risks with those values.”²⁶ The justices, for example, formerly declared informed consent laws unconstitutional not because informed consent was a constitutional evil, but because the justices feared such measures would be used “to ‘intimidate women’ and ‘to deter’ abortions.”²⁷

Having perceptively identified “fear of popular majorities” as the central question of contemporary judicial politics and rhetoric, however, Nagel assumes a particular answer. In the political universe of *Judicial Power*, opponents of liberal judicial activism can do no wrong; they wish only “to serve the public good.”²⁸ Racism ceased to be a political factor in American public life somewhere around 1960²⁹ and no reason exists for thinking that obscenity laws might result in “widespread timidity and arbitrary practices, where valuable ideas and information about sexuality never see the light of day.”³⁰ Proponents of restrictions against homosexuality are not bigots, in Nagel’s opinion. Such persons are “profoundly uncertain about egalitarian experimentation on policies having consequences for such a sensitive and mysterious matter as sexual identity.”³¹ Nowhere does Nagel explain how such advocates differ from Klansman who are presumably “profoundly uncertain about egalitarian experimentation on policies having consequences for such a sensitive and mysterious matter as [racial/religious] identity.”

Indeed, opponents of liberal judicial policies need not articulate reasons when defending their preferred norms. The liberal demand that any state coercive policy be justified,³² in Nagel’s mind, is merely another manifestation “of a prejudice or impulse

26. *Judicial Power* at 76 (cited in note 4).

27. *Id.* at 74 (discussing *Thornburgh v. American College of Obstetricians*, 476 U.S. 747 (1986)).

28. *Id.* at 155.

29. *Id.* at 115-19 (discussing *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968)).

30. *Id.* at 125.

31. *Id.*

32. See Cass R. Sunstein, *The Partial Constitution* 17 (Harv. U. Press, 1993) (“In American constitutional law, government must always have a reason for what it does. If it is distributing something to one group rather than to another, or depriving someone of some good or benefit, it must explain itself”); Ronald Dworkin, *Law’s Empire* 93-95 (Harv. U. Press, 1986).

widely seen among the intellectual elite—an unexamined bias against the inarticulate.”³³ This disregard for what Nagel labels “mute behaviors”³⁴ privileges elite values because less educated citizens lack the intellectual sophistication necessary to defend their inherited traditions. Nagel recognizes that “mute behavior[s]” can “be either attractive or repellent; they can represent deep wisdom or intractable prejudice.”³⁵ Unfortunately, *Judicial Power* offers no guidelines for distinguishing between “attractive” or “repellent” “mute behaviors.”

The case against progressive uses of the judicial power substantially weakens when one examines more closely than Nagel the concerns of those popular majorities that liberal jurists fear. Consider Nagel’s claim that the court acted as a censor when striking down informed consent statutes. Pro-choice advocates, he claims (without quoting or citing them), fear that “many pregnant females—by instinct or acculturation—were, no doubt, highly receptive to reasons for giving birth.” This use of the judicial power, therefore, enables proponents of *Roe v. Wade*³⁶ to “protect” “pregnant patients . . . from their own minds and inclinations.” Like traditional censors, Nagel maintains, pro-choice forces regard “information [as] dangerous because it is potentially persuasive and . . . people should be relieved of the burden of deciding whether to be persuaded.”³⁷

A closer look at both informed consent provisions and the pro-choice attack on them belies Nagel’s naive assertion that “the provision of accurate information could have been seen as helping to assure knowing, voluntary decisions.”³⁸ Opponents of informed consent do not object only to State efforts that discourage abortions. They object to state efforts that conscript doctors in that state effort to discourage abortions. As the Supreme Court noted in *Thornburgh v. American College of Obstetricians*, “forcing the physician or counselor to present the materials and the list to the women makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list.”³⁹ More significantly, both pro-choice justices and advocates regard informed consent laws as “‘a parade of horrors’ of dubious validity,” and many spe-

33. *Judicial Power* at 146 (cited in note 4).

34. *Id.* at 151.

35. *Id.* at 152.

36. 410 U.S. 113 (1973).

37. *Judicial Power* at 114, 115 (cited in note 4).

38. *Id.* at 113.

39. *Thornburgh v. American College of Obstetricians*, 476 U.S. at 763.

cific requirements as “the antithesis of informed consent.”⁴⁰ Pennsylvania, for example, required physicians to inform women seeking abortions that “detrimental physical and psychological effects might occur and were not accurately foreseeable,” even though medical authorities generally agree that the overwhelming majority of women who have abortions suffer no significant physical or psychological complications.⁴¹ Similarly, the Keystone State required patients to be informed that “the father was required to assist with child support.” Yet, as welfare authority Deborah Stone notes,

fathers are generally ordered to pay only a small proportion of their income in child support, and the portion declines as the man’s income rises. Around half of fathers who are ordered to make child support payments do not make them after the first year or so, and courts do nothing about enforcing the awards.⁴²

As the Court politely noted in *Thornburgh*, “theoretical financial responsibility often does not equate with fulfillment.”⁴³

In short, from the perspective of pro-choice justices and advocates, proponents of so-called “informed consent” are interfering with “knowing, voluntary decisions” by “conveying . . . misleading and factually inaccurate impression[s].”⁴⁴ Pro-life advocates do have anecdotes of women being pressured into abortions through presentation of misleading information.⁴⁵ Still, rather than accept one side’s interpretation of itself, as Nagel does, a realist investigation of informed consent laws would examine how accurate each party’s claims are and how perceptions of abuse by one side lead to actions that the other side regards as abusive. Who the censor is depends on how informed “informed consent” laws are.

40. *Thornburgh*, 476 U.S. 760, 764 (quoting *Akron Center for Reproductive Health, Inc. v. City of Akron*, 462 U.S. 416, 445 (1983)).

41. See Donald N. Bersoff, *Brief of Amicus Curiae American Psychological Association in Support of Appellees, Thornburgh v. American College of Obstetricians*, 476 U.S. 747 n.9 (1986).

42. Deborah A. Stone, *Sex, Lies and the Scarlet Letter*, 22 *The American Prospect* 105, 108 (Spring 1995).

43. *Thornburgh*, 476 U.S. at 763.

44. Bersoff, *Brief of Amicus Curiae* at n.12 (cited in note 41).

45. See David C. Reardon, *Aborted Women: Silent No More* 30-31 (Crossway Books, 1987). No study, however, has found that coerced abortion is a major social problem. Very few women regret their abortions upon reflection, and most women who have abortions become more sympathetic to pro-choice positions. See E. Freeman, *Influence of Personality Attributes on Abortion Experiences*, 47 *Am. Jour. of Orthopsychiatry* 503, 506 (1977); Donald Granberg, *The Abortion Activists*, 13 *Family Planning Perspectives* 157, 161 (1981).

Nagel concludes *Judicial Power* with a call for democratic "renewal."⁴⁶ To revitalize our republic, he proclaims, "society at large" must overcome "doubts about itself and its past" that lead the citizenry to "participate[] willingly in its own [judicial] censorship."⁴⁷ Repressing these doubts, unfortunately, apparently requires that we either deny the existence of past repressive practices that scholars have documented played a vital role in American constitutional development⁴⁸ or insist that no vestiges of those practices exist at present.⁴⁹ Acknowledging past injustices, on the other hand, might force Americans to recognize that our society is capable of systemically violating fundamental human and constitutional rights, and that such abuses may still occur at present. Moreover, the moral certainty Nagel would foster may not be conducive to a healthy republic. Anthony Comstock, in his view, seems the ideal democratic citizen, along with John Brown, Joe McCarthy and Pat Buchanan, none of whom ever expressed doubt about their essential political commitments. A more realistic view of democracy suggests that popular government functions best when most citizens treat their fellows with equal concern and respect and do not take opposing and unyielding positions on matters of public importance.⁵⁰ If abortion and affirmative action are examples of the present state of political debate, the polity might benefit from less certainty and more doubt.

46. *Judicial Power* at 156 (cited in note 4).

47. *Id.* at 154.

48. See Rogers M. Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 *Am. Pol. Sci. Rev.* 549 (1993).

49. See notes 28-31 and the relevant text.

50. See Louis Hartz, *The Liberal Tradition in America* 85-86 (Harcourt Brace Jovanovich, 1955); Robert A. Dahl, *A Preface to Democratic Theory* 75-84 (U. of Chi. Press, 1956).