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Throughout a long and distinguished career, Bob Nagel's scholarship has, from different angles and on different topics, displayed a persistent skepticism about the importance and capabilities of American courts. Court skepticism has in recent years shifted its political valence as the Supreme Court, and the federal judiciary, have moved rightward,[1] but Nagel's skepticism has spanned the shifting winds of political power. Indeed, Nagel's misgivings about an expansive role for the Supreme Court, in particular, and the courts, generally, first emerged as an especially unfashionable position at a time when court glorification, or at least considerable sympathy with an expansive view of the proper role of judicial power, was the prevailing mode of American public law scholarship.[2]

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* David and Mary Harrison Distinguished Professor of Law, University of Virginia. This Essay was prepared for a Symposium at the University of Colorado School of Law in honor of Professor Robert Nagel. I am delighted to help celebrate the career of Bob Nagel, a friend of long standing and a scholar whose work over four decades has been marked by unconventional but wise insight, analytic precision, and an incessant unwillingness to substitute adjectives for argument.

1. *Compare* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1053 (1984) (endorsing the Supreme Court's "higher lawmaking functions"), *and* Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 24 (1986) (arguing that the Supreme Court "represent[s] . . . the possibility of practical reason"), *with* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) (arguing for narrow and limited Supreme Court decisions), *and* Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 37 (2003) (criticizing the Rehnquist Court for refusing to acknowledge the role of Congress in the creation of constitutional meaning). For what it is worth, my own view is that it is entirely appropriate for views about the respective roles of the judiciary, the other branches of government, and the public at large to take account of the likely substantive attitudes of the inhabitants of those roles at particular periods in history. Frederick Schauer, *Neutrality and Judicial Review*, 22 L. & PHIL. 217 (2003).

Finley Peter Dunne's Mr. Dooley famously opined that "th' supreme coort follows th' iliction returns," FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1901), and I suspect that Bob Nagel, not without justification, believes that much the same applies to the American constitutional law professoriate.

2. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975);

Nagel's doubts about the capacities and proper roles of the courts have multiple aspects. He has objected to treating the Supreme Court as the final and authoritative determiner of constitutional meaning,[3] and thus has long been one of the leading theorists of what is commonly known as departmentalism—the view, to oversimplify, that the legislative and executive branches of the federal government (and possibly the states) are as entitled to interpret the Constitution for their assigned tasks as the Supreme Court is entitled to do the same for its tasks.[4] And he has also been persistent in denying that the Supreme Court (or other courts) has the authority or the ability to craft the kinds of precise rules of conduct that, in his view, are better created by legislatures or administrative agencies.[5]

With respect to both of these topics, Nagel and I have had our disagreements,[6] but they have always been honest and respectful. In one form of skepticism about the courts, however, Nagel and I are in substantial agreement, and that is with respect to the empirical question of the causal effect of judicial action on public opinion. In the face of grandiloquent claims about the Supreme Court as moral leader and shaper of public attitudes,[7] Nagel has been a deflationary voice, asking whether

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Arthur S. Miller, *Judicial Activism and American Constitutionalism: Some Notes and Reflections*, *in* CONSTITUTIONALISM (NOMOS XX) 333 (J. Roland Pennock & John W. Chapman eds., 1979); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023 (1979).

3. Robert F. Nagel, *Judicial Supremacy and the Settlement Function*, 39 WM. & MARY L. REV. 849 (1998), taking issue with, inter alia, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

4. *See* Robert F. Nagel, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 380 (1988). *See also* Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1988) (explaining and defending departmentalism); Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987) (challenging the view that Supreme Court constitutional interpretations are authoritative as against the states); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994) (defending executive interpretive authority); Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539 (2005) (book review) (defending departmentalism).

5. Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985). Contrast Frederick Schauer, *Abandoning the Guidance Function:* Morse v. Frederick, 2007 SUP. CT. REV. 205 (2007); Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455 (1995).

6. *See supra* notes 3, 5.

7. *See, e.g.*, RICHARD FUNSTON, A VITAL NATIONAL SEMINAR: THE SUPREME COURT IN AMERICAN POLITICAL LIFE 216–17 (1978); MICHAEL J. PERRY, THE

the effect of Supreme Court judgments and opinions on public attitudes is as great as Court celebrants typically claim.[8] Let us call this the empirical challenge. In offering this empirical challenge, I believe that Nagel is largely correct.

Relatedly, and perhaps more importantly, Nagel has also questioned whether the nature of the judicial task is suited to the sending of messages to the larger public. Even assuming that the messages sent by courts are in fact received and internalized by the public, Nagel has argued that the way in which courts frame and decide issues may fit poorly with the task of trying to affect public opinion on the issues with which the courts deal. We can call this the structural challenge. Here Nagel believes that it may be a mistake to expect the courts to try to perform the role of public educator, a role he maintains is better performed by institutions not constrained by the peculiar characteristics of judicial decision-making.[9] Again I believe that Nagel is largely correct on this score, and this Essay will explore Nagel's empirical and structural challenges to the view that courts in general, and the Supreme Court in particular, do or should have a larger educative function.

I. THE CONVENTIONAL (CELEBRATORY) WISDOM

Does law matter? It is not surprising that lawyers, including practicing lawyers, judges, and law professors, among others, believe that it does. And although it would be silly to deny that law matters, it remains the case that in many of its manifestations law may not matter as much as law students and those who teach them believe.[10] Statutes and

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CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 112–13 (1982); Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 14 (2008) ("Justices teach by their opinions."); Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127 (1967); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952); Michael Ashley Stein, Michael E. Waterstone & David B. Wilkins, *Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658, 1693 (2010) (book review) (noting the Supreme Court's "influence on public opinion"); Robin West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 103 (1990).

8. Robert F. Nagel, *Teaching Tolerance*, 75 CALIF. L. REV. 1571 (1987) (reviewing LEE C. BOLLINGER, THE TOLERANT SOCIETY (1986)).

9. *Id.* at 1577 (noting the possible "dysfunction" of courts in sending messages regarding toleration); *id.* at 1580 (expressing a worry that concern about sending messages to the larger public might lead courts to ignore subtleties and "exaggerate the stakes").

10. In her recent Presidential Address, the president of the Association of

regulations typically purport to tell people what to do, but whether people actually do what the law officially tells them they must do, and if so to what extent, is a different question.[11] We know, for example, that the relationship between the official legal speed limit and how fast people actually drive is an attenuated one, just as we know that compliance with many other laws is far from perfect. This is most obvious with respect to those laws that appear to many people to be obsolete or pointless, as with criminal sanctions for possession of marijuana,[12] and prohibitions on a wide range of sexual practices between and among consenting adults,[13] practices that, until *Lawrence v. Texas*,[14] were prohibited and whose prohibition was constitutionally permissible.[15] But even laws more generally supported in the abstract often achieve limited compliance in reality. Cars get stolen, cigarettes get smoked in no-smoking areas, lawful taxes are often unpaid, and it is impossible to pick up a newspaper without reading about instances in which this or that law has been disobeyed.

Much the same is true with respect to the specific and concrete judgments of the courts. Practicing lawyers know that all too often a judgment is only a piece of paper, but much of legal academic life seems to the contrary. It is rare, for example, to find a casebook that raises the question whether a victorious plaintiff has actually recovered the sum to which some court has said she is entitled. There are, of course, ways in which a victorious litigant can use the coercive forces of courts to compel the payment of a judgment or to force compliance with the terms of an injunction, but these post-

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American Law Schools expressed alarm at "how hard it is for even very smart people to understand the importance of the rule of law to how the world works," and insisted that law is part of the "ecosystem for human flourishing." Kellye Y. Testy, Why Law Matters, Presidential Address Before the Association of American Law Schools (Jan. 9, 2016), *in* 65 J. LEGAL EDUC. 707, 708 (2016). I take this as a representative example of the conventional wisdom that law matters, and it matters a lot, and that things can be said about the role of law that would not be said about, say, dentistry, or plumbing, even though both of those domains seem pretty important components of the ecosystem for human flourishing.

11. For my own exploration of this question, see FREDERICK SCHAUER, THE FORCE OF LAW (2015).

12. *See* Matthew A. Christiansen, *A Great Schism: Social Norms and Marijuana Prohibition*, 4 HARV. L. & POL'Y REV. 229, 236 (2010).

13. *See* William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1872 (2000).

14. 539 U.S. 558 (2003).

15. Bowers v. Hardwick, 478 U.S. 186 (1986).

judgment mechanisms are themselves often less than perfect, and judgments that seem on their face perfectly legally valid often remain, at the end of the day, unsatisfied.

The same phenomenon of imperfect compliance (and occasional rampant non-compliance) exists as well in constitutional law and in other aspects of public law. The problems of compliance with *Brown v. Board of Education* have been well-documented (and extensively litigated),[16] but constitutional non-compliance is far from limited to the topic of school desegregation. *Abington School District v. Schempp*[17] may have held that official organized prayers in public schools violate the Establishment Clause of the First Amendment, but in many school districts the very teacher-led praying that *Abington* invalidated continued to a substantial degree for many years, and may well continue still.[18] *Craig v. Boren*,[19] which first definitively established heightened scrutiny for gender-based classifications, has hardly brought an end even to official discrimination on the basis of gender. Further, the War Powers Resolution, which limits the president's power to initiate and continue military hostilities without congressional

16. Among the leading Supreme Court cases attempting to deal with non-compliance to *Brown* are *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218 (1964), *Green v. Cty. Sch. Bd.*, 391 U.S. 430 (1968), and *Cooper v. Aaron*, 358 U.S. 1 (1958). Many of the lower court cases are described in 2 THOMAS I. EMERSON, DAVID HABEL & NORMAN DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1665–80 (1967). The extensive secondary literature includes: MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 350–51 (2004); MICHAEL J. KLARMAN, BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT (2007); Alexander M. Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193 (1964); Robert B. McKay, *"With All Deliberate Speed": Legislative Reaction and Judicial Development 1956–1957*, 43 VA. L. REV. 1205 (1957).

17. 374 U.S. 203 (1963). *Abington*'s slightly narrower predecessor, limited to a specific official prayer, was *Engel v. Vitale*, 370 U.S. 421 (1962).

18. Studies on the degree of non-compliance with the Supreme Court's school prayer and related decisions include: KENNETH M. DOLBEARE & PHILIP E. HAMMOND, THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE (1971); DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY IN RESPONSIBILITY (1966); KENNETH D. WALD & ALLISON CALHOUN-BROWN, RELIGION AND POLITICS IN THE UNITED STATES 102–04 (7th ed. 2014). *See also* Gordon Patric, *The Impact of a Supreme Court Decision: Aftermath of the* McCollum *Case*, 6 J. PUB. L. 455, 457 (1957) (analyzing the limited effect on behavior of *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948)). On this and other issues of compliance with Supreme Court decisions, a good overview and analysis of the research is Keith E. Whittington, *James Madison Has Left the Building*, 72 U. CHI. L. REV. 1137, 1139–42 (2005) (book review).

19. 429 U.S. 190 (1976).

approval, has been routinely ignored or hedged by presidents of both political parties.[20]

According to the conventional wisdom, too much of a focus on compliance (or non-compliance) may still represent an excessively narrow preoccupation with *direct* behavioral compliance and consequently ignore the way in which law and judicial opinions can and do change public attitudes about the topics that law chooses to address. Thus it is sometimes claimed that the Supreme Court, to take the most salient example of a court whose decisions are thought to influence public opinion more generally, acts as a moral and social educator.[21] The authority and prestige of the Court, coupled with the visibility of its rulings, can have what we might call a propaganda effect, but without the pejorative connotations of that word. Thus, it is often asserted that cases like *Brown* have had the effect of helping to change people's views not only about school integration, but also about race in general.[22] More recently, it has been argued that Supreme Court decisions such as *Romer v. Evans*,[23] *Lawrence v. Texas*,[24] *United States v. Windsor*,[25] and, most recently, *Obergefell v. Hodges*,[26] have played a substantial causal role in making the population at large more accepting of a wide variety of non-traditional sexual orientations.[27]

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20. *See* Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62 (2011); Frederick Schauer, *The Political Risks (If Any) of Breaking the Law*, 4 J. LEGAL ANALYSIS 83 (2012).

21. *See* authorities cited *supra* note 7.

22. *See* Robert A. Burt, *Constitutional Law and the Teaching of Parables*, 93 YALE L.J. 455, 486–89 (1984); Loren Miller, *Very Deliberate Speed, in* THE SEGREGATION ERA 1863–1954, at 280, 281 (Allen Weinstein & Frank Otto Gatell eds., 1970); ARYEH NEIER, ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE 239 (1982); Robert H. Wiebe, *White Attitudes and Black Rights from* Brown *to* Bakke, *in* HAVE WE OVERCOME?: RACE RELATIONS SINCE BROWN 147 (Michael H. Namorato ed., 1979).

23. 517 U.S. 620 (1996).

24. 539 U.S. 558 (2003).

25. 133 S. Ct. 2675 (2013).

26. 135 S. Ct. 2584 (2015). Also relevant here, as part of the group of highly-publicized judicial opinions on same-sex marriage, and, earlier, civil unions, are *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), and *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

27. *See* ANDREW R. FLORES, NATIONAL TRENDS IN PUBLIC OPINION ON LGBT RIGHTS IN THE UNITED STATES 29 (2014); James W. Stoutenborough, Donald P. Haider-Markel & Mahally D. Allen, *Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases*, 59 POL. RES. Q. 413 (2006); Kyle C. Velte, *Obergefell's Expressive Promise*, 6 HOUS. L. REV.: OFF THE RECORD

There should be little doubt that it is, in theory, possible for judicial decisions and opinions to change public attitudes.[28] If advertising can have a causal effect on smoking, drinking, and car buying, and if the wartime speeches of Winston Churchill and the Depression-era "fireside chats" of Franklin Roosevelt can mobilize public opinion and public action, then there seems no *a priori* reason to deny that the public statements of the Supreme Court, just as with the public statements of presidents or the public statements written by advertising agencies, might also have a causal effect on what the public believes about race, gender, sexual orientation, and much more. Or so the conventional wisdom believes.

II. NAGEL'S CHALLENGE

Although it is certainly possible that the actions of the Supreme Court and other courts can have the kind of educative or opinion-shifting effect described in the previous section, whether and when this effect actually exists is an empirical and not a logical question. And that such a causal effect might not be as great as law professors, among others, typically claim, is one of Nagel's earlier and most important, even if understated, contributions.

Nagel's challenge first arose in the context of a lengthy review essay of Lee Bollinger's book, *The Tolerant Society*, published in 1986.[29] Bollinger, in the course of defending an understanding of the First Amendment that protected the proposed march of the American Nazi Party in Skokie, Illinois, in 1977,[30] argued that the tolerance of unpopular views and unpopular people was, in general, a good thing.[31] Bollinger then went on to argue that the decisions of the courts in the Skokie controversy offered a valuable lesson in tolerance, a lesson that would have salutary effects on the level of tolerance

157, 166 (2015).

28. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 167 (1999) ("In our political system courts play an important role in explaining constitutional values to those in the public who pay attention. Eliminating judicial review would reduce that teaching role.").

29. Nagel, *supra* note 8; *see also* LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986).

30. *See* Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978); Vill. of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21 (Ill. 1978).

31. BOLLINGER, *supra* note 29, at 194–97.

in general,[32] and on the toleration of people and opinions far less despicable than the American Nazi Party.[33]

Bollinger's claim starts with the premise that more tolerance is better than less. This itself is an interesting claim, for it is based on the further premise that the level of general tolerance existing when Bollinger was writing was in need of an increase. But it is hardly clear that the United States in 1977 suffered from a tolerance deficit, as opposed to a tolerance surplus.[34] It all depends on what we are tolerating. If the claim is that we ought to have more tolerance in general, then we would want to know whether that increase in tolerance produced too much tolerance of that which we might not want to tolerate along with an increase in tolerance of what which ought to be tolerated. Still, assuming that more tolerance is a good thing, Bollinger's additional claim was that the courts' influential protection of so unpopular, dangerous, and morally bankrupt an organization as the American Nazi Party would lead to increased tolerance of other unpopular people, groups, positions, and behavior.[35] For Bollinger, tolerating Nazis was an effective lesson in tolerance generally.

In responding to Bollinger, Nagel astutely noted, seemingly with some skepticism, the factual contours of the claim that Bollinger was offering.[36] Nagel emphasized the claim's empirical nature,[37] and argued that one cannot really know just how much of an effect there is "[w]ithout measuring."[38] Moreover, he suggests that there is reason to "doubt that the language of free speech law can be expected to validate tolerance,"[39] and that "there is reason to think the case law has been an ineffective teacher."[40]

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32. And not just toleration of speech.

33. BOLLINGER, *supra* note 29, at 197–200.

34. *Cf.* Frederick Schauer, *Modeling Tolerance*, 170 J. INSTITUTIONAL & THEORETICAL ECON. 83 (2014) (analyzing tradeoff between the costs and benefits of insufficient and excessive tolerance); Frederick Schauer & Richard Zeckhauser, *Cheap Tolerance*, 9 SYNTHESIS PHILOSOPHICA 439 (1994) (same). To make the point in the text sharper, consider whether there is too much or too little tolerance of sexual violence, or too much or too little tolerance of child abuse.

35. *See* BOLLINGER, *supra* note 29, at 124–25 (discussing the "symbolic significance" of extreme cases).

36. Nagel, *supra* note 8, at 1577–78.

37. *Id.* at 1577.

38. *Id.* at 1578.

39. *Id.*

40. *Id.*

Nagel's claims here are modest. He does not directly challenge the claim that the courts can have an educative function, nor does he directly challenge the claim that judicial actions might under some conditions affect public attitudes. But Nagel does highlight the empirical nature of these claims, and he is best understood as gently asking Bollinger (and others) to provide some actual empirical support for their irreducibly empirical claims about the causal effect of judicial actions on public attitudes.

One of the things that makes Nagel's subtle call for empirical support important is that subsequent research has suggested that the ability of judicial action to affect public attitudes, while by no means non-existent, is in reality often less than many proponents of such a role for the courts, including Bollinger, have supposed.[41] Perhaps most prominently, Gerald Rosenberg has argued that, at least in the area of race, the effect of judicial decisions about segregation have had much less of an effect on public attitudes about race than has often been claimed.[42] Others have since joined in, and there is now a respectable body of research coming to the conclusion that the opinion-forming or opinion-changing function of the courts is at the very least more limited than the most extravagant claims for judicial influence on public opinion have supposed. It would be a mistake to attribute to Nagel too much influence on this subsequent research, but it would also be a mistake to ignore the fact that his doubts about the causal

41. For good overviews of the research, much of which did not exist when Nagel first took on the issue, see generally VALERIE J. HOEKSTRA, PUBLIC REACTION TO SUPREME COURT DECISIONS (2003); PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008); Thomas R. Marshall, *The Supreme Court as an Opinion Leader: Court Decisions and the Mass Public*, 15 AM. POL. RES. 147 (1987); Kevin M. Scott & Kyle L. Saunders, Courting Public Opinion: Supreme Court Impact on Public Opinion Reconsidered, Presented at 2006 Annual Meeting of Midwest Political Science Association, www.kevinscott.com/SSmpsa06.pdf [https://perma.cc/DKU5-CD8D]; Michael Andrew Unger, After the Supreme Word: The Effect of United States Supreme Court Decisions on Public Opinion (Aug. 2007) (unpublished Ph.D. dissertation, Univ. of Tex. at Austin) https://repositories.lib.utexas.edu/handle/2152/3507 [https://perma.cc/U39T-WEC6]; Katerina Linos & Kimberley Twist, *The Supreme Court, the Media, and Public Opinion: Comparing Experimental and Observational Methods* (Univ. of Cal. Berkeley working paper), www.law.uchicago.edu/files/files/linos_twist_supreme_court_and_media.pdf [https://perma.cc/BPQ2-WKDE].

42. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 107–56 (1st ed. 1991).

claims were offered well before such doubts became part of the accepted wisdom.

III. THE NATURE OF COMMUNICATION AND THE NATURE OF THE JUDICIAL ROLE

Although Nagel was an early adopter of the skeptical view about the capacity of the courts to bring about changes in public opinion, his more extensively developed views appear implicitly to assume, if only for the sake of argument, that judicial actions and opinions can have such an effect.[43] But he then argues that this effect might not be as unqualifiedly valuable as so many people have thought. For Nagel, the kind of positive effect sometimes assumed or alleged would be inconsistent with what courts do and how they do it, and that as a result it is a mistake, both normatively and descriptively, to see the courts' public educative role, even if it exists,[44] as being largely beneficial.

Many of Nagel's conclusions derive from his view that there is a mismatch between the role of the Supreme Court (and other courts) as educator and its function as a *court* primarily devoted to resolving concrete controversies between specific parties. And Nagel's conclusions are rooted as well in his views, which seem to me largely correct, about the nature of legal argument, a nature reflected in the judicial opinions that are claimed to have such a large effect on public understanding. Thus, Nagel believes that legal and judicial language is often highly technical, thus speaking in a language that is "alien to the general public."[45] Assuming that this claim about the judiciary's use of technical language largely inaccessible to the lay public is sound,[46] there emerge two alternatives for dealing with the gap between the language in which courts speak and the language the public can understand. One is that the courts would adhere to their traditional technical linguistic focus. This approach would facilitate the judiciary's role as a decider of concrete disputes

43. Nagel, *supra* note 8, at 1579–80.

44. *Id.* at 1581–82.

45. Robert F. Nagel, *A Response to Professor Bix*, 42 SAN DIEGO L. REV. 835, 836 (2005).

46. *See generally* Frederick Schauer, *Is Law a Technical Language?*, 52 SAN DIEGO L. REV. 501 (2015).

involving specific parties and specific facts, but at the cost of writing in a language (and deciding according to categories) largely removed from what non-judicial actors, including but not limited to the public at large, would find either interesting or comprehensible. Alternatively, the courts could strive to make their language and decisional categories less technical, and less removed from the categories and language of ordinary life. This might make it easier for the courts to serve an educative function, but here the cost would be a loss to the fine distinctions embedded in legal language and categories, distinctions that might well be important to courts intent on reaching the best decisions in individual cases.

Even apart from the technical nature of legal language, legal discourse in general, Nagel argues, tends to be argumentative in the extreme, and thus typically ignores subtleties, encourages exaggerated claims, and often under-credits or caricatures opposing positions.[47] If such a form of discourse were taken as a model of how to discuss and debate difficult issues of public policy, Nagel argues, the consequences would be "destructive,"[48] largely because the hyperbolic, exaggerated, and one-sided nature of legal discourse would "distort and impoverish public understanding" of the issues.[49]

Although Nagel does see legal discourse as having some advantages, he is more concerned with the pathologies of that discourse. At times legal discourse is, he believes, overly non-intellectualized in its combativeness,[50] and at its extreme exhibits a disingenuous character that may have its uses in litigation, but is hardly what one would desire in public debate.[51]

Nagel's concerns about legal discourse and the dangers of its pathologies spreading to the public go beyond the stylistic. In fact he is more concerned with those structural aspects of litigation that, whatever purposes they may serve in courts,

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47. Nagel, *supra* note 44, at 836–37. *See also* Robert F. Nagel, *Name-Calling and the Clear Error Rule*, 88 NW. U. L. REV. 193 (1993).

48. Nagel, *supra* note 45, at 837.

49. *Id.* at 839.

50. Robert F. Nagel, *Indirect Constitutional Discourse: A Comment on Meese*, 63 L. & CONTEMP. PROBS. 507, 507–09 (2000). *See also* Nagel, *Name-Calling*, *supra* note 47.

51. *See generally* Robert F. Nagel, *Lies and Law*, 22 HARV. J.L. & PUB. POL. 605 (1999) (considering the effect of legalistic language in public and non-litigated settings).

have pernicious and not beneficial effects on public discourse.[52] Many policy issues are highly complex, but litigation tends to collapse complex issues into binary oppositions.[53] Indeed, the problem may be greater than Nagel supposes. Although modern civil procedure does incorporate such devices as interpleader,[54] impleader,[55] and joinder[56] in an effort to accommodate multiple parties and multiple interests,[57] the modal number of parties in a lawsuit is two, and efforts to shoehorn multiple interests or positions into litigation run a serious risk of distorting a policy world in which a multiplicity of interests and parties is the norm and not the exception. At its extreme, Nagel argues, constitutional litigation tends to nationalize issues, thus creating a nationalized political discourse on issues that may involve significant local variation, even apart from the fact that local discourse is more likely to involve discursive participants who know each other and deal with each other on a regular basis.[58] Local discourse is thus likely to be more subtle, more reflective of complex interests, more personal, and less extreme, and therefore on balance more desirable.[59]

When political disputes are nationalized and judicialized, the tendency is also away from gradualism and incrementalism.[60] Some issues, Nagel believes, are better dealt with in small steps, but the legal system's typical insistence on principles substantially broader than the cases they govern and the cases in which they arise may again produce an unfortunate distortion in the nature of policy discourse.[61] Relatedly, and although the point is mine and not (I think) Nagel's, litigation tends to have winners and losers, and

52. Nagel, *supra* note 8, at 1581–82.

53. Robert F. Nagel, *Utilitarianism Left and Right: A Response to Professor Armour*, 68 U. COLO. L. REV. 1201 (1997).

54. FED. R. CIV. P. 22.

55. FED. R. CIV. P. 14.

56. FED. R. CIV. P. 18, 19, 20, 21.

57. I exclude the class action (*see* FED. R. CIV. P. 23) from this list precisely because it is in the nature of a class action to collapse potentially different claims into one unified claim.

58. Robert F. Nagel, *Nationalized Political Discourse*, 69 FORDHAM L. REV. 2057 (2001).

59. *Id.* at 2058–60.

60. *See* Robert F. Nagel, *Marriage and Practical Knowledge*, 50 S. TEX. L. REV. 37 (2008).

61. *Id.*

although cases are sometimes (and often, in private law) settled, the kinds of compromises that one typically sees on issues of public policy are often more elusive in litigation.

And the list goes on. Nagel has been worried that litigation and its discourse inclines towards a degree of certainty greater than the underlying facts can support, and that disguising the degree of risk and uncertainty in policy is hardly a virtue to be emulated in general public discussion.[62] He is also concerned that judicial decision making carries a pretense of impartiality, and that, perhaps as with most public and political decision making, open acknowledgment of partiality might be for the better.[63]

Perhaps most pervasively of all, Nagel believes that litigation inevitably focuses on epiphenomenal cases,[64] suggesting that whatever the public or political actors may learn from litigation will be a knowledge distorted by unusual cases,[65] and thus by cases poorly tailored to teaching broader

62. Robert F. Nagel, *The Term Limits Dissent: What Nerve*, 38 ARIZ. L. REV. 843 (1996).

63. Robert F. Nagel, *Partiality and Disclosure in Supreme Court Decisions*, 7 NW. J.L. & SOC. POL'Y 116 (2012). As I write this, there is widespread public attention to Justice Ginsburg's public criticism (which she then publicly claimed to regret) of presidential candidate Donald Trump, and I wonder whether Nagel's sympathy with acknowledged partiality would lead him to have been sympathetic with Justice Ginsburg's overtness, even if not (I do not know) with the substance of her views.

64. *See generally* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). The so-called selection effect, now the subject of a vast literature (a good overview is Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictions of Failure to Settle*, 49 CASE W. RES. L. REV. 315 (1999)), posits that easy cases will either not be brought or will settle quickly, meaning that the cases that go to trial—or appeal—will be unrepresentative of the full range of events of their type. The implication of this is that it might be a mistake to make policy—whether in the courts or elsewhere—on the basis of these unrepresentative events. *See* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006); Frederick Schauer & Richard Zeckhauser, *The Trouble with Cases*, *in* REGULATION VS. LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW 45 (Daniel P. Kessler ed., 2011).

65. Indeed, the Skokie litigation that framed much of the dispute between Bollinger and Nagel is a very good example. Although many people still remember or know about the 1977 proposed march in Skokie, Illinois, by the American Nazi Party, what may be lost is the fact that this was not a Supreme Court case. The attempts by Skokie to prohibit the march were rebuffed on appeal in the United States Court of Appeals for the Seventh Circuit, *Collin v. Smith*, 578 F.2d 1187 (7th Cir. 1978), and the Supreme Court denied certiorari, 439 U.S. 916 (1978). And Skokie was also the loser in the Supreme Court of Illinois. Vill. of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21 (Ill. 1978). So although there can be a debate about the educative value of the entire Skokie episode, that is a debate

lessons.[66] For Nagel, the principal role of the courts, including the Supreme Court, is that of "authoritatively determining disputes,"[67] and the disputes that wind up in court may, Nagel insists, be poor vehicles for public education, even apart from the extent to which they may be, as I[68] and perhaps Nagel also believe, poor vehicles for making law. And thus in this dimension, as well as the others just listed, the central and important theme in Nagel's critique is that picking a mechanism designed to settle disputes as the mechanism for public education may be a mismatch that goes to the heart of what both law and public education are all about.

IV. CONCLUSION: TAKING STOCK

Because Nagel has for so long been a skeptic about judicial review generally, and about judicial power even more generally, it can be difficult to isolate his views about courts as educators and thus difficult to separate his views about the educative functions of courts from his views about the limitations of courts more broadly. Still, what appears to emerge from Nagel's writings is a mild skepticism about the communicative powers of courts coupled with a less mild skepticism about the nature of the messages that the courts might be communicating to larger and non-judicial audiences.

But if we distinguish skepticism about what courts should be doing from skepticism about what they are saying, things become a bit clearer. Now Nagel's worry is that the public side of litigation—judicial opinions, press reports of litigation outcomes, and the like—are poor vehicles for educating the public, even assuming that litigation in general does have the

framed by press reports of a series of decisions, none of which were decisions on the merits by the Supreme Court of the United States.

66. *See* Robert F. Nagel, *How Useful is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302 (1984). A related and important claim is made in SHEILA JASANOFF, SCIENCE AT THE BAR: LAW, SCIENCE, AND TECHNOLOGY IN AMERICA (1997). Jasanoff argues persuasively that the adversarial nature and culture of litigation, insofar as litigation is publicly salient, may lead the public to have a distorted view about scientific certainty and uncertainty, and thus to believe that some issues are more open to dispute than the underlying science would suggest. Also relevant is Carl E. Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 CALIF. L. REV. 151, 174–75 (1988) (noting drawbacks of "legalizing" decisions that present more complex issues).

67. Nagel, *supra* note 8, at 1581.

68. Schauer, *supra* note 64.

capacity to communicate.[69] Nagel's worry is thus that litigation will lead to communication failures of various kinds.[70] The tendency in much of the scholarship cited above[71] is to assume that the lessons received by the public (as mediated by the press) are the same lessons received by legal insiders reading judicial opinions. In suggesting with his empirical challenge that perhaps the public is not learning very much from the courts, Nagel's contributions have been brief and suggestive, but they admirably anticipated the more extensive research that has come later. With respect to his structural challenge, however, Nagel has developed the ideas extensively over many years. Here he has argued that what the public may be learning is very different from what insiders learn, and that what the public learns may not be for the better even if the judicial outcomes are favorable. Nagel has thus been for decades a strong voice of what may well be an entirely justified skepticism about the role and effect of the courts. Courts have a valuable role to play, he believes, but that is a role that should be limited to deciding concrete controversies between specific parties to particular disputes.[72] When courts go beyond that, he believes, not only do they overstep their proper role, but they may also be less effective as educators than are some number of other institutions better designed for that task.

69. *See generally* Nagel, *supra* note 8.
70. *Id.*
71. *Id.*
72. *Id.* at 1581.

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