Review Essay

CONSTITUTIONAL CULTURES

MARK TUSHNET

Robert Nagel. *Constitutional Cultures*. Berkeley: University of California Press, 1989 xii + 232 pp. Notes, index.

INTRODUCTION

Robert Nagel's provocative analysis of "constitutional cultures" is likely to be misread as just another conservative criticism of liberal activism.[1] He directs his ire almost exclusively at "liberal" decisions and fails to explore the implications of his analysis for conservative decisions, including the one decision that he almost unequivocally praises, *National League of Cities v. Usery* (1976).[2] And some of his statements are needlessly offensive[3] or ignorant.[4]

For all that, though, Nagel's work is perhaps the most subversive analysis of constitutional law that has recently been produced. Most criticism of constitutional law from the left—and from the

I would like to thank Gerry Spann for his comments.

[1] I should note that I reviewed Nagel's manuscript for the University of California Press—which I disclosed to the editor of the *Review* when I was asked to review the book here—and recommended that it be published. I did make a number of substantive criticisms of the manuscript, some of which I repeat in this review.

[2] This case is discussed below.

[3] I hesitate to provide a great deal of support for this statement, precisely because providing the details is likely to put off people who would profit by attempting a sympathetic reading of Nagel's argument. The statements I noted as most offensive, and again needlessly so, all seemed to involve aspects of feminism. See, e.g., pp. 114, 126 ("If our deep attachment to the Constitution arises from its capacity to be interpreted to prohibit visual barriers around outdoor theaters or to sanction a nearly absolute personal prerogative to destroy fetal life, then our attachments come from strange sources").

[4] I was particularly struck by his statement on the last page of the book: "No more than the arrogant modern painter or composer, whose roles also are to uplift an unappreciative and uncomprehending mass sensibility, need the judiciary employ an idiom that draws on and is understandable to ordinary people" (p. 155). The relationship between the avant-garde and the general culture is extremely complex, and should not be dismissed in such an off-handed way. (One might think there about the reactions of the French Academy to the Impressionists of the late nineteenth century, who permanently changed the way we all look at the world. Or—or so I would contend—about the seemingly direct line of descent from the New York Abstract Expressionists to Spike Lee's "Do the Right Thing.")

LAW & SOCIETY REVIEW, Volume 24, Number 1 (1990)

https://doi.org/10.2307/3053793 Published online by Cambridge University Press

right as well—takes the form of deprecating, in one or another way, the fact that constitutional law is politics. Liberals have responded to the criticism from the left by defending the proposition that constitutional law is, at least to an important extent, law, and conservatives have proposed that things would be straightened out if only constitutional law actually became law again. Nagel's subversive point is, however, that the problem with constitutional law is that it is law.

MODELS OF CONSTITUTIONAL ADJUDICATION

Nagel begins by saying that the problem with constitutional law is the "routinization of judicial power" (pp. 2–3), a phenomenon he exemplifies by way of a standard conservative litany of the routine use of federal judicial authority to supervise such state institutions as prisons and mental hospitals. Here, too, the exclusive use of "liberal" institutional reform decisions is misleading, because, when Nagel explains in more detail what he means by "routinization," it turns out that routinization is simply the use of judicial power, period. The reason for routinization, according to Nagel, lies in the culture of lawyers and judges, whose professional task is to take some legal rule and proliferate ambiguity about the rule in the service of the lawyers' clients and the judges' power. This, however, is to say that routinization is the application of rules of law in the ordinary way that lawyers and judges apply them.

Why is this sort of routinization a problem? I want to develop Nagel's point in a manner perhaps particularly appropriate for this *Review*, by describing in a relatively formal—or at least formalizable—way some models of the relationship between constitutional adjudication and the promotion of constitutional values. Nagel describes something like a standard model of adjudication and constitutional values. In this model, the citizenry initially has particular preferences for social policies that may conflict with constitutional values because, in some versions, citizens operate in ordinary politics with a substantially shorter time horizon than is consistent with constitutional values (see Ackerman, 1984). They have their representatives enact policies that embody these unconstitutional preferences, whereupon the courts interpret the Constitution to invalidate the legislation. At this point the standard model identifies two possible branches. In one branch, the courts effectively communicate the long-term perspective embodied in the Constitution to the citizenry, successfully instructing them to subordinate their immediate preferences to their long-term ones. In the other branch, the fact that a court invalidates a statute has no general impact on the citizenry's preferences; rather, the citizenry continues to prefer short-term gains to constitutional values, and the courts continue to stand ready to invalidate unconstitutional laws.

https://doi.org/10.2307/3053793 Published online by Cambridge University Press

On Nagel's model, judicial review neither dampens nor merely preserves the citizenry's unconstitutional preferences. Rather, it amplifies those preferences. The reason, according to Nagel, lies precisely in the culture of constitutional law. To understand how this is so, one must understand the stochastic relation between what a court does when it invalidates the first statute and what it does when it invalidates the second and later ones. When a court considers the first case, it has a relatively clear constitutional standard against which the statute can be assessed. The words of the Constitution are, for these purposes, clear enough, and when the court lays the statute against the Constitution, in Justice Roberts's notable phrase which Nagel defends (p. 132), its communication about why the statute is inconsistent with the Constitution is relatively clear.

But in invalidating the first statute, the court articulates a legal doctrine, and that is where the trouble begins. Of necessity, the legal doctrine is to some degree independent of the clear words of the Constitution. Otherwise there would be no need for a doctrine; a recitation of the words of the Constitution demonstrates the statute's invalidity. When the second case arises, the court no longer compares the second statute to the Constitution; instead, it assesses the statute in light of the legal doctrine it articulated in the first case. In doing so, the court necessarily dilutes the message it sent the first time, for now the citizenry has to consider, not the Constitution, but some judicial "interpretation" of the Constitution. Further, precisely because lawyers and judges are professionally adept at proliferating distinctions, each new case that arises causes the legal doctrine used by the court to become more complicated. Each proffered distinction has to be discussed and rejected or accepted, all with supporting reasons that generate the opportunity for new distinctions in the succeeding case. In a relatively short time, according to this model, the court can no longer effectively communicate anything clear about the Constitution. Indeed, as its doctrine becomes more complex, the court finds itself taking seriously claims about the Constitution that the general public senses are absurd. At some point, after constitutional doctrine has become "too" complex, the public throws up its hands and says, in effect, "If that's what the Constitution means, who needs it?" As Nagel puts it, "A public exposed to the judiciary's lessons will inevitably ask certain troubled questions. Why . . . [i]f the first amendment . . . is so important, is it so often invoked to protect seemingly silly, unsavory, or dangerous activities?" (p. 47; see also p. 112).

The important point in Nagel's model, I should stress, is that the dynamic which drives it is the simple need to decide novel cases by articulating legal rules. Nagel argues repeatedly, in one form or another, that "if constitutional meaning is to be durable, it must seem to be plain to those who are governed by it" (p. 17), but

https://doi.org/10.2307/3053793 Published online by Cambridge University Press

the rationalistic urges of the culture of lawyers and judges inevitably produce complexity and ambiguity. For example, they develop "formulas" and "tests" in part to deal with the complexity of fact patterns not fully anticipated when the first case arose.[5]

JUSTIFYING JUDICIAL REVIEW

Nagel does leave room for the exercise of judicial review, although I believe his account of when judicial review is appropriate is basically incompatible with his general model of constitutional adjudication. The reasons he offers for approving the exercise of judicial review in *some* cases are available in *all* cases, and the reasons he offers for disapproving the exercise of judicial review in most cases are applicable as well to the cases that Nagel believes correctly decided. In short, on Nagel's own arguments, judicial review is an all-or-nothing proposition.

Nagel uses two cases to illustrate proper exercises of judicial review: *National League of Cities v. Usery* and *Brown v. Board of Education.* He devotes one chapter to the now-overruled decision in *National League of Cities v. Usery* (1976), in which the Court held that Congress lacked power to require that states comply with congressionally mandated standards for the wages and hours of their employees (pp. 60–84). For Nagel, *National League of Cities* was correctly decided in two complementary ways. First, and less important for Nagel's argument, if Congress were allowed to prescribe wage and hour standards for state employees, the general population would see it as a symbol of the withering away of the states in the national system and would progressively lose faith in the ability of their states to promote desirable social policies (pp. 74–75). In addition, when states comply with federal standards, the state's employees will come to have divided loyalties (pp. 77–78). Taking this as an account of perceptions and loyalties, I confess that I find it quite implausible. State government compliance with congressional wage and hours standards seems marginal to the popular understanding of the allocation of power between

[5] Nagel's discussion of rationalism in law develops other specific criticisms of the rationalistic impulse, for example, that rationalism cannot deal with legislation that is expressive or constitutive of a public's sense of itself, which may be a large domain (p. 112), and that it seeks empirical validation, which "skews dialogue away from aspiration" (p. 115). These criticisms, though well-taken, are less fundamental than the general point I discuss in the text.

Nagel also suggests that the Supreme Court is committed to rationalism in a way that produces "a continuing presumptive hostility to the past" (p. 118), which in light of *Bowers v. Harwick* (1986) seems quite peculiar. Nagel cites *Bowers* in this connection only to make the point that Justice Blackmun's *dissenting* opinion "appealed to values 'deeply rooted in our Nation's history' in arguing for a right to engage in private homosexual sodomy" (p. 206 n.47). Nagel may not like Blackmun's attempt to use history in this way, but I am hard-pressed to find Blackmun expressing a hostility to the past in what he said.

https://doi.org/10.2307/3053793 Published online by Cambridge University Press

the states and the United States. I would have thought that requiring states to comply with federal standards regarding waste collection, power production, and the like would have much more symbolic importance to the general public, and yet Nagel does not appear to advocate that judicial review be used—"routinely," one might put it—to invalidate the wide range of federal substantive mandates imposed on the states. Indeed, Nagel appears to agree with this criticism of his argument: "[I]t is even possible to doubt whether federal control over the incentives and working conditions of state employees will in fact undermine the capacity of the states to compete with the national government even in the long run. . . . All that can be said is that *Usery* offered special advantages for richly conveying a central lesson about our constitutional system, a lesson in danger of being slowly eroded by the drift of events" (p. 80).

The more important reason why, according to Nagel, *National League of Cities* was correctly decided is that the Court went about its work in the right way. Eschewing anything like a formula, Justice Rehnquist's opinion alluded to the values of federalism without reducing them "to anything concrete or measurable" (p. 73). For Nagel, the decision was "notable for its tentative and uncompleted quality," and the Court's opinion "consisted of unstructured, but suggestive, examples, analogies, contrasts, and phrases" (p. 135). Similarly, he praises the Court's fact-bound definition of "state action" in *Burton v. Wilmington Parking Authority* (1961), precisely because it is not crisp or doctrinal (pp. 143–45).

As these cases indicate, however, there is a tension between Nagel's praise for decisions that communicate simple messages clearly and his attraction to opinions that are allusive and come close to saying, "We can't tell you what it—federalism, state action, whatever—is, but we know it when we see it, and this is it." Nagel argues that the tension is greatly lessened and the message is clearly communicated when the Court says, "We know it when we see it," and its audience, the general public, knows it just as well. This, in essence, is how Nagel deals with the skeptical question, "What About *Brown*?" which he takes as the title of his first chapter. According to Nagel, *Brown* was correctly decided because it was "in fact rooted in widely shared understandings" that properly overrode "a regional aberration." "Everyday perceptions grounded *Brown* in a morality that was both powerful and widely understandable" (pp. 4–5). Not every case is as clear as *Brown*, however, and the tension between allusion and clarity is not so easily reduced.

The *Brown* case illustrates several additional difficulties with Nagel's argument about the appropriate occasions for judicial review. In general, he fails to specify in sufficient detail the circumstances under which Supreme Court cases arise. By this I mean that Nagel appears to defend judicial review in situations such as

https://doi.org/10.2307/3053793 Published online by Cambridge University Press

Brown where, on his analysis, it would have no occasion to come into play. The analysis assumes there are indeed widespread public perceptions of what the Constitution's simple terms fairly require. It is not entirely clear, therefore, why unconstitutional legislation ever is on the books. Nagel's reference to a "regional aberration" is not entirely satisfactory, because to the extent that segregation was indeed a regional aberration, we would need some account of why the national consensus judgment expressed by the Supreme Court in *Brown* was unable to find expression in congressional legislation.

Elsewhere, when Nagel discusses the "uninterpreted Constitution," insufficient clarity about how cases arise again clouds the analysis. He states that "most people would be surprised and affronted" by dramatic departures from the understandings worked out in practice about the meaning of the uninterpreted Constitution—to use his example, the republican form of government clause—and "would either oppose a change or move quickly to reestablish the norm" (p. 12). Here, too, Nagel overlooks the problem posed by the hypothetical he imagines. Departures from the norms of the uninterpreted Constitution would not happen unless people wanted them to happen, which makes his assumption that they would oppose the departures more than a little puzzling.

There may be a solution to this difficulty, though I am not sure that it provides much comfort to Nagel. Perhaps judicial review is appropriate when a majority of the general public has a certain understanding of the Constitution but is unable, for a variety of structural reasons, to implement that understanding through legislation. In the case of *Brown* such an account would make reference to such structural impediments in the era of *Brown* as the seniority system in Congress backed up by one-party domination of the South. On these occasions, judicial review serves majoritarian goals, overriding legislation that is on the books only because a strategically placed minority is able to keep it there. Yet, once such considerations are introduced into the analysis, it loses precisely the advantages of clarity that Nagel treats as essential to sound constitutional decisionmaking. Moreover, this solution poses additional difficulties, once we consider that standard democratic theory allows for legislation desired by a deeply concerned—"intense"—minority even over the objections of a mildly opposed majority. In any event, it is clear that Nagel's account, however augmented, is unlikely to provide a robust statement of the occasions for judicial review.

Nagel's "we know it when we see it" analysis of *Brown* brings out a second difficulty in his position, which is that it often cannot easily be applied to assess the correctness of individual cases. For example, Nagel criticizes the Court's decision in *Gibson v. Florida Legislative Investigation Committee* (1963), which held that the committee violated the first amendment by attempting to force the

https://doi.org/10.2307/3053793 Published online by Cambridge University Press

NAACP to assist in an inquiry into Communist infiltration of the organization without first having established a sufficient factual basis for the inquiry. According to Nagel, in *Gibson* "the Court 'protected' free speech by denying the public access to important information" (pp. 42–43). In the lawyers' culture, that may be true. But applying the "we know it when we see it" standard, a member of the general public, looking at the case in hindsight, would surely understand that the Florida legislature was not primarily interested in informing the public about Communist infiltration of the NAACP but was instead attempting to discredit the NAACP because of its activities in support of *Brown*; the case was one facet of the South's campaign of massive resistance to desegregation.

In addition, and perhaps equally damaging to Nagel's general case, *Gibson* was decided the way it was solely because Justice Frankfurter resigned and was replaced by Justice Goldberg; prior to Frankfurter's resignation, the Court had voted to uphold Florida's authority to investigate the NAACP.[6] I would be loath to make many general statements about cases whose disposition turns on such idiosyncratic facts. Yet, every case will have some such facts to it.

Another difficulty in Nagel's account of the appropriateness of the *Brown* opinion is, I think, more fundamental. It is, simply, that his understanding of *Brown* is grossly ahistorical. To Nagel, writing in the late 1980s, it may look as if *Brown* was an easy decision, clearly supported by widely shared understandings of what racial justice required. All that can be said, however, is that it certainly didn't look that way at the time. For example, the Justices of the Supreme Court were quite uncertain about the likely public reception of the result in *Brown*, and not only in the South (see Kluger, 1975). We might remember that President Eisenhower refused to endorse the result publicly, and Herbert Wechsler's famous lecture on "neutral principles" made a point of stressing the moral complexity of the analysis of the problem of segregation. Perhaps the "routine" exercises of judicial review that so vex Nagel will be seen, in the fullness of time, as obviously correct in the way that he views *Brown* to be.

This ahistoricism reflects a basic tension between Nagel's lukewarm defense of judicial review on some occasions and his understanding of the dynamics of law. For, given those dynamics, it is simply wrong to treat *Brown* and *National League of Cities* as isolated cases. Nagel does suggest that the routinization of *Brown* may have undermined the central moral message of the decision (p. 4); although he does not spell out his point with respect to *Brown*, I assume from the general tenor of his discussion that he has in mind the line of descent from *Brown* to busing and affirma-

[6] For a general study of the case and its background, see Lawson (1989).

https://doi.org/10.2307/3053793 Published online by Cambridge University Press

tive action. If my assumption is correct, once again I wonder about the implicit historical account of the development of those ideas. Perhaps they resulted from the routinization of judicial power in desegregation cases, but a more persuasive account is that they resulted from the Court's repeated confrontations with massive resistance to compliance with the core requirement of *Brown*.

The "single-case" difficulty is obvious in connection with Nagel's discussion of *National League of Cities*. The core of that discussion, which essentially reproduces an article Nagel published in 1981, does not consider doctrinal developments after the decision. Although one might describe *National League of Cities* as nondoctrinal and nonformulaic, the "rule" it embodied rapidly became a three-part test, with all the rigidities that Nagel associates with the routinization of judicial power (for Nagel's discussion of the sequels to *National League of Cities*, see pp. 136–37). Nagel offers a dynamic account of the destabilizing effects of judicial review, and it is inconsistent with that account to focus on any single case as he does in connection with *National League of Cities*. His understanding of the dynamics of judicial review should have led him to understand that *National League of Cities* was bound either to be overruled or to produce results that would increasingly seem quite senseless. On Nagel's understanding, we cannot have just a little judicial review—in for a dime, in for a dollar. His praise of *National League of Cities*, like his praise of *Brown*, ultimately cannot be sustained within his system.

This is all very well, for one might take Nagel, at the most fundamental level, to be committed to opposition to judicial review entirely because of its dynamic. The dynamic, again, is the rationalistic drive to provide reasoned accounts of a series of decisions, which produces increasingly strained distinctions, complex tests, and the like. Nagel does hint that he would prefer a more traditionalistic approach to adjudication, and refers admiringly to the work of Michael Oakeshott (pp. 106–20). Oakeshott, a conservative in the tradition of Edmund Burke, argues that institutions like courts do better when they refrain from the effort to provide rational justifications for what they do and instead rely on their sense that the departures from tradition on which they embark are justified in some inarticulable way. He does not, however, work out the idea that courts should confine themselves to resolving "specific controversies" (p. 149), and for good reason. As far as I know, the only detailed account along these lines is Hayek's (1983) distinction between law and legislation, and it is quite clear that Hayek did not understand the common law process that he praised so highly. Once we have courts that are something other than the *kadi* under the tree, we are bound to ask them for explanations of what they do, and as new cases arise those explanations are bound to get complex and formulaic. Hayek erroneously believed that common law adjudication involves the simple disposi-

https://doi.org/10.2307/3053793 Published online by Cambridge University Press

tion of cases one at a time, with a rule emerging—or being retrospectively discerned—only from the course of dispositions of similar cases. Hayek contrasted this with legislation, to him the prescription of rules to govern behavior in the future (Hayek, 1973). Yet, common law judges certainly talk as if their adjudications are designed to prescribe rules for the future, and in any event the criteria of similarity that justify the construction of a rule, even retrospectively, must be legislative in character. Indeed, the original Legal Realist attack on formalism took as its subject the formulaic decisions of common law courts, which purported simply to be resolving specific controversies. We might escape these difficulties by calling for a return to the era before the Enlightenment, when traditional standards were valued simply because they were traditional. Yet, although Nagel makes some important points about the ways in which the values embodied in traditional ways of doing things are entitled to some rational respect, he acknowledges that "traditions, needless to say, can be outmoded or repressive" (p. 118) and, more generally, that these days rationalism and "other forms of decision" coexist (p. 111).

ELABORATING THE MODEL

Suppose that we did purify Nagel's account, stripping it of its unjustified defense of judicial review on some occasions. What would we have to do to make the model of judicial behavior more realistic, even at the cost of allowing us to provide a normative defense of judicial review? Nagel suggests one elaboration, which once again would make the account more complex. As noted earlier, Nagel directs most of his attention to liberal judicial activism, but most of his points could be made against right-wing judicial activism as well, for example, against the entire notion of regulatory takings that plays so central a role in Richard Epstein's scheme (see p. 2 for Nagel's reference to Epstein). Sometimes, though, right-wing activism has taken the form, which Nagel ought to like, of a simple literalism about the Constitution. In the legislative veto case, *Immigration and Naturalization Service v. Chadha* (1983), for example, the Supreme Court made much of the fact that the Constitution provides that legislation has to pass through both houses of Congress and be presented to the president for signature or veto. This clear reading of the terms of the Constitution seems consistent with Nagel's analysis. Yet, when Nagel refers later to the Court's separation of powers decisions, he says that it is "likely" to use the principle "to invalidate practical efforts to cope with the complexities of modern governance, [which will lead] to intellectual—and eventually public—disfavor" (p. 21). It may be, of course, that Nagel's prediction here simply refers to the inevitable routinization of simple readings of the clear text of the Constitution. I find it more informative, however, to read this pas-

https://doi.org/10.2307/3053793 Published online by Cambridge University Press

sage in light of the academic criticism of decisions like the legislative veto decision, which academics have derided for its simple-mindedness. If that reading is accepted, however, Nagel's dynamic model must take into account the fact that public acceptance of judicial decisions rests in part not only on what the Court says—or even what the media says—but also on what intellectuals say about the intellectual strength of the Court's opinions. To the extent that intellectuals value complexity and the like, they will praise, and the public will come to admire to some degree, the formulaic decisions that Nagel criticizes. Once this aspect of the dynamic is considered, the criticism or defense of judicial review is likely to become a question of "more or less," rather than "yes or no," as Nagel's purified model would have it.

Further elaboration is also needed with respect to Nagel's simple disjuncture between the culture of lawyers and judges, who for professional reasons are committed to complex and multivalued rules, and the general civic culture, which is committed to simplicity. Two points undermine this distinction although from different directions. First, Nagel's discussion of the routinization of judicial power does not deal with the kinds of doctrinal developments that have so exercised liberal activists in the areas of standing and justiciability, which are doctrines whose design and effect are to bar the routine exercise of judicial power (see Fink and Tushnet, 1987: 301–5). The reason for this oversight should be apparent. These doctrines are precisely the kinds of technical, complex rules that cannot adequately communicate to the public what constitutional values are at stake in refraining from exercising the power of judicial review. I have not done a search of the literature, but I would guess that the public understanding of *Allen v. Wright* (1984) takes the form of saying, "The Supreme Court held that the Internal Revenue Service could give tax exemptions to schools that discriminate against blacks." If that is so, a court following Nagel's prescriptions would end up exercising judicial power even more routinely than the Supreme Court now does, because it could not use these technical doctrines as a reason for refraining from the practice.

Second, it is not clear that in all areas of the law the disjuncture between the lawyers' culture and the general culture operates in the direction that Nagel supposes. For example, there is essentially no public awareness of the state action doctrine, so that in barrooms across the country people talked about whether Pete Rose was being denied due process by Commissioner Giamatti. And, contrary to Nagel's claims, I suspect that the public understands the due process clause to be a general prescription of fair procedures in every interaction a bureaucracy has with its clientele, including the "proper way to suspend a public school student" (p. 3).

The Court's decision in the recent flag-burning case, *Texas v.*

https://doi.org/10.2307/3053793 Published online by Cambridge University Press

Johnson (1989), seems to me to highlight the difficulties with Nagel's analysis. Although all of the returns are not yet in, it seems clear that the general public understands that punishing people for burning flags is as pristine a violation of the core meaning of the first amendment as we are likely to see. I know of no other recent case that involves punishing someone solely because of disapproval of the political statement he or she made, yet that is what the flag-burning case involved. I think people understand this, whether or not they believe it is acceptable to violate the core meaning of the first amendment in this or other contexts. Yet, for the Court to make that point, it had to rely on its earlier decision in *Cohen v. California* (1971), which Nagel severely criticizes and uses as an example of a doctrine being applied to "dubious, farfetched settings" (pp. 43–46). Without the existence of *Cohen*, however, the Court would not have been in as comfortable a doctrinal position to analyze the flag-burning problem. In a sense, *Cohen* was an essential predicate for the simplicity of the flag-burning case. It is unclear to me how Nagel could handle this, except by implausibly characterizing the flag-burning case as itself "farfetched," which, as I have said, seems incompatible with public understandings of the case.[7]

In short, the Court's opinion in the flag-burning case was simple and straightforward, and yet did not generate popular support. At the same time the Court was able to write a plain opinion here only because it had previously developed an elaborate doctrinal structure of the sort that Nagel disapproves. Simplicity is neither self-defining, relying as it does on whatever doctrinal background has been built up, nor, it appears, sufficient to generate popular support for exercises of judicial review.

What this comes to, I suspect, is that Nagel is clearly onto something in his analysis and that his alternative to the standard model of judicial review captures something about the practice that the standard model overlooks. His analysis, however, has to be disaggregated. Sometimes the standard model works, sometimes the alternative model works, and what we need to explore next is when each one comes into play.

REFERENCES

ACKERMAN, Bruce (1984) "Discovering the Constitution," 93 *Yale Law Journal* 1013 (1984).

[7] In addition, it may well be that Nagel's criticism of *Cohen* is another example of the lawyer's culture at work. For, again perhaps in retrospect, there is a generally shared public understanding that *Cohen* involved an effort to suppress opposition to the Vietnam War in some way or another, at a time when efforts to suppress the more dramatic and effective forms of opposition to the war were evidently failing.

https://doi.org/10.2307/3053793 Published online by Cambridge University Press

FINK, Howard, and Mark TUSHNET (1987) *Federal Jurisdiction: Policy and Practice*. 2d ed. Charlottesville, VA: Michie.
HAYEK, Friedrich (1973) *Law, Legislation, and Liberty: Rules and Order*. Chicago: University of Chicago Press.
KLUGER, Richard (1975) *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality*. New York: Alfred A. Knopf.
LAWSON, Steven F. (1989) "The Florida Legislative Investigation Committee and the Constitutional Readjustment of Race Relations, 1956–1963," pp. 296–325, in Kermit Hall and James Ely (eds.), *An Uncertain Tradition: Constitutionalism and the History of the South*. Athens: University of Georgia Press.

CASES CITED

Allen v. Wright, 468 U.S. 737 (1984).
Bowers v. Hàrwick, 478 U.S. 186 (1986).
Brown v. Board of Education, 347 U.S. 483 (1954).
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).
Cohen v. California, 403 U.S. 15 (1971).
Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963).
Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).
National League of Cities v. Usery, 426 U.S. 823 (1976).
Texas v. Johnson, 109 S. Ct. 2533 (1989).

https://doi.org/10.2307/3053793 Published online by Cambridge University Press