

## THAYER, NAGEL, AND THE FOUNDERS' DESIGN: A COMMENT

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### I. INTRODUCTION

Firmly embedded in every theory of judicial decisionmaking lies an important set of assumptions about the way government is supposed to work. Sometimes these theories about government are made explicit. More often they are not. Moreover, deeply embedded in every theory of government is a theory of human nature. Although these assumptions about human nature generally remain latent within the larger theory, because they provide the underpinnings for our ideas about the way government is supposed to work, they drive our notions about judicial decisionmaking. For example, the theory of government reflected in the United States Constitution

reveals what one would call a "realistic" view of human nature—i.e., a view that is more alert to the absence of human virtues than to their presence, a view that is skeptical of the ability of human beings to govern themselves without the prior imposition of severe institutional self-restraints. There is no visible "democratic faith" in this Constitution.<sup>1</sup>

In other words, the model of human nature that guided the framers assumed that both the rulers and the citizenry are rational, self-interested, utility-maximizing individuals who will be unable to govern themselves wisely without the imposition of severe institutional restraints on their power.<sup>2</sup>

The framers feared that some would abuse their power by seeking to advance their own selfish interests through political activity. This self-interest might take form in the organization of narrow special interest groups designed to transfer wealth to themselves from the population as a whole. Thus, the U.S. Constitution was the first constitution in world history expressly designed to confront the problems of interest-group opportunism by channeling and constraining the self-interest of politicians and their constituents.<sup>3</sup>

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<sup>1</sup> Irving Kristol, *The Spirit of '87*, PUB. INTEREST, Winter 1987, at 3, 3.

<sup>2</sup> Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 485-86 (1988).

<sup>3</sup> Jonathan R. Macey, *Competing Economic Views of the Constitution*, 56 GEO. WASH. L. REV. 50, 57 (1987).

The purpose of this essay is to place the essays by James B. Thayer<sup>4</sup> and Robert F. Nagel<sup>5</sup> in the context of the framers' view of human nature. Basically, my argument is that Thayer's view of the role of the judiciary is fully consistent with the framers' views of both human nature and how government is supposed to work, while Nagel's view is starkly at odds with the framers' constitutional theory and design. My essay begins with a description of the framers' view of human nature and proceeds to a discussion of Thayer's view of human nature. In the final section, I discuss Professor Nagel's view of human nature and attempt to show how this view is at odds with the Founders' design.

## II. THE FRAMERS' VIEW OF HUMAN NATURE: SELF-INTEREST

The Constitution attempts to channel human nature in general and self-interest in particular in three distinct ways. First, by establishing a federal scheme, the framers attempted to set up a competitive system of government in which local governments would have an incentive to pass efficient laws in order to prevent exit by citizens disadvantaged by inefficient legal rules. A federal system creates competition among the providers of legal rules, thereby causing politicians to suffer the costs associated with citizen exit if they enact sub-optimal legal rules.

Put another way, as long as there are viable substitutes for an existing political regime, the state will find it difficult to extract wealth from its constituents if they may move to other states at low cost. The American Constitution was established with the idea that the individual states would compete for citizens. Thus, the Constitution provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens of every other state.<sup>6</sup>

Second, the framers placed a number of outright prohibitions on Congress in order to mitigate the problem of self-interest. The most obvious example of course is the Fifth Amendment's prohibition on takings of private property. In addition, the constitutional protections of speech and press "protect the integrity of the political process to insure that the country will adopt the course of action that conforms to the wishes of the greatest number."<sup>7</sup> Moreover, the Commerce Clause, the Privileges and Immunities Clause, the Equal Protection Clause, the Due Process Clause, and the Contract Clause are all "united by a common theme and focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they

<sup>4</sup> James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

<sup>5</sup> Robert F. Nagel, *Name-Calling and the Clear Error Rule*, 88 NW. U. L. REV. 193 (1993).

<sup>6</sup> U.S. CONST. art. IV, § 2, cl. 1.

<sup>7</sup> ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 62 (1975) (summarizing the views of Robert Bork and Alexander Meikelfohn).

want.”<sup>8</sup>

Third and most importantly, the very structure of the Constitution itself was designed to block the power of legislatures to transfer wealth to special interest groups. The structural features in the Constitution that protect property rights by reducing the efficacy of interest group activity are as follows: (1) the provision for a bicameral legislature in which the House and the Senate are of different sizes and represent different constituencies; (2) the executive veto; and (3) the provision for an independent judiciary.

With regard to the bicameral legislature, Robert McCormick and Robert Tollison have demonstrated empirically that for a fixed number of total legislators, interest groups fare better in the market for legislation where the legislators are distributed equally between the houses.<sup>9</sup> By contrast, where the members of each house of a bicameral legislature represent different constituencies and where the two houses must concur to pass a law, it is more difficult and more costly for interest groups to ensure the passage of legislation that furthers their interests. This is because the cost of making collective decisions goes up in a nonlinear fashion—such costs increase at a faster rate than the growth in the size of the legislature.<sup>10</sup> As a result, if the total size of the legislature is held constant, increasing the size of one house (with a concomitant decrease in the size of the other house) raises the cost to an interest group of obtaining agreement in that house by an amount that is greater than the group’s savings in the other house.

Thus, for example, the cost to an interest group of obtaining a wealth transfer in a bicameral legislature of 200 will increase if the legislature moves from a structure in which there are 100 people in each house to a representative body in which there are 160 representatives in one house and 40 in another house. This is because the “logic of collective action” dictates that the increase in costs to interest groups of effectuating wealth transfers in the body of 160 will increase by more than the decrease in the cost of purchasing influence in the body of 40.

Consistent with this analysis, Article I of the Constitution, which sets forth the composition of the Senate and the House of Representatives, clearly envisions a bicameral legislature in which the houses are of radically different size. Section 2, Clause 3 of Article I provides that membership in the House of Representatives shall not exceed one for every thirty thousand people, while Section 3, Clause 2 of Article I provides that the Senate shall be composed of two Senators from each state.

Similarly, the provision in Article I, Section 2 allowing for the

<sup>8</sup> Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984).

<sup>9</sup> ROBERT E. MCCORMICK & ROBERT D. TOLLISON, *POLITICIANS, LEGISLATION, AND THE ECONOMY* 45-57 (1981).

<sup>10</sup> MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 53-65 (1971).

growth of the House of Representatives as the population grows is another structural feature designed to protect property rights by controlling the efficacy of interest groups. This is consistent with the expectation that rent-seeking will increase as the population grows larger, but become more difficult as the legislature grows. The executive veto raises costs to interest groups in much the same way as does the bicameral legislature. The veto permits the executive branch to act as a third house of the legislature, thus furthering the cost to interest groups of obtaining favorable legislation.

The provision for an independent judiciary also protects property rights by raising the costs to interest groups of destroying such rights. While it is clear that the independent judiciary does not fully live up to its intended role in the constitutional scheme as a vehicle for protecting property rights, it is also clear that the judiciary continues to play an important, albeit needlessly self-constrained, role in the protection of property rights.

### III. THAYER AND THE FRAMERS

At first blush, James Bradley Thayer's classic article would seem to conflict with the basic view of human nature embraced by the framers. The essence of Thayer's argument was that courts should declare legislative acts unconstitutional only when the law in question is "not merely . . . a mistake, but . . . a very clear one—so clear that it is not open to rational question."<sup>11</sup> This argument appears to conflict with the views of the framers because it undermines the judiciary as an important institutional restraint on the power of government. Interestingly, however, Thayer did not want to weaken the judiciary. He wanted to preserve and protect it by insulating it as much as possible from attack by the legislature.

Thayer did not see the judiciary as a branch of government inferior or subordinate to the Congress. Rather, Thayer saw the judiciary as a co-equal branch of government with a unique and specialized role to play within a divided government. Thayer's view was that the legislature specializes in crafting laws while the courts specialize in construing such laws. For Thayer, the problem with unfettered judicial review of legislative acts was that it provides judges with the power both to revise the actions of the other branches and to declare those actions null.<sup>12</sup>

For Thayer, judicial deference to legislative acts was based not on a view that the courts should be subservient to the legislature, but rather on the view that such deference was necessary to preserve the specialized and compartmentalized nature of the American constitutional scheme. Thayer's desire to preserve the specialized and compartmentalized nature

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<sup>11</sup> Thayer, *supra* note 4, at 144.

<sup>12</sup> *Id.* at 152.

of government did not arise out of distrust of the courts or faith in the legislature. Instead, Thayer's article was an attempt to *strengthen* rather than to weaken the judiciary by protecting it from the wrath of the legislature. For Thayer, it was important that the judiciary use its power to review legislative acts sparingly in order to promote public confidence in it as an institution and to reduce the incidence of confrontation between the judiciary and the legislature—confrontations the judiciary was sure to lose.

In my view, the most important passage in the Thayer article is the quotation from Chancellor Waties:

The interference of the judiciary with legislative Acts, if frequent or on dubious grounds, might occasion so great a jealousy of this power and so general a prejudice against it as to lead to measures ending in the total overthrow of the independence of the judges, and so of the best preservative of the constitution. The validity of the law ought not then to be questioned unless it is so obviously repugnant to the constitution that when pointed out by the judges, all men of sense and reflection in the community may perceive the repugnancy. By such a cautious exercise of this judicial check, no jealousy of it will be excited, the public confidence in it will be promoted, and its salutary effects be justly and fully appreciated.<sup>13</sup>

From this passage emerge two critical, but generally unrecognized points about Thayer's desire to limit the exercise of judicial review. First, Thayer saw the benefits of an activist judiciary. As the passage above demonstrates, he clearly recognized the "salutary effects" of the judicial check on legislative enactments. Second, Thayer had a healthy distrust of legislatures.

For Thayer, the judiciary's power to review legislative enactments was derived from the Court's constitutional authority to decide the cases that come before it.<sup>14</sup> In rendering such decisions, judges are not free to ignore the Constitution. And neither Congress nor the state legislatures are empowered to amend the Constitution unilaterally.<sup>15</sup> Hence the doctrine of judicial review is born out of the power to interpret.<sup>16</sup> This limited power to interpret, however, is not without costs. In particular, Thayer recognized that "much which is harmful and unconstitutional may take effect without any capacity in the courts to prevent it, since their whole power is a judicial one."<sup>17</sup>

In this single sentence Thayer shows that he recognizes the salutary role that courts play in forcing congressional enactments to conform to the rule of law, as well as the dangerous proclivities of unchecked legislatures. In fact, it was Thayer's fear of Congress rather than his fear of courts that led him to caution the judiciary against being too aggressive

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<sup>13</sup> *Id.* at 142.

<sup>14</sup> *Id.* at 135.

<sup>15</sup> See U.S. CONST. art. V.

<sup>16</sup> Thayer, *supra* note 4, at 136.

<sup>17</sup> *Id.* at 137-38.

in repudiating legislative enactments. Thayer was concerned that if judges asserted the primacy of the Constitution over the legislature too aggressively, the legislature would react violently and threaten the very existence of the independent judiciary.

In sum, one is at first tempted to argue that Thayer's cautious vision of the role of the judiciary is at odds with the framers' views of human nature because it gives popularly elected legislators too many degrees of freedom. The framers planned to protect individual rights from erosion by creating a constitutional structure of checks and balances, which, along with various provisions of federalism, make it difficult for Congress to pass laws. In other words, the framers wanted to *create* gridlock and to *raise* the costs to Congress of passing laws. Thayer, by urging judges to defer to Congress, would seem to be operating contrary to the Founders' design by promoting judicial behavior that would lower rather than raise the costs to Congress of passing laws.

But a more careful reading of Thayer reveals that this is not the case. Thayer's words of caution for the federal judiciary were based on his recognition that the third branch, which relies on the other branches for funding and for enforcement of its orders, is particularly vulnerable to political attack. Thus, the proper reading of Thayer demonstrates that he would have the judiciary marshal and conserve its resources by using those resources only when absolutely necessary because the judiciary is at once vulnerable and important.

One implication of Thayer's analysis is that the judiciary should allow itself to play a more active role in nullifying acts of Congress as its prestige grows and as it becomes more secure in its position. However precarious the status of the federal courts in 1793 or 1893, it seems quite secure today. Thayer's worries about preserving the Court as an institution, therefore, do not seem as pressing as they may have a hundred years ago. Put another way, Thayer urged caution in the judiciary's dealings with the legislature because he was worried about the fragility of the judiciary as an institution. That concern is less acute today. Thus, a dynamic reading of Thayer's article suggests that the judiciary should be less cautious about exercising the power of judicial review since the bases for Thayer's concerns about the "jealousy" of the other branches and the public confidence in the judiciary have largely eroded. At the same time, the beneficial effects of judicial review and the need for judicial protection against legislative excess have not diminished.

A second implication of Thayer's analysis is that the judiciary should be made more autonomous vis-à-vis the political branches. Thayer's arguments against judicial assertiveness can be summarized in economic terms as follows. There are costs and benefits to judicial activism. The benefits come in the form of protecting the integrity of the Constitution and curbing the excesses of the legislature. Indeed, Thayer describes the independent judiciary as "the best preservative of the

[C]onstitution.”<sup>18</sup> On the other hand, the costs of judicial activism come in the form of the risk that there will be a legislative backlash against the judiciary that will “lead to measures ending in the total overthrow of the independence of the judges.”<sup>19</sup> Given this cost-benefit calculus, it seems clear that the way to avoid the costs while enjoying the benefits of judicial activism is to strengthen the independence of the judiciary. This could be done by making the judiciary self-funding and by depriving Congress of the ability to alter the jurisdiction of the federal courts.

#### IV. NAGEL AND THE FRAMERS

James B. Thayer’s contribution to intellectual discourse on constitutional law was to bring into sharp focus the delicate nature of judicial review. Robert Nagel takes a much different view of the nature of the federal judiciary. Where Thayer wanted to protect and nurture the judiciary’s authority, Nagel wants to challenge and diminish that authority.

It is my argument that Nagel’s view of the judiciary’s role in constitutional jurisprudence evinces a fundamental misunderstanding of both the political theory of the framers and the role of democratic values in a civil society. Indeed, it is ironic in this day and age, when distrust of Congress is at an all-time high, that Professor Nagel can seriously argue that the federal courts somehow stand as an impediment to Congress’s ability to serve the will of the people. Nagel’s world view is that the legislature is trying to serve the will of the people, while the courts are getting in its way. My world view is that the legislature is bound and determined to effectuate amorally redistributive wealth transfers and that the courts are doing far too little to stop them.

Nagel alleges that Thayer’s clear error rule will lead to a sort of “false consciousness” among judges who convince themselves that they are exercising admirable self-restraint when in fact they are usurping the legislature’s constitutional prerogatives. Nagel claims that Thayer’s attempt to control judges will have the unintended effect of expanding the power of the judiciary by cloaking their decisions in a veil of legitimacy and restraint that does not really exist. Nagel asserts that:

[A]s a realistic matter, Thayer’s formulation is a recipe for creating a self-deluding and imperious judiciary.

The self-image of judges employing the clear error rule will be profoundly complacent. They must feel and announce great reluctance before invalidating a statute. Even when, on a “just and true construction,” a law seems unconstitutional, they are to exercise restraint. Naturally, these judges will be motivated to believe that they are highly selective in voiding legislation and that, when they do, their judgments are specially justified.<sup>20</sup>

There are at least three problems with this formulation. First, it is

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<sup>18</sup> *Id.* at 142.

<sup>19</sup> *Id.*

<sup>20</sup> Nagel, *supra* note 5, at 201 (footnote omitted).

counterfactual. In point of fact, judicial invalidations of congressional acts are exceedingly rare. Thus, we simply do not observe a state of affairs in which judges wring their hands while declaring acts of Congress unconstitutional. Second, at best, Nagel's analysis succeeds only in identifying one of the costs of judicial activism. By ignoring the benefits of such activism, he provides no basis for determining whether the net benefits of activism exceed the cost that he identifies. This criticism is particularly telling in light of the fact that the particular cost Nagel identifies has not manifested itself to any appreciable degree.

Finally, Nagel's analysis suffers because it presents an incomplete and impoverished view of what law is. Under the American constitutional scheme, a bill does not become law even though it is passed by both houses of Congress. After being passed, it must be presented to the President and either approved by him or else returned to the house in which it originated. If returned, it must receive a two-thirds vote of that house, as well as the other, in order to become law. Even then, however, the constitutional scheme envisions that private citizens may have standing to challenge individual laws and that the federal courts construing such laws will evaluate them for constitutional infirmity. The judiciary validates and legitimizes the laws passed by Congress.

#### A. *Nagel and the Facts*

Professor Nagel's article starkly presumes that the federal courts are running rampant over Congress. This is an empirical assertion, but the only support marshaled for the assertion consists of a series of unconvincing anecdotes. Indeed, besides the flag burning case,<sup>21</sup> Nagel supports his point by looking at a series of cases in which the federal courts have defended the rights of minorities or disadvantaged groups against real or perceived attack by the legislature.<sup>22</sup>

The available empirical evidence suggests that, contrary to Professor Nagel's presumption, judges rarely invalidate statutes on constitutional grounds. For example, a study by Bill Landes and Richard Posner calculated the number of statutes invalidated as unconstitutional from 1789 to 1972. They found that only 97 acts of Congress were held unconstitutional during this period.<sup>23</sup>

Of course, as I have argued elsewhere, it is possible for the federal courts to thwart Congress's will through statutory construction as well as judicial review.<sup>24</sup> In particular, interpreting statutes according to their publicly stated purposes instead of their hidden, interest group motives

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<sup>21</sup> See *id.* at 202-03.

<sup>22</sup> *Id.* at 197-99.

<sup>23</sup> William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 895-901 (1975).

<sup>24</sup> Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 226 (1986).

will limit interest group capture by forcing interest groups and politicians to publicize any nefarious purpose a "captured" statute has.<sup>25</sup> But, as Bill Eskridge has demonstrated, Congress is perfectly capable of overriding the Court's decisions construing federal statutes and in fact does so with great frequency.<sup>26</sup>

Thus, it is hard to know what to make of Professor Nagel's concerns about judicial activism. Indeed, at times, Professor Nagel seems more concerned with the Supreme Court's *rhetoric* than with its actions:

It is possible that every law struck down by the Supreme Court using words like "irrational," "prejudiced," "invidious," "suppressive," and "defiant" were, on the whole, bad laws. I also concede that some of the motivations that went into their enactment may have been—probably were—regrettable or even reprehensible. I still insist that we have become inured to the extreme rhetoric the justices use in characterizing the decisions of others. I also insist that, however ignorant or evil these other decisionmakers may be, this rhetoric (as well as the "findings" and legal analysis that it expresses) is inaccurate in that it does not leave enough room for the difficulty of the judgments involved, the ambiguity of human motivations, and the complex nature of public decisionmaking.<sup>27</sup>

But here Nagel confuses the Court's criticism of particular legislative enactments with criticism of the legislature itself. If Nagel were correct in his assessment, we would observe more tension between the courts and the legislature than we do. The fact is that, rightly or wrongly, constitutional jurisprudence over the past sixty years has resulted in a sort of jurisdictional truce between Congress and the Court over the allocation of authority to decide the constitutionality of particular issues. Congress has essentially plenary authority to legislate in the area of economic rights, while the Court has supreme authority to evaluate statutes that involve noneconomic rights such as racial equality, freedom of expression, freedom of assembly, and freedom of religion.<sup>28</sup>

And, as anyone who observed the Senate confirmation hearings on Robert Bork's nomination to the Supreme Court must have recognized, Congress simply *does not want* all the power the Court exercises. Indeed, the Senators on the judiciary committee made it clear that the basic problem with Bork's nomination was that his vision of the federal judiciary was far less intrusive than Congress would like. This point was made most succinctly by Senator Edward Kennedy who, in a nationally televised speech, announced that

Robert Bork's America is a land in which women would be forced into back

<sup>25</sup> *Id.* at 252-56.

<sup>26</sup> See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331 (1991).

<sup>27</sup> Nagel, *supra* note 5, at 199.

<sup>28</sup> See Jonathan R. Macey, *Some Causes and Consequences of the Bifurcated Treatment of Economic Rights and 'Other' Rights Under the United States Constitution*, 9 *SOC. PHIL. & POL'Y* 141 (1992).

alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim [of] government, and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.<sup>29</sup>

The Bork confirmation hearings presented the rare spectacle of a nominee who was promising legislators that as a judge he would not stand in the way of their legislative plans, only to find the legislators howling in protest at the prospect of such cooperation.

The point here is that even if Nagel is correct in opining that the Court often takes an unnecessarily derogatory tone when it goes about chastising Congress, this disrespect does not seem to offend the lawmakers themselves very much. Indeed, it is not clear that the judiciary's lack of tact offends anyone other than Professor Nagel. The reason for this seems clear. The federal courts' aggressive protection of noneconomic liberties frees Congress by allowing it to be irresponsible. The flag burning case is a perfect example. Individual members of Congress can signal their patriotism and love for the flag by voting for a clearly unconstitutional anti-flag-burning statute without any fear that this enactment will actually become law.<sup>30</sup> In this way, the federal courts serve Congress's interests quite well. The same analysis applies in a variety of areas, such as abortion, where the Supreme Court's defense of abortion rights has insulated Congress from having to deal with this political hot potato.<sup>31</sup>

Perhaps the most perplexing aspect of Professor Nagel's argument is his point that the views of judges and lawyers should be discounted because their modes of thought are "highly specialized and, therefore, counter-intuitive to a broad range of the public."<sup>32</sup> Similarly, Nagel argues that judges' opinions are not worth much because their views of social issues like abortion, school desegregation, and religion are out of the mainstream. Judges' views are aberrational, Nagel suggests, because judges are from social classes that are educationally and socially distinct from that of the general public.<sup>33</sup>

Nagel is probably right that judges are from elite groups within society. But that is not the issue. The issue is whether judges are any more

<sup>29</sup> 133 CONG. REC. S9188 (daily ed. July 1, 1987).

<sup>30</sup> Akhil R. Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 125 (1992) (describing the *Texas v. Johnson* flag burning case as "as right and easy a case in modern constitutional law as any I know"); Mark Tushnet, *Constitutional Cultures*, 24 LAW & SOC'Y REV. 199, 209 (1990) (reviewing ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES* (1989)) (describing the case as "simple and straightforward").

<sup>31</sup> Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 75 VA. L. REV. 265, 286-90 (1990).

<sup>32</sup> Nagel, *supra* note 5, at 205.

<sup>33</sup> *Id.*

insulated from the real world than Congress. Both judges and congressmen enjoy remarkable job security. Federal judges' job protection comes from the life tenure provided by Article III of the Constitution. Congressmen's job security comes from the awesome power of incumbency. Moreover, Congress can hide from public scrutiny far better than judges. Being only one of 435 members of Congress provides a remarkable degree of anonymity. And even this anonymity can be enhanced by legislators who avoid roll call votes and other mechanisms that allow for accountability. By contrast, judges must produce written opinions in which they not only take responsibility for their decisions, but defend them as well. In particular, justices on the Supreme Court are in the public view to a far greater extent than most individual members of Congress.

The available evidence indicates that Congress is almost completely insulated from public scrutiny. Elections to Congress are becoming increasingly uncompetitive.<sup>34</sup> The fact that incumbents are routinely re-elected is so well known that the statistics need not be recounted here.<sup>35</sup> Moreover, there is overwhelming evidence that the American people believe that Congress is dramatically out of touch with the feelings of the American people. A review of thirty-five national surveys conducted between 1975 and 1990 that asked whether people approved or disapproved of what Congress was doing found a consistently high rate of popular disapproval of Congress's performance.<sup>36</sup>

More importantly, Gallup polls taken in 1981 and 1989, asking Americans about their confidence in a wide range of social and political institutions, found that the Supreme Court ranked considerably higher than Congress in the esteem of the American people. As Everett Carll Ladd has observed:

When Congress's standing is compared with that of a variety of other institutions besides the presidency, the same picture is evident. For example, Gallup asks its respondents whether they have "a great deal, quite a lot, some, or very little" confidence in the military, banks, the Supreme Court, and other institutions. Congress is consistently back in the pack. It always lags well behind churches, the military, public schools and the Supreme Court. Its peers are such relatively low-rated institutions as organized labor, television, and big business.<sup>37</sup>

Thus, Nagel's claim that the Supreme Court is an elitist institution that is out of touch with the American people may be true. But if so, the nine justices have managed to fool a lot of people over a sustained period of time. Moreover, since Nagel is discussing judicial review of congress-

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<sup>34</sup> Everett Carll Ladd, *Public Opinion and the "Congress Problem"*, PUB. INTEREST, Summer 1990, at 57, 58.

<sup>35</sup> *See id.*

<sup>36</sup> *Id.* at 61.

<sup>37</sup> *Id.* at 62.

sional enactments, the critical question is not whether the Court is elitist (and hence out of touch with public issues) in some abstract or absolute sense, but whether the Court is *more* out of touch with public issues than is Congress.

Once again, the available evidence runs counter to Professor Nagel's assertions. Nagel portrays the Court as an elitist, out-of-touch institution that obstructs Congress's valiant effort to carry out widely shared social policies. By contrast, a substantial majority of people believe that Congress is in fact an elitist institution filled with people who (1) lie when the truth will hurt them politically; (2) care more about special interests than ordinary citizens; (3) make campaign promises they have no intention of fulfilling; and (4) make a lot of money using public office improperly.<sup>38</sup> Again, it appears that nobody except Professor Nagel really believes that the Supreme Court is thwarting the will of a large portion of the American public by impeding the good works of Congress.

### B. *A Cost-Benefit Analysis of Nagel's Arguments*

Professor Nagel claims that the judiciary's lack of sufficient deference to Congress harms society because it results in the nullification of laws that would increase human flourishing and happiness. In other words, Professor Nagel believes that the Court's refusal to yield to what he regards as majoritarian preferences imposes costs on society because the American people get less of some things of which they, as a whole, would like to have more.

I have no doubt that Professor Nagel is correct about this. For example, there is no question that if Professor Nagel's views of constitutional law were shared by a majority of the Supreme Court, there would be less flag burning, more school prayer, fewer abortions, and more discrimination against racial minorities in the private sector. But even if one were to assume (and not even Professor Nagel is willing to assume this) that all of these outcomes would constitute *improvements* for society, the complete abdication to congressional will that Professor Nagel advocates should not be endorsed until the costs of his regime are considered.

One cost of Professor Nagel's jurisprudential vision is that the Supreme Court will no longer serve as a source of moral instruction for America. Clearly, Professor Nagel is correct that the Supreme Court does some unpopular things. This point is almost banal. But the Court's unpopular decisions (including *Brown v. Board of Education*) have had a powerful and salutary educational effect on the American people that should not be ignored in any cost-benefit calculation of judicial review. People ultimately got used to the idea of desegregated schools, and now desegregation enjoys widespread public support.

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<sup>38</sup> *Id.* at 63 (citing an *ABC News/Washington Post* survey taken in May 1989).

Another cost of Professor Nagel's jurisprudential vision is that his hyper-deferential approach would increase judicial error. The Supreme Court is not infallible. It makes mistakes. In the context of judicial review, these mistakes come in two forms. First, justices run the risk of declaring laws unconstitutional when they are not. Second, justices run the risk of declaring laws to be consistent with the Constitution when in fact they violate it. Professor Nagel's approach to jurisprudence has the benefit of reducing the second type of judicial error, but it has the defect of increasing the first. In my judgment, one need only look to the *Korematsu* case,<sup>39</sup> involving the internment of U.S. citizens of Japanese descent during World War II, to conclude that reducing the second type of judicial error is a higher priority than reducing the first type.

Finally, Professor Nagel's analysis does not distinguish between individual rights and legislative preferences. In other words, his analysis does not admit to the fact that legislative preferences may at times interfere with individual rights. But it is clear that this is often the case. Professor Nagel offers no explanation for why legislative preferences—even if they reflect the will of the majority—should trump individual rights provided for in the Constitution. Put another way, Professor Nagel's vision of judicial restraint could be achieved only through a sacrifice of individual rights that people count on the federal courts to protect. Unfortunately, Professor Nagel considers only the benefits of his system of judicial restraint. Any serious consideration of the desirability of such a system must take account of the costs as well.

### C. Nagel and the Founders' Design

My final and most serious concern with Professor Nagel's perspective on judicial review is its lack of grounding in constitutional theory. Nagel asserts that judges are elitist and out of touch with "the people." But, as I have shown above, so is Congress. More importantly, Nagel asserts that judicial interference with legislative acts is deplorable because it substitutes the antimajoritarian, and hence illegitimate, views of judges for the majoritarian, and hence legitimate, views of the legislature.

In other words, Professor Nagel's notions of judicial review contain an unstated theory of representation. Implicit in his view of democracy is the erroneous idea that actions of elected representatives have a moral legitimacy deriving from the very fact that these representatives are elected. This romanticized view of representative democracy was not shared by the framers.

The Federalists considered and dismissed the argument that the purpose of democracy and majority rule is to legitimize the actions of elected officials.<sup>40</sup> The framers believed that democracy should play a

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<sup>39</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>40</sup> Jonathan R. Macey, *Representative Democracy*, 16 HARV. J.L. & PUB. POL'Y 49, 51 (1993).

*checking* function rather than the *legitimizing* function envisioned by Professor Nagel:

The Federalists saw democracy as a check on government because it allowed citizens to unseat incompetent rulers and thereby align the interests of governmental actors with those of the electorate. This understanding of representative democracy was strongly influenced by John Locke, who believed that the purpose of democracy was to allow the people to *judge* their government.<sup>41</sup>

In other words, Professor Nagel's idea that judges lack the legitimacy of popularly elected officials is based on the assumption that winning an election confers legitimacy on the actions of such elected officials. But this misconstrues the purpose of democratic elections in the American political system. The purpose of such elections is not to establish a system in which the people rule through their elected representatives. Rather, the purpose is to permit the people to sit as "judges, able to check the legislature."<sup>42</sup>

Thus, imbedded within Professor Nagel's approach to judicial review is a theory of representation far different from that embraced by the framers. This in turn leads Professor Nagel to a theory of government far different from that conceived in the Constitution. The framers rejected the idea of voting as a means of legitimizing legislative acts, for they feared that certain factions would be able to form effective political coalitions and so deprive less powerful factions of fundamental rights.

In other words, where the framers were concerned with the power of democracy to undermine the rights of the politically weak, Professor Nagel is concerned with the power of the judiciary to thwart the will of the politically powerful. In Nagel's view, once the people have spoken through their lawfully elected representatives, the judiciary should do nothing to impede the swift implementation of their will. But the American constitutional system is full of devices explicitly designed to *raise* rather than to lower the decision costs of government. The bicameral legislature, the rules regarding the size and composition of the House and the Senate, the executive veto, the presentment requirement, the separation of powers, and judicial review all constitute structural devices designed to make it more difficult for a transitory majority coalition to pass laws.

Modern public choice theory demonstrates conclusively what the framers understood intuitively, namely that not all groups enjoy equal access to the political process. Indeed, laws are likely to benefit the few at the expense of the many by transferring wealth from widely dispersed, poorly organized interests to those discrete, well-organized groups that enjoy superior access to the political process. Elected representatives will enact laws that deprive certain citizens of rights and that reduce societal

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

wealth and economic efficiency in order to benefit these favored groups.<sup>43</sup> As Bruce Ackerman has observed, the principal defense given in *The Federalist Papers* for ratification of the new Constitution was that it laid the "foundations for a different kind of politics—where well organized groups try to manipulate government in pursuit of their narrow interests."<sup>44</sup>

Thus, where Professor Nagel attacks the judiciary for being antimajoritarian and elitist, I, like the framers, worry far more about Congress's susceptibility to interest group capture, small-mindedness, and corruption. To the extent that judicial review reduces these problems, the game is worth the candle.

## V. CONCLUSION

At a superficial level, there is a striking similarity between the works of Professor Nagel and Professor Thayer because both strongly advocate judicial restraint. But there the similarity ends. Professor Thayer favored judicial restraint out of a desire to nurture and protect the judiciary, which he viewed as a fragile institution, from more powerful social and political forces that would destroy it. By contrast, Professor Nagel favors judicial restraint out of a dislike for judges whom he somehow manages to regard simultaneously as both self-deluding and imperious.

The more profound difference between Professors Nagel and Thayer lies in their differing views of the legitimacy of Congress. Nagel sees Congress as closely aligned with the people, where Thayer clearly understood both the potential for legislative abuse and the role of the judiciary in checking such abuse. Thus, in the end, Thayer's vision of the federal judiciary is much more intellectually robust, and much more consistent with the American constitutional system of limited government characterized by checks and balances, than the unfettered democracy championed by Professor Nagel.

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<sup>43</sup> See Macey, *supra* note 24, at 230, 242-50.

<sup>44</sup> Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1020 (1984).