BOOK REVIEWS


Reviewed by Steven M. Barkan*

I. INTRODUCTION

Interdisciplinary scholarship that combines law with social sciences and the humanities has become commonplace. These efforts often add new insights and depth to our understanding of law.

Considering the proliferation of these "law and" activities, it is surprising that little attention has been given to the relationship between law and information.1 This dearth of activity is particularly troublesome because of the intimate relationship that exists between law and its informational sources. The graphic manifestations of law, such as case reporters and statutes, are often spoken of as "the law" itself, and the "[m]anipulation of information underlies the way legal institutions work, how legal doctrines are applied, and how social and moral values are translated into legal values. Law is a response to information received from the public. Law is also information that is communicated to the public."2

M. Ethan Katsh’s new book, The Electronic Media and the Transformation of Law, is a path-breaking attempt to provide a

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* Director of the Law Library and Assistant Professor of Law, Marquette University Law School, Milwaukee, Wisconsin; B.A. University of Wisconsin-Madison, Madison, Wisconsin; A.M.L.S. University of Michigan, Ann Arbor, Michigan; J.D. Cleveland State University, Cleveland, Ohio.


comprehensive analysis of the relationship between law and information. Katsh, a graduate of Yale Law School and a Professor in the Department of Legal Studies at the University of Massachusetts, uses the advent of new information technologies as the vehicle to discuss the law’s relationships to information in the past, present, and future. The dominant theme of his book is that “broad changes are occurring to the law, to what it is and how it works, and that these changes are linked to the appearance of new methods of storing, processing, and communicating information.”3 To Katsh, communications media are more than mere containers for carrying legal information. They influence the law’s methods, capabilities, values, and goals.

According to Katsh, “law has come to rely on the transmission of information in a particular form.”4 Throughout the book he argues that the control, organization, and movement of information are no longer the same as they once were, and that the changes will have a considerable impact upon the law. “The law is about to catch up to the rest of society and, in so doing, become as different as the electronic businessman, the electronic politician, and the electronic athlete are from their predecessors.”5

Katsh presents a historical analysis to support his argument. He divides history into four broad periods of society: oral, written, printed, and the society of the new electronic media. He then identifies some of the ways in which law changed greatly during these periods of development, and suggests why and how law is being affected by modern changes in the transmission, storage, and processing of information.

In oral societies an unsophisticated legal system relied primarily on custom. There were effective nonlegal methods for enforcing standards of conduct and for dealing with deviant behavior. Writing created something that was tangible and could be modified, and further allowed an increase in both the amount of information and in the willingness to access and use information. Problems related to copying written information, however, resulted in a cultural attitude that discouraged change. Oral proof was more valuable than written proof because written proof could easily be forged.

Printing provided the ability to produce a large number of uniform copies, and allowed society to build on the past with confidence that each step was being made on a firm foundation. Katsh observes:

3. Id. at 3.
4. Id. at 8.
5. Id. at 6.
Our model of law has coincided with the age of the printed word and is an outgrowth of it. Law as we know it would not be possible without the special properties of print. We expect certain things from it because the technology of print structured the capabilities and functioning of law in various ways.\(^6\)

The new media are radically different from traditional print media, and, Katsh notes, are not simply more powerful versions of print. When compared to print, the new media can store much more information, can reproduce it more quickly and accurately, and can revise or modify information more readily. Katsh maintains that the effects of these differences are not simply to increase the quantity of information, to make us more knowledgeable, or to render our institutions more efficient. According to Katsh, the new media are reorienting characteristics of the law and creating new opportunities. They foster connections between areas of knowledge that were previously isolated, and they create new relationships and legal issues. Most importantly, the new media will cause changes in our attitudes, expectations, and ways of thinking about law, and will pressure the law to become a different, and not simply a more efficient, institution.

II. PRECEDENT: LAW ADAPTING TO CHANGE

In his first chapter, Katsh explains that printing had an enormous influence on law because it changed the law's attitude on the use of judicial decisions and enabled the doctrine of precedent to develop.\(^7\) According to Katsh, it is through the doctrine of precedent that the law has balanced stability and change and has fostered a public image of both predictability and flexibility.

Under the doctrine of precedent, the printed case report is given supreme authority regardless of the realities of the decision-making process; it has been forgotten that the printed decision is only a representation of reality. Katsh explains that this use of judicial decisions is a "modern," post-print, phenomenon.\(^8\) Until the sixteenth

\(^6\) Id. at 12.

\(^7\) "Precedent is generally understood to mean that earlier decisions of courts should control later decisions." Id. at 35 (quoting L. CARTER, REASON IN LAW 84 (2d ed. 1984)).

\(^8\) Printing was introduced in England in 1475, and the first printed case reports appeared in 1537. Id at 39. Before printing, written rulings and reports of decisions evidenced the judge's knowledge of what English custom required. Giving lawyers access to citeable authorities led to a change in the legal authority of the report of a judge's ruling. By the eighteenth century, reports of judicial decisions
Katsh believes that by placing heavy emphasis on maintaining links with the past, the modern doctrine of precedent enables law to promote stability and regularity and to limit the process of societal change. He argues that our law is designed to prevent too rapid of change, and that making law more current, would change the nature of law radically and would diminish the law’s ability to promote stability, regularity, and predictability. Bringing law up to date, he maintains, would require that it be revised constantly so that law would always be consistent with the newest knowledge on any subject. Katsh implies that law that is up to date cannot be relied on. Planning would be difficult; predicting outcomes of disputes would be impossible and knowing the state of the law at any one time would be uncertain.

Katsh suggests that it is "unwise to pretend that the stability of law and the authority of prior decisions will remain constant" as computers are used.9 Because speeding up the distribution of information causes us to be more interested in the present than in the past, he believes that the electronic media may lead to a much faster pace of change by increasing public demands for resolving pressing current problems and by diminishing public desire for law to maintain links to the past. Katsh predicts that, as the public demands more rapid change, concepts of precedent that have developed over the past few centuries will change; the result will be a system of law that is more accepting of change, instability, and uncertainty. Law will be more up to date but less a force for preserving continuity with the past. "While this may be desirable from the point of view of social or economic justice," Katsh notes that "it does entail a threat to the prevailing conception of law."10

Katsh believes that the LEXIS® service11 and WESTLAW®, the two computer-assisted legal research (CALR) systems, are leading the attack on the doctrine of precedent and weakening law’s link to the past. These systems have unlimited storage, they distribute new information quickly, and they provide direct access to material rather than

10. Id. at 20.
11. LEXIS is a registered trademark for information products and services of Mead Data Central, Inc.

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using indexers and other intermediaries. CALR expands the amount of both "legal" and "nonlegal" information available to researchers. Rather than merely means to increase efficiency of the legal profession, Katsh considers CALR systems to be enormous threats to the authority of precedent.

Katsh notes that commentators were alarmed in the 1880s about a glut of reported cases. He describes the West Digest and West Key Number System as the solution that made the increasing amounts of law manageable.12 The result was a practical system for retrieving case law that shaped the notions of both lawyers and law students about the degree of order that existed in the legal system.13 The problems relating to excessive precedents that existed at the end of the nineteenth century are appearing again, he argues, because the paper system is reaching its limits. Although the computer has thus far enabled the system to avoid a public breakdown, it will also be, ironically, the cause of fundamental change in the law.

The doctrine of precedent, Katsh writes, becomes unworkable when too many cases are available.14 The fact that cases are added to the CALR systems more quickly increases the pressure to use the most recent cases and to continually modify and expand arguments. Furthermore, computers facilitate access to "nonlegal" information and this "threaten[s] to undermine the categorization of information that lies at the core of the precedent process."

Easy access to nonlegal information will create competition for cases as the building blocks of the legal process. Due primarily to computers, lawyers will have more precedents to choose from, the authority of prior cases will be diminished, and the nature of legal arguments will be changed.

III. SETTLING DISPUTES AND GRIEVANCES

In chapter two, Katsh goes on to examine the role that law plays in settling disputes and grievances and in keeping the peace in society.

12. Id. at 45. For other interpretations see G. Gilmore, The Ages of American Law 58-59 (1977); R. Stevens, Law School: Legal Education in America from the 1850s To The 1980s 132-33 (1983). Gilmore and Stevens suggest that West's National Reporter System, and the West Digest and West Key Number Systems that support it, created an excessive number of precedents and caused fundamental changes in American jurisprudence.

13. For a thorough discussion of the impact of West's Digest and Key Number Systems, see Berring, Full-Text Databases and Legal Research: Backing into the Future, supra note 1.

14. See Simpson, supra note 1, at 676-79, and Stevens, supra note 12, for the idea that jurisprudence based on precedent, rather than principle, is the effect of too many precedents.

15. Katsh, supra note 2, at 47.
'Writing and print are the structural supports for the modern ideal of dispute resolution and have contributed to law's growth over time, to our reliance on law, and to the authority of law.' Katsh argues that new technologies are eroding some of these structural supports.

Writing enabled some law to gain immortality. However, "[l]aw in print, when compared with written law, tended to be both more recent in origin and less tied to the norms and values of other institutions in society." Printing enhanced the authority of the common law because it made possible the standardization and wide distribution of legal information. Law became conceived of differently as the attention of judges was focused on positive law. Printing increased the authority of words on paper, narrowed the judge's consideration to written texts, and created the perception that disputes are settled through attention to autonomous rules. Katsh writes:

We assume that legal information is located in printed books and is distinct from and superior in authority to other bodies of information, such as custom, religion, public opinion, and so on, which might have something pertinent to say about the dispute and which may conflict with the law. For us, unlike our ancestors, all of law is indeed in the books, and judges are instructed to limit their attention to what is contained between the covers of the book.

Katsh believes that the speed of communicating electronically over long distances, coupled with the large storage capacities of computers which can easily be copied and revised, are threats to traditional models of dispute resolution. He maintains that presentation of the law in stable and reliable form supports the trust that has been placed in law, and that the fixed quality of law is being lost as legal information is disseminated electronically. Katsh argues that because electronic copy is easily altered, the legal process is opened to doubt because electronic legal information, which cannot be easily verified, might not carry the same influence as printed legal information.

Another significant problem, according to Katsh, is that electronic media break down the categorical barriers that print established. Limiting and structuring the use of information are fundamental functions within the legal process.

16. Id. at 51.
17. Id. at 80-81.
18. Id. at 72.
Law has its own editorial process that filters out certain information in order to make the process operate efficiently. . . . The process of law, for it to work according to plan, must structure and limit the mind of the judge. Faith in law is faith in a process that is successful when it suppresses one's natural instinct to consider all the complexities in a dispute. . . . The explosive growth of information is a serious challenge for law if it will diminish the effectiveness of the means employed by the law to suppress the information that may enter the legal process.19

Katsh explains that new technologies expand options, increase the number of avenues for obtaining information, and encourage the seeker of knowledge to try new paths. They blur the lines separating categories of information. They allow individuals to enlarge or reduce categories of information as they see fit and to create new areas of knowledge, and they do not filter out legally irrelevant information or nonlegal information in the same way that print does.

"The accelerating quantitative growth of information and the increasing volatility of information are fostering cracks in the law's perceived monopolization of the dispute resolution process and are weakening the hold of law on the public mind. 20 Because electronic information will be exceedingly difficult to control, legal institutions, which need to direct attention to rules and away from other categories of information, will face serious obstacles. There will be a shift in what courts do, in what the public thinks courts do, and in what the public wants courts to do.

According to Katsh, law may cease to be the preferred and respected method for settling disputes, and the public's acceptance of the legal process might erode. Rather than a force uniting society, Katsh suggests that the new media might heighten diversity, fragmentation, and conflict.

IV. LEGAL DOCTRINES AND THE CONTROL OF INFORMATION

Katsh further remarks, in various contexts, that movement of information at electronic speed will gradually weaken control over information, and that law cannot be expected to successfully control the movement of information as it has done in the past.21 "Rather

19. Id. at 101.
20. Id. at 106-07.
than being an ally of state power, the new media are more likely to be a force that will undermine state control and authority."^22

Katsh believes that, in the future, information will frequently be out of control rather than in the control of any one individual or institution. "As a result, ... many values associated with the First Amendment are probably more secure in the new environment than they were in the old. Conversely, those legal doctrines that attempt to restrict the flow of information are finding it increasingly difficult to achieve their goals."^23

Laws relating to copyright, obscenity, and privacy, which are designed to restrict communication of certain kinds of information, assume that the control of information is necessary and possible. By accelerating the production and movement of information, new technologies make it more difficult to enforce the law in these areas. To the extent that copyright law, obscenity and privacy expectations reflect print-oriented models, they can be expected to change.

V. THE LEGAL PROFESSION

Katsh points out that the form in which information appears can influence how it is organized, who has access to it, and how the profession that depends on it is perceived. Books and other sources of law influence the methods used by lawyers; they shape and conceptualize the law itself. He comments that at least part of the reason lawyers are perceived to be powerful is that they control information about law. 24 "Lawyers were and are interpreters of a body of knowledge that laypeople are either unable to master or do not wish to learn."^25

Print set law apart from other activities and acted as a force unifying the legal profession. It fostered the growth of distinctly legal libraries with standardized collections, and contributed to the belief that there is a shared theoretical basis for law. Printed books emphasized to readers that they had something in common with other readers of the same books. "The law library [itself] stands as a powerful symbol that law is distinctive and separate from other human endeavors."^26 In sum, the specific qualities of print enabled the legal profession to attain monopolistic powers.

22. Id. at 114.
23. Id. at 117.
25. Id. at 205.
26. Id. at 215-16.
As with other subjects, Katsh believes that new communication technologies are eroding the structural supports that print provides to the legal profession. Although lawyers would seem to be the beneficiaries of the new technological developments because of the possibilities for increased productivity and increased revenues, the long-term impact might not turn out to be beneficial to the legal profession.

Katsh questions whether the legal profession will be more powerful, stable, and secure in the future, and suggests that the practice of law will change. Lawyers will not be able to control information in the same way as before because new technologies are changing the knowledge base of the profession. What is considered to be "legal" and within the exclusive domain of lawyers is changing. Information will be more readily available to the public, and "[i]nformation that the profession has successfully hidden or kept secret but that does not require expert interpretation will be more difficult to control in the future than it has been in the past."27 The new media will threaten those lawyers who have benefitted from artificially created complexity.

Katsh's prediction is that the new media will weaken the internal organization of legal information and the external boundaries between legal and nonlegal work. The traditional legal research methods and tools rendered a model of law that was structured by familiar categories of print. As new means of structuring and accessing information develop, new ways of thinking about information will develop as well, and the categorical lines and organizational boundaries that were fostered by print will be weakened.

Katsh uses the West Digest and West Key Number System as an example of how print has influenced the organization of law. He explains that West's Digest categories might be helpful to lawyers in identifying and retrieving relevant case law, but the categories do not represent a structure that is inherent in the nature of the law. The development of LEXIS and WESTLAW means that the internal organization of legal information need not conform to a publisher's predetermined structure, because information can be organized and retrieved by the researcher's varied needs and views of law. "It is easier and quicker to find electronically stored information than printed data because more avenues of access exist, and knowledge of where, how, and why some item has been placed is less necessary."28

As in previous chapters, Katsh maintains that new technologies will cause the external boundaries of law to change. Print assisted in

27. Id. at 220.
28. Id. at 221.
separating law from other fields; the separation of law libraries from general libraries emphasized the distinctiveness of law. Electronic links will break down artificial barriers and make information from outside the world of law accessible to lawyers. It will be more difficult to exclude nonlawyers from the legal process, and lawyers will be in competition with others such as accountants, real estate consultants, bankers, and insurance advisors, whose fields overlap law. The questions of what is law and who is entitled to dispense legal information will become more difficult in the future.

VI. LEGAL THINKING AND THE INDIVIDUAL

In his final chapter, Katsh focuses on two characteristics of modern legal thinking that he believes will be affected by new technologies: the perspective on the individual and the reliance on abstract thought.

Katsh points out that the modern, liberal legal system views society as being constituted of individuals who are autonomous, equal units, and who are more important than their larger constituent groups. The legal world is also composed of abstract ideas and concepts that exist apart from the actual persons and practices of the law. "In the abstract legal world, we are equal before the law because the abstract individual is the same as all other abstract individuals. He or she is without gender, without emotion, and without economic advantages that lead us all to be different from one another." 29 Factors such as wealth and intelligence are not supposed to affect decisions of lawfulness or liability.

Print contributes to this orientation toward the individual. It has been a means for promoting abstract thought, for limiting the information that is considered relevant to decision making, and for substituting faceless beings for real people in the world of rules. Katsh believes that the new media may make this conceptual model less viable. He argues that the new media provide links which reflect a perception of the individual that is very different from the abstract, autonomous, independent, rational, and whole person, whose dignity is respected and protected by the political and legal systems.

Katsh minimizes the potentially dehumanizing impact of computers. He acknowledges popular concern that people will be treated as numbers rather than individuals, that decisions will be made by machines, that relations will be more formal and inflexible, and that we will be too legalistic and rule oriented. But Katsh disagrees with

29. Id. at 256.
this way of thinking because it rests on the assumption that computerized decision-making will reproduce human habits of thought. Katsh does not believe that the new media are merely more powerful versions of print; rather, they will foster new and different habits of thought and practice.

Katsh suggests that removing limitations on the form of information will result in fewer limitations on thought. "As we begin to employ and rely on media that are less capable than print of promoting the use of abstract concepts, we... may be less willing... to accept the abstraction in place of the real." 30 The new media are leading us in the direction of treating people as persons with dignity and autonomy, rather than as abstract concepts.

VII. THE ECONOMICS OF ELECTRONIC INFORMATION

A significant omission from Katsh’s analysis is suggested by his repeated observations that new technologies will make information more difficult to control. He notes that electronic media make accessible previously inaccessible information, and that electronic information can reach people who were previously isolated. 31 Katsh creates the impression that law-related information will generally be more readily available to the public. But he also notes that the "reworking of information is a key ingredient of the information society or information economy in which new information or old information processed into a new form acquires substantial economic value." 32 He unfortunately overlooks some of the potential effects for a society in which legal information is an economic resource that is bought and sold as a commodity.

One of the effects of the proliferation of electronic forms of legal information has been a subtle form of commercialization of information that had previously been made available to the public without charge. As a general rule, computerized legal information sources operate on a pay-as-you-go basis. Researchers are charged by information vendors for searching the databases.

With the exception of the federal government’s depository program, American law book publishers have always been profit-making institutions that sold books to lawyers and law libraries. The affluent have always had more resources and better information. However, the

30. Id. at 263.
31. Id. at 158.
32. Id. at 172 (citing J. BENIGER, THE CONTROL REVOLUTION: TECHNOLOGICAL AND ECONOMIC ORIGINS OF THE INFORMATION SOCIETY (1986)).
strategic value of information has never been as great, and the commercialization has never been as drastic as it is today. Furthermore, for the past one hundred years, county, court, bar association, academic, and public law libraries existed in the public sector which, for the most part, provided free access to legal information.

The implementation of new technologies, and the conversion from traditional print resources to electronic resources, are changing the nature of the commercialization of legal information. Academic law libraries are forced to restrict access to online services to students and faculty for academic purposes, and other libraries are forced to pass costs on directly to clients. Support mechanisms have not developed to make the technologies available in the same way as traditional resources.

The increased commercialization of legal information will affect what information is available and who has access to it. Supply and demand theories notwithstanding, there is little correlation between the need for information and the ability to pay for it. If legal information is primarily a commodity for sale, information producers will make available information that sells, and sells at the highest price. Hence, information designed to meet the needs of the wealthier segments of society will be produced more readily than information that meets the needs of the less wealthy segments of society.

Furthermore, when the standard for accessing information is the ability to pay, only those who can pay will have access to legal information. The sad paradox of this situation is that, at a time of abundance of information, we run the risk creating classes of the informationally privileged and informationally impoverished, and of deepening the divisions in society.34 In light of the breadth and depth of Katsh's analysis, his failure to discuss these issues is surprising.

VIII. THE USE OF HISTORY

Another problem of The Electronic Media and the Transformation of Law is Katsh's use of history. His periodization of history is too broad; he tries too hard to fit history into his thesis. Classifying the span of time since printing was introduced as one "modern" period, obscures the significant changes in the law's attitude toward precedent, in the forms of dispute resolution, and in the legal profession that have occurred since printing was introduced. The broad periodization does not help to explain why these subjects are manifested very differently in civil law countries and common law countries, and even in different civil law countries.

34. Id. at 102-03.
common law countries, where printing has been equally available, such as England and the United States.

To the extent that new technologies make more types of information available to lawyers, judges, and other decision-makers, that information will be used and will affect legal arguments and legal decisions. But there is a great deal of difference between claiming that communications media support and contribute to legal methods and concepts, as Katsh does for print resources, and suggesting, as he does, that the new media will cause conceptual and methodological changes.

IX. QUESTIONS OF PERSPECTIVE

The major problems with Katsh's analysis relate to his perspective on law. The dominant, and recurring theme of this book is that new technologies will erode and break down both the internal and external categories, structures, and supports of the law and its institutions. Katsh argues that the new technologies will blur the distinctions and reduce the barriers between what is "legal" and what is "nonlegal." Without its protective structures, the fortress of law will be vulnerable to attack from the outside nonlegal world.

It is doubtful that the internal structures of the law will be weakened as Katsh suggests. There is no indication that law will be more simple in the future. Rather, every indication is that law will be more complex and specialized. Although traditional legal categories are contingent and do not represent an inherent logic, they are necessary means for organizing thought. Without categories it is impossible to build on the past. This is not merely to maintain a link to the past for purposes of predictability and stability. It is taking advantage of the past's wisdom to avoid reinventing the wheel, so to speak, for each new problem. The point to be made, is that legal categories are functional devices for organizing knowledge. They should not be misconceived as knowledge itself.


It is impossible to think about the legal system without some categorical scheme. We simply cannot grasp the infinite multiplicity of particular instances without abstractions. Further, the edifice of categories is a social construction, carried on over centuries, which makes it possible to know much more than we could know if we had to reinvent our own abstractions in each generation. It is therefore a priceless acquisition.

Id.
Retrieving cases from databases by searching for words in the cases does not remove categories, rather it makes every word a new category. Computer-assisted legal research expands the number of categories by which information may be retrieved and facilitates new forms of research. For example, CALR will encourage comparative factual research because cases can be retrieved and organized by factual similarities as well as by legal principles. Literal word searching, however, means that only cases with the words searched will be retrieved. Analogies, metaphors, and implications are often overlooked. Labels and categories, which can capture these concepts, can therefore expand as well as limit thought. The impact of CALR will be to expand the access points to information and thereby reduce the conservative effects of legal research tools. But to be accomplished effectively, CALR requires higher levels of subject expertise and a more complete understanding of potential categories.

More significantly, Katsh’s model of law is too autonomous and isolated. His law depends on cases for decisions, sets itself apart from other areas of knowledge, and excludes “nonlegal” information. He perceives that nonlegal information threatens the authority of precedent, contemporary methods of dispute resolution, and the status and role of the legal profession. But the legal and nonlegal worlds are not so distinct; the law is not as isolated and autonomous as Katsh seems to believe. Even referring to some legally relevant information as “nonlegal” is misleading. His comments relating to this information suggest a positivistic concept of law that borders on formalism.

Law is driven by forces outside the law. Although new technologies will undoubtedly have significant effects on law, legal practice, and society as a whole, paradigm changes in law of the nature Katsh describes are most likely caused by many of the same forces that cause similar changes in other areas of thought. The postmodern world, which is characterized by a general disorientation and questioning of traditional forms of authority, is a result of a variety of forces: industrialization, economics, devastating wars, increased regulation, improved transportation, and, of course, communication technologies, among other things. Communication technologies facilitate and accentuate our current world view, but they are one of many causes for it.

What this means is that Katsh has overstated his case. It is doubtful that the effects of the new media will be as severe as Katsh suggests.

37. On the conservative nature of legal research tools, see Barkan, Deconstructing Legal Research: A Law Librarian’s Commentary on Critical Legal Studies, 79 LAW LIB. J. 617, 632 (1987); Berring, Full-Text Databases and Legal Research: Backing into the Future, supra note 1; Delgado & Stefancic, supra note 1.
In fact, much of the transformation of law that he predicts has already occurred. We have seen an expansion of what are considered to be sources of law. It is commonly accepted that legal transactions and decisions are not determined by legal rules articulated in judicial opinions; they are based on the totality of the relevant information available in the environment of the transaction or decision. The law and the world in which it operates will continue to be more regulated, complex, and controversial, and the roles of law, courts and lawyers will continue to evolve and increase accordingly.

X. Conclusion

Although Katsh phrases his analysis in cautionary and worrisome language, his vision of the future presents more reasons for optimism than for concern. By diminishing the influence of precedent and forcing case law to compete for authority with other forms of information, the law will be more responsive to social needs and will better serve the ends of justice. By fostering alternative methods of dispute resolution, many disputes that should not go to law will be determined more quickly, economically, and judiciously. By eliminating the legal profession's monopoly on law-related information and by redirecting the power and influence of lawyers, law-related tasks will be performed by the people and institutions—family counselors, accountants, bankers, real estate agents—who are best situated to perform them. A legal system that treats people as unique, yet interrelated humans, rather than identical and autonomous individuals, is certainly to be welcomed. If the electronic media represent a threat to the status quo, Katsh indicates how they also create promises of new opportunities.

The Electronic Media and the Transformation of Law is a courageous and in many ways a profound book. Even if his case is overstated, Katsh's basic insights are noteworthy, and his arguments cannot be ignored. Exploring the relationship between law and information adds an interesting and necessary dimension to our understanding of the legal system. This book, it is hoped, will encourage further exploration.

Reviewed by Leonard P. Strickman*

As is often the case when a new book crosses my desk, I read the dust jacket of Robert F. Nagel's book, Constitutional Cultures, which attempts to set out the thesis for his particular endorsement of judicial self-restraint by the United States Supreme Court. In his summarized views on the evils of judicial activism the dust jacket asserts "constant application of the artificial logic of legal doctrine diminishes public support for basic values... [I]n their ambitious efforts to give immediate effect to the Constitution, courts gradually undermine the very system they seek to protect." Later, the same summary concludes, "If constitutional law is to be wise and useful... we must resort to it less often."

I could not help thinking, as I turned to the Table of Contents, "What about Brown v. Board of Education?" I was therefore delighted to find that Chapter I was titled "What About Brown?" and realized that Nagel, whose scholarship I have always found provocative, had hooked me.

What about Brown? Despite its tortured doctrinal analyses and problematic historical supports, there would appear to be a wide consensus amongst constitutional scholars and political scientists that this exercise of judicial activism, which was without precedent for its sweeping social consequences, was an appropriate exercise of judicial authority in the vestments of constitutional interpretation. Nagel does not disagree with this consensus but is compelled to justify its apparent inconsistency with his primary thesis:

Our political life had made available to the Justices a body of common experience about both segregation and integration. In the context of this experience, racial exclusion unmistakably involved acute insult and profound political injustice; in light of this experience, nondiscriminatory attendance policies stood, not as imaginable, but as familiar alternatives. Everyday perceptions grounded Brown in a morality that was both powerful and widely understandable.1

* Professor of Law, Northern Illinois University.
This passage reflects an important part of the Nagel thesis. Constitutional meaning is to be derived more from culture—"common experience" and wide understanding—than from interpretation, the often anti-cultural device of lawyers. Further, because the constitutional cultures—widely shared assumptions about both governmental structures and public moral values—are more accurately identified by the political process than the judiciary, judicial intervention should occur only where there has been a departure from the clear prescriptions of the Constitution, or where, as in Brown, an aberrant regional political structure has acted in contradiction of national cultural norms. Negative consequences which flow from a more active judicial role are that:

1. opportunities for the evolutionary development of constitutional cultures are cut off by judicial pronouncements; and
2. overall respect for the law as an instrument of justice is reduced.

Nagel amplifies his basic thesis by examining the judicial role in three specific areas of constitutional adjudication: free speech, federalism and equal protection. He believes there is a constitutional culture which constrains the suppression of that free speech which is of political consequence, and that judicial interventions tend either to undermine that culture (for example, when reviewing the regulation of corporate political contributions, commercial advertising or nude dancing) by embracing within the concept activity not worthy of similar respect, or to cause suppression of political speech by carefully drawing lines about that which is protected, thus encouraging regulation or prohibition of that which is outside the line.

His stated assumption that "politicians...understand...the needs and values of a system of free expression...on which they depend" would appear naive, given that it is those who have achieved public office who make governmental decisions, and whose maintenance of power may be threatened by free expression. Moreover, in light of technological advances which permit government to more readily than ever suppress civil liberties, openly or surreptitiously, there is an argument that the need for judicial protection of first amendment values has actually increased in the second half of the twentieth century.

I surely accept Nagel's view that there is a social and political culture embracing free expression which is vital to the viability of the

2. Id. at 55.
first amendment, but I believe he dismisses too summarily the role that judicial interpretation has played in reinforcing that culture. It may be that nude dancing and commercial advertising are not at the core of the culture, but their protection by the Supreme Court provides an important buffer against the erosion of liberties more central to the maintenance of a democratic society. In other words, if we have our interpretive battles about nude dancing, we are less likely to have to confront issues of seditious libel. Rather than undermining the core values of the first amendment, judicial activism tends to reinforce them. While I cannot prove this proposition empirically, the health of those core values after a half century of judicial activism at the periphery would seem to refute Nagel’s concerns.

When one is arguing for judicial restraint as a matter of process, every bad judicial decision may be used as support for the general proposition. I agree with Nagel, for example, that *Board of Education v. Pico*, a Supreme Court case limiting the right of a local school board to decide which books should be purchased by a school library, was wrongly decided. Uniformly bad decisions might prove that courts should not make decisions, but it is simply fallacious to argue a process result by substantive illustration.

Like most judicial restraint advocates of this era, Nagel makes an exception for judicial intervention on behalf of states’ rights, particularly in defending the result in *National League of Cities v. Usery*. Apparently theories of federalism provide justifiable occasions for judicial activism because they are based on historical understanding of the intent of the framers, rather than on more problematic and subjective judicial interpretation. Nagel’s suggestion that the states are not capable of protecting their presumed sovereignty from federal overreaching through the political process is probably correct; but his companion view that individual rights are likely to be protected by that same process is difficult to accept. In my view, *National League of Cities* was decided incorrectly, not because the Court should have foresworn decision-making on process grounds, but because principles of Constitutional federalism, as developed through the process of judicial interpretation, supported the validity of the Fair Labor Standards Act as applied to state and local governments. The framers might well have been shocked by such a result; but it is through the

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4. Nagel cites school desegregation decrees to argue activist courts are likely to abuse the first amendment in the course of protecting more subjective constitutional values. See Nagel *supra* note 1, at 55, n.152.
process of interpretation and incremental change that our Constitution has had the capacity to respond to both technological progress (particularly in transportation and communication) and social need. Judicial interpretation, rather than defeating our Constitutional culture, has contributed to it. Nagel writes:

To see the purposes of judicial review almost entirely in terms of securing individual rights is to invert the priorities of the framers and ultimately to trivialize the Constitution. The framers' political theory was immediately concerned with organization, not individuals. Their most important contributions had to do with principles of power allocation . . . . Even the danger of local majoritarian excess—so frequently cited today as a justification for vigorous protection of individual rights—cannot reconcile the modern emphasis on rights with the priorities of the framers.6

The Bill of Rights was essential to the adoption of the Constitution, notwithstanding its subordinate role in the eyes of the original framers, and the fourteenth amendment is entitled to no less recognition than Article I because of its late adoption. Indeed, the fourteenth amendment became a part of the Constitution after the full acceptance of the principles of judicial review, and was in large part a response to the exercise of constitutional interpretation by the Supreme Court in Dred Scott v. Sandford.7

Nagel's discussion and critique of the Supreme Court's equal protection jurisprudence provides one of the most persuasive chapters in the book. His analysis of the cases in which the Court has applied the "mere rationality" test to strike down legislative classifications, demonstrates convincingly the absence of a conceptually sound theoretical basis for the Court's development of the law. Assuming, however, that the intent of the framers of the equal protection clause identified by the Slaughterhouse cases as exclusively concerned with racial discrimination was not the final word on the subject, the Court's troubled and unconvincing search for a sound analytical framework in which to consider equal protection claims is not a sufficient reason for denying the ultimate value of the process of interpretation.

Nagel questions effectively the employment of rationalism in constitutional judicial review. "Important social decisions," he states, "cannot be limited to those areas for which information is readily

6. Nagel, supra note 1, at 64-65.
7. 60 U.S. (19 How.) 393 (1856).
available and susceptible to conclusive analysis." 8 Indeed he concludes:

Legislative "irrationality," ... provides real advantages to a democratic system. If values need not be formally articulated and consistently pursued, legislators can serve many interests at once. 9

This is persuasive, except in those areas where the nature of the classification demands that the values being furthered be examined with closer scrutiny, as the Court does when it uses an elevated standard of review. Rationalism is a device which may well be too easily manipulated by reviewing courts when the presumption should favor the political process, for example in the "mere rationality" test. However, rationalism does provide useful interpretive tools appropriate for judicial application where the presumption of deference is overridden, such as when the legislature employs a suspect classification.

In his final chapter, Nagel considers the characteristics of judicial interpretation of the Constitution embraced by notions of standards of review—as he characterizes them, the formulaic Constitution. His primary criticism of the formulaic model is that "[i]t achieves organizational control and intellectual respectability, to the extent that it does so, by excluding the general public from the Court’s audience and impoverishing the Court’s thought." 10

Nagel suggests that the Court’s formulaic style is addressed to its clerks, lower courts and academics, 11 and by excluding the public, defeats the development of valuable constitutional cultures. Notwithstanding their doctrinal shortcomings, he exalts the opinions of Chief Justice Marshall in McCulloch v. Maryland 12 and Chief Justice Warren in Brown v. Board of Education 13 for their inspirational, and non-formulaic, rhetoric. I am not sure that the language of judicial opinions was incorporated into a societal culture in either of these cases, but I do believe that Nagel has given too short shrift to the importance of the Court’s speaking to the players in the constitutional scheme—lower courts, legislatures, government officials and the bar which must advise its clients with respect to constitutional questions.

8. NAGEL, supra note 1, at 114.
9. Id. at 119.
10. Id. at 131.
11. See id. at 129.
While the formulaic approach has surely not created certainty regarding the resolution of hard constitutional issues, it has provided predictability and routineness in a great portion of the functioning of governmental institutions. To forego the effort to achieve analytical models which will provide predictability and guidance for actors in the constitutional system will, in my opinion, impair the ultimate viability of the system.

In any event, Robert Nagel has written a stimulating book, one worthy of serious attention by constitutional scholars. His critique of the Supreme Court is novel and challenging, although I would conclude that his attack on the process of judicial interpretation is, in the final analysis, unpersuasive.