seen by egalitarians not as a hitherto unrecognized affirmation of libertarian values, but as a way to "liberate" women from childbirth and motherhood. We will have to wait and see whether the consequent devaluation of the unique female biological role has liberated women or set them adrift. But in any case that is the way the issue of abortion has evolved in the United States during the last third of the twentieth century. Feminists and their juristic allies who appeal to a woman's right to her own body do not characteristically base this appeal on the killing/letting die distinction; they seem willing to allow that abortion is killing, but hold that the woman's right to her own body justifies it. Admirable as is Wennberg's philosophical craftsmanship, and accurate as is his pinpointing of the conceptual abortion issue as fetal right to life versus libertarian values, the pith of the abortion debate actually raging today is the fetal right to life versus certain notions of sexual equality.

THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY. By John Agresto.[1] Ithaca: Cornell University Press. 1984. Pp. 167. Cloth, $25.00; paper, $7.95.

David E. Engdahl[2]

In small compass, this book sets new bearings for exploration of the judicial role in a polity at once claiming democratic postulates and constitutional restraints. The author finds defective both in theory and in consequence not only the thesis of judicial supremacy over constitutional doctrine, but also the counteractive thesis that popular opinion or democratic actions should control the constitutional opinions of courts. Dr. Agresto endorses judicial independence—including a vigorous independence in exercising the function of judicial review; yet judicial supremacy troubles him as much as attempts to restrain the judiciary.

It seems not quite accurate to call his "a middle path"—even though Agresto himself uses that metaphor. That expression connotes compromise in quest of repose, accommodating divergent views. Rather than repose, Dr. Agresto points a course of continuing, creative conflict. "What is needed," he suggests,

> is a way . . . to keep democracy, constitutionalism, and judicial review in a supportive and complementary relationship to one another; that is, to keep the tension in balance, not to resolve it. . . .

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> [T]he mere genius of the American constitutional system is not merely the separation of functions but their interactions, their debates, their perennial clashes.
>
> What is needed is a defense of the principle of judicial review within a system of reciprocal checks. It must be a position that recognizes and encourages the exercise of judicial review. But it must also be a position that understands the tenuous connection between judicial review and republican government. Moreover, it must be a position that understands the potential dangers to a constitutional republic—that is, government that is both principled and limited—arising from a corps of permanent judges working under notions of independence equivalent to judicial autonomy and judicial finality.

Sharing the opinion of many that over the past thirty years (more or less) the nation has acquiesced restlessly in a kind of "judicial imperialism," exhibited perhaps most presumptuously in *Cooper v. Aaron*,[3] Agresto expresses the hope:

> that, if a reaction to judicial supremacy ultimately does occur, it will not be carried out against the principle of judicial review or against the Court as an institution, but rather will take the form of restoring the Court to its proper place in a system of checked and balanced powers.

Dr. Agresto begins by inquiring why we should countenance the practice of judicial review. It is no answer that the framers intended it; other things intended but later judged dysfunctional have been changed. To those who contend that judicial review is the ultimate safeguard for individual rights, Agresto points out the readily documented[4] but too easily forgotten fact that, historically, the Supreme Court more frequently has restricted such rights and restricted liberal legislation.[5] Suggestions that judicial review is of value (at least with respect to national legislation) for sobering legislative judgment "are more elegant," Agresto observes, "in theory than in actual practice . . . . If the argument contained in such scholarship is to be believed, the Court's function seems to be to take national legislation (which is itself often too little too late), prevent its effectuation for some time, and then relent."

Moreover, declares Agresto, when judicial activism is controversial less for blocking legislative initiatives than for the shaping of social policy without benefit of initiative from any elected branch, such justifications are insufficient.

Yet, while he rejects the arguments commonly made in its de-

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3. "[T]he interpretation . . . enunciated by this Court . . . is the supreme law of the land . . . ." Cooper v. Aaron, 358 U.S. 1, 18 (1958). *See also id.* at 23-24 (Frankfurter, J., concurring).

4. *See, e.g.*, Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983), and *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981).

5. "The modern defense of judicial power which sees the Court as, by its nature, a liberal institution and the protector of minorities from oppressive majorities requires of us too much historical and philosophical forgetting."

fense, Agresto is a champion of judicial review. What distinguishes him from others who have written on judicial review and democracy is that he makes no pretense of reconciling the two. Instead he underscores their inherent conflict, rejects any assertion that democracy can or should be safeguarded in the conflict by judicial "self-restraint,"[6] and suggests serious resort to the "seemingly baroque" scheme of checks and balances.

In terms of political theory, Agresto observes:

> The underlying promise of judicial review is that with it we may bring our philosophy, our principles, to bear on our actions, and thus work out our present and our future in terms of our inheritance from the past.
>
> . . . .
>
> [T]he great promise of judicial review is that with it we may rise to the level of our highest aspirations and live, politically, a principled life.

Judicial review, he maintains, operates "as the legal check on political excess and as the mediator of our principles"; but its more important function is the second of these two. The former function, in a democracy, could have been served by more frequent elections or shorter terms of office; it is the latter function—principled mediation of democracy itself—that requires something more.

Agresto devotes much of his final chapter to expounding the advantages of an "active" Supreme Court, engaged in constitutional decisionmaking without contrived self-restraint. Not forgetting that historically the Court has acted as a barrier "to almost all national attempts to expand the meaning and scope of liberty in this country," he notes that more recently it has turned actively to enlarging constitutional rights. While warning of danger if this new kind of activism should remain effectively unchecked, Agresto endorses it as the Court's grandest role:

> The primary defense . . . of the power of judicial review under the Constitution is the possibility of using that power as a guide to the democracy in its desire to live a principled life, a life in accord with certain formative national ideals. . . . [I]t is here, in the sheltering and nourishing of ideals and principles and in the guidance of choice, that the supreme role of the Court is to be found.

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6. As Agresto puts it:

> The demand for self-restraint is usually ineffectual when addressed to most holders of political power. It may be especially fruitless when those holders of power can also see themselves as possessing special insight into constitutional mandates and constitutional right. In addition, the partisans of judicial self-restraint, who are generally perceptive students of the constitutional foundations of American political institutions, should find the idea of *self*-restraint an anomaly in a system purposely built on layers of *external* restraints. The genius that animinated all of our politics was that each and every institution (not to mention every faction and individual) could be freed—allowed to be *active*—because each would be balanced and checked. To be active without a check is tyranny; but a self-generated check on activity may well undermine the possibility of great contributions.

> . . . .
>
> [I]t is part of the nature of the human species that we necessarily seek "to work out the implications" of our beliefs.
>
> . . . The greatest role of the Court is neither to revise our fundamental beliefs nor merely to apply those beliefs to new occurrences. At its peak the Court will be that part of American politics which more than any other struggles to work out the implications of our beliefs. More than any other branch the Court explains to us the living mute words of the Constitution as the Constitution's principles of equal liberty grow in self-understanding.
>
> . . . Here, in the reasoning out of our public philosophy, of articulating the still shadowy images of our thoughts, is the final justification for judicial review.

Thus Agresto marks himself off both from those who would confine the Constitution to its framers' intent or understanding and from those who would say it is a "living" document malleable to meet changing perceived needs. His ideal is a Supreme Court operating actively as the nation's "institutionalized theoretician," grappling with and explicating our deepest political thoughts, elucidating and nourishing our national ideals—but doing so within a scheme of effective democratic checks.

As to the historical emergence of judicial review, Agresto notes that the existence of a few, well-published precedents explain the evident expectation of most members of the Constitutional Convention that judges should assess independently the constitutionality of government acts, and also explain the *Federalist*'s allusions to the practice with no perceived need for theoretical justification. The Supreme Court's later exercise of that function in *Marbury v. Madison*, therefore, Agresto finds quite unremarkable in itself.

What he does find remarkable, however, is that Chief Justice Marshall used neither of the arguments Agresto deems strongest to justify judicial review. The stronger arguments, Agresto suggests, might have been eschewed precisely because, while establishing the principle of independent judicial review, they "might also have admitted other ideas as well"—in particular, "checks" on the judicial review function of the Court: "Clearly, what Marshall needed was not the best arguments that would allow the Court judicial review, but arguments that would set off the Court as, in Marshall's words, the especial, the emphatic interpreter of the organic law, the interpreter capable of binding all states and all branches."

Thus Agresto attributes to Marshall a strategic decision to employ a purely formal "ontological proof for the existence of judicial review—judges say what the law is, the Constitution is law, therefore judges must say what the Constitution is . . . ." The "obvious effect" of this syllogism, he argues, "is that, in matters of constitutional interpretation, Congress is bound and the Court is the body empowered to bind"; and with this "we find ourselves perilously

close to a simple acceptance not merely of judicial review but of ultimate judicial supremacy . . . ." For:

> [i]f, following Marshall, we base our understanding and defense of judicial review on the idea that "the Constitution is law," then the primacy of the Court in the American system of governance becomes more set. But if our basic view of the Constitution begins not with what the Constitution is—law—but with what it established—a constitutional democracy of separated powers, checked and balanced—then the activity of judicial review becomes part of an interlocking totality of governance. In other words, the idea of the Constitution as law interpreted by judges and the idea of the Constitution as a framework for limited government may well lead to different results.

Although Agresto believes it to be "relatively clear" that judicial review was intended by the framers, it seems to him obvious that:

> if the Founders had thought that the power of judicial review might later be used as the bulwark of privilege against private rights, or that it might weaken—or even unduly work to strengthen—national political power as against local rights, or that it would someday involve the active promulgation of governmental activity rather than merely the checking of questionable legislation, we then could have expected greater clarity from the Founders and a more extensive debate in the convention. But such notions never arose. And so discussion of the limits of judicial review, or of the proper restraints on judicial independence, or of the optimal relationship of judicial power to the democratic will never surfaced.

Thus the relative silence of the Convention on the point is attributed to failure to anticipate the uses to which the presumed review prerogative eventually might be put.

In contrast, however, the equal silence in *Marbury* as to "effective and practical checks on the Court" Agresto attributes to "the brilliance (if we may call it that) of Marshall's analysis. . . ." Agresto stops just short of endorsing the conventional view that judicial supremacy (as distinguished from independence in reviewing government acts brought into question in litigation) was Marshall's avowed thesis in *Marbury*. Supremacy, he says, is a "quite plausible" extrapolation from Marshall's reasoning; but Agresto seems to believe that Marshall himself intended the extrapolation to be made.[7]

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7. Chief Justice Marshall in 1803 did not contemplate judicial supremacy at all. A maverick in his Federalist party, unlike two of his fellow Justices he never had endorsed that High Federalist view. On the contrary his view (which he expressed earlier in Congress) was one of interdepartmental independence without any preeminent authority—essentially the same as Jefferson's at the time. (Only much later did Jefferson espouse congressional supremacy, although some of his partisans had done so as early as 1802). Furthermore, the folklore image of Marshall as masterful strategist enhancing the power of the judiciary by craft does not correspond to historical fact. He had too much integrity, humility, and candor for that. Only later, when unequivocal authority at the center seemed essential to counter increasingly centrifugal political forces, did his younger associate and friend Joseph Story apparently swing Marshall toward the supremacist view. One cannot understand correctly

As the years passed after *Marbury* the judicial supremacy thesis did come to enjoy rather general acceptance—despite several contrary views successively propounded by Jefferson, which Agresto calls " a compendium of all of the various radical alternatives to judicial review." At least by 1830, judicial supremacy had taken on "all the aspects of constitutional orthodoxy." As Agresto points out, it survived even Jackson's rhetoric largely because, "[i]n a nation deeply troubled by regional and sectional conflicts," the idea of a single authoritative expositor of the Constitution within the central government itself not only "seemed rather favorable to the forces of American nationalism" but also "seemed (at least in theory) to take the most explosive issues of the day out of the electoral arena and settle them more objectively" by means of judges "endowed by popular myth with the attributes of dispassion and disinterest. . . ."

What was overlooked as the judicial supremacy thesis attained general acceptance, Agresto notes, is that it—no less than the thesis of congressional supremacy (to which Jefferson ultimately was driven)—"suffer[s] from the defect of oversimplification . . . ," overcoming "the tension between constitutionalism and democracy by blinding us to the historic and proper reasons behind that tension." For a time the danger of this oversimplification was not apparent; but the blinders were removed by *Dred Scott*.

"The oddest aspect of those parts of the Lincoln-Douglas debates concerning the nature of the Constitution," Agresto observes, "is that our popular contemporary ideas of judicial review are always expressed by Douglas and never by Lincoln." "To Lincoln," he observes, "the status of judicial authority in a constitutional democracy was considerably more complex." Lincoln "sought to find ways of working within the tensions and ambiguities of American politics and not to resolve those tensions." Lincoln's distinction between what we lawyers call res judicata (Agresto, being a political scientist, does not use that term), and treating Supreme court pronouncements as "political rules," is well known. So is his perception (shared with Jackson and Jefferson and many other critics) that "mere precedent is a dangerous source of authority. . . ." What Agresto seeks to do is to expand on Lincoln's position and, having

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that oft-quoted sentence from *Marbury v. Madison* about "the province and duty of the judicial department" except in the context of the sentence which Marshall immediately subjoined, about the application of a rule "to particular cases." 5 U.S. (1 Cranch) 137, 177 (1803). It was independence in the function of adjudicating "cases," and by no means authoritative supremacy as to constitutional "questions," which Marshall in his 1803 opinion espoused.

"endeavored to lay out the theoretical framework of the discussion," to "attempt to speak somewhat more practically."

For the most part the "attempt to speak somewhat more practically" is made in Agresto's penultimate chapter. The "usual" answer given to those seeking checks on the power of judicial review—constitutional amendment—Agresto dismisses as worse than ineffective. Because a fraction as small as 13.1% can block a constitutional amendment, to consider amendment a check on the Court would be to institutionalize minority rule. But for the Civil War, he notes, *Dred Scott* could not have been overturned by amendment; and neither could the holdings on child labor, minimum wages, and government economic intervention. Moreover, "despite the wide and pervasive political effects a decision might have, not every political decision should become a matter of *constitutional* politics." And in any event, amendment is deficient as a check because any amendment itself remains subject to final judicial interpretation; the Court's prompt evisceration of the Reconstruction Amendments illustrates the easy frustration of this "check."

The other often recited "checks" Agresto finds too severe, impossible, or both. Impeachment of course is a bugbear; "[i]n fact, the reason impeachment is impossible politically is in large measure that it seems extremely inappropriate morally." Appointment discretion is notorious for its ineffectiveness, and courtpacking is a strategem of dubious practical utility. Of greater practical prospect—but worse in terms of political liabilities—is congressional manipulation of subject matter jurisdiction: Agresto rejects this "check," not merely because the current spate of critical literature about "court-stripping" makes Congress's power in this regard seem unclear, but more because:

> it seems to demand that consideration of the constitutional legitimacy of particular legislative acts be, a priori, closed in certain areas. Thus, in the very exercise of a power granted with seeming constitutional clarity, Congress finds itself verging on the very type of autonomous legislative activity that the principle of constitutionalism was meant to deflect.

The checks which Agresto tenders as "effective," however, he takes fewer than eight pages to present. The principal one is "Congress' unquestioned ability to rewrite voided legislation in order to pass judicial scrutiny," forcing the Court to reexamine in slightly different context a constitutional position previously taken. This modest expedient, he maintains, history shows to have been generally effective, "especially when it is buttressed by timely presidential appointments or sympathetic legal scholarship . . . " He instances the experience with child labor legislation, the first and second

AAA, and civil rights statutes. Sometimes equivalent legislative designs might be recast "in alternate constitutional guise"—an expedient he is unnecessarily ready to confess as sometimes a "ruse." At other times, minimal changes might be enough to surmount judicial objections; and there are even examples of reenactment without material changes, "not seeking to have the Court distinguish but simply to have to relent."

In addition, Agresto points out, "Congress also has the ability to circumscribe the holding of any decision in an attempt to delimit its effects." He instances the sundry enactments responding to the Supreme Court's abortion holdings. Admittedly, many of these might be invalidated, but each presents an opportunity for reconsidering the basic holding and the whole process amounts to a "type of constitutional dialogue with the Court, through legislation, on matters of vital national concern."

Beyond these, Agresto suggests in two modest paragraphs that there might be other congressional responses to judicial acts. Without elaboration or critical evaluation, he specifies Congress's powers under the fourteenth amendment: on the one hand, "for example, the long-neglected privileges and immunities clause"; and on the other, Congress's power "under the fifth section of the Fourteenth Amendment."

Agresto's important contribution to the chronic and sometimes acute debate on constitutional democracy and judicial review is a matter of emphasis, not of detail. Agresto's objective is to restore a perspective easy to lose in preoccupation with detail. He does not attempt to be exhaustive, but instead hopes his work "can serve as a guide to the complexity of the problem and as a preface to further practical suggestions . . . ." The book proves to do this very well; and therefore to point out that further practical suggestions require more exacting scrutiny of certain points of history and of theory than his effort to shift attention and discussion from reconciliation to tension and checks, is not to denigrate Agresto's work.

Consider, for example, the "more speculative and tenative means" he mentions for "framing congressional responses to judicial acts." Too optimistically Agresto suggests: "It may well be that here, in the expansive powers purposely vested in Congress under the Fourteenth Amendment, the best response to all instances of judicial over-extension may finally be found." The particular notion to which Agresto here alludes—that Congress has "power 'to define the substantive scope of the Amendment' " is hopelessly fallacious. The phrase which he quotes is from Justice Harlan's dissent in *Katzenbach v. Morgan*, and does accurately summarize the

effect of the *second* rationale articulated in Justice Brennan's majority opinion in that case.[8] But that rationale (although it carried the voting age statute through Congress) is incapable of surviving reflection.[9] *No* Justice endorsed it in *Oregon v. Mitchell*, although Brennan attempted a deft revision.[10] Unanimously today the Justices deny any power in Congress to effect its own (in contrast to the Justices') understanding of the substantive scope of fourteenth amendment guarantees.[11] (Some of them, indeed, are even disinclined to admit the full power supported by the *Morgan* case's valid *first* rationale—the analogy to the "necessary and proper" clause.[12] The "substantive" rationale of *Morgan* would lack merit even if the Justices had not yet recognized its error. Its fault is the same that Agresto points out with respect to the contention of Jefferson, late in his life, that Congress is the exclusive oracle of the Constitution. That the judiciary must remain free to pursue its own construction of the Constitution, is a proposition which Agresto himself employs in explaining why amendment is ineffective as a check on the Supreme Court.

Yet Agresto's failure in this detail should not discourage more creative theorizing in the general direction he points; there are viable arguments capable of producing, in significant measure, "that vital continuing dialectic between judicial insight and democratic needs and desires" which he deems an effective check.

For example, whether or not the Supreme Court is ready to acknowledge the error of the *Slaughterhouse Cases* and read more constitutional meaning into the "privileges or immunities" clause of the fourteenth amendment, that clause need not be confined to rights which have constitutional stature. The words "privileges" and "immunities" and equivalent terms of high-level generality were employed from Magna Carta beyond the Restoration, in colo-

8. 384 U.S. 641 (1966). The opinion's second, or "substantive," rationale is at 654-56; its first rationale (a valid analogy to the "necessary and proper" clause power) occupies 650-53.

9. The fallacy of that rationale, and the misapprehension of precedents relied upon by government counsel and several in academia to support it, were pointed out in this reviewer's article, Constitutionality of the Voting Age Statute, 39 GEO. WASH. L. REV. 1, 13-25 (1970), delivered to the Justices while *Oregon v. Mitchell* was pending. *Morgan*'s *first* rationale, although valid, could give little support to the voting age statute; *see id.* at 8-12, 37-38.

10. 400 U.S. 112, at 246-249 (1970) (opinion of Brennan, joined by White and Marshall, JJ.).

11. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732 (1982).

12. *See, e.g.*, Justice Rehnquist, dissenting in Rome v. United States, 446 U.S. 156 (1980), omitting from his accounting of "enforcement" clause theories the valid proposition (analogous to its power under the "necessary and proper" clause) that Congress can act prophylactically to prevent, as much as remedially to correct, violations of the "judicially established substantive prohibitions of the [various] amendments." *Id.* at 210.

nial charters and revolutionary documents, and in early state constitutions, to embrace rights some of which rested on immemorial custom but some of which rose out of parliamentary legislation. It does not require *Morgan*'s misconstruction of the "enforcement" clause to support statutory articulation of "privileges or immunities" which are not in themselves of constitutional stature.[13]

Of course it would not require the fourteenth amendment to invalidate *actual* state abridgement of such statutory rights; for that, the "supremacy" clause is sufficient. But treating such statutory rights as within the "privileges or immunities" clause would legitimate congressional measures designed to prevent possible abridgements *before* they occur (not merely to remedy those which in fact have occurred), by virtue of the "enforcement" clause as correctly expounded in the *Morgan* case's *first* rationale. This would mean that citizen rights based upon valid federal statutes are as much within Congress's broad protective power as rights constitutionally derived. It would not allow Congress by statute to contravene any interest which the judiciary found to warrant constitutional protection, and for this reason (as well as because one not deemed a "person" could hardly be deemed a "citizen") it might not allow Congress to override *Roe v. Wade*. In some other contexts, however, acknowledging statutory "privileges or immunities" as invoking Congress's enforcement power might at least discourage attenuated judicial arguments.

A more critical look at some other points of history and theory suggests another means within the reach of Congress to preserve a vigorous practice of judicial review while "preventing the power of constitutional interpretation from becoming the power to rule." At this point, however, this reviewer must ask the reader to contemplate certain ideas which might seem heretical. These ideas are only sketched here for the reader's consideration; but a brief resort to history might induce at least a suspension of disbelief.

Contrary to an apparently universal misunderstanding, the 1789 Judiciary Act did provide at least one federal forum where virtually every "federal question" then conceivable could be heard—either originally, by removal, or on writ of error. (The civil remedy customarily afforded private persons injured by others' violations of federal statutes, for example, was forfeiture, which was within the jurisdiction of the District Courts.) When the short-lived

13. Certainly, without *Morgan*'s "substantive" rationale some authority for congressional conferral of rights must be found consistent with the doctrine of enumerated powers; but a wide array of statutory rights can be conferred upon citizens as means to effectuate objectives constitutionally within the national government's enumerated powers, by virtue of the "necessary and proper" clause.

1801 Act introduced the "general federal question" language—which did not reappear until 1875—supporters and opponents of the 1801 measure alike noted that it added not a whit to the scope of jurisdiction statutorily conferred upon the federal judiciary as a whole. What distinguished the 1789 Judiciary Act was not any substantial shortfall in terms of subject matter jurisdiction,[14] but rather that it contemplated final adjudication of most federal court cases without opportunity for Supreme Court review. That no criminal case was reviewable is only the easiest of several examples; reviewability in civil cases was exceptional as well.

The original judicial structure thus did not conduce to uniformity of opinion even within the judicial branch; indeed, at the time of *Marbury* it was still rather common for circuit courts to disagree on constitutional as well as on numerous other legal questions. The first Congress had considered it more important in general to facilitate final disposition of particular lawsuits than to ensure that the grounds of decision be uniform. That reflected the argument made by Madison in the Convention for leaving discretion in Congress to establish more than one national court: several might be needed, he argued, "dispersed throughout the Republic with *final* jurisdiction in *many* cases," lest "appeals . . . be multipled to a most oppressive degree. . . ."[15] In 1802 and 1803, the original system was just beginning to be refashioned—and refashioned *legislatively*—into a pyramidic form; until then, in practice although not in name the original Virginia plan for the judiciary—that there be "one *or more* supreme tribunals"[16]—was in effect.[17]

Suppose some modern Congress were emboldened selectively to follow the first Congress's lead. The consequence in the long run would most likely be such hegemony of sound reasoning and good sense as generally emerges from open debate and repeated reflec-

14. *Marbury* itself introduced the first substantial shortfall apart from the diversity "assignee" clause. Marshall reasoned for the Court that Marbury had a right to his commission; that the national government must afford him a remedy; and that the proper remedy was mandamus. Nonetheless the erroneous "mutually exclusive" view taken of Supreme Court original and appellate jurisdiction led him to hold unconstitutional the only provision that Congress had made for securing such relief. Because the requisite jurisdiction had not been vested in any other federal court by the 1789 Judiciary Act, *Marbury* actually contradicted its own premises by foreclosing all mandamus relief for unlawful behavior of non-judiciary officials—thus opening the first significant fissure between the federal question jurisdiction contemplated by article III and that provided for by statute. Other events too complex to outline here subsequently enlarged the gap.

15. 1 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (Rev. ed. 1937) (Madison's notes) (emphasis in original).

16. *Id.* at 21 (emphasis added).

17. One therefore must not equate *judicial* review with *Supreme Court* review, as Agresto throughout his book tends to do.

tion. This could result on various "constitutional" points, just as it does on private law questions recurring among state appellate courts, from the exchange and reciprocal critique of opinions among federal courts of appeals (or, it could as well be, among district courts).[18] Any resulting uniformity on such points of constitutional law then would have resulted from much wider (and perhaps wiser) deliberation induced by directive of the democratic organs, rather than from authoritarian imposition.[19] If there is to be an "institutionalized theoretician" in our polity, why should it not be the entire judiciary established pursuant to article III, instead of the one "supreme court" (whose appellate jurisidiction, after all, Congress certainly may circumscribe)? Are the opportunities for sober reflection on our formative national ideals, the prospects of guidance toward a principled political life, the hopes of bringing our philosophical principles to bear on our actions and working out the implications of our beliefs, not greater if we institutionalize public and scholarly debate over time with and among some score of such judges as Learned Hand, Henry Friendly, Skelly Wright, David Bazelon, John Gibbons, Richard Posner, Richard Arnold, Joseph Sneed, and Robert Bork, than if we ascribe special authority to a preeminent set of nine, no greater in talent, who so often disagree so sharply and by such narrow margins? If agreement were not ultimately forthcoming from such a broadened array of the special capacities and talents which lawyers might bring to the task, would that not be reason to doubt that a particular point in controversy is

18. Wisdom counsels against resting the final disposition of a constitutional question for purposes of any "case" in the hands of a single judge; the value of shared deliberation and risk of idiosyncratic judgment are too great. The first Congress, while it provided for "inferior" court finality, respected this wisdom. Judgments of the single-judge district courts generally were reviewable by a multi-judge circuit court; and the circuit courts (where most cases other than in admiralty or for forfeiture were tried), while most of their judgments were unreviewable, originally sat with three judges. When Congress reduced the number of judges on circuit courts to two, and then made it permissible for even one judge to hold court alone, apprehensiveness over finality of disposition by a single judge added substantially to the pressure for easing barriers to Supreme Court review, and hence to the pyramidization of the federal judicial structure.

19. Uniformity in rules of decision is a moral ideal of justice which has carried great force from the beginning; and certainly it was one factor inducing Jefferson's Congress tardily to commence pyramidization of the federal courts. But uniformity of decision—even on constitutional questions—is not a value of constitutional dimension. There are indeed questions, including many constitutional questions, the coexistence of different rulings on which is inconsistent with the practical needs of government operation; but there are other constitutional questions addressed by the modern Supreme Court of which that cannot be said. The Union would not be imperiled, for example, if school children prayed in the fourth circuit but not in the ninth, or if abortions were legal in the tenth circuit but not in the eighth, or if the exclusionary rule were applied in the second circuit but not in the fifth. On such questions, the text manifestly affording fair room for disagreement among intelligent, critical, and reflective minds, it is incompatible with the highest constitutional values to dictate uniformity while storms of controversy rage.

so clearly resolved in the collective mind of the nation that it should be called "constitutional" and removed from the realm of political debate?

For any who share Dr. Agresto's concern for effective checks to prevent judicial review from operating to constitute the Supreme Court an undemocratic ruler, selective de-pyramidization of the federal judiciary is a practical, historically precedented, and clearly constitutional possibility worthy of serious thought.

DUE PROCESS IN THE ADMINISTRATIVE STATE.

By Jerry L. Mashaw.[1] New Haven, Conn.: Yale University Press. 1985. Pp. xiv, 279. $24.00.

Ronald A. Cass[2]

The due process clauses of the fifth and fourteenth amendments have for some time been among the deadliest foes of trees. Courts constantly write about these clauses, and numerous academics—chiefly professors of law, philosophy, or government—have offered words of wisdom on the derivation, meaning, and role of due process. Due process is, indeed, the Constitution's clause celebre. It is hard to find much new to say about due process. It is hard even to find new ways to phrase old thoughts about due process, much less better ways. Authors who would add to the literature on due process must overcome a presumption that their messages are trite, trivial, or implausible. Jerry Mashaw's book clearly succeeds.

There are many ways to write about due process. One can approach the subject historically, tracing the development and use of the concept from its appearance in the Magna Charta as the requirement of action *per legem terrae* (by the law of the land). Another approach is doctrinal analysis, not just reporting the cases but evaluating the legal tests for due process against implicit or explicit criteria for legal decisionmaking. A third sort of inquiry is philosophical, asking what process rules would be used in a good or just society.

In some measure Mashaw's book may be classed as belonging to all of these genres, but none is a good fit. A better description of the book is an *exploration* of the due process field. Mashaw roams through case law and commentary, searching for arguments that

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2. Professor of Law, Boston University. Thanks to my colleague, Ira Lupu, for his helpful comments.