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Book Review of The Supreme Court and Constitutional Democracy

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Book Reviews

THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY *by John Agresto.* Ithaca, N.Y.: Cornell University Press (1984) 192 pp. $7.95.*

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The judicial branch is the clear focus of constitutional decision-making; national debate regarding abortion, busing, school prayer, and the rights of the criminally accused generally fastens on the Supreme Court's decisions. Concerned that "[t]oday citizens, members of Congress and presidents alike look to the courts for all constitutional deliberation — that is, for all decisions involving the deepest questions of national direction,"[1] John Agresto emphasizes the need for the executive and Congress to check the judiciary and to develop constitutional law by interpreting the Constitution independently. Agresto's work, *The Supreme Court and Constitutional Democracy,* offers a new perspective on the ongoing debate over constitutional interpretation and the role of the Supreme Court in American government.

Part I of this Review describes Agresto's theory of "constitutional" government and its impact on our conception of judicial review. Part II assesses the viability of that theory.

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1. J. AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 11 (1984).

I. Agresto's Theory of Constitutional Government

Congress and the executive are undoubtedly authorized to interpret the Constitution.[2] Congress's repeated passage (and the executive's repeated signing) of child-labor laws, in the face of contrary rulings by the Court, is but one example of independent constitutional interpretation by the elected branches.[3] Nevertheless, scholars addressing the role of the Supreme Court in American government rarely view constitutional interpretation as the interplay between the Court and the other branches of government.[4]

Unlike the spate of recent works on judicial review,[5] *The Supreme Court and Constitutional Democracy* is concerned with the relationship of Congress and of the executive to the Supreme Court. For Agresto,

> [C]onstitutional government implies that the ultimate interpreter of our fundamental law is not an autonomous judiciary but the interactive understanding of the people, their representatives, and their judges together. We should see the American political system not as a pyramid, with the Court at the top as the ultimate authority, but rather as an interlocking

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2. *See* United States v. Nixon, 418 U.S. 683, 703 (1974); Fisher, *Constitutional Interpretation by Members of Congress,* 63 N.C.L. REV. 707, 747 (1985).

3. *See* J. AGRESTO, *supra* note 1, at 27-31. After invalidating child-labor legislation in 1918, *see* Hammer v. Dagenhart, 247 U.S. 251, 276 (1918), and again in 1922, Bailey v. Drexel Furniture Co., 259 U.S. 20, 44 (1922), the Supreme Court upheld Congress's third child-labor statute as a legitimate exercise of its Commerce Clause power, United States v. Darby, 312 U.S. 100, 121 (1941). *See* J. AGRESTO, *supra* note 1, at 29-31.

4. Scholars merely have compared institutions' capacities for making and implementing social policy. *See, e.g.,* D. HOROWITZ, THE COURTS AND SOCIAL POLICY 298 (1977) (concluding that the judicial process is ill-suited to consider competing interests and institute social reform); M. REBELL & A. BLOCK, EDUCATIONAL POLICY MAKING AND THE COURTS at xi (1982) (proposing that courts, in view of separation of powers and their fact-finding capabilities, are adept at making policy decisions on education issues); Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis,* 51 U. CHI. L. REV. 366, 366 (1984) (suggesting that when confronted with constitutional issues the Court should compare the various governmental institutions' abilities to deal with a particular issue and, on the basis of that comparison, choose the best decisionmaker from among them).

5. In recent years, major works by prominent scholars and jurists have offered conflicting views of the appropriateness, scope, and effect of judicial review. Although great differences exist within this body of scholarship, these varying inquiries serve the limited purpose of justifying or of undermining judicial review without addressing the ongoing dialogue between the branches. *See, e.g.,* R. BERGER, GOVERNMENT BY JUDICIARY 407-48 (1977) (suggesting that the Court's expansive decisions on suffrage and segregation are contrary to the framers' intent and constitute judicial legislation); P. BOBBITT, CONSTITUTIONAL FATE 241-49 (1982) (contending that judicial review is not legitimated by social or political theory but by the legal system's theoretical imperatives); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 258-59 (1980) (advocating limiting Supreme Court review to individual rights cases); J. ELY, DEMOCRACY AND DISTRUST 181-83 (1980) (recommending limiting judicial review to the policymaking process as opposed to policy content); M. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS 163-65 (1982) (supporting noninterpretive review as a protection of individual rights); Rehnquist, *The Notion of a Living Constitution,* 54 TEX. L. REV. 693, 699 (1976) (arguing that insufficiently limited judicial review has been disastrous historically and does not comport with concepts of separation of powers and democratic government)

> system of mutual oversight, mutual checking, and combined interpretation.[6]

Agresto's structural approach does not deny judicial review. Instead, it sees judicial review as but one component of "interactive" constitutional interpretation.

By considering judicial review in terms of our tripartite governmental scheme, Agresto's work is characterized by its dual advocacy of judicial review and checks on judicial power. On one hand, he sees judicial review as a necessary component of constitutional government, for it serves as a "restraint[ ] on the democratic will."[7] On the other hand, he argues that "insofar as the Court has been a leader in the making and enforcement of societal rules, the concerns of those who decry the dangers of judicial imperialism can no longer be lightly dismissed."[8] This dual advocacy, rather than placing him in an intractable position of self-contradiction, creates a dynamic that is vital to Agresto's theory of structural constitutional interpretation. By recognizing both the promise and the peril of judicial review, Agresto is not forced to choose between a limited and an active judiciary. Instead, he seeks a middle ground — a way to encourage both judicial activism and the coordinate review of judicial decisionmaking.

There is surface appeal to Agresto's approach. Judicial review is neither foreclosed nor made supreme — two extremes that few people find satisfactory. But in advancing his theory of structural constitutional interpretation, Agresto fails to flesh out its necessary components. Specifically, by not prescribing appropriate standards of conduct for the three branches,[9] Agresto makes the successful implementation of his proposal unlikely.

Agresto confronts the issue of judicial review on distinctly pragmatic grounds. Rather than striving to create an ideal (or better) society, Agresto's concerns are whether judicial review plays a necessary role in our governmental scheme and, if it does, how the elected branches should interact with an "activist" Court.

Agresto concludes that judicial review is necessary because it serves two essential purposes. First, Agresto argues that judicial review ensures that government does not place the temporal popular will above the eternal Constitution.[10] In other words, judicial

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6. J. AGRESTO, *supra* note 1, at 10.
7. *Id.* at 53.
8. *Id.* at 163.
9. For example, Agresto clearly indicates his displeasure with Court rulings on abortion, school prayer, and busing, *id.* at 11, 156-63, and his approval of President Abraham Lincoln's interpretation of the *Dred Scott* decision, *id.* at 90-94.
10. *See id.* at 52-55. For Agresto, judicial review "[b]uild[s] on the Founder's desire to overcome the dangers of majoritarian despotism or legislative tyranny (yet retain 'the spirit and

review ensures that the popular will, as expressed in legislative and executive action, conforms to the Constitution. The elected branches, according to Agresto, cannot accomplish this purpose. Functioning within the limitations of democratic elections, Agresto feels that the actions of the president and Congress, at best, will reflect the popular will.[11]

Second, Agresto contends that judicial review "contributes to the demands of a free society,"[12] for it prevents the Constitution from becoming a stagnant, time-bound document. Towards this end, he speaks loftily of "[t]he Court's . . . promise . . . to help us apply and develop our fundamental principles and constitutional commands, its ability . . . to help bring our philosophy to bear on our actions, to work out our present and our future in terms of our inheritance from the past."[13] Agresto thus supports judicial review, in part, because of the Court's "capacit[y] for dealing with matters of principle."[14]

Agresto, although a proponent of judicial review, differs substantially from contemporary scholars who contend that the judiciary is the branch most capable of advancing American values[15] and the interests of the underrepresented.[16] Unlike these thinkers, Agresto argues that "the desire to live by stated principle means that no branch, not even the Court, can reform or shape those values freely or at will."[17] Claiming that our system of checks and balances is a response to fears over the possible centralization of power in any branch of government, Agresto argues that "[p]ower checked mean[s] liberty supported."[18] He thus

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11. *See id.* at 52-53.
12. *Id.* at 152.
13. *Id.* at 156-57.
14. *Id.* at 149 (quoting A. BICKEL, THE LEAST DANGEROUS BRANCH 25 (1962)). Agresto further argues that "[a]t 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 . . . ." *Id.* at 146.
15. *See* P. BOBBITT, *supra* note 5, at 94.
16. *See* J. CHOPER, *supra* note 5, at 68; M. PERRY, *supra* note 5, at 152-54.
17. J. AGRESTO, *supra* note 1, at 55. In this way, Agresto's thinking resembles Thomas Jefferson's views regarding judicial review. According to Jefferson, "Our country has thought proper to distribute the powers of its Government among three equal and independent authorities, constituting each a check on one or both of the others, in all attempts to impair its Constitution." C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 266 (1926) (quoting C. BEARD, ECONOMIC ORIGINS OF JEFFERSONIAN DEMOCRACY 454-55 (1915) (quoting message by President Thomas Jefferson to Congress (Dec. 8, 1801) [hereinafter Jefferson's message to Congress] (passage omitted from message before delivery))). This passage is remarkably similar to Agresto's argument in emphasizing both the independence of each branch and the interlocking nature of our system of checks and balances. Unlike Agresto, however, Jefferson also contended that each branch "within the line of its proper functions . . . acts in the last resort and without appeal." *Id.* at 266 (quoting C. BEARD, *supra* at 454-55 (quoting Jefferson's message to Congress)). In other words, as Agresto recognizes, Jefferson did not support an interactive constitutional dialogue between the branches; "[r]ather, he held that each branch must construe the Constitution for itself *as it concerns its own functions.*" J. AGRESTO, *supra* note 1, at 80 (emphasis in original).
18. J. AGRESTO, *supra* note 1, at 142. Agresto's concern extends beyond simple reciprocal checks, for he contends that each branch has a responsibility to develop constitutional law through independent constitutional interpretations. *See supra* text

blends his recognition of the Court's special role "as the mediator of our principles"[19] with his belief that constitutional government is furthered by the elected branches serving as a check on the courts and vice versa.[20]

Agresto, to make concrete these fears of possible judicial centralization, claims that there presently is a need for the elected branches to stymie activist Court rulemaking. Pointing to Supreme Court decisions on school prayer, abortion, and busing, he posits that, unless checked, the judiciary is "exceedingly dangerous . . . in its ability to be the creator, the designer, of new social policy."[21] Moreover, to demonstrate that judicial centralization should be of concern to both liberals and conservatives, he notes that, prior to *Brown v. Board of Education,*[22] judicial action frequently limited human and civil rights.[23]

With respect to an understanding of when and to what extent the elected branches should check Court decisions, Agresto provides little guidance.[24] In fact, all that Agresto makes clear is that he supports Abraham Lincoln's approach toward the finality of judicial decisionmaking.[25] Lincoln, in response to the Supreme Court's recognition in the *Dred Scott* case of the right of whites to own black slaves,[26] argued that Court decisions bind only the parties to the suit.[27] Under this vision, the impact of the Court's decisions are limited, and the elected branches remain free to shape future political action. Indeed, as Agresto posits, the elected

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accompanying note 6; *infra* notes 24-28 and accompanying text. Critics of Agresto fail to understand this distinction. Professor Ronald Kahn, for example, claims that Agresto's "[simplistic belief] that an expanded congressional checking power [i.e., reciprocal checks] will reinvigorate the doctrine of separation of powers" makes his theory unworkable. Kahn, *Process and Rights Principles in Modern Constitutional Theory* (Book Review), 36 STAN. L. REV. 253, 256 (1984) (reviewing J. AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY (1984)).

19. J. AGRESTO, *supra* note 1, at 55.

20. *Id.* at 119.

21. *Id.* at 11.

22. 349 U.S. 294 (1955).

23. J. AGRESTO, *supra* note 1, at 154.

24. Because of his support of active judicial review, Agresto makes clear his dissatisfaction with court-curbing measures bandied about in recent years. Impeachment is considered too severe and politically impossible; limitations on federal courts' subject-matter jurisdiction are also viewed as too severe, because such legislation would deny judicial review. *Id.* at 119-20. Agresto also rejects judicial self-restraint because, if rigorously applied, it would "seriously minimize[ ]" the judiciary's ability "to contribute to the healthy governance of the nation." *Id.* at 113. Finally, although recognizing that such procedural devices as the establishment of narrower requirements for class action suits "have substantial merit," Agresto is "not yet certain that we should want a Court . . . prevented from 'pondering abstract principles.' " *Id.* at 133-34 (quoting McDowell, *A Modest Remedy for Judicial Activism,* 67 PUB. INTEREST 3, 6 (1982)).

25. *Id.* at 87-95.

26. Dred Scott v. Sandford. 60 U.S. 393. 411-12 (1856).

27. *See* J. AGRESTO, *s*

branches have an obligation to check such improper judicial action by acting on their independent constitutional interpretations.[28]

Agresto, however, never specifies the manner in which the elected branches can determine the propriety of a Court decision or how the elected branches should respond to an improper decision. Apparently, Agresto's sole concern is that the elected branches do act, not how they act.

II. Analysis

Agresto clearly hopes that the elected branches become actively involved in constitutional interpretation. He views constitutional government "as an interlocking system of mutual oversight, mutual checking, and combined interpretation."[29] Pointing to the "manifest errors of judicial legislation," he argues that "[w]e must, of course, go further than to signal our concern over particular acts of modern judicial policy,"[30] and he views as exemplary Lincoln's response to *Dred Scott*.[31] Moreover, while Agresto acknowledges that "this book cannot hope to prod Congress to act,"[32] he hopes that his book will result in a greater "recognition that the Court's interpretations of the Constitution need not be immediately accepted as binding 'rules of political action.' "[33]

To merely encourage legislative and executive responses to judicial action, as Agresto does, serves only the narrow purpose of limiting the authority of the courts. Agresto claims that this is not his aim; he considers judicial review an essential component of constitutional government.[34] Yet, without suggesting standards to govern the appropriate responses of the elected branches to judicial action, Congress and the executive might act, or fail to act, in a counterproductive manner. At one extreme, the elected branches may respond too weakly to inappropriate judicial action. For example, had Congress accepted the Court's invalidation of child labor laws in 1918, many more lives would have been ruined in the factories. At the other extreme, the elected branches may respond too strongly to appropriate judicial action. For example, had Congress sought to undercut *Brown v. Board of Education* by

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28. *Id.* at 94 (stating that "the Lincolnian position does begin with the notion that all parts of the political process — the democratic branches as well as the courts — have a legitimate hand in shaping the meaning of the constitutional text").

29. *Id.* at 10.

30. *Id.* at 162.

31. *See supra* note 9.

32. J. AGRESTO, *supra* note 1, at 137.

33. *Id.*

34. *See supra* notes 10-14 & 24 and accompanying text. Professor Lino Graglia misconstrues Agresto's criticism of activist Court rulings on abortion, school prayer, and school desegregation. In Graglia's view, to oppose such activist rulings is to oppose activist judicial review. Graglia thus concludes that Agresto "defeats his purpose [of limiting judicial review] entirely by embracing" an aspirational approach towards constitutional interpretation. Graglia, *Constitutional Mysticism: The Aspirational Defense of Judicial Review* (Book Review), 98 HARV. L. REV. 1331, 1331 (1985) (reviewing J. AGRESTO, THE [illegible] (1984)).

limiting federal court power in desegregation cases,[35] many black and white children would have been denied the opportunity to learn with each other.

The risk of such improper elected branch action is substantial. Executive and congressional action plainly suggests that those branches cannot be trusted to distinguish proper from improper judicial action and to act in turn. With reference to Congress, Abner Mikva, former congressman and now D.C. circuit judge, recently commented that "[f]or the most part, legislative debate does not explore the constitutional implications of pending legislation; and, at best, Congress does an uneven job of considering the constitutionality of the statutes it adopts."[36] Although there is reason to believe, as Dr. Louis Fisher aptly remarks, that "[m]embers of Congress have both the authority and the capability to participate constructively in constitutional interpretation,"[37] Congress, at best, acts cautiously on constitutional matters — thus making it an unlikely participant in an active constitutional dialogue with the other branches.

Executive constitutional interpretation is subject to similar criticism. The Reagan administration, for example, has advocated that the judiciary pay greater attention to values of justiciability in constitutional decisionmaking.[38] Policy preference and political expediency, however, have made the administration's support of these values merely rhetorical.[39] For example, in the Supreme

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35. The constitutionality of such congressional action is subject to question. *Compare* Rice, *Limiting Federal Court Jurisdiction: The Constitutional Basis for the Proposals in Congress Today,* 65 JUDICATURE 190, 197 (1981) (approving proposed legislation to limit federal court authority) *with* Sager, *The Supreme Court, 1980 Term — Foreword: Constitutional Limitations on Congress's Authority to Regulate the Jurisdiction of the Federal Courts,* 95 HARV. L. REV. 17, 70 (1981) (stating that Congress should not have authority to deprive federal courts of jurisdiction over constitutional claims).

36. Mikva, *How Well Does Congress Support and Defend the Constitution?,* 61 N.C.L. REV. 587, 587 (1983). Also recognizing Congress's limitations is Professor Owen Fiss, who commented, "Legislatures . . . are not ideologically committed or institutionally suited to search for the meaning of constitutional values, but instead see their primary function in terms of registering the actual, occurrent preferences of the people . . . ." Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice,* 93 HARV. L. REV. 1, 10 (1980).

37. Fisher, *supra* note 2, at 747. For Dr. Fisher, "[m]uch of constitutional law depends on fact-finding and the balancing of competing values, areas in which Congress justifiably can claim substantial expertise." *Id.* Moreover, as Senator Harrison Schmitt argues, "[C]ourts may lack the institutional capacity to review all aspects of legislative decisions, such as the subjective motivations of the lawmakers. Here, if the Constitution is to be applied at all, it must be applied by ourselves as lawmakers." 128 CONG. REC. 5091 (1982) (statement of Sen. Schmitt).

38. *See, e.g.,* Smith, *Urging Judicial Restraint,* 68 A.B.A. J. 59, 60 (1982) (stating that the Reagan administration will admonish courts "to observe strictly the requirements of justiciability").

39. *See* Devins, *Who's to Blame for Judicial Activism?,* Wall St. J., Apr. 17, 1984, at 34, col. 3.

Court's 1983-84 term, the administration proferred inconsistent views of Article III standing requirements. In *Heckler v. Mathews,* the administration conceded that a male plaintiff *could* challenge a sex-based governmental classification *solely* because he was a male;[40] but in *Allen v. Wright,* it claimed that parents of black school children *could not* challenge governmental compliance with antidiscrimination laws *solely* because they were black.[41]

The inability of the tug and pull of the three branches to invariably result in "appropriate" constitutional interpretation is exemplified by the recent controversy concerning the tax-exempt status of racially discriminatory private schools.[42] In May 1983, the Supreme Court, in *Bob Jones University v. United States,*[43] upheld an Internal Revenue Service (IRS) ruling[44] that denied tax exemptions to private schools that practice racial discrimination.[45] In order for the Court to resolve this issue, however, all three branches of government ignored their designated roles in our constitutional scheme.

Congress, well aware of the tax-exemption controversy for more than fifteen years, has yet to enact clear legislation on this matter. Instead, it has permitted a jerry-built regulatory scheme to originate primarily from court rulemaking. The closest Congress has come to acting on this matter was during the Carter administration when it prohibited the IRS from implementing its 1978 proposal[46] that tax-exempt private schools satisfy quota-like, nondiscrimination enforcement standards.[47] Congress did not respond, however, to President Reagan's January 1982 announcement[48] that he would support tax-exempt status to racially discriminatory schools. In fact, our legislators could not even muster enough support to approve a proposed concurrent resolution opposing the administration's position.[49] Congress thus has never given any real guidance to the other branches of government in

40. Brief for Appellant at 48, Heckler v. Mathews, 465 U.S. 728 (1984) (No. 82-1050).

41. Brief for Federal Petitioners at 24, Allen v. Wright, 468 U.S. 737 (1984) (No. 81-757).

42. *See* McCoy & Devins, *Standing and Adverseness in Challenges of Tax Exemptions for Discriminatory Private Schools,* 52 FORDHAM L. REV. 462-65 (1984).

43. 468 F. Supp. 890 (D.S.C. 1978), *rev'd,* 639 F.2d 147 (4th Cir. 1980), *aff'd,* 461 U.S. 574 (1983).

44. Rev. Rul. 71-447, 1971-2 C.B. 230.

45. *Bob Jones Univ.,* 461 U.S. at 605.

46. Proposed Revenue Procedures on Private Tax-exempt Schools, 44 Fed. Reg. 9451 (1979) (proposed Feb. 13, 1979); 43 Fed. Reg. 37,296 (1978) (proposed Aug. 22, 1978).

47. Congress delayed implementation of the proposed IRS procedure by denying appropriations for the procedure's formulation or enforcement. Treasury, Postal Service, and General Government Appropriations Act of 1980, Pub. L. No. 96-74, §§ 103, 614-615, 93 Stat. 559, 562 (1979) (current version codified at 26 U.S.C. §§ 170, 501 (1982)).

48. Statement on Tax Exemptions for Private, Nonprofit Educational Institutions, 1 PUB. PAPERS 17 (Jan. 12, 1982).

49. *See* S. Con. Res. 59, 97th Cong., 2d Sess., 128 CONG. REC. 363 (1982). Ironically, the basis of the Reagan policy was the administration's preference that Congress enact specific legislation [illegible] organiza-

interpreting or implementing its intent on the tax-exemption issue.

The president neglected his rulemaking responsibility on this matter in a quite different fashion. Immediately after announcing its decision to grant tax-exempt status to racially discriminatory schools, the Reagan administration filed a motion to dismiss the *Bob Jones University* lawsuit, claiming that it was moot.[50] After the administration suffered severe criticism and political embarrassment for this policy decision, the Justice Department asked the Supreme Court to hear the *Bob Jones* suit.[51] The Reagan administration, however, was unwilling to reverse its January 1982 decision to grant tax-exempt status.[52] Consequently, the Department was forced to ask the Court to appoint "counsel adversary" to Bob Jones University on the case's underlying issue so that the case would satisfy the threshold constitutional requirement of adverseness.[53]

Adverseness, however, also requires that the parties who bring a case to court should be the ones whose interests will be represented before the court.[54] Thus the administration's request abandoned a fundamental requirement of federal judicial proceedings. Instead of abiding by the Constitution's inherent restrictions on federal court jurisdiction, the Supreme Court agreed to hear the case,[55] thus transferring to the judiciary the apparent responsibility for a controversial political decision. Shortly after the Supreme Court appointed "counsel adversary" to Bob Jones University, Congress refused to ratify those limitations it had earlier placed on the Carter IRS, claiming that it was inappropriate for the legislature to act on this matter in light of the Supreme Court's forthcoming decision in *Bob Jones University*.[56]

The tax-exemption debate, in which all three branches failed to assume their constitutionally designated responsibilities, highlights possible pitfalls of interbranch dialogue. Such pitfalls do not refute Agresto's thesis; he is concerned with how constitutional interpretation should proceed, not with how it has failed in the past. But Agresto provides little guidance to those interested

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tions instead of having an administrative agency's decision govern the issue. *See supra* note 48, at 17.

50. *Bob Jones Univ.*, 461 U.S. at 585 n.9.

51. *See id.*; *Administration Asks High Court to Settle School Exemption Issue*, Wash. Post, Feb. 26, 1982, at A3, col. 4 [hereinafter *School Exemption Issue*].

52. *Bob Jones Univ.*, 454 U.S. 892 (1981).

53. *See School Exemption Issue*, *supra* note 51, at A3, col. 4.

54. *See* Warth v. Seldin, 422 U.S. 490, 498 (1975); McCoy & Devins, *supra* note 42, at 442 n.4.

55. *Bob Jones Univ.*, 454 U.S. 892 (1981).

56. *See* 128 CONG. REC. 8622 (statement of Rep. Shannon); *id.* (statement of Rep. Panetta).

in implementing his proposal. On one hand, Agresto encourages judicial activism because "the deliberate and often cumbersome arrangements of legislative institutions in America . . . are sometimes too slow and often unable to remedy the denial of rights and privileges to certain individuals, groups, and classes."[57] On the other hand, Agresto asks the question: "What checks can we devise in order to superintend a judiciary with (it is claimed) final power over policies involving abortion, welfare, schools, police, racial balance, busing, [and] employment?"[58]

How then do we distinguish reasonable from unreasonable judicial conduct (or proper from improper elected branch responses to court decisions)? Agresto provides examples of what he considers appropriate elected branch responses to judicial action.[59] Yet, by not delineating his own values, Agresto leaves the implementation of structural constitutional interpretation to the myriad and oft-conflicting views of his readers. As such, individuals who approve of the busing and abortion decisions and disapprove of decisions limiting, for example, court-ordered racial quotas in employment[60] can line up behind Agresto. That Agresto clearly disagrees with these individuals, and that nothing in his book could be used to refute their position, points to the need for Agresto to recommend criteria governing the implementation of his theory.

Notwithstanding this limitation, Agresto's book is a valuable contribution to the current debate over the legitimacy and scope of judicial review. Agresto makes an effective case for checking the judiciary. By highlighting the Supreme Court's hostility towards legislatively enacted individual rights protections prior to *Brown v. Board of Education*,[61] Agresto demonstrates that great perils surround a judiciary willing to invalidate governmental programs.[62] These "costs" of judicial review are substantial, pointing to the need for further exploration of how the elected branch might appropriately check judicial action. When viewed as a call for elected branch review of judicial decisionmaking, *The Supreme Court and Constitutional Democracy* does quite well.

57. J. AGRESTO, *supra* note 1, at 162.
58. *Id.* at 163.
59. *See supra* note 9.
60. *See* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 580-82 (1984).
61. *See* J. AGRESTO, *supra* note 1, at 27-30.
62. *See id.* at 31.