Hyperspace

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In the latter half of the twentieth century, the United States was preoccupied with the quest for governmental legitimacy. Although the intensity of that preoccupation never matched the nation's fervor for scientific advancement, the two pursuits did share a common feature. The range of permissible postulates governing the development of both political and scientific theories was artificially constrained by a certain conceptual rigidity that seemed generally to characterize the intellectual thought of the period. As strange as it may seem from our twenty-fifth century perspective, where contradictory coexistence is as common as time travel itself, throughout most of the twentieth century, political and scientific theorists considered themselves bound by the assertedly logical implications of the premises that they chose to adopt.

By the end of the century, the physicists were able to take the first steps necessary to overcome this fixation. They realized that significant scientific progress was being impeded by their inability to transcend the light barrier, but they also realized that exceeding the speed of light was a physical impossibility. However, acquainted with ancient Zen texts, mindful of the mathematicians' insights into the shortcomings of dichotomous logical systems, and emboldened by the rational implausibility of their own work with quantum mechanics, the physicists imagined a way out of their dilemma. Following the clues contained in the era's more prescient works of science fiction, they developed an elementary model of hyperspace that in fact continues to serve as the basis for our time-space conceptualization today. In hyperspace, of course, superluminal travel becomes possible over nearly infinite distances through the constructive interaction of higher level time and space dimensions. But significantly, hyperspace does nothing to overrule or even suspend the laws that govern physical interactions; time travel notwithstanding, it is still true that no velocity can analytically exceed the speed of light. Hyperspace is, instead, a
place where counterproductive rules of order simply pose less of a problem — a place where logical impossibility is permitted to flourish rather than being suppressed.

Unlike the physicists, the political theoreticians clung tenaciously to the myth of rationality. Because of their almost mystical attraction to the binary modes of analysis, twentieth century political theorists were unable to replicate the physicists' escape from logical constraint. As a result, they were forced to theorize in terms of imagined polar opposites, and they remained largely insensitive to the unitary nature of dichotomous relationships that is now conceded to be a mainstay of all civilized conceptualization. The work of John Agresto, a political scientist who published during the 1980s, is illustrative. His book, *The Supreme Court and Constitutional Democracy*, for example, is noteworthy not for any virtues or vices contained in its thesis, but rather for the precision with which the author captured the analytical predispositions of his time.

I. THESIS

The thesis of *The Supreme Court and Constitutional Democracy* was that a misconceived understanding of judicial review had created a danger of judicial supremacy that threatened the principles of liberty, equality, and representative democracy on which the American republic had been founded. Because the elected branches of government mistakenly believed in the finality of Supreme Court constitutional interpretations, they refrained from imposing on judicial activity the political constraints that were required by the theory of checks and balances built into the American system of separated governmental powers. As a result, the politically unaccountable Court was free to formulate antimajoritarian social policy without sufficient participation by the representative branches of government.

Agresto asserted that the principle of judicial review, when properly understood, did not authorize the Court to pronounce constitutional meaning with any significant degree of finality. Instead, it authorized the Court merely to offer reasoned interpretations of constitutional provisions for consideration by the representative branches as part of a continuing process of political interaction. It was through the give and take of the ongoing political process, rather than through the process of judicial exposition alone, that the organic American Constitution acquired meaning over time and changing social circumstances.

Agresto's thesis was constructed around three component hypotheses, each of which merits attention for what it shows about the analytical tendencies of the time. First, as his inquiry into constitutional history was designed to reveal, judicial review was conceived of by the framers as a component of constitutionalism whose function in the
governmental process was not simply to check but to be checked as well. Second, this system of mutual checks worked best when the objective of judicial review was viewed as promoting interbranch political interaction rather than providing for judicial finality in constitutional interpretation. The way that the elected branches were to engage in political conversation with the court was through a process of re-presentation that forced the Court to reconsider constitutional rulings with which the elected branches disagreed. Third, although the theory of judicial review did not imply judicial finality, it did imply special judicial competence to ascertain the core meaning of fundamental principles, which was entitled to deference by a nation wishing to temper its majoritarianism through adherence to such principles. Agresto’s apparent objective was not to provide a specific strategy for implementing his thesis, but more subtly, to produce a change in prevailing attitudes that would make his thesis self-executing.

A

Agresto relied heavily on constitutional history to establish his theory of judicial review, devoting four of the book’s six chapters to his historical inquiry (chs. 1-4). This curiosity becomes more understandable when the prevailing attitudes of the twentieth century are recalled. At the time of the book's publication, it was widely believed that diligent research into dusty documents could produce an account of past events that corresponded to actual, objective occurrences. Although a few theorists emphasized the interpretive aspects of all historical accounts, in accordance with a briefly popular science known as hermeneutics,1 belief in the concept of historical accuracy nevertheless remained so prevalent that Agresto’s strategy of vesting his hypotheses with the framers’ imprimatur was a common and often effective method of attracting adherents.2

In Chapter One, Agresto began by rejecting the customary justifications for judicial review that were based upon the Supreme Court’s competence to enforce the Constitution, the Court’s obligation to protect individual rights, and the Court’s ability to promote sober second thoughts.3 Chapters One, Two and Four laid the groundwork for

2. Twentieth-century dependence on historical validation was so strong that Agresto amusingly concluded an argument favoring de-emphasis of the framers’ intent with the assurance that “[the framers] would have wanted it no other way.” P. 20; cf. Powell, The Original Understanding of Original Intent, 98 HARV. L. REV. 885 (1985) (arguing that the framers did not believe that their personal intentions should play a role in constitutional interpretation).
3. He argued that judicial review could not be justified, as John Marshall had tried to justify it in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), by asserting that judges had a special ability and obligation to enforce the Constitution; judges were people, with prejudices and self-interests, whose constitutional interpretations did not always turn out to be correct. Pp. 20-24. Nor could judicial review be justified by the need for judicial protection of individual rights —
Agresto's own justification by tracing the historical development of judicial review. From this constitutional history, Agresto extracted a crucial strand for his theory of judicial review. Consistent with the development of American constitutionalism, judicial review was desirable as a check on the activities of the other branches of government, helping to ensure that they operated within the confines of the Constitution. But constitutionalism also demanded that the Court remain within constitutional limitations on its own authority. Moreover, the theory of separation of powers required those limitations to be enforced through external checks exercisable by the other branches of government. Accordingly, any acceptable theory of judicial review another justification relied on in Marbury; historically, courts had not been viewed as the primary guardians of individual rights, and empirically, courts had tended to invalidate rather than uphold congressional efforts to protect such rights. Pp. 24-31. Nor could judicial review be justified on the grounds that it merely slowed implementation of the popular will long enough to permit sober second thoughts that could improve the quality of democratic decisionmaking; historically the judicial decision rather than the popular decision it reviewed often turned out to be the imprudent decision, and moreover, no such justification could be used to support the increasingly prevalent expansion of judicial activism into more affirmative, legislative policymaking. Pp. 31-38.

4. According to Agresto, British common law had rhetorically recognized the authority of courts to invalidate acts of Parliament as inconsistent with "common right and reason," but general exercise of that authority was politically unacceptable. Pp. 40-42. Eighteenth-century American colonists, however, seized upon the idea of judicial review as a means of constraining parliamentary rule of the colonies, and colonial courts began to invalidate acts of Parliament viewed as overly intrusive. Pp. 42-44. However, after the advent of self-rule following independence, the American idea of judicial review fell into disuse, without a sound theoretical justification for it ever having been developed. P. 45. Although state courts invalidated legislative enactments only sporadically during the period of confederation, American statesmen did, during that period, evolve a theory of constitutionalism that subordinated ordinary laws to principles of higher law that could be incorporated into written constitutions. Pp. 45-52. By 1787, the principle of judicial review as a check on legislative power had become so widely accepted by the delegates to the constitutional convention that there was little need even to discuss it during the course of the constitutional debates. (This lack of discussion is subject to a rather obvious alternative interpretation.) As a result, the limits of judicial review were never established by the framers. Pp. 59-64. In addition, theoretical justifications for judicial review, such as those offered by Hamilton in the Federalist papers and by Marshall in Marbury, focused on the need for the judiciary to serve as a check on the activities of the other branches of government without considering how the other branches were to check the activities of the judiciary. Pp. 64-76.

During the period after ratification of the Constitution, the danger of judicial supremacy posed by unchecked judicial review became more evident, and theorists began to look for ways to contain judicial activism. Jefferson lost faith in the judiciary as the guardian of individual rights when the judiciary failed to invalidate the Alien and Sedition Acts of 1798. Then, after initially being attracted to nullification and coordinate departmental interpretation, Jefferson ended up advocating congressional finality in constitutional interpretation as preferable to vesting finality in the politically unaccountable Supreme Court. Pp. 78-86. In addition, following the Dred Scott decision in 1857, 60 U.S. (19 How.) 393 (1857), Lincoln realized that the Supreme Court might sometimes be wrong in its interpretation of the Constitution. Accordingly, while conceding the finality of Court decisions for the cases in which they had been rendered, Lincoln argued that controversial decisions should be accorded only limited precedential effect until they came to be popularly accepted. Pp. 86-95. The problem of judicial supremacy became more severe as time went on, and increased significantly during the twentieth century when the Supreme Court abandoned its reactive role in favor of more affirmative involvement in legislative policymaking. Pp. 154-55, 158, 160-61.
had to provide a mechanism by which the Court could simultaneously check and be checked, thereby increasing the likelihood that the actions of government as a whole would remain within the bounds of the Constitution. Because the other branches of government operated politically, a sound theory of judicial review had to involve the Court in the political process (pp. 96-102).

B

Agresto believed that the Supreme Court had improperly been immunized from effective political checks by a misplaced belief in the finality of the Court's constitutional interpretations. Although *Marbury v. Madison* \(^5\) implied, and *Cooper v. Aaron* \(^6\) stated, that Supreme Court constitutional exposition was final and authoritative, such a view was hard to square with the framers' desire to limit the power of each branch of government. Accordingly, in Chapter Five, Agresto explained how it was belief in judicial finality, rather than judicial review itself, that created the danger of judicial supremacy (pp. 102-07).

Agresto found the mechanisms most frequently cited as means for exerting political leverage over the Court inadequate to overcome the problem of judicial finality. These included constitutional amendment, judicial self-restraint, impeachment, congressional regulation of jurisdiction, and "court packing." According to Agresto, the perfect solution to the problem of judicial finality would have been for the

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5. 5 U.S. (1 Cranch) 137 (1803).
6. 358 U.S. 1, 18 (1958).
7. Agresto found the constitutional amendment process to provide an unsatisfactory method for overruling Supreme Court decisions because of the difficulties involved in amassing the needed supermajorities. Moreover, the amendment process itself gave veto power to the minorities who favored an unpopular decision, thereby institutionalizing the very type of minority rule that the framers had attempted to prevent. In addition, even if an amendment were enacted, its meaning would still be determined by the Court whose constitutional decision was being amended. This could frustrate implementation of the policies embodied in an amendment, as the Supreme Court initially frustrated implementation of the Civil War amendments, the eleventh amendment, and the sixteenth amendment. Pp. 107-11.

Because a need for judicial independence was widely recognized, judicial self-restraint was often advocated as a safeguard against unwarranted judicial policymaking. Self-restraint, however, was an inadequate substitute for an effective political check. Not only had it failed to work well in the past, despite frequent scholarly and judicial endorsement, but self-restraint was also inconsistent with the framers' desire to have each branch of government operate vigorously within its own sphere of power, secure in the knowledge that external checks would prevent usurpations of power properly belonging to another branch. Pp. 112-16.

Although the Constitution itself appeared to authorize some political checks on the judiciary, Agresto also found those checks to be inadequate. Impeachment was an unsatisfactory check on judicial activity because it verged on being politically impossible and because impeachment seemed to be a morally inappropriate response to the exercise of judicial judgment in construing a constitutional provision. Pp. 119-20. Although the Constitution gave Congress the power to regulate Supreme Court jurisdiction, congressional regulation of jurisdiction reintroduced the danger of legislative supremacy, and the scope of congressional power over the Court's jurisdiction was uncertain. Pp. 120-22. Neither congressional power to regulate the size of the Supreme Court nor presidential power to appoint new justices provided an adequate political check, because court packing no longer seemed viable, and new appointees to the Court often failed to vote
framers to have prescribed a method for overriding judicial decisions that was similar to the two-thirds vote of Congress required to override presidential vetos (pp. 134-35). Although the framers failed to provide such a mechanism, the representative branches could nevertheless use political pressure to prod the Court into reconsidering unpopular constitutional rulings. This could be done simply by reenacting legislation invalidated by the Court, either in a modified form presenting a stronger case for constitutionality or, more confrontationally, by reenacting legislation in the same form in which it had initially been invalidated, thereby sending the Court an unambiguous message of popular dissatisfaction with its ruling. Over time, this process of re-presentation could cause the court to modify its interpretation of the Constitution (pp. 125-30).8 Borrowing from Lincoln's theory that unsettled Supreme Court decisions, although binding in the cases that they decided, did not finally fix the meaning of the constitutional provisions that they expounded (pp. 128-29),9 Agresto found the re-presentation strategy for involving the Court in the political process to be constitutionally legitimate (p. 130).10

Agresto identified two variants of his re-presentation strategy that could also be used to combat judicial finality. First, Congress could enact legislation to contain the impact of unpopular Supreme Court decisions, as it did when it limited the availability of government funds for abortions and abortion-related activities in response to the Court’s abortion decisions. Although the validity of such legislation would ultimately be subject to Supreme Court constitutional interpretation, the legislation’s enactment would precipitate healthy political dialogue between Congress and the Court (pp. 130-31). Second, Congress might be able to enact legislation that was especially resistant to Supreme Court invalidation by enacting that legislation pursuant to its special enforcement powers under section 5 of the fourteenth amendment. In

8. Agresto believed that, historically, the Court had responded favorably to this strategy on several occasions, including upholding twentieth-century civil rights legislation despite its 1883 decision invalidating similar legislation in the Civil Rights Cases, 109 U.S. 3 (1883); upholding the second Agricultural Adjustment Act despite its decision in United States v. Butler, 297 U.S. 1 (1936), invalidating the first Act; and upholding the 1938 child labor law (presumably the Fair Labor Standards Act) despite its 1905 decision invalidating a constitutionally indistinguishable earlier law. P. 127. (It is unclear what earlier decision Agresto had in mind, and no case is cited. Historical time travel techniques suggest that Hammer v. Dagenhart, 247 U.S. 251 (1918), is the most likely candidate, but it was decided in 1918 rather than 1905.)

9. See note 4 supra.

10. An interesting theory of justiciability could have been developed around the extent to which the article III case-or-controversy requirement necessarily limited the precedential impact that could be accorded judicial decisions. The issue also arose in the twentieth-century administrative law debates concerning the propriety of agency nonacquiescence in lower court decisions beyond the facts of the case decided. See R. Pierce, Jr., S. Shapiro & P. Verkuil, Administrative Law and Process 413-17 (1985).
fact, the expansive powers of Congress under the fourteenth amendment might provide the best congressional response to all judicial overextension (pp. 132-33). Although the suggested strategies could be useful means of involving the Court in the political process and subjecting judicial decisions to a political check, the utility of those strategies would be limited by the extent to which Congress was willing to implement them rather than abdicate its responsibility to undertake independent constitutional interpretation (pp. 136-38).

C

In Chapter Six, Agresto shifted ground. Although judicial interpretations of constitutional provisions were not to be viewed as final, Agresto did believe that they had a unique value. The framers envisioned a government that would simultaneously advance the objectives of equal liberty and representative democracy, but those two objectives were potentially divergent. Because the majority might on occasion be tempted to interfere with the liberty of the minority, realization of the framers' dual objectives required the majority to bind itself to the principles of equal liberty embodied in the Constitution. Consistent with the doctrine of separation of powers, therefore, the "supreme role" of the Supreme Court was to sound a warning when the majority was in danger of violating its own principles. The primary justification for judicial review was "as a guide to the democracy in its desire to live a principled life" (pp. 53-54, 139-43).

The task of ascertaining constitutional meaning was complicated by the fact that the meaning of constitutional principles was not fixed but developed over time. Accordingly, it was the function of the Supreme Court, as the nation's "institutionalized theoretician," to help evolve and apply the political, moral, philosophical, and theoretical principles embodied in the Constitution. Agresto believed that the Court was able to do this by using the power of reason (pp. 143-45). In charting the growth of constitutional principles, however, the Court was not itself to revise those principles. Rather, it was to help work out the implications of the original principles as they paradoxically grew and yet remained the same (pp. 145-48). According to Agresto,

11. There was at least a potential inconsistency in this suggestion. If congressional enactments under section 5 of the fourteenth amendment were beyond the reach of judicial reversal, such enactments were unlikely to foster the political interaction between Congress and the Court that Agresto deemed desirable; Congress would simply, and unilaterally, have done whatever it wished.

12. According to Agresto, principles could grow in two ways. First, their coverage could be expanded, just as the scope of the power of Congress to regulate interstate commerce expanded to encompass the growth of commerce itself. Second, and more valuably, a principle could grow through judicial unfolding of new implications that revealed its most profound meaning. It was through this second type of growth, for example, that the "inner logic" of the equal protection principle was eventually seen to prohibit segregated schools even though the same principle was not so viewed at the time that the fourteenth amendment was enacted. The fact that constitu-
the great paradox regarding judicial review was that the power to elucidate principles was also the power to substitute judicial preferences for the true meaning of those principles. Moreover, the paradox could not be avoided simply by asserting that there was no difference between objective constitutional meaning and Supreme Court interpretation of the Constitution; if that were true, it would undermine the very rationale of judicial review. Not only did the Constitution have an objective meaning, but the Supreme Court had, in the past, made serious mistakes in the interpretation of constitutional principles. These included the Court's mistakes in deciding the racial cases of the 1880s, the economic decisions of the early twentieth century, and "the crisis of constitutional adjudication in the first years of the New Deal" (p. 157). In addition, the 1973 abortion decision in Roe v. Wade was "a transparent attempt to impose a constitutionally unfounded policy preference on the unwilling words of the Constitution" (id.). Further, "insofar as the Court's affirmative action decisions [had] reestablished race as a legitimate criterion for preference or reward, the Court [had] not expanded [the nation's] highest constitutional principles but twisted them" (id.). There was also a danger that the Court would mistake the practical application of a principle it was called upon to construe, as if, for example, it were to order busing as a school desegregation remedy in a neighborhood where "white flight" would result in resegregation rather than desegregation (p. 159).

As envisioned by the framers, the principle of liberty required little more than freedom from governmental intervention in private matters. By the middle of the twentieth century, however, the principle of liberty had grown to require affirmative governmental intervention to prevent private acts of oppression. This increase in judicial activism, along with its conferral of powers and rights, its establishment of new public programs, its initiation of new privileges and procedures, and its expenditure of large sums of money, was more difficult to restrict than earlier forms of judicial activity focusing simply on the prevention of governmental overreaching. Moreover, the special function of the Supreme Court as the custodian of the nation's organic principles made the danger of judicial supremacy especially grave. An institution with the power to elucidate and nourish national ideals was in a position to be uniquely powerful. To the extent that the judiciary had become able to formulate its own legislative policy, while avoiding

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political checks under the guise of finality, the situation had become more intolerably inconsistent with republican government and constitutionalism — the very ideas that gave judicial review its birth (pp. 152-61). Agresto's suggested solution to the problem of judicial imperialism was to preserve rather than resolve the tension between democracy and constitutionalism, and to realize that the Court was merely one of the participants in the political formulation of policy, not the final expositor of constitutional principles (pp. 165-67).

II. **Antithesis**

Agresto and his contemporaries relied heavily on logic in conducting their analytical activities. More specifically, they structured their arguments to suggest that the conclusions they reached followed naturally from the application of neutral rules of logical analysis to unobjectionable initial premises. Because of its binary nature, logical analysis is helpful only when the initial premise can be shown to be either true or false, or at least generally accepted as valid. When the truth value of a premise is indeterminate, application of the rules of logic to that premise cannot generate reliable conclusions. Although twentieth-century theorists realized that the soundness of a logical conclusion depended upon the validity of the premise from which it was derived, they did not appreciate the nondichotomous nature of the premises with which they dealt. Despite the efforts of earlier philosophers, such as Hegel, theorists of the era were not yet committed to the principle that every thesis tends to establish its antithesis; they treated indeterminate premises as if they were proper subjects for logical analysis. As a result, twentieth-century theorists did little more than make normative assertions, but they vested those assertions with the then-legitimizing mystique of logical rigor. These analytical tendencies, as well as the futility of engaging in them, can be illustrated by examining the three component hypotheses in Agresto's thesis.

A

Agresto's first hypothesis was that judicial review, as an integral component of the system of separated governmental powers, was an activity whose function was not only to check, but to be checked as well. This presupposes the existence of a concept of judicial review that needs checking — that is analytically distinct from the absence of judicial review. Without breaking any logical rules, however, the presence and absence of judicial review can be shown to be as much the same as they are different — something that is impermissible within the confines of a logical dichotomy. Because the truth value of the unstated initial premise — that the Supreme Court engaged in judicial review — cannot be determined, logical analysis incorporating that premise cannot lead to reliable conclusions. Even if one were to argue
that logic was, nevertheless, useful in cases where the truth value of
the judicial review premise happened to be known — for example,
where everyone agreed that the premise was acceptable — the qualifi-
cation would be of little value because such cases are unlikely to exist;
the nature of judicial review is such that its exercise or nonexercise in a
particular case can never be determined in a way that is sufficient to
make logical analysis useful. All of this rendered Agresto’s subse-
quent discussion about the desirability of imposing a check on the ac-
tivity of judicial review largely inconsequential. Moreover, to the
extent that judicial review existed even as a hypothetical construct, it
may well have checked itself.

As a purely theoretical matter, it is possible for judicial review to
negate itself. That is, it is possible for judicial review to produce no
judicial review. This could occur quite simply if, in the exercise of
judicial review, a reviewing court determined that the Constitution or
some legal doctrine precluded the court from exercising judicial re-
view. In that event, the truth value of the judicial review premise
would be indeterminate. By today’s standards the problem may seem
wholly unimportant, but by the standards of twentieth-century theo-
rists committed to binary logical dichotomies, the problem was neces-
sarily troublesome.

In cases in which the Court declined to address the merits, it is
difficult to conceive of the Court’s action as an exercise of the power of
judicial review. At most, the Court’s action amounts to a tacit affir-
mane or invalidation of the challenged enactment, depending upon
which way the lower court ruled, and a judicial review characteriza-
tion can be no more satisfying than it is in the case of an explicit af-
firmance or invalidation.

In cases in which the Court explicitly affirmed the validity of a
legislative enactment, the propriety of a judicial-review characteriza-
tion is stronger, but far from self-evident. Because the effect of judicial
review is precisely the same as the effect of nonreview, it is difficult to
view the characterization as consequential. Even though an explicit
affirmance could conceivably lend an air of legitimacy to legislative
enactments that they would not possess in the absence of Supreme
Court validation, such legitimation would not seem to trigger the anti-
majoritarian or checking concerns for which Agresto postulated the
existence of judicial review.

The strongest case for the existence of judicial review is exempli-
ified by *Marbury* itself, where the Supreme Court actually invalidated
the action of a coordinate branch. But there, too, characterization of
such judicial activity as judicial review remains problematic. On one
level, *Marbury* showed how confused things could get. The President
ultimately won in *Marbury*; the Court declined to exercise judicial re-
view over the President’s actions. But the reason that the President
won was because the Court invalidated an act of Congress. Accordingly, by engaging in judicial review, the Court was able to refrain from engaging in judicial review. And it is difficult to know which characterization captures the essence of what the Court did.\footnote{According to the traditional \textit{Marbury} myth, Justice Marshall conceded to President Jefferson a political battle over the appointment of certain new judges in order to win a political war by establishing a nominal principle of judicial review that would preserve power for judges, who tended to share Marshall’s political views. \textit{See}, e.g., G. \textsc{Gunther}, \textsc{Constitutional Law} 10-12 (11th ed. 1985).}

On a deeper level, the concept of judicial review is even more perplexing. In twentieth-century terms, judicial review connoted antimajoritarianism. In fact, it was that very connotation of antimajoritarianism that caused Agresto to call for a check on judicial activity. The twentieth-century majority, however, must have approved of judicial invalidation, even in cases in which the Court invalidated an enactment with great popular support, because the majority continued to adhere to a constitutional system of government in which the Court’s determination of validity was deemed to supersede popular will. Stated differently, the will of the majority was to have its own will negated whenever required by the long-term or structural concerns that the Court was asked to oversee — concerns that Agresto referred to collectively as “principle” (ch. 6). Although a constitutional amendment modifying that governmental structure could not have been enacted without supermajority support, there is no indication that anything approaching even a bare majority favored across-the-board termination of the power of invalidation.

The problem of proper characterization was more than just theoretical, as is evident from the vast difference between present and historical characterizations of twentieth-century judicial activity. Contemporaries of the twentieth-century Supreme Court, regardless of their political persuasion, tended to view the Court as activist.\footnote{\textit{See} Seidman, \textit{ABSCAM and the Constitution} (Book Review), 83 \textsc{Mich. L. Rev.} 1199, 1204-07 (1985) (reviewing \textsc{ABSCAM Ethics: Moral Issues and Deception in Law Enforcement} (G. Caplan ed. 1983)).} Today, of course, we view that historical period as one in which the Court was remarkably passive, declining to exercise judicial review on almost every occasion that the opportunity presented itself. Our present concern with what Agresto and his colleagues would have called “the merits” makes it difficult for us to understand the twentieth-century Court’s preoccupation with ceremonial procedure and distracting technicality. But the twentieth-century Supreme Court, building on the work of its predecessors, had managed to erect an array of devices for avoiding judicial review that was truly elaborate.

Assuming that a case fell unambiguously within the jurisdiction of the Supreme Court, it was nevertheless unlikely that the Court would ever review the merits of the case. Supreme Court consideration of
most cases was discretionary and seldom granted, and even when an appeal existed as of right, the Court almost always invoked one of a variety of doctrines that it had developed to avoid meaningful consideration of the merits. When the Court did agree to give a case plenary consideration, justiciability rules, rules of construction and avoidance, or rules of Supreme Court procedure often prevented the Court from resolving the merits. If the Court reached the merits, the deferential standards of review often accorded legislative enactments tended to preclude probing judicial inquiry. Moreover, when the Court chose to undertake an extensive constitutional examination of a case, it often decided as a matter of substantive constitutional law that the meaning of the provision at issue was to be determined by a branch of government other than the Court. Empirically, if invalidation of congressional enactments is taken to be an appropriate measure, the frequency with which the Supreme Court actually exercised its nominal power of judicial review was quite low. As late as 1983, the Supreme Court was able, in a single decision, to more than double the number of federal statutes invalidated in the nation’s entire

16. These doctrines, which permitted summary disposition or outright dismissal where the questions raised were deemed to be insubstantial, were discussed in P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler’s The Federal Courts and the Federal System 643-62 (2d ed. 1973).

17. Rules relating to standing, mootness, ripeness, political question, and other doctrines that could preclude consideration of the merits were discussed in H. Fink & M. Tushnet, Federal Jurisdiction: Policy and Practice 205-28, 276-397 (1984).


20. For example, in the absence of special circumstances, such as the implication of a fundamental right or a suspect classification, legislative enactments needed to have only a rational basis to survive constitutional scrutiny under the equal protection clause. See, e.g., San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973).

21. In McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), the Court essentially held that the necessary and proper clause of article I, section 8, authorized Congress, rather than the Court, to determine what were appropriate means of legislating, at least in the absence of a specific constitutional restriction on congressional power. Similarly, in Wickard v. Filburn, 317 U.S. 111 (1942), the Court essentially held that the scope of congressional power to regulate interstate commerce was to be determined by Congress itself, rather than the Court. Likewise, in Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005, 1016-21 (1985), the Court held that the scope of tenth amendment, federalism-based restrictions on congressional power, was to be determined by Congress rather than the Court. Moreover, whenever the Court deemed something a political question, it was essentially holding that one of the representative branches, rather than the Court, was to resolve the issue.

22. To the extent that scrutinizing and upholding the validity of an enactment is viewed as an exercise of judicial review, actual invalidation is an inappropriate measure of the Court’s exercise of the power of judicial review.

23. After the Supreme Court invalidated a congressional enactment in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), it was 54 years before the Court invalidated its next congressional enactment, in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
Agresto and his contemporaries must have proceeded from a perspective that we can no longer fully appreciate in characterizing such a Court as one that was actively engaged in judicial review. Undoubtedly, those theorists had acceptable reasons for their characterization, but they can hardly be said to have adopted a characterization that was consistently accurate across all perspectives, or even within their own. To the extent that judicial review existed even as a hypothetical construct, the historical data suggest that it would have been viewed as perfectly capable of restraining itself. As a result, Agresto's distrust of judicial self-restraint (pp. 37-38, 112-16) seems incongruous. To us, the Supreme Court of Agresto's era evaded the merits so frequently that it appears to have become a master of self-restraint. Yet Agresto deemed self-restraint to be an inadequate safeguard against judicial activism. It may be that he viewed even the low frequency of judicial invalidation occurring in the twentieth century as excessive, but such a conclusion cannot be shown to follow logically from his premise that the Supreme Court engaged in judicial review, because his premise is too indeterminate to qualify for use in a logical evaluation.

Both as a theoretical and an empirical matter, the truth value of Agresto's judicial review premise cannot be determined. The mutually exclusive, dichotomous relationship between the presence and absence of judicial review required for proper recourse to logical rigor does not exist. As a result, inferences drawn through the application of logical rules to the premise of judicial review are unreliable.

Like dividing by zero under the rules of twentieth-century mathematics, adherence to logic could produce only haphazard results when applied to premises with indeterminate truth values. Nevertheless, Agresto and his contemporaries persisted in their use of highly contingent, definitional premises without sufficient regard for their inescapable contingency. Such persistence tended to be fatal to twentieth-century adventures in logic. Agresto's conception of judicial review as something distinct from majoritarian politics, for example, must have seemed artificial to those who already conceived of the Court as a political body. And to them, his suggested solution to the perceived problem of judicial review — subjecting the Court to a political check — must have seemed little more than trite. Agresto's second hypothesis further illustrates the point.

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Agresto's second hypothesis was that, because judicial review was properly part of the process of interbranch political interaction, judi-

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cial exposition should be subject to the political check of re-presentation rather than being treated as final. Implicit in this hypothesis is the premise that political interaction exists in a way that is distinct from the absence of political interaction, which Agresto termed "judicial finality" (pp. 102-07). Once again, however, the dichotomy fails to hold. Just as judicial review could be shown to negate itself by producing no judicial review, political interaction can be shown to negate itself by producing no political interaction. Moreover, Agresto's development of this hypothesis illustrates a second misuse of logic, stemming from a confusion between logical assertion and normative preference, that is also evident in much twentieth-century theory.

As Agresto readily admitted, twentieth-century Congresses possessed an arsenal of political weapons, ranging from court packing to impeachment, that could have been used to express dissatisfaction with Court decisions and to serve as a political check on judicial activity. To the extent that Congress chose not to exploit those sources of political leverage, it must have been because there were insufficient votes to secure the necessary congressional approval. Congressional inability to enact measures that would have served as political checks on the Court, therefore, translated into political power that was possessed by the Court, and that was potent enough to defeat the political forces favoring the imposition of a check. Accordingly, it was political interaction itself that produced the judicial finality that Agresto viewed as the absence of political interaction, thereby rendering illusory the supposed dichotomy between political interaction and noninteraction.

What Agresto must have meant by his assertion that Congress had improperly accorded finality to judicial decisions was that he disapproved of the low level of political pressure that Congress was willing to exert on the Court. But that, of course, was a normative assertion that logical analysis could neither negate nor establish. Moreover, Agresto offered little basis for determining what the proper degree of political interaction should have been. While he favored the re-presentation technique as a means of increasing the level of political interaction, it was unclear when, how often, or how vigorously he believed that the technique should be used. At times he seems to have contemplated slow and deliberate use of the technique as part of a process that could, like the functional overruling of the *Civil Rights Cases*, take nearly one hundred years (pp. 126-27). At other times, however, he seems to have contemplated congressional pressure so vigorous that it would virtually negate any judicial role, such as when he argued in favor of congressional reliance on the powers granted by section 5 of the fourteenth amendment as a means for avoiding judicial invalida-

25. See note 7 supra.
26. See note 8 supra.
Agresto also disapproved of particular Supreme Court decisions relating to abortion, affirmative action, and busing (pp. 156-59), but he failed to explain why those decisions were objectionable. He apparently considered them to manifest self-evident judicial overreaching, but from our present perspective it is difficult to detect any pertinent distinction between those cases and, say, the school desegregation cases with which Agresto did agree (pp. 149-50). It is, perhaps, this suggestion of self-evidence, more than any other feature of Agresto's book, that caused some twentieth-century commentators to consider the work more a neo-conservative political tract than a serious effort at political theory. Agresto has even been accused of awkwardly imitating John Marshall's *Marbury* performance by trying to advance a camouflaged political agenda through a nominal discussion of political theory.

Once again, Agresto was representative of his era in treating normative preferences as if they were supported by logical analysis. Frequent failure to honor the distinction between content-neutral logical method and content-laden substantive assertion is likely to have artificially enhanced many twentieth-century normative assertions by giving them an undeserved air of legitimacy. Moreover, failure to honor the distinction is also likely to have prolonged the attractiveness of logical modes of analysis by permitting them to appear more useful than we now believe them to be. When added to the danger of unwarranted dichotomous thinking, confusion about substantive neutrality illustrates a second problem posed by twentieth-century fascination with logical rigor. Agresto's final hypothesis illustrates a third.

Agresto's third hypothesis was that, although Supreme Court constitutional interpretations were not entitled to finality, they were nevertheless entitled to a high degree of deference because of the Court's special competence to ascertain the meaning of the nation's fundamental principles. This hypothesis rests upon the premise that there is a distinction between accurate and inaccurate interpretations of principle that would make the Court's special competence material. But like the other suggested dichotomies, this one also fails to hold. Moreover, to the extent that the hypothesis can have meaning, that meaning can be acquired only through recourse to normative assertions that are not

27. See note 11 supra and accompanying text.
29. See Spann, supra note 28, at 642.
properly subject to logical evaluation. Finally, the nature of the hypothesis reveals what was perhaps the most insidious aspect of twentieth-century logical analysis — its capacity for self-preservation.

Like his other two hypotheses, Agresto's special competence hypothesis suffers from the failure of the dichotomy on which it is based. Special competence in the exposition of principle would be relevant only if there existed accurate and inaccurate interpretations of principle. But a principle has no existence independent of its interpretation. Indeed, any effort to pronounce a given interpretation inaccurate would amount to nothing more than a second interpretation, which would itself be subject to pronouncements of inaccuracy by the initial interpreter. Because Agresto's conclusion that the Supreme Court should be the guardian of fundamental principles rests on an indeterminate premise, the argument cannot properly be said to be the reliable product of sound logical analysis.

We now realize that, because principles have no existence independent of their interpretations, the only way that one interpretation of principle can be favored over another is through recourse to the interpreter's preferences. Accordingly, Agresto's special competence hypothesis, like his political interaction hypothesis, also amounts to a mere normative assertion. Agresto believed the Supreme Court to be more competent than the representative branches to oversee the development of fundamental principles because of its greater capacity for reason (p. 144). By "reason" he presumably meant freedom from potentially distorting political considerations thought to be advanced by judicial independence. Agresto never explained what reason-free-from-politics would consist of, although one might well fear that logical analysis is what he had in mind. But given the irrelevance of accuracy in the interpretation of principle, there is no apparent reason why nonpolitical interpretations should be preferable to political ones. On the contrary, because political interpretations of principle reflect some degree of popular approval and nonpolitical interpretations reflect what can only be called judicial preference, a proponent of democratic government could easily have been expected to favor political interpretations. Although not necessarily inconsistent with his hypothesis that the Court should be more actively involved in the political process, Agresto's sometime preference for reason over politics seems no more compelling than the distinction upon which it is based.

30. Agresto insisted that there was a distinction between principle and interpretation; otherwise there would have been no justification for judicial review. P. 157. The circularity of this argument becomes apparent, however, when one remembers that it was being offered as a justification for judicial review.

31. The two were not inconsistent if one assumed that the proper mode of judicial participation in the political process was through the presentation of principled arguments entitled to nondispositive deference from the representative branches, but that view depended upon the existence of a distinction between politics and principle that is difficult to accept.
The resilience of logical analysis in twentieth-century thought was remarkable. In retrospect, for example, the flaws in Agresto's third hypothesis seem so obvious that even twentieth-century theorists must have realized that the hypothesis rested on a distinction between objective meaning and subjective interpretation that was highly suspect. Such realization would presumably have prompted an extrapolation to other supposed dichotomies, which in turn would have produced a dramatic de-emphasis of logical modes of analysis. But it did not happen that way. By all accounts, twentieth-century theorists appear to have gone out of their way to suppress, or at least to marginalize, any perceptions that would disserve the endurance of logical thought. All closed systems have some capacity to deflect outside attack, but a culture's fascination with any particular system is generally short-lived. Although American culture had little difficulty transcending its brief attachments to things like rights theory, free-market economics, and nihilistic denial, it was inexplicably drawn to logical analysis for an extended period of its history. Such was the seductive nature of logic. It appears to have had a remarkable instinct for self-preservation. And a remarkable ability to retard the growth of American intellectual thought. In fact, twentieth-century misapprehension of logical limitations was so profound that, ironically, theorists of the period almost stumbled into making a major conceptual advance.

III. HYPERSPACE

In hyperspace there are no logical limitations. In fact, the ability to conceptualize hyperspace was materially advanced by the perception that logical premises could always be viewed as indeterminate rather than dichotomous. Because this deprived logical thought of most of its value, the physicists began to de-emphasize it and to evolve nonbinary modes of analysis that could subsist on indeterminacy. By breaking the logic barrier, they were able to break the light barrier and move to modern levels of conceptual sophistication. But the political theorists put up more resistance.

Like most political theorists of his era, Agresto had all of the perceptions necessary to make the conceptual leap to hyperspace. He was sufficiently aware of the frailties inherent in his dichotomies to label the conception of judicial review that was based upon them a paradox (pp. 145-46, 156-57). Moreover, he believed that the solution to the supposed problem of judicial review lay not in choosing between majoritarian democracy and judicially enforced constitutionalism, but rather, in somehow preserving the tension between the two (pp. 84-85, 167). Agresto's instincts, like the instincts of many of his contemporaries, were trying to liberate him from the confines of binary logic, but they were not strong enough to let him break free.

Rather than question the continued utility of their logical commit-
ment, twentieth-century theorists devised various strategies for domesticating their subliminal appreciation of logical disutility. The three most common strategies were polar domination, continuum compromise, and dialectical mediation. Polar domination, the most elementary of the three techniques, consisted of viewing one pole of a dichotomy as superseding the other, as when one decided that the Supreme Court rather than Congress should have the final say as to the meaning of the Constitution. This not only dissipated the tensions produced through simultaneous pursuit of inconsistent objectives but, more significantly, avoided the need to confront the significance of simultaneously possessing contradictory desires. Agresto was sophisticated enough to resist this technique (pp. 84-85), but only in favor of the other two.

Continuum compromise posited the presence of a continuum between two dichotomous polar extremes and then focused on the continuum rather than the extremes in order to reduce dissonance. Proper resolution of the conflict generated by the competing polar objectives lay at some midpoint along the continuum corresponding to an appropriate compromise. The bulk of Agresto's thesis embodied this strategy. For Agresto, proper resolution of a social problem was determined by where the problem fell along the continuum between the dichotomous poles of principle and policy. If, like Agresto's view of school desegregation, the problem related primarily to principle, proper resolution corresponded to what the Court deemed best (pp. 149-50). But if, like Agresto's view of abortion, the problem related primarily to policy, proper resolution corresponded to what the politically accountable legislature preferred (p. 157). Neither pole properly determined the outcome in all cases.

Dialectical mediation was the most sophisticated of the three techniques. It posited continuous societal vacillation between the mutually exclusive polar extremes in a way that allowed both poles to be occupied at once. Just as the twentieth-century process of animation could show a cartoon character appearing simultaneously in two places at once by alternating frames in which she appeared in one place with frames in which she appeared in the other, contradictory ideas could be simultaneously held through a similar process of conceptual vacillation. Proponents of this technique tended to advocate such vacillation through procedural rather than substantive approaches to conflict resolution. To the extent that Agresto called for increased political interaction between the representative branches and the Court as the solution to the problem of judicial review, he can be seen as having adopted a dialectical mediation strategy. Issues of social policy were to be constantly shuttled back and forth between Congress and the Court, with the actions of each continually being
corrected through the political checks of the other.\textsuperscript{32} Viewed in the proper time frame,\textsuperscript{33} this permitted societal decisionmaking that was simultaneously majoritarian yet principled. All three techniques were primitive, but they were effective enough to prevent the twentieth-century mentality from having to confront the incoherence of dichotomy itself.

The solution to the twentieth-century conceptual problem now seems so obvious that it is hard to imagine theoreticians of the period having missed it. Even in the twentieth-century they were familiar with nonlogical modes of conception and, in fact, relied heavily upon nonlogical conceptualization in their art, music, and literature. Moreover, they revered the physical sciences, which increasingly repudiated the validity of binary paradigms. And the emotional determinants on which they blamed everything from procreation to nuclear destruction often must have seemed to defy all twentieth-century precepts of logical order. So much in their culture pointed to the viability of contradictory coexistence that they certainly seemed ready to conceive it. But they resisted, and their attachment to logic persisted.

\textbf{CONCLUSION}

As Agresto's work illustrates, twentieth-century political theorists failed to recognize the disutility of logical analysis because they were unaware of the indeterminate truth values of the premises on which they relied. Because such indeterminacy precluded reliable use of logical analysis, twentieth-century logical conclusions tended to be nothing more than normative assertions. Although theorists of the period perceived the self-contradiction inherent in dichotomous thinking, they repressed rather than nourished that contradiction, and were unable to escape the grip of binary thought.

It is tempting to imagine that we are back in their time and to imagine ways in which we might have shown them how close they were to conceptual maturation. But, of course, we could not have shown them. Neither hyperspace nor the epistemology out of which it was conceived could have been understood by twentieth-century political theorists — not even those who might have strained to understand.\textsuperscript{34} Logic being what it was, they could never have comprehended analytical thought without it until they were able to engage in analytical thought without it. Even if they had been able to

\textsuperscript{32} Agresto's focus on a procedural solution to the problem of judicial review was arguably inconsistent with his disapproval on substantive grounds of particular Supreme Court decisions. Pp. 157-59; see text at note 13 supra. It is unclear why inadequate political interaction tainted those decisions but not others.

\textsuperscript{33} Time frame is as important to conceptualization as it is to animation. In this regard see Kelman, \textit{Interpretive Construction in the Substantive Criminal Law}, 33 \textit{Stan. L. Rev.} 591 (1981).

\textsuperscript{34} See, e.g., Spann, supra note 28.
read the present historical review, it would have made little difference. Most theorists would have perceived nothing more than the irony of offering a dichotomous logical argument as the basis for rejecting dichotomous logical argument. Completely unaware of what was about to unfold, and completely unable to do anything else, they would simply have subjected the review to logical evaluation and incorporated it into one of their existing conceptual paradigms.

But despite themselves, of course, they eventually did make the leap.