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Book Review: Due Process in the Administrative State. by Jerry L. Mashaw.

Ronald A. Cass

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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will shed light on what due process is, on how we should think about it, and on how courts should apply the due process clauses. He discovers arguments, examines them, and turns them over and looks at them from another angle. Mashaw keeps some arguments, or at least pieces of them, discards others, and moves on, finding more arguments, examining these, and then often discarding a piece he previously thought worth keeping. Finally, Mashaw picks up some pieces previously discarded, puts them together with the few he has retained from his trek, and discusses the products of his exploratory journey.

I

Mashaw begins by identifying the field he will explore. The field is not due process. Rather, it is administrative law. The central problem of administrative law is that administrators have discretion and affect other people's lives. In combination, these facts require a theory that can legitimate bureaucratic discretion.

Three theories are at hand. One, the "transmission belt" thesis, posits that bureaucrats are merely extensions of the legislative-political process; bureaucratic discretion is legitimated by the political process that creates it and checks its operation. The second, the expertise thesis, argues that bureaucratic discretion is a necessary by-product of expert judgment by specialists, whose knowledge of some particular area, like the automobile mechanic's or the neurosurgeon's, has value to society independent of political actors' capacity to constrain their decisions. The third legitimating thesis is that the very process of bureaucratic decisionmaking provides avenues for participation by interested parties sufficient to justify the exercise of bureaucrats' power.

Mashaw links the three legitimating theories to the historical development of administrative law, admits the looseness of the fit between history and theory, and critiques the theories. None of the theories is found to be a good justification for bureaucratic power. The transmission belt thesis really sidesteps the argument against administrative discretion, substituting a tautology for analysis of the claim against discretion. Expertise is not a plausible explanation for much administrative discretion, which can more readily be described by various capture theories. Participation in agency decisionmaking need not replicate participation in legislative decisionmaking; it need not produce the decision the legislative process would; and it need not produce fair results. The theories of administrative legitimacy, thus, are unsatisfactory ultimately because each is incomplete without a normative thesis of what admin-

istrative decisionmaking *ought* to be, who ought to participate, and how that participation should be weighted and structured. That normative thesis will be coextensive with a definition of due process.

The problem of administrative discretion, thus, is the problem of due process. Mashaw has set the stage for exploring the meaning of due process mainly in the context of arguments against the exercise of administrative discretion. The field to be explored is the meaning of due process as the foundation of legitimate administrative power. The starting point is not an examination of arguments intended to legitimate government power, but rather the meaning of the due process guarantee that constrains government power.

Having introduced the central problem to be explored, Mashaw then devotes roughly three-fifths of his book to examination of the principal models of due process. Three models, generally analogous to the three explanations of administrative legitimacy, are examined in the same sequence as their legitimacy analogues.

First, Mashaw discusses the "model of appropriateness." Under this model, courts ask whether the procedure used in making a particular administrative decision resembles the procedures generally used to make similar decisions. In part, the appropriateness inquiry is whether current rules have been followed: The model asks whether the process used is the ordinary, regular process or whether it is different and therefore suspect. There are two problems with this inquiry: the analogical basis for application of the model always will be open to question (how do you know what decisions are best analogized to *this* one?), and the reliance on tradition may inhibit beneficial change (Mashaw notes here the early New Deal experience). Moreover, legal analysis under the appropriateness model tends to be overly formal or overly abstract. It can only provide clear rules for decision at the expense of sensitivity to the range of different decisions and decisional processes that may be appropriate.

Ultimately, the appropriateness model is wanting because it does not rest on principle. It relies instead on the common-law instinct that a rule of adherence to tradition, even if not capable of precise formulation, best keeps the faith with whatever principles *do* guide us. Finding appropriateness both operationally and intellectually deficient, Mashaw sets this model aside.

The second due process model examined is the "model of competence." This model, embraced by the Supreme Court in *Mathews*

v. Eldridge,[3] asks that procedures minimize error costs. These costs are given by the number of errors a process produces and the cost of the respective errors. This "social cost accounting" approach to due process has the benefit of explicit advertence to the balancing of interests that takes place under any approach. It also has the benefit of grounding in a normative framework, utilitarianism. But Mashaw notes the Court's incomplete fidelity to utilitarianism in its implementation of the competence model. Mashaw also finds the court's application of the model less than completely faithful to the terms of the *Mathews* test.

One possible reason for haphazard application is that earnest application of the competence model requires an enormous amount of information about process effects and individual values. The informational requirements of the competence model do more than frustrate serious and consistent application. They also undermine the judicial role in due process adjudication because the information may be more accessible to legislatures than to courts. Mashaw portrays the competence model as inclining courts toward both unprincipled intervention in and unprincipled abstention from control of the administrative process. After reviewing the perils of competence-based review, and especially the "positivist trap" exemplified by Justice Rehnquist's "bitter with the sweet" argument,[4] Mashaw concludes that the competence model cannot be the basis for due process analysis. At the same time, he sees the concern about accurate decisionmaking, which is central to the competence model, as a critical process concern. The interest in accuracy, however, does not stand alone. It is the surrogate for some other concern.[5]

II

Mashaw now, midway through the book, has defined his field of interest, quickly examined and rejected three administrative law models, and more fully examined and rejected two due process models. The reader knows that only one due process model remains. Surely, this model must contain the answers and must identify the concern for which accuracy is but an imperfect proxy.

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3. 424 U.S. 319 (1976)

4. The "positivist trap" is Mashaw's term for strong judicial deference to legislative decisions on process. When it is admitted that a utilitarian calculus supports the judicial decision and that legislatures may be able to make such a calculus better than courts—is society better off if government employees receive higher pay and less job security or the other way around?—it is difficult to avoid total abdication of the judicial role in supervising process choices.

5. *See* p. 157. Mashaw describes accuracy as an important function of an unknown variable "f(x)."

Mashaw's third model of due process, the "model of dignitary values," thus arrives with high expectations for its resolving power.

At first, Mashaw's treatment of this third model further boosts our expectations. Before elaborating on the model, Mashaw detours for some additional advertising on its behalf. He describes its history, finding strands of dignitary concern interwoven with appropriateness and competence in hoary Supreme Court jurisprudence. He finds contemporary support for the values a dignitary model protects. And he suggests ways in which a focus on dignitary values promises to solve the difficulties of the other models.

Yet, in the course of promoting the model to come, Mashaw's language intimates an unwillingness to make more than very modest claims for it: "A dignitary theory that sought to articulate, defend, and effectuate a process-oriented conception of procedural due process just *might* discover, in its quest for the core conditions of individual dignity, principles that could both explain and limit individual demands for particularized official responsiveness." Here, Mashaw begins to shift from the gains a dignitary theory offers to the difficulty of developing such a theory. His treatment of the dignitary approach over the remaining hundred pages or so of the book places at least as much stress on the difficulties and weaknesses of the dignitary approach as on its benefits. Indeed, even before articulating the model, Mashaw explicitly acknowledges its limitations:

> I can specify no algorithm for the unimpeachable resolution of due process claims. I have not solved the problem of how to combine political philosophy with constitutional adjudication. My arguments for a dignitary approach are marked by the frustrating interplay of logic and contingency common to all such efforts. I will not offer support to those who would move constitutional analysis beyond liberty and toward community; my theory leaves the implementation of communitarian ideals at a subconstitutional level. For I believe not all institution building is or should be accomplished through constitutional adjudication.

Mashaw here does more than apologize for the dignitary model's imperfection and for the necessity of making a normative choice that will not gain universal assent: he also shifts from third person to first person writing, from describing and discussing others' models to building his own. That is the burden of the last two-fifths of his book. But Mashaw is in no hurry to build. Thus, he turns back to revisit the models suggested by other proponents of dignitary values. These models serve as stalking horses for Mashaw as he works through the strengths and weaknesses of the dignitary approach.[6]

The goal, then, is to begin spelling out the sources, meanings,

6. *See, e.g.*, pp. 179-80 (discussing position taken by Professor Frank Michelman).

and operational consequences of the dignitary approach before specifying a model to encapsulate it. Dignitary approaches build on notions of respect for individuals, recognizing the contribution of decisional transparency, rationality, and consistency to such respect.[7] Process should advance these goals. The goals are part of the set of intuitions defining "fundamental fairness" which Mashaw derives from the liberal tradition. Mashaw examines this tradition briefly but cogently, separating several threads of the tradition and explaining which threads best support the arguments for dignitary proces constraints on government power.[8]

The intuitive derivation of process claims provides a central concern for due process, but it does not provide a strong set of rights. Process claims are not assertions of entitlement to respect posited in opposition to arguments of disrespect. They are claims for respect that must be weighed against competing claims, with no obvious means for weighting the values of respect on either side of the balance and no obvious means for evaluating the instrumental contribution of any process to respect. Does a judicial hearing necessarily contribute more to respect than majoritarian-political decisionmaking? Not necessarily, for majority rule can be derived from propositions of individual autonomy and rationality. Mashaw concludes that the dignitary model, to effectuate its goals, must resort to prudential balancing and that the judiciary enjoys no clear comparative advantage at such balancing.

The defects of the dignitary model seem as troubling as those of the appropriateness and competence models. But Mashaw, having exposed these defects, is not willing to concede that dignity has no more to offer than other approaches:

> . . . I am rather encouraged by the way in which a search for first principles and a sketch of their application incorporates the valuable insights of prior models of due process adjudication. In particular the dignitary approach seems to explain much of what is valuable in the model of competence and to present those values in a more plausible and convincing way. Attention to accuracy is obviously important. It relates to our most general due process demands for a reasonably stable, coherent, and therefore comprehensible legal order. Such a legal order cannot survive legal decision making that is arbitrary, that ignores what is or can be known about the physical and social world in which we attempt to plan our actions and achieve our goals.
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> Of equal or greater importance, the dignitary model explains our concern to

7. Mashaw also argues separately for dignitary sub-values of participation and privacy.

8. The principal strands of liberal thought are assimilated from the works of John Locke, Jeremy Bentham, and Immanuel Kant, although others' writings are noted. John Rawls receives considerable attention, given the space devoted to exploration of liberal thought.

> respect the positive law. Majority rule is integrated into the set of dignitary values that are of interest to individuals. Judicial deference therefore is not the abdication, but the fulfillment of the judiciary's accepted constitutional mission of protecting individual rights. Yet, unlike the positivist traps that beset the model of competence, there is here no logical implication of universal judicial abdication. Majority rule's support for individual perceptions of equal citizenship need not *always* trump other dignitary values. For the substantive right that due process protects is not some contingent substantive claim embodied in positive law, but the fundamental individual right to legal arrangements that preserve the preconditions for moral agency and self-respect. Majority rule with universal suffrage is but one of those preconditions. It must somehow be accommodated to others where, in specific situations, they compete.
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> From what has been said it seems also to follow that the dignitary model, unlike the prior models, is not embarrassed by the relationship of substantive and procedural claims. The basic value of individual self-respect is obviously substantive. Yet at its core it is noncontroversial. The maintenance of individual liberty is what the American Constitution is preeminently about. To say that due process analysis proceeds from this substantive basis carries none of the implications of judicial usurpation that have long been associated with the term "substantive due process." The substantive agenda is neither hidden, as in the model of appropriateness, nor is it misdirected to general social welfare considerations, as in the model of competence.

Despite the superficial similarity to defects of other models, the only real problem with the dignitary approach, Mashaw tells us, is that it needs translation into simple rules for judges. Mashaw devotes his pentulimate chapter to that end, introducing the "model of dignitary appropriateness." The effort in this model is to construct prototypes of appropriate processes out of the lessons gleaned from exploring dignitary values. The main message of dignity is that "state power shall not be used to subject any person to the will of another." The mechanisms for preventing personal domination are consent to particular decisions (or at least to particular decisional processes) and general, impersonal rules. These statements suggest four ideal process types: negotiation, majoritarian voting, bureaucratic administration, and adjudication. Each process type has a legitimating requirement: there must be actual consent in negotiation, opportunity to participate in voting, rational and efficient decisions in bureaucratic administration, and fairness in adjudication. Mashaw hopes that courts will be able to identify the ideal process type for any given decision and ascertain serious departures from the ideal. Mashaw urges the value of his approach at improving the "constitutional conversation" in which courts and commentators are engaged, although he recognizes the imprecision of the ideal decision and process types. This recognition leads to his final argument, that much of the elaboration of appropriate processes belongs to the "subconstitutional dialogue" of non-judicial branches rather than the courts' constitutional conversation.

III

At the end of Professor Mashaw's exploration, what has the reader learned? The answer no doubt will vary markedly from reader to reader, but there are plenty of learning opportunities to be had. *Due Process in the Administrative State* provides a good overview of the literature and arguments concerning due process, and is a very useful introduction for beginners. For old hands at this game, the book offers a wealth of interesting and intelligent commentary on an impressive array of writings in administrative law, constitutional law, political science, and philosophy, as well as on a fair cross-section of the judicial decisions applying due process concepts.

The writings and decisions that are grist for Mashaw's mill have not, by and large, escaped others' notice. Mashaw's book does not introduce into the controversy over due process analysis a new body of thinking that previously lay unnoticed outside the due process walls.[9] Nor is Mashaw's commentary strikingly novel. His categorization of legitimating concepts of administrative law, for instance, owes much to Professor Richard Stewart's earlier work,[10] a debt Professor Mashaw acknowledges.

Yet even where the book tracks past learning, Mashaw's treatment is both useful and engaging. In part, that is because so often it is the better, more thoughtful commentary that Mashaw's analysis tracks. In part, the book engages even where it recapitulates because there is a freshness to Mashaw's rethinking of old problems. The book is also useful because it brings together so many of the diverse strands that run through this subject. *Due Process* presents Mashavian observations on majority rule, judicial review, social contracts, the Kantian categorical imperative, and the relationship between substantive and procedural constraints on governmental action. Whatever time one has spent thinking about due process, there is something in Mashaw's commentary to spark rethinking or to rekindle old faiths.

That contribution is more than enough to ask of a book about due process. Professor Mashaw, however, has aspired to more than

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9. The two bodies of literature that readers of standard law review fare on due process may not readily link to due process—Kantian philosophy and political choice or political science treatments of majority rule—previously were employed in discussion of due process in Epstein, *Voting Theory, Union Elections, and the Constitution*, in NOMOS XVIII: DUE PROCESS 333 (J. Pennock & J. Chapman eds. 1977) [hereinafter cited as NOMOS XVIII]; Kuflik, *Majority Rule Procedure*, in NOMOS XVIII, *supra*, at 296; Pincoffs, *Due Process, Fraternity, and a Kantian Injunction*, in NOMOS XVIII, *supra*, at 172.

10. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

thoughtful commentary on a broad range of related issues. His last chapters attempt a synthesis of approaches to due process that will differ from other authors' visions and move beyond even Mashaw's own copious prior work in this area. Mashaw offers the "model of dignitary appropriateness" as a solution to problems of the other approaches he has examined. He does not, after exposing its flaws, suggest that normative conflicts at the core of due process resist all attempts at resolution, his included. Although Mashaw recognizes some of the limits of his last model—recognition that in part informs his plea for more reliance on subconstitutional dialogue and less on constitutional conversation—he endeavors, understandably, to convince readers that his approach substantially improves due process analysis.

This is the most difficult and least successful part of the book. To succeed at the level of grand theory, Mashaw must solve the two problems for which he criticizes other models. First, a principle is necessary to explain why courts should override the decisions of other branches. Second, the principle must yield coherent instructions that allow courts to intervene at predictable times, without leaving courts general discretion to intervene or abstain. Thus, a solution must avoid both a positivism that obviates judicial scrutiny of government decisionmaking processes, as well as unbridled judicial power, whether actively exercised or dormant.

The first quest is for the legal version of the philosopher's stone. To answer that courts override legislative-administrative decisions because the Constitution commands it, is of course no answer at all.[11] Here, as generally in constitutional argument, the search is for help in plumbing the protean commands of the document. Mashaw rightly seeks grounding in extra-constitutional principles that can be related to the constitutional text. But, perhaps inevitably, the foundation rests on soft earth.

One main support for Mashaw's due process structure is the second formulation of Kant's imperative for universality of reason, to treat others as ends and not merely as means. Mashaw suggests that a basis for judicial protection of individual claims to process rights is derivable from the liberal tradition in general and the Kantian instruction in particular. The syllogism that emerges from Mashaw's treatment of Kant is this:

(1) A strong consensus in our liberal tradition says that how we treat people is

11. Hence, all the argument over the derivation of constitutional meaning. *See* Cass, *The Meaning of Liberty: Notes on Problems Within the Fraternity*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 777 (1985).

important and that our treatment should convey respect, including equality as an aspect of respect.

(2) The process of public decisionmaking, as it derives from positive law, does not always conform to this command of respect.

(3) Hence, judicial protection of process rights is appropriate to ensure respect.

Mashaw recognizes that majoritarian decisionmaking itself has a claim as a guarantor of appropriate respect. Indeed, in a cursory reference to Kenneth May's work,[12] Mashaw declares that majority rule is the only decision rule that serves claims of equal respect at least under certain conditions (not noting the substantial debate over the conditions on which May's axiom rests, a debate that suggests less than universal agreement that majority rule is optimal).[13] Majority rule does not invariably produce decisions—especially decisions about processes for delegated decisions—that seem congruent with respect-derived concerns about process. Yet Mashaw also recognizes that process concerns must be balanced against other, competing individual concerns that also deserve respect. These admissions and qualifications undermine the value of liberal thought for solving the controversy between judicial abstentionists and interventionists.[14]

Ultimately, Mashaw's contention is that a constitutional due process provision must, if it is to have any meaning, allow*some* judicial supercession of majority decisions. The real contest is not against complete judicial deference to other branches. Rather, the choice is between deference except when some narrow core of interests is at stake[15] and non-deference in some broader class of cases.[16] Mashaw chooses the latter; but he does so with obvious reserva-

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12. May, *A Set of Independent, Necessary and Sufficient Conditions for Simple Majority Decision*, 20 ECONOMETRICA 680 (1952).

13. *See, e.g.*, D. MUELLER, PUBLIC CHOICE 209-26 (1979).

14. Similar arguments about the power of liberal ideals (sometimes generalized to other abstract conceptions of good) to resolve concrete disputes have been made in numerous other contexts. *See, e.g.* ,M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229; Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103 (1983).

15. For example, when the government immediately, substantially, and directly threatens physical liberty or property now in an individual's possession by a decision based on determinations specifically referring to that individual. *See, e.g.*, Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property,"* 4 HARV. L. REV. 365 (1891); Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926); Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3 (1983).

16. *See, e.g.*, Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clauses Nonjusticiable*, 60 TEX. L. REV. 875 (1982); Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579 (1984); Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978); Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261.

tions—reflected in his prudential compromises—and he cannot convincingly establish the choice as more than a matter of taste. Mashaw emphasizes that the taste, at least in the abstract, is widely shared. There is, however, no ready referendum on the specific applications of this principle or even on its popularity relative to competing abstract conceptions.

The principle's resolving power is also suspect. The four ideal process types are an interesting effort to expand the number of molds into which many courts and commentators would force governmental decisions.[17] Mashaw's effort on this score should be applauded, given the diverse array of interests, issues, and circumstances that define governmental decisions. Yet two of the four process types seem to have quite limited utility. Negotiation may indeed, as Mashaw urges, be the ideal that informs the positivist vision embraced by Justice Rehnquist in *Arnett v. Kennedy,*[18] but if Mashaw would abandon that vision, where can negotiation be invoked as the ideal process? Mashaw's contention must be that, for the *Arnett* plurality, any discharge process ratified by contract is constitutionally acceptable. But the critical question is whether a government can ask its employees to accept certain contract terms.[19] If one does not generally defer to legislative decisions on process, should contracts based on such legislative decisions stand in better stead? Voting, too, would seem to have little use in due process analysis. Voting is not an ideal process for administrative decisionmaking. Instead, like negotiation, voting as an ideal puts in issue the appropriate judicial deference to another decisionmaker.[20] Thus, these two process types simply rephrase the argument that

17. The dominant model of administrative action posits a choice between two types of government decisional processes. For a discussion of this model and its principal competitors and an argument that a richer model with more process types is desirable, see Cass, *Models of Administrative Action*, 72 VA. L. REV. 363 (1986).

18. 416 U.S. 134 (1974). Mashaw also argues that the Court adhered to this vision in Bishop v. Wood, 426 U.S. 341 (1976). *See* p. 241.

19. This is the point often missed by those who stress notions of consent. *See, e.g.*, Snepp v. United States, 444 U.S. 507 (1980) (deciding, almost entirely on contract grounds, that a constructive trust could be imposed on proceeds from a book published in violation of a CIA prepublication clearance requirement; the former government employee argued that the requirement, to which all CIA employees must agree, violated the First Amendment). For discussion of related problems, see Westen, *"Freedom" and "Coercion"—Virtue Words and Vice Words*, 1985 DUKE L.J. 541.

20. Voting by affected parties is seldom used as a decision process for delegated administrative action. Voting becomes a relevant process only insofar as we are willing to defer to elected officials to select appropriate administrative procedures. Thus, voting is less an ideal process type for administrative decisionmaking than an alternative to judicial process selection. In other words, this paradigm restates the question: is deference to other branches appropriate? The question obviously is relevant to due process analysis, but it does not advance thinking about administrative decisionmaking processes to state the deference issue in terms of an ideal process type.

judicial supervision of process is sometimes inappropriate. To the question, "when?," we now reply: when opportunities for democratic participation or negotiation are adequate protection against domination. Here we go again.

The last two processes, administration and adjudication, are general process types that do compete in many arguments over governmental decisionmaking.[21] It is fair enough to argue that each is appropriate in some circumstances. Administrative law in good measure is the elaboration of competing conceptions of when each of these processes should be used.[22] Mashaw argues that one, administration, is useful in resolving fact disputes, the other, adjudication, in resolving conflicts among values.

That said, Mashaw recognizes that the division between administration and adjudication is artificial, and that application of these categories is far from mechanical: "The determination that a decision is allocable to any particular process model is obviously to construct reality, not to find it. Judicial justification of the application of such simplified constructions on the ground that some particular decision necessarily implies one or another particular decision process will strain our credulity to the breaking point." How, then, does Mashaw's approach better guide courts than the approaches he has discarded along the way? Despite his claims for the model of dignitary appropriateness, there is little basis to think that it does offer courts surer footing.

These criticisms in general merely restate points Professor Mashaw himself makes, implicitly or explicitly. In context, his emphasis on conversation and dialogue can be understood as more than a concept of process based in respect for other individuals. It also is a recognition of the difficulty of giving answers to the intractable problems he is tackling. Better to sell one's views as a conver-

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21. *See, e.g.*, K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.3 (2d ed. 1979); Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 DUKE L.J. 103; Pierce, *The Choice Between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy*, 31 HASTINGS L.J. 1 (1979); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965); Smith, *Judicialization: The Twilight of Administrative Law*, 1985 DUKE L.J. 427.

22. *See* Cass, *supra* note 17. Argument over the respective roles of adjudication and administration is not, of course, the sole focus of administrative law. Efforts to enrich the administrative law dialogue are numerous. *See, e.g.*, Cass, *Black Robes and Blacker Boxes: The Changing Focus of Administrative Law*, 1984 DUKE L.J. 422; Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981); Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771 (1975); Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537 (1983); Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195 (1982).

sation than a solution. And, even if he is no better than a number of predecessors in this field at defining due process, Mashaw is an excellent conversationalist.

As with due process, conclusions about *Due Process in the Administrative State* lend themselves to metaphor. The book is perhaps best analogized to a train ride. The route is at times difficult to discern. The scenery is interesting, lush, and varied; its order sometimes surprising. Veteran travellers will find much of the scenery familiar but also will note that many passing vistas appear in a new light. Although the journey covers considerable ground, no one will be bored on the trip. On disembarking, most will notice that they arrived back where they started. But everyone should feel curiously refreshed and glad that they went.

LIBERALISM AND AMERICAN CONSTITUTIONAL LAW. By Rogers M. Smith.[1] Cambridge, Mass.: Harvard University Press. 1985. Pp. 1, 328. $22.50.

Kirk Emmert[2]

The law, and particularly American constitutional law, is not self-contained. There are both practical and theoretical obstacles to confining the meaning of the Constitution to a strict reading of the words of the text supplemented, perhaps, by the clear intention of its framers. Our fundamental law points beyond itself, both down to the political forces and consensus that generate and support it, and up to the broader political and moral purposes to which it is finally instrumental. Constitutional law, understood as a mediator between regime purposes and principles and everyday political life, necessitates a Supreme Court that, as Tocqueville argued, is a political as well as a legal institution.

But if this view is more true to the nature of our constitutional law than the narrowly legalistic view, it too is problematic and raises a host of difficulties. How can we prevent infrequent, principled, and well-considered exercises in judicial statesmanship from giving way to frequent, unprincipled, and ill-considered fiats? Is there an understanding of the judicial task that promises to reduce instances of judicial imperialism by guiding and restraining judges as they move beyond the law to the broader purposes that it serves? Is an unelected Court, which is also a powerful political institution,

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