

Book Review

Common Law Court or Council of Revision?

Interpreting the Constitution. By Harry H. Wellington.* *New Haven: Yale University Press, 1990. Pp. xii, 189. \$22.50.*

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I

Harry Wellington's *Interpreting the Constitution* offers a highly readable, provocatively old-fashioned, and somewhat complacent account of constitutional decisionmaking by the Supreme Court. The book is the first in a projected series of discussions of legal topics for lay readers,¹ and the style is lucid and engaging. But *Interpreting the Constitution*, which provides brisk critiques of leading constitutional theories as well as an affirmative thesis that constitutional adjudication should adhere to a "common law method," also presents a challenge to much of the recent constitutional scholarship produced by academic lawyers for other academic lawyers.

Wellington's critical arguments generally achieve their aims. He exposes flaws in the theories he discusses and reveals the dubious foundations of an entire genre of scholarship that calls upon Supreme Court Justices to cast themselves as political philosophers.

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1. HARRY H. WELLINGTON, *INTERPRETING THE CONSTITUTION*, at ix (1990) [hereinafter cited by page number only].

His affirmative arguments require a more complex assessment. On the one hand, Wellington argues that his preferred "common law method" reflects tried-and-true norms of craft that both structure Supreme Court decisionmaking and mark a path to substantively acceptable results.² Writing in this vein, he makes constitutional adjudication by the Supreme Court sound comfortingly like the kind of adjudication historically and relatively unproblematically performed by other courts.³ On the other hand, Wellington repeatedly emphasizes the "political" dimension of Supreme Court adjudication.⁴ He suggests that the Court's decisionmaking should be responsive to public opinion,⁵ and he welcomes public efforts—such as protest marches on the Court building—to influence the Justices.⁶ He also recognizes that legal conventions can and do change,⁷ substantially in response to Supreme Court practice. In sum, Wellington frequently writes as if the Supreme Court were a moral and political decisionmaker, relatively unconstrained by distinctively legal norms. Indeed, although he does not expressly draw the comparison, much of his prose suggests that the Supreme Court has less in common with a paradigmatic common law adjudicator than with the Council of Revision proposed but rejected at the Constitutional

2. Pp. 77-123.

3. In the eyes of some, common law adjudication—the characteristic stock and trade of American courts and the type of judicial decisionmaking to which Wellington attempts to assimilate constitutional adjudication—has never been unproblematic at all. Bentham, for example, did not regard the common law as "law" properly so-called. See Jeremy Bentham, *A Comment on the Commentaries*, in *A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT* 161-62 (J.H. Burns & H.L.A. Hart eds., 1977). Two features arguably give common law adjudication a suspect character. First, because common law rules frequently lack any agreed canonical formulation and extend no further than their rationales, "it appears as if the common law allows its rules to be remade in the process of application." Frederick Schauer, *Is the Common Law Law?*, 77 CAL. L. REV. 455, 455 (1989). Second, "the values that guide a common law court in modifying or discarding what had previously been thought to be a rule of law are moral, economic, social, and political." *Id.* at 456. If rights can be overridden or adjusted in light of such considerations, concerns arise about whether they are truly "rights" at all.

More typically, however, the common law tradition is an object of celebration, not excoriation, for it is largely within the common law tradition that Western ideals of the rule of law and about the judicial function in a government of separated powers took root. As thus celebrated, common law adjudication occurs in the shadow of the legislature, which enjoys undoubted power to revise or set aside common law rules, see GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 4 (1982), and is relatively tightly structured by conventions of legal reasoning, including stare decisis. On this model of common law adjudication, the role of common law judges is a modest one, and change typically occurs only slowly, since the legitimacy of judicial lawmaking depends at least partly on adjudication proceeding case-by-case and in the shadow of the legislature. See *id.* at 75 ("slowness in common law change" is "almost inevitable" since legitimacy of any common law change at all "depends . . . on a willingness of courts to make law incrementally and tentatively"). Wellington quite clearly wants to invoke the image of common law adjudication as familiar and convention-bound, rather than problematic or unconstrained. See, e.g., p. 86 (arguing that constitutional decisionmaking is "constrained by the methodological and substantive conventions of adjudication").

4. E.g., pp. 29, 83, 157.

5. E.g., pp. 96-123, 142-58.

6. Pp. 156-57.

7. Pp. 14-19.

Convention.⁸ Such a council could have vetoed legislation on grounds of morality or prudence, not just irreconcilability with constitutional commands.⁹

Wellington, I suspect, would deny any dualism in his thought that is not also reflected in the institution he aims to portray.¹⁰ The Supreme Court, he would probably contend, is neither a common law court nor a Council of Revision, but is partly, and only imperfectly, analogous to each. Even so, *Interpreting the Constitution* exhibits a residual two-mindedness that seems to me to be interestingly representative of prevailing constitutional scholarship. In certain moods, or when certain purposes are in mind, many observers tend to view the Supreme Court as just another court, higher in the constitutional hierarchy but constrained by the same obligation of fidelity to law as any other tribunal¹¹—the sort of institution that Hamilton probably envisioned when he characterized the judiciary as “the least dangerous branch.”¹² When the Supreme Court deals sloppily or dismissively with precedent, we condemn it as lawless,¹³ and we worry that the Justices might pursue too political an agenda. At other times, however, we think of the Court as a policymaker or moral

8. A Council of Revision was included in the series of resolutions that were proposed by Governor Edmund Randolph of Virginia on May 29, 1787, and that became the focus of discussion when the Convention began to meet as a Committee of the Whole. See 1 THE RECORDS OF THE FEDERAL CONVENTION 20-23 (Max Farrand ed., 1911) [hereinafter FEDERAL CONVENTION RECORDS]. Randolph's draft provided:

Resd. that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate . . . and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed . . . by ___ of the members of each branch.

Id. at 21. The provision for a Council of Revision disappeared from the Convention's working draft on June 4, when the delegates voted (with six states in favor and four against) to vest the veto power in the “national Executive” alone. *Id.* at 94. Motions to reconsider this action and to restore the Council of Revision were defeated on June 6, July 21, and August 15. See *id.* at 131, 138-40; 2 *id.* at 71, 80.

9. See 2 *id.* at 73-74 (remarks of James Wilson) (“Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature.”).

10. Wellington begins the book with an account of the “dualism” inherent in the Court's roles of deciding individual disputes and regulating the future. P. 3.

11. See, e.g., Christopher Edley, Jr., *Mr. Justice Thurgood Marshall: A True Commitment to the Rule of Law*, BOSTON GLOBE, June 30, 1991, at 60 (the rule of law forbids Supreme Court decisionmaking to be “nothing more than politics by other means” and such decisionmaking cannot simply “twist and turn with the politics of judicial retirements, appointments, and Senate confirmation”); cf. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 10 (2d ed. 1988) (seeking “the outlines of an answer” to why the Constitution should be regarded as legitimately barring legislation favored by current majorities in “the parable of the pigeon”—an experiment showing that pigeons sometimes prefer to “bind their ‘own future freedom of choice’”) (citing G.W. Ainslie, *Impulse Control in Pigeons*, 21 J. EXPERIMENTAL ANALYSIS BEHAV. 485 (1974)).

12. THE FEDERALIST NO. 78 (Alexander Hamilton).

13. See, e.g., *Payne v. Tennessee*, 111 S. Ct. 2597, 2625 (1991) (Marshall, J., dissenting) (criticizing Court's failure to follow doctrine of *stare decisis* as encouraging “blatant disregard for the rule of law”); Edley, *supra* note 11; Richard H. Fallon, Jr., *Reflections on Dworkin and the Two Faces of Law* (Sept. 12, 1991) (unpublished manuscript, on file with author).

conscience.¹⁴ It is time, we say, to be honest about how political constitutional adjudication inevitably is.¹⁵

Is the Supreme Court more properly assessed under the standards applicable to a common law court or under criteria fit for a Council of Revision? Sometimes intentionally and sometimes unintentionally, Wellington's book suggests that, if we are to appraise the Supreme Court's performance coherently, it is time we got our paradigms in order.

II

Interpreting the Constitution deals with a practice of judicial review that is subject to perennial, if not perpetual, legitimacy crises.¹⁶ The Constitution is law, and we tend to equate law with constraint.¹⁷ Even the Supreme Court is supposed to be bound by law.¹⁸ At the same time, many of us assume that there must be a link between law, especially constitutional law, and justice. Recent scholarship emphasizes this connection.¹⁹ Rejecting "authoritarian" demands for adherence to the plain meaning of an old text and its original understanding,²⁰ this work calls on the Justices of the Supreme Court to function as moral philosophers. On this view, the Justices should make our constitutional law morally the best it can be—though what will count as morally best depends on what theory of moral philosophy a Justice happens to subscribe to.

Wellington cuts concisely through the modern debate as he understands it. Originalism, he argues, fails to produce the kind of constraints that its adherents seek.²¹ Justices would have a way of finding that the Constitution's Framers intended what the Justices think the Framers ought to have intended.²²

14. See, e.g., TRIBE, *supra* note 11, at 584 (Supreme Court must make "difficult substantive choices among . . . inevitably controverted political, social, and moral conceptions"); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1266-68 (1987) (discussing Supreme Court's need to make controversial value choices).

15. See, e.g., TRIBE, *supra* note 11, at 584 ("[A]ll significant constitutional judgments . . . are inescapably political."); Fallon, *supra* note 14, at 1266-68; Christopher Edley, Jr., *Doubting Thomas: Law, Politics and Hypocrisy*, WASH. POST, July 7, 1991, at B1 ("[O]nly ideology—theory laced with political preferences—can provide us with an answer" to difficult questions about "where to draw the line between legislating from the bench and mere interpretation of statutes or the Constitution.").

16. Pp. 26, 47.

17. See, e.g., Margaret J. Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989).

18. It is eagerness to constrain the Court that gives currency to the politically charged concept of "originalism"—the idea that the Constitution must be interpreted to mean what it was understood to mean by those who wrote and ratified it. On the varieties of originalism, see Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

19. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* (1986); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

20. Michelman, *supra* note 19, at 1496.

21. Pp. 57-60.

22. Wellington relies heavily on the example of Justice Hugo Black, an adherent of originalist methodology, but also a Justice that Wellington credits with giving the Warren Court, much of whose work "[t]oday's originalists seek to overturn," "at least as much [of its substantive direction] as anyone else did." P. 58.

Wellington brings a similar charge against John Ely's representation-reinforcement theory, which calls for judicial deference to the judgments of politically accountable institutions except when entrenched groups attempt to thwart democratic change or prejudice corrupts the political process.²³ Wellington argues that judges would need to make contestable decisions in order to implement this theory; like originalism, it might hide but could not eliminate the need for courts to make value judgments.²⁴ According to Wellington, Ely's theory shares with originalism another, more disturbing defect: both encourage judges to ask the wrong questions. The Supreme Court, Wellington suggests, should accept responsibility for producing a body of constitutional law that is workable and morally acceptable, and it can best carry out this task by proceeding in the traditional, lawyerly way of framing principles appropriate to the case at hand.²⁵

Wellington parts company here with those who would convert the Supreme Court to a philosophers' academy. The Justices, Wellington argues, are practical lawyers, not philosophers, and their job requires negotiation and compromise.²⁶ If we asked the Justices to become philosophers, we should expect not only bad philosophy but worse law than we have now.²⁷

III

Many of Wellington's best arguments, as he recognizes, are old-fashioned and derivative. In particular, his approach reflects the work of two former Yale colleagues, Charles Black²⁸ and Alexander Bickel.²⁹

From Black, Wellington takes the important insight that judicial review is as functionally crucial when it "legitimizes" as when it invalidates government

23. See JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980).

24. Pp. 67-71.

25. Pp. 77-123.

26. Pp. 15, 80-82.

27. Although he denies that constitutional adjudication is a form of moral philosophy, Wellington does not suggest that moral values are irrelevant to the Supreme Court's mission. On the contrary, he emphasizes that the Constitution is an open-ended text, *e.g.*, pp. 48, 72, 77, and that its interpretation is inextricably bound up with values and politics, *e.g.*, pp. 83, 158. For a discussion of the nature of this connection, see *infra* text accompanying notes 40-46.

28. See CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* (1960).

29. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962). *Interpreting the Constitution* is distinctively a Yale book. Wellington takes particular aim at the approaches of two other former Yale colleagues, Robert Bork and John Ely. Each, Wellington argues, would constrain the judicial role too narrowly. See pp. 44, 66-72. Among constitutional theorists coming after the generation of Black and Bickel, Yale professor Bruce Ackerman is singled out as having important insights. See pp. 65-66. Wellington's theory of interpretation also shows the pervasive influence of one-time Yale professor Ronald Dworkin. The book is therefore an interesting reminder of how much Yale Law School has contributed to constitutional law and theory. Is it churlish to wonder whether Wellington might have benefitted from a similar engagement with the ideas of Harvard's Frank Michelman or Chicago's Cass Sunstein?

action.³⁰ Measured against original intent and understanding, many of the central functions and institutions of modern government would be constitutionally problematic.³¹ The Framers never contemplated, and the Constitution makes no specific provision for, federal regulation of an integrated national economy, independent agencies, or a welfare bureaucracy. Although Congress and the executive branch have taken the lead in structuring a government adequate to changing times, the courts have played a vital role in conferring legitimacy. The Supreme Court, as disinterested an arbiter as our system can furnish,³² has legitimated the pertinent adaptations not as naked assertions of power but as reasonable accommodations that do not threaten fundamental constitutional principles.

Legitimation is, of course, less troublingly "counter majoritarian"³³ than judicial invalidation.³⁴ It is sometimes argued that the appropriate approach would be one of judicial deference to the political branches.³⁵ To this argument Wellington gets his best response, which he quotes at least three times, from Bickel: Actions by politically responsive officials frequently have two aspects—their immediate, intended effect in responding to some perceived problem and their secondary, easily overlooked impact on time-honored principles.³⁶ Courts, Bickel argued, are more likely than legislatures to function as effective custodians of long-term values.³⁷

Here, however, a familiar dilemma emerges. How is the Supreme Court to protect moral values without becoming a moral tyrant? Wellington appears to believe that the Supreme Court makes law in every practical sense,³⁸ based on substantially moral judgments, but in doing so poses little threat of moral tyranny. He offers at least four arguments in support of this belief.

First, Wellington claims that the Justices are bound to rely on "public morality," rather than their own, when allowing values to influence constitutional decisions. He rightly refrains, however, from giving this argument too much weight. Among other difficulties, Wellington is never wholly clear about what "public morality" is. He says that public morality must be identified through a "unique form of interpretation"³⁹ that attends to "widely shared"⁴⁰ attitudes, and he illustrates his understanding by imagining how "we"⁴¹ would respond

30. See pp. 24-25. For Black's pioneering discussion, see BLACK, *supra* note 28, at 46-86.

31. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

32. P. 84.

33. E.g., p. 26. The term comes from Bickel. See BICKEL, *supra* note 29, at 16.

34. As Charles Black pointed out, however, the Supreme Court could not effectively perform its legitimating function if it lacked a mandate to invalidate as well. BLACK, *supra* note 28, at 53, 87.

35. Pp. 72-74.

36. Pp. 25, 29, 83.

37. BICKEL, *supra* note 29, at 24-28.

38. See, e.g., pp. 7-8.

39. P. 86.

40. *Id.*

41. P. 115.

to a variety of hypothesized moral questions related to marriage, contraception, and abortion.⁴² But he never quite comes to grips with the challenge posed by cultural pluralism.⁴³ Even more importantly, Wellington acknowledges that the identification of public morality is an "interactive"⁴⁴ process, in which the views that a Justice begins with will often influence what she finds.⁴⁵ Indeed, Wellington goes a step further. The Justices, he maintains, should try "to 'read' public values in a way that accentuates what they . . . believe to be desirable for the country."⁴⁶

As a second guarantee that judicial lawmaking will not amount to moral tyranny, Wellington calls attention to conventions of legal reasoning.⁴⁷ Familiar conventions establish, for example, that courts, including the Supreme Court, must acknowledge the relevance of various sources of authority and must follow precedent unless they can persuasively distinguish or are prepared to overrule it. But the restraints of convention—though they undoubtedly exist—are comparatively weak at the Supreme Court level. The Court need not tailor its interpretive process to avoid reversal by some higher body. It is free to overrule its own precedents. Loose theories of precedent accord the Justices great flexibility in identifying what past decisions stand for. Moreover, the applicable conventions are subject to change,⁴⁸ and the Supreme Court has important power in defining what the conventions are.

Third, Wellington notices that Supreme Court decisions frequently are less "final" than is widely assumed.⁴⁹ The Court often rests its holdings on nonconstitutional grounds and thereby permits legislative revision. Prior cases can be distinguished or overruled when subsequent developments suggest that the Court misgauged public morality. As Wellington appreciates, however, the Court need not take any of these steps. It has sometimes held its ground against manifest popular sentiment,⁵⁰ and it may do so again.

42. Pp. 99-123.

43. Cf. Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713 (1988) (emphasizing diversity of American subcultures and risks of attempts at homogenization).

44. Pp. 86, 149.

45. See p. 149.

46. Pp. 149-50.

47. See, e.g., pp. 14-17, 80, 86-87.

48. Pp. 14-17.

49. E.g., pp. 34-40.

50. During the roughly three decades of the so-called *Lochner* era, beginning about the time of *Lochner v. New York*, 198 U.S. 45 (1905), and persisting into the mid-1930's, the Supreme Court struck down nearly 200 regulations on substantive due process grounds. GERALD GUNTHER, *CONSTITUTIONAL LAW* 445 (12th ed. 1991). "Regulations of prices, labor relations (including wages and hours), and conditions for entry into business"—which both the state and national legislatures persisted in enacting—"were especially vulnerable." *Id.* at 444-45. More recently, the Supreme Court refused to yield after its decision invalidating a state statute prohibiting flag desecration, *Texas v. Johnson*, 491 U.S. 397 (1989), triggered swift enactment of the Flag Protection Act of 1989. Although passed by "overwhelming majorities in each house [of Congress]," GUNTHER, *supra*, at 1246, the Act was held unconstitutional by the Supreme Court in *United States v. Eichman*, 110 S. Ct. 2404 (1990).

Wellington therefore places principal reliance on his final argument against the possibility of moral tyranny by an unelected judiciary: the Supreme Court is subject to political constraints. There are limits, he argues, to the public's capacity to "digest" judicial pronouncements of constitutional norms.⁵¹ The notorious *Dred Scott* case,⁵² according constitutional protection to slavery in the federal territories, proved indigestible in Wellington's sense. So, by the end, had the substantive due process doctrine of the *Lochner* era.⁵³

IV

Although Wellington sees politics and digestibility as setting the outer bounds of judicial power, he also believes that there are norms of craft that, if followed by the Supreme Court, are conducive to decisions that are not only tolerable but also wise, prudent, and morally attractive.⁵⁴ It is debatable, of course, whether such norms exist and, if they do, whether they are attractive.⁵⁵ But Wellington takes a generally optimistic view.⁵⁶ The path to constitutional wisdom, he says, lies in "the common law method."⁵⁷ Unfortunately, perhaps the least successful sections of *Interpreting the Constitution* are those aimed at explicating the common law method as Wellington conceives it.

Wellington's main idea seems to be that courts should reach constitutional decisions by relying on at least five different kinds of "sources of law": the Constitution's text, its structure and history, precedent, and public morality.⁵⁸ But beyond enumerating these sources, and suggesting that the ways in which courts deal with them are familiar,⁵⁹ Wellington offers no systematic exposition. Instead, he uses a specimen case to exhibit his idealized method, and that case, involving the constitutional permissibility of abortion regulation, seems ill-adapted to its purpose. Wellington's argument that public morality supports

51. *E.g.*, pp. 19, 40, 127-58.

52. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

53. *Lochner v. New York*, 198 U.S. 45 (1905). It is digestibility, or resonance with widely and staunchly held public values, that Wellington sees as marking the distinction between modern substantive due process cases that identify fundamental liberty or privacy interests—of which he treats *Griswold v. Connecticut*, 381 U.S. 479 (1965), as paradigmatic—and now discredited cases, such as *Lochner*, that were concerned with economic liberties. *See* pp. 94-95.

54. Although Wellington does not expressly draw the distinction, I take him to acknowledge a difference between the rules, conventions, and political forces that define the outer bounds of law, transgression of which would count as judicial lawlessness, and the norms of craft that mark judicial excellence within the bounds of law.

55. Wellington worries that the relevant norms have too often reflected the characteristic values and prejudices of white males. *See* pp. 16-19.

56. He himself more commonly describes his view as "not pessimistic," p. 13, or "nonpessimistic," p. 15.

57. P. 78.

58. *See* pp. 84, 86, 88-89.

59. P. 127.

a scheme of abortion rights similar to those recognized in *Roe v. Wade*⁶⁰ seems suspect in his own terms, since he appears to acknowledge that *Roe* may prove “undigestible” in the roiled stomach of public opinion.⁶¹

The methodological claim that grounds Wellington’s discussion is this: Justices of the Supreme Court should identify principles that deserve judicial protection in the constitutional text, but they should determine the “weight” of those principles—their capacity to overcome competing considerations—by reference to public morality.⁶² Exactly where in the constitutional text, however, is the liberty interest in abortion rooted? If in the Due Process Clause’s prohibition against the deprivation of “life, liberty, or property, without due process of law,”⁶³ then there would be a constitutional root for literally any “liberty interest” that anyone might wish to claim. For all practical purposes, the constitutional text would vanish from the picture. The weight of interests, and weight alone, would matter.

Wellington may have something more specific in mind. Perhaps he thinks that interests in bodily autonomy that are related to sexuality and procreation have a more specific textual pedigree, not in the spare words of the Constitution, but in judicial precedent.⁶⁴ If this is so, however, he ought to explain how lines of precedent permissibly get started. Or perhaps, again, he means that text and precedent are both relevant, but that public morality should determine the correct way to read them. All that seems certain is that Wellington should say more about how the various “sources of law” interact in constitutional decisionmaking.

Absent further elaboration, the discussion of abortion rights leaves the impression that the Supreme Court should take its direction less from any text than from its conception of public morality and its view of when judicial intervention is appropriate to protect long-term values. The Court, as Wellington sometimes says explicitly, is an institution of governance⁶⁵ with a responsibility for helping to produce a body of law that is both functional and perceived by the public as fair. Indeed, much of his prose suggests that the Supreme Court is a political decisionmaker hemmed in only by the concern that its decisions must not prove indigestible.⁶⁶

60. 410 U.S. 113 (1973); see pp. 99-109. Although Wellington claims that arguments based on public morality support the recognition of constitutional abortion rights, he acknowledges that these arguments “do not justify the sweep of *Roe v. Wade*,” p. 108, and that *Roe*, “when decided in 1973, went too far,” p. 109.

61. See pp. 155-58.

62. See pp. 84-85.

63. U.S. CONST. amend. V.

64. Wellington seems to put heavy weight on the entrenched status of *Griswold v. Connecticut*, 381 U.S. 479 (1965), and other cases recognizing the existence of substantive liberty interests that are protected under the Due Process Clause. See pp. 88-95; see also p. 84 (arguing that Court must articulate and reinterpret principles used to interpret Constitution in past).

65. E.g., p. 3.

66. See, e.g., pp. 40, 158.

The passages in which Wellington paints the Supreme Court as a political decisionmaker in this sense—a partial analogue to the rejected Council of Revision—are among the most striking in the book. Wellington says plainly that the Court has two roles: resolving individual disputes and, more importantly, propounding effective regulatory rules.⁶⁷ Indeed, Wellington suggests that the Court, in playing the latter role, has revisory powers that are greater in some ways than those contemplated for the Council of Revision proposed at the Constitutional Convention. For the Supreme Court can revise whole bodies of doctrine, not just reject proposed legislation, and it can also revise the conventions of legal analysis that govern decisionmaking in the lower courts.⁶⁸ Finally, vetoes of legislation by the Council of Revision would have been subject to congressional override.⁶⁹ The most important decisions of the Supreme Court typically are not.⁷⁰

There is a good deal of insight in this bracing portrait of Supreme Court power and responsibility,⁷¹ which is the more startling for being presented in plain language, shorn of philosophical pretense, that draws support mostly from older works of scholarship. It is unclear, though, whether Wellington wishes to endorse this view, however immanent it may be in much of his book. For his formal claim, as I have said, is that the Supreme Court characteristically does and should adhere to a common law method of constitutional adjudication. And this implies, according to Wellington, that the Court must treat public morality as a source of law, but is otherwise deeply “constrained by the methodological and substantive conventions of adjudication.”⁷² Wellington seems ultimately to be of two minds about this issue, and the strands of his thought do not easily coexist. As I have suggested already, so it may be with many of us.⁷³

67. P. 3.

68. P. 148.

69. See 1 FEDERAL CONVENTION RECORDS, *supra* note 8, at 21.

70. *But cf.* pp. 34-38 (explaining how some Supreme Court decisions can in fact be overridden by Congress).

71. In carrying out its responsibility to help produce a workable and acceptable body of law, the Supreme Court is undoubtedly a more distinctively judicial body than the proposed Council of Revision. Not only does the Court produce reasoned opinions, full of citations to distinctively legal authority; it also refuses to render “advisory opinions,” and its adjudication of concrete “cases” tends to focus the issues presented for decision on the factual setting of a particular dispute. But when the national interest in a swift judicial resolution of a general constitutional question is clear, especially when Congress has enacted facilitative legislation, the Supreme Court has shown a willingness to render “declaratory judgments” even on the constitutional permissibility of omnibus statutes such as the Federal Election Commission Act and its 1974 amendments. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976).

72. P. 86.

73. See *supra* notes 10-15 and accompanying text.

V

Although Wellington frequently portrays the Supreme Court as a comparatively freewheeling, relatively political, yet philosophically undisciplined decisionmaker, his tone is generally complacent. He is uninterested in infusing the methodology of Supreme Court adjudication with philosophical rigor. The Court, he suggests, is not very philosophical now, yet is doing fine when its performance is viewed in the long term.⁷⁴

Wellington by no means eschews the giving of advice, however. Beyond commending continued adherence to the common law method, he counsels that the Justices should draw insight from an abundance of sources and perspectives. He welcomes the pluralization of the legal culture, as the clubby conventions of a practice dominated by white, middle and upper class males encounter increasing resistance from those who find covert biases in traditional modes of analysis.⁷⁵ Indeed, he suggests that Supreme Court deliberations should reflect the views of all segments of society.⁷⁶

Because he views Supreme Court decisionmaking as substantially political, Wellington regards the selection of Supreme Court Justices as appropriately political as well.⁷⁷ He argues that both the President and the Senate are entitled to take an interest in a prospective Justice's opinions about the role of the Supreme Court in general and about controversial issues in particular.⁷⁸ He similarly welcomes demonstrations, marches, and other peaceful displays designed to influence the Court's assessment of public morality.⁷⁹

74. In an occasional departure from this theme, Wellington argues that the Court does better to root its conclusions in arguments of principle than in concerns of instrumental expediency. Pp. 135-40. He suggests, for example, that the Court was on treacherous territory when it justified the rule of *New York Times v. Sullivan*, 376 U.S. 254 (1964), which protects even false and defamatory statements about public officials unless the speaker acted with "reckless disregard" for the truth, on the ground that this standard is necessary to prevent the chilling of politically valuable speech. Wellington appears to view the case as rightly decided but wrongly reasoned. Criticizing the Court's argument that without "breathing room" the press might become too timorous, he argues that the Court is no expert on these matters and ought not risk being proved wrong by relying on predictive and empirical judgments. Pp. 136-40. But the line between the Court's resting a decision on (1) a judgment of principle and (2) a judgment of what is practically necessary to vindicate a principle is exceedingly fine. See David Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 192-205, 207 (1988) (denying existence of sharp distinction between "prophylactic" rules and rules commonly accepted as reflecting interpretation, and affirming that courts "constantly . . . create constitutional doctrine by taking into account both the principles and values reflected in the relevant constitutional provisions and institutional realities"). Although Wellington says the Court's job is to lay down regulations for the future, see, e.g., p. 3, he occasionally sounds as if he would deny it the tools to perform this function effectively.

75. Pp. 17-19.

76. See p. 155.

77. See pp. 150-53.

78. Although Wellington accepts a politicized appointments process, he offers several implicit cautions, of which one seems especially timely. The Supreme Court is in its own way a representative institution, with a special responsibility at least to appreciate the varied moral outlooks that help to comprise what Wellington terms our "public morality." "[A] public morality must be as inclusive as possible," he writes, "and adjudication needs its substitutes for the access and accountability that theoretically exist where regulation is by legislation." P. 155.

79. See pp. 156-57.

This analysis seems sensible in its own terms, but it again highlights the duality in Wellington's thought. On the one hand, he says the Supreme Court is an appropriately political and indeed politicized institution; but on the other hand, he tells us, its methodology characteristically has been and should continue to be the familiar, convention-bound, lawyer's approach associated with common law adjudication. Can he—can we—have it both ways?

If he can, it must be because two of the most crucial terms in his analysis—"common law" and "political"—are exceedingly loose. Wellington's references to common law adjudication typically associate it with the traditional, the familiar, the unproblematic. Much, if not most, of the time, his is the common law tradition of complacent lawyers and patriotic orators: the engine that slowly, incrementally, and in the shadow of the legislature maintains a tolerable coherence between legal doctrine and society's changing needs and moral outlook.⁸⁰ But there is, of course, another side. Some have questioned whether the common law, which allows judges to weigh policy concerns and to revise rules in the process of applying them, properly deserves to be called "law" at all.⁸¹ Common law judges, on this view, look disconcertingly like policymakers.

The term "political" is, if anything, even more variable in range and connotation. What does it mean for a judicial decision or philosophy to be political? It may help to distinguish three (among many) possible meanings.⁸² First, a decision may be "political" in the sense of being calculated to influence someone else's subsequent voting decision. Decisions by electorally accountable officials are often thought to be political in this way. Similarly, it is at least imaginable that judges might trade votes or frame their decisions with an eye toward influencing the outcome of elections. Second, a decision may be "political" in the sense of reflecting a view about what is fair or just that is testable only under the ordinary, contestable standards of debate concerning questions

80. See *supra* note 3.

81. See *supra* note 3.

82. Some of the best, recent works of constitutional theory have distinguished among different kinds of "politics." See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6-33, 230-322 (1991) (distinguishing "normal" politics, in which most citizens' degree of engagement with fundamental issues is relatively low, from "constitutional" politics, in which aroused citizenry engages seriously and deeply with issues of justice and appropriate governmental structure); Michelman, *supra* note 19, at 1503-15 (distinguishing "republican" or "jurisgenerative" politics, involving deliberation building upon and aiming to achieve normative consensus, from "pluralist" politics, in which individuals and groups seek to advance their particularistic interests); Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1542-58 (1988) (distinguishing "pluralist" politics, in which citizens and groups strive to advance preconceived interests, from "republican" or "deliberative" politics, aimed at identifying through deliberation a shared conception of the public good) [hereinafter Sunstein, *Republican Revival*]; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29, 31-33, 45-59 (1985) (distinguishing "pluralist" or "factional" politics, in which groups and individuals seek to promote private interests, from "republican" or "Madisonian" politics, characterized by aim of identifying and promoting public good) [hereinafter Sunstein, *Interest Groups*].

of ultimate good and right.⁸³ Adjudication would be unavoidably political in this sense if legal reasoning could not be meaningfully distinguished from moral reasoning. Third, a decision might be “political” by involving judgments of what is good or right under particular circumstances, but still be constrained in a way that purely moral or political decisions are not. A process of decision might be political in this third way and yet be subject to either or both of two constraints. Applicable rules or conventions might create only a bounded discretion to take moral or policy considerations into account. For example, it might be agreed that moral principles should be appealed to only to resolve uncertainties arising from the vagueness, open texture, or ambiguity of a set of written rules. Moreover, rules or conventions might limit the substance of the moral values that a court could accord weight.

Wellington suggests that accepted conventions of adjudication, as reflected in Supreme Court practice, allow constitutional decisions to be political only in something like the third, constrained sense⁸⁴ and that, so long as this is so, political adjudication by the Supreme Court is analogous enough to common law decisionmaking so as not to be especially troublesome. But the argument does not quite come off. First, and most obviously, the Supreme Court’s constitutional pronouncements do not, like those of a common law court, occur in the shadow of a legislature with primary lawmaking responsibilities. How much like a common law court could a Court with such nearly ultimate powers be?

Second, it is doubtful that the relevant conventions effectively constrain the Supreme Court to the extent that the common law analogy suggests. As Wellington appears to recognize, there are no clear legal bounds to the ability of a majority of the Court to alter not only specific doctrinal rules, but also the general framework within which the lower courts approach constitutional issues. The requirement of political digestibility defines the operational outer limit.⁸⁵

Third, however much the Court may have respected generally restraining conventions in the past, today those conventions may be loosening, largely due to the political culture surrounding Supreme Court appointments. During the past decade, Supreme Court nominations and confirmation proceedings have become more “political”—in the distinctive sense of being deeply influenced

83. Cf. ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 18 (1983) (“The rationality for which [an appropriately] expanded version of legal doctrine can hope is nothing other than the modest and potential but nevertheless significant rationality of the normal modes of moral and political controversy.”).

84. See, e.g., p. 82 (“While it is not quite true . . . neither is it false . . . that constitutional interpretation is the practice of principled, non-partisan politics.”). *But cf.* p. 81 (acknowledging that “[i]n the contest for votes, it would appear that in addition to reasoned arguments justices have used personal flattery and emotional appeals, and have even traded votes,” and accepting judicial negotiation as “a source of law”).

85. See p. 19 (characterizing political digestibility as most important constraint on judicial “reshaping” of law); see also pp. 40, 127-58 (discussing “the politics of the indigestible”).

by specific public policy agenda and partisan electoral interests⁸⁶—than at any time since the New Deal. Moreover, this increasing politicization of the nomination process⁸⁷ has occurred at a time when the Court has assumed, and is widely expected to play, a larger role in shaping rules for the nation's governance than at any time since the Marshall Court.⁸⁸ As Justices who are nominated and confirmed in this political climate increasingly dominate the Court, there is less reason than before to believe that the Court will approach its task in the deliberate, cautious way typically associated with common law decision-making.

Justice Thurgood Marshall believes that a brave new era of political decisionmaking has already begun. Just before announcing his retirement from the Court, Marshall leveled a parting blast at his colleagues for their willingness to overturn settled doctrine.⁸⁹ "Power, not reason, is the new currency of this Court's decisionmaking," he said.⁹⁰ Marshall claimed that the Court was failing to act in an appropriately judicial manner, by which he presumably meant that it should proceed like a common law court—cautiously, incrementally, and with a heavy presumption against innovation.

Marshall's charges are by no means implausible,⁹¹ but they raise an issue of their own about consistency in appraisal: Does Marshall's critique exhibit the same kind of dualistic thinking that I have criticized in Wellington? Surely it would have been astonishing to hear Marshall direct a similar critique at the Warren Court, or at the Court of the late New Deal, both of which were fully as revisionary as the current Rehnquist Court. It is all too easy to laud the Supreme Court as a Council of Revision when we like its substantive drift, but to hold it to the standards of a common law court when we do not.⁹²

86. See John H. Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different From Legislatures*, 77 VA. L. REV. 833, 843-44 (1991).

87. See *id.* at 848-49.

88. Although there is a long history of Presidents attempting to appoint Justices with congenial views, see LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985), the Court has not always enjoyed the prominent role that it has today, and many of the early Senate rejections of Supreme Court nominees involved state politics and similarly parochial disputes in an era when the Justices were required to "ride circuit." See Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146 (1988).

89. See *Payne v. Tennessee*, 111 S. Ct. 2597, 2619-25 (1991) (Marshall, J., dissenting).

90. *Id.* at 2619.

91. Over the past couple of Terms the Supreme Court has acquired a powerful, substantively conservative momentum. See, e.g., Robin West, *The Supreme Court, 1989 Term—Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 53-60 (1990). A majority has either overruled or, more commonly, brushed aside a number of precedents that stood in the way of its preferred results. See, e.g., *Payne*, 111 S. Ct. at 2597 (overruling two prior cases); *Employment Division v. Smith*, 110 S. Ct. 1595, 1599-1606 (1990) (distinguishing and limiting cases finding facially neutral state legislation imposing disproportionate burdens on members of particular religious groups must be justified by reference to "compelling state interest").

92. There are a number of fascinating parallels between the Warren and the Rehnquist Courts, several of which illuminate the facility with which liberals and conservatives alike can drift between incompatible pictures of the appropriate judicial role. When the Warren Court made criminal procedural decisions non-retroactive, in order to facilitate its revolutionizing of the constitutional law of criminal procedure, conservatives howled that courts could not, like legislatures, limit the retroactivity of their decisions. See Richard

My own strong instinct, after reading Wellington's book, is to think that those of us who wish to assess the Supreme Court need to avoid a sort of careless mental drifting, in which we sometimes imagine the Supreme Court as comfortingly analogous to an ordinary common law court and sometimes as thrillingly similar to a Council of Revision, but pay too little attention to how the images can be integrated. Wellington tells us "it" is not broken, so we do not need to fix it.⁹³ But what sort of thing is this "it," and what would count as its being broken?

VI

For me, *Interpreting the Constitution* provokes a number of thoughts in response to this question. Some are consistent, some dissonant, with Wellington's analysis.

A

It is a signal virtue of Wellington's book that it deals systematically with a variety of aspects of constitutional lawmaking that might be praised, pilloried, or simply described as "political": (1) conventions of legal reasoning, (2) the value judgments that Justices can and sometimes must make, (3) the judicial nomination and confirmation process, and (4) the requirement of "digestibility." Clearly it is time to get past sloganeering about law being just another form of politics. We ought to move on with the hard work of analyzing "politics" as well as "law" and figuring out what the specific relationships—for surely there are many—between politics and the production of our constitutional law ought to be.⁹⁴ But while Wellington offers a number of insights, he fails to integrate them into a strong, normative theory. More work needs to be done.

Wellington is not the first, of course, to try to sort out the sundry relationships between "law" and "politics." Ronald Dworkin⁹⁵ and Frank Michelman,⁹⁶ to cite just two contemporary theorists, have contributed importantly to our understanding of necessary and appropriate judicial politics. Their work, however, offers the problematic prescription that judges should be moral

H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1734 (1991). More recently, however, the conservative Rehnquist Court has deployed the retroactivity doctrine for its own purposes in the criminal law area, see *Teague v. Lane*, 489 U.S. 288 (1989), and it is liberals who are raising complaints focused on the appropriate nature of the judicial role. See Fallon & Meltzer, *supra*, at 1797-98 & n.355, 1804-07.

93. P. 9 ("On the judicial side . . . there is nothing to repair, for nothing is broken . . ."); p. 153 (it is neither "a dirty little secret" nor "an institutional failure" that "constitutional law is shaped, influenced, indeed made by those authorized to interpret").

94. A number of notable works have recently taken this general line of approach, see *supra* note 82, though not precisely in the way suggested here.

95. See, e.g., DWORKIN, *supra* note 19.

96. See, e.g., Michelman, *supra* note 19.

philosophers. Current Supreme Court Justices are unlikely to turn to philosophy with much enthusiasm or aptitude, and the notion that the Justices are philosophers willy nilly, albeit not very good ones, is a philosophers' conceit. Nor, if recent experience is any guide, are philosophers of the first order likely to get named to the Supreme Court anytime soon. Although ideal theory is often illuminating, the practical choice is likely to be between second-best and something worse. It is time to think harder and more systematically about second-best.

This, in a loose sense, is the project of constitutional scholars as diverse as Bruce Ackerman, Vincent Blasi, Frederick Schauer, Steven Shiffrin, Cass Sunstein, and Guido Calabresi. Rather than promoting the Supreme Court as a relatively unconstrained moral decisionmaker, Ackerman asks us to consider viewing the Constitution as capable of being effectively amended by profound changes in public opinion.⁹⁷ Blasi,⁹⁸ Schauer,⁹⁹ and Shiffrin¹⁰⁰ invite the Court to remain alert to recurring pathologies of American democratic politics. Their animating idea is that it is easier for the Court to develop a clear picture of evils to be averted than of the good society to be pursued. Sunstein, in a number of important articles, has tried to sort the politics that deserve judicial respect from the politics that do not and has striven to furnish judges with workable interpretive tools.¹⁰¹ Finally, Dean Calabresi has recently explored techniques through which the Supreme Court might maintain a judicial check on legislative choices that impress it as rash or insensitive, but without claiming an inappropriate finality for its views on irreducibly contestable moral issues.¹⁰²

B

Thought about a world of constitutional second-best must also attend to the processes of judicial selection. As Wellington makes clear, lawyerly acumen is helpful, but seldom sufficient, for the Supreme Court's largest challenges. In a contemporary context, these challenges include the constitutional issues surrounding race and gender discrimination, affirmative action, abortion and substantive due process claims, and the use of administrative agencies and other independent government officials who fit uneasily into the traditional separation

97. See ACKERMAN, *supra* note 82.

98. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

99. See Frederick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905, 921-35 (1984); Frederick Schauer, *The Second Best First Amendment*, 31 WM. & MARY L. REV. 1 (1989).

100. See STEVEN SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990).

101. See, e.g., CASS R. SUNSTEIN, *BEYOND THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 160-226 (1990); Sunstein, *Republican Revival*, *supra* note 82; Sunstein, *Interest Groups*, *supra* note 82.

102. See Guido Calabresi, *The Supreme Court, 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80 (1991).

of powers model. Whom would we want, or trust, to resolve issues of this kind?

This question is obviously a “political” one, but Wellington is right that politics has no necessary aura of tawdriness. Politics can be good as well as bad, bipartisan as well as partisan. Wellington stops short of offering a substantive theory of “good” politics, and I do not have one either.¹⁰³ But one concept of local relevance might be that of “bipartisanship.” This once-familiar notion, which has fallen into near desuetude, implies that some issues, although irreducibly “political,” sufficiently implicate the common, long-term interests of the vast bulk of the American public that it would be treacherous for elected officials to “play politics” with them. The selection of Supreme Court Justices, within a healthier, longer-sighted national politics, might well qualify as a matter of “bipartisan” concern.

As between the President and the Senate, there should be a genuinely consultative process¹⁰⁴ aimed at identifying people suited not just for technical lawyering but for statecraft and even an element of moral stewardship.¹⁰⁵ Senators should not apologize for holding Presidential nominees to this standard. If it takes a seemingly partisan stand by Senate Democrats to launch a politics of bipartisanship—for example, concerted refusal to confirm nominees selected to further a narrowly partisan agenda—there should be no apology about the surface paradox. But what is good for the goose is good for the gander. As Bruce Ackerman has argued, outside of extraordinary eras when the people themselves exhibit profound commitments to historically novel understandings of fairness and appropriate institutional structure¹⁰⁶—such as occurred during Reconstruction and the New Deal¹⁰⁷—efforts to use appointments to move the Supreme Court either to the left or to the right of a plausible politics of bipartisanship should be viewed as suspect—as “playing politics” in an appropriately pejorative use of that term.¹⁰⁸

C

However Justices are appointed, questions remain about how they should view their role, and about how those of us who are not Justices should assess

103. For useful and provocative attempts to develop such theories, see ACKERMAN, *supra* note 82; Michelman, *supra* note 19; Sunstein, *Republican Revival*, *supra* note 82; Sunstein, *Interest Groups*, *supra* note 82.

104. This would not be unprecedented. See TRIBE, *supra* note 88, at 80-81, 126-28.

105. Cf. Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735 (1988) (judging requires mixture of intellectual and moral virtues).

106. See Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988).

107. See ACKERMAN, *supra* note 82; discussion *infra* note 109.

108. See ACKERMAN, *supra* note 82, at 53 (noting problems associated with “transformative appointments” through which Presidents, if “they can convince a bare majority of the Senate to consent,” can cause “constitutional law [to] be jolted onto a new course without persuasive institutional evidence that a mobilized majority of the American people support the change”).

the Supreme Court's performance. Following Wellington, I have accepted that the Court must sometimes practice statecraft and sometimes function as a moral conscience, and that Justices should be selected with these functions in mind. Moreover, I agree that the Supreme Court can—and sometimes probably should—effect relatively large revisions of settled constitutional law.¹⁰⁹ But there is, of course, another side. Sometimes, again in step with Wellington, my instincts tell me that the Court should act within a narrower conception of the judicial role. To be quite frank about it, my instincts tell me that right now. To be even more frank, however, I have to suspect my own motives, since I know that I dislike the current Court's increasingly conservative substantive drift. It is therefore tempting for me, as for Justice Marshall, to demand that this Court should act more like a common law court and less like a Council of Revision.¹¹⁰

But would this be just another example of careless mental drifting? How do the Court's functions—some analogous to those of a common law court, some analogous to those of a Council of Revision—fit together? Is the decision to adopt one or the other mode entirely political and, if so, "political" in what sense? To my mind, Wellington never deals adequately with these questions. Perhaps they have no satisfactory answers. A respected tradition holds that practical wisdom is inherently contextual and defies reduction to rule like norms. More seems needed, however, than *Interpreting the Constitution* supplies.¹¹¹

A possible approach to the problem of drifting and dualistic thought about the Supreme Court's proper role might be to recognize the existence of two paradigms—common law court and Council of Revision—that the Supreme Court sometimes should approximate. Ideally, of course, we would develop standards peculiarly appropriate to the hybrid. But if that task seems too

109. I am unsure whether this position is consistent or inconsistent with the theory of the judicial role supported in Bruce Ackerman's recent, important book. *See id.* Ackerman argues that our Constitution has been effectively amended, in ways not captured by Article V, by the profound changes in popular attitude and belief that occurred during Reconstruction and the New Deal. *See id.* at 44-57. He further suggests that the appropriate judicial function is one of synthesizing and applying the political judgments of the American people reached during periods of the heightened political awareness that can generate higher lawmaking. *See id.* at 131-62, 261-65. Although I am sympathetic to much of Ackerman's argument, I do not believe—and it is unclear to me whether he believes—that, outside of periods of "constitutional" politics, *see id.* at 6-33, 230-322, courts could not justify substantial doctrinal overhauls at least partly by reference to contemporary moral or prudential concerns. To be slightly more concrete, I am doubtful whether, as Ackerman suggests, *see id.* at 133-62, cases such as *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Griswold v. Connecticut*, 381 U.S. 479 (1965)—which I join the great mass of contemporary lawyers in approving—can be successfully rationalized as reflecting essentially backward-looking syntheses. In short, although I agree with Ackerman that constitutional lawmaking does indeed occur through periods of high politics in ways not captured by Article V, I am doubtful that either the practical or the conceptual universe is quite so binary as he sometimes seems to suggest, and I believe that the Supreme Court can and should engage in what is for all practical purposes interstitial, even revisory lawmaking.

110. *See supra* text accompanying notes 89-92.

111. *See, e.g.*, MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* (1986).

daunting, we can begin with a question of priority and emphasis. Which is the better model most of the time?

Although I have made much (perhaps too much) of the analogy of the Supreme Court to a Council of Revision, the contrasts between the two institutions are at least as illuminating as the similarities are. First, the Justices are required to work with a fabric of doctrine and precedent that must be kept in order for people who want to know what the law is today and what it will be tomorrow. However much the Supreme Court's functions may overlap those of an imagined Council of Revision, the Court cannot escape being a court, and it has the responsibility to maintain a body of precedent that is usable as law. Second, as Wellington emphasizes, the Supreme Court does not merely reject laws that it finds objectionable; it also produces affirmative legal rules.¹¹² The promulgation of broad new rules, or the abandonment of old ones, can have ripple effects through the doctrinal and practical landscapes that do not flow from the mere nullification of proposed legislation. The Supreme Court may not be well situated either to anticipate such effects or to deal with them.

These contrasts suggest that the Supreme Court should normally proceed more modestly than boldly, in accord with conventional adjudicative constraints and with norms of craft such as those that Wellington associates with the common law method. In other words, the Supreme Court should recognize a presumptive obligation to proceed narrowly, cautiously, and within the framework of existing doctrine. The presumption should be subject to override, however, when competing moral or political concerns are sufficiently powerful.¹¹³

Fortunately or unfortunately, the requisite calculation could never be captured in an algorithm. In making that calculation, however, a third contrast between the Supreme Court and the proposed Council of Revision needs to be kept in mind: decisions of the Council of Revision would have been subject to legislative rejection, while those of the Supreme Court often are not. At some level, this factor undoubtedly counsels judicial self-restraint. But, as Wellington reminds us, the degree of difference between Supreme Court judgments and those of a Council of Revision is more variable than constant.¹¹⁴ There are techniques of judicial inquiry that permit invalidation yet still leave politically accountable officials—if they are clear and resolute—free to proceed in ways

112. See, e.g., p. 3.

113. There is a close analogy between this prescription for constitutional adjudication and the jurisprudential theory that Frederick Schauer has denominated "presumptive positivism." See, e.g., Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645 (1991). According to presumptive positivism, judges characteristically do and should follow established legal rules and conventions unless to do so would conflict egregiously with a value or policy of supervening importance. See *id.* at 674-79. The significance of this position is that, in addition to cases in which judges would regard the legally dictated outcome as desirable, there would be "some cases in which the recognized rule indicated a result that conflicted with [a moral value or social policy], but not so egregiously that it [was] worth setting aside the result indicated" by legal rules or conventions. *Id.* at 676.

114. See pp. 34-40 (noting Supreme Court decisions frequently lack "finality").

that impress the Justices as constitutionally dubious. The Court, for example, can demand explicitly clear language before construing a statute to achieve effects that the Justices regard as constitutionally problematic or imprudent.¹¹⁵ In addition, legislation can be invalidated not because the ends are impermissible, but because the chosen means impose unfair or disproportionate burdens on particular, disadvantaged groups.¹¹⁶ When the Court proceeds in this way, political officials are not precluded from taking a second, more considered look. Because the risk of judicial autocracy is diminished, the Supreme Court should feel at least somewhat freer to adopt a revisory substantive stance when its judgments can be so framed as to permit legislative override.¹¹⁷

If this analysis of the Supreme Court's role sounds like trying to "have it both ways"—claiming that the Court appropriately acts both like a common law court and like a Council of Revision—it at least encourages clarity about which way we are trying to have it at any particular time, and why the choice is appropriate to the matter in question.

VII

For its intended audience of nonlawyers, *Interpreting the Constitution* is right on target. It reduces large problems and abstractions to the language of common sense, and it strips away much of the mystery that too often surrounds constitutional adjudication.

For legal academics, Wellington's book poses a challenge: Have we imagined the Supreme Court's proper role too much in our own (idealized) image—as the political philosophers, the clear seers of principle, that we would like it to be? Are we urging the Court, and encouraging each other to want the Court, to reason and act in a way that it never plausibly could? After reading this lucid and provocative book, I am inclined to think so.

The question then remains: How should we envision the Supreme Court as it moves toward the twenty-first century? Wellington, like many of us, seems to have a dualistic view of the Supreme Court—sometimes thinking of it as a convention-bound institution closely analogous to other courts, sometimes as a relatively unconstrained moral and political decisionmaker. To integrate those two images remains a pressing task.

115. See Calabresi, *supra* note 102, at 119-20, 122-23.

116. See *id.* at 114-19.

117. See *id.* at 131-37.