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On Wellington Interpretation: A Timely Reappraisal (Harry H. Wellington Festschrift Issue)

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ON WELLINGTONIAN INTERPRETATION: A TIMELY REAPPRAISAL

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I. INTRODUCTION

Let me begin on a personal note. As for much of my time at New York Law School, Harry Wellington has been Dean. I have felt much support from Harry in my scholarly development here. Some of that, discussed further on in these remarks, relates to our shared interests in constitutional jurisprudence. But, more broadly, it has to do with our many conversations over the years, about books we've read in common, about the scholarly enterprise and, more generally, about ideas. We have had many wide-ranging conversations, about various scholarly contributions to law and politics, and at one point had even formed a book club on the topic.[1] I have fond memories of these conversations, and hope that they will continue, despite Harry's stepping down from the deanship.

II. CONSTITUTIONAL DOUBLE STANDARDS: JUDICIAL REVIEW AND CONSTITUTIONAL INTERPRETATION

I now turn to my sense of Harry's influence in the area of constitutional interpretation, Harry's 1973 *Yale Law Journal* article entitled *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication.*[2] In teaching constitutional law, virtually every year, I launch into the problem of constitutional interpretation at the very beginning of the course,[3] I have assigned my students parts of *Constitutional Double Standards.* In assigning the article, it has been my sense that it was important to address early on the problem of interpretation in the broader context of the legitimacy of judicial review. Moreover, it was

1. Where we read, for instance, JOHN RAWLS, THE LAW OF PEOPLES; WITH "THE IDEA OF PUBLIC REASON REVISITED" (Harv. Univ. Press 1999) and RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (Knopf Press 1993).

2. *See* Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication,* 83 YALE L. J. 221 (1973).

3. This despite that the text I use, CONSTITUTIONAL LAW (Geoffrey R. Stone et al. eds., Little Brown & Co. 3d ed. 2000), discusses issues of interpretation in the second semester.

also my sense, in the context of reading a variety of scholarly views on the interpretation debates, that it was helpful to students to see their own Dean offering a way out of the thicket of the interpretation debates.[4]

With the passage of time, my appreciation for the *Constitutional Double Standards* article has only grown. There has been an enduring influence of arguments in the *Constitutional Double Standards* article, and an abiding impact of that piece on three debates on interpretation in constitutional law, as well as on my own writing in constitutional theory. In the remainder of my remarks, I would like to further pursue these introductory comments and to discuss the enduring influence of *Constitutional Double Standards* on three debates. First, its influence on the debate over constitutional interpretation, in particular, on originalism and the role of history; second, on the so-called civic-republicanism debate regarding the various conceptions of constitutional identity, constitutional self and community in constitutional theory; and last, the debate over theories of constitutional change.

In 1973, Harry published *Constitutional Double Standards,* where he explores what today may well be constitutional dogma in the United States Supreme Court's theory of interpretation, the use of "double standards" concerning various areas of lawmaking—in particular, economic liberties and fundamental rights.[5] The first observation about *Constitutional Double Standards* is its date, in constitutional law, the now perhaps infamous date of 1973, the year *Roe v. Wade* was decided.[6] The timing of the article turned out to be auspicious because, even at the time, Harry would, as we shall see, anticipate many of the challenges that would later appear concerning *Roe.* Indeed, the article is so prescient, it is almost prophetic. As it engages *Roe,* it explicates problems in *Roe*'s reasoning,[7] flaws that would later become the subject of substantial scholarly discussion.[8]

Not only was *Constitutional Double Standards* ahead of its time, but it would later have an enduring impact on a number of subsequent debates about constitutional interpretation. For one, after *Roe v. Wade,*

4. *See infra* pp. 5-8 for the discussion of the originalism debate.

5. *See* United States v. Carolene Products Co., 304 U.S. 144, at 152, n.4 (1938) (J. Stone, dissenting).

6. *See* Roe v. Wade, 410 U. S. 113 (1973).

7. *See* Wellington, *supra* note 2.

8. *Compare* John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 YALE L. J. 920 (1973), *with* Phillip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics,* 53 B.U. L. REV. 765 (1973).

the interpretation debates really got going. The opinion spurred substantial scholarly and other exchange regarding what interpretive principles appropriately guide judicial review. There would also be subsequent debates about the relation of our constitutional theory and constitutional identity on civic-republicanism, which I will discuss further on in these remarks.

The ingenious point in *Constitutional Double Standards* goes to what is commonly thought to be the flaw in *Roe*:[9] the problem of the Court somehow arrogating illegitimate power, in engaging in judicial review on an issue implying a moral question. The brilliant move in *Constitutional Double Standards* is that it simply concedes that the issues treated in *Roe v. Wade* raise moral questions. And, rather than fudge the point, Harry runs with it.

Indeed, this concession becomes the basis for the important claim the article makes, that it is not in spite of, but because of, the character of the abortion issue, that the Court is in a good position to offer resolution. At least, the Court is in a comparatively far better position than the other political branches, which necessarily act in a more transient, and politically exposed fashion. This is an important argument that gives rise to the theory of judicial review proposed in *Constitutional Double Standards*. The article goes on to explicate Harry's understanding of the meaning of "conventional morality,"[10] and of precisely why the judiciary is in a better position than the legislature to translate what constitutes conventional morality.

The important move made early on in the article is to address exactly what sorts of questions are at stake when the Court addresses issues of fundamental rights. Moreover, the article explicates just why the Court is in a position of peculiar competence to decide these questions.

Let me pursue this point further. *Constitutional Double Standards* illuminates a particular method and role of constitutional adjudication. Here, Harry's work is extremely important, because it explicitly joins issue with the scholarship challenging judicial review in the area of morality as lacking in constraints. By contrast, *Constitutional Double Standards* suggests that such review is not an unbounded interpretive strategy, but rather a highly constrained exercise. Moreover, the article also contends that the proposed interpretive strategy of constitu-

9. *See* Wellington, *supra* note 2, at 299.

10. *See id.*

tional common law is not a matter of sterile logic, but rather one that is situated within a particular context and history. The notion he elaborates is that the relevant moral principles of what he terms "conventional morality"[11] are not ideals in a vacuum, but rather norms that emerge in particular societies and at particular times. Through this conception, the article anticipates the later critique of the Court's power grab, and addresses it through a neat set of arguments about the character of judicial competence and judicial process.[12] By addressing what the Court must do when it decides questions in the area of sexuality and reproduction, the article clarifies just why the Court is the appropriate decisionmaking body with particular competence in the realm of individual rights.

III. Constitutional Double Standards and Three Debates

In the next Part, my remarks explore some of the further ramifications of this proposed argument. In particular, I will discuss the dimensions of the Wellingtonian approach to "conventional morality" as situated in time, in a distinct history, and tradition.[13] *Constitutional Double Standards* discusses just how issues involving morality ought not be considered apart from society, history and tradition, and that, moreover, this evolving historical understanding is accessible to the Court by virtue of its body of precedent.

A. On Constitutional Tradition

While Harry's piece anticipates, but does not directly weigh in on, the so-called "originalism" debate,[14] by virtue of his position about the role of the Court in the project of translating conventional morality,

11. *See* Wellington, *supra* note 2, at 299 (stating that "[t]he meaning of liberty in the Fourteenth Amendment. . .depends in the first instances upon its weight in the conventional morality").

12. *See id.*

13. 13 *Id.* at 244.

> Unlike the moral philosopher, the court is required to assert our moral point of view. This requirement imposes constraints: Judicial reasoning in concrete cases must proceed from society's set of moral principles and ideals, in much the same way that the judicial interpretation of documents (contracts, statutes, constitutions-especially constitutions) must proceed from the document. And that is why we must be concerned with conventional morality, for it is there that society's set of moral principles and ideals are located.

Id.

14. *See id.*

within a body of adjudication and a line of precedent, he offers us a helpful theory about what the appropriate role of history might be in constitutional adjudication.[15] Harry writes about the challenge of constituting a historical perspective that is appropriate to constitutional adjudication.[16] The aim, he argues, is a larger historical view—one that is, independent from transient politics. Harry proposes the notion of "constitutional common law." This is an important move that would have ongoing influence. Harry's conceptualization contends for a distinctive place for evolving history in the adjudicatory process of constitutional interpretation.

In considering the direction of subsequent constitutional theorizing, what becomes eminently clear is that Harry Wellington's *Constitutional Double Standards* article, written at the beginning of the heightened period of debate about the Court's role in interpretation, has had an enduring influence. Let me offer an illustration. In the area of First Amendment and religious freedom, the Court's approach appears impliedly to endorse a form of interpretive method, of evolving history analogous to "tradition." The notion of traditionalism in constitutional jurisprudence is the subject of discussion in a piece I wrote early in my career reviewing Leonard Levy's *First Amendment and Original Intent.*[17] In that review article I argue that the Supreme Court's Religion Clause jurisprudence fails to adopt an interpretive ap-

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15. *See* Wellington, *supra* note 2, at 245.

> A society's moral ideals evolve, but cannot be detached from history and tradition. One must ask what those ideals have been to know what they are. This is important because a society's moral ideals help us understand how its moral principles apply in concrete situation. And that is the role of moral ideals that concerns us.

Id.

16. 15 *See* Wellington, *supra* note 2, at 248.

> The major difficulty for the official charged with the task of determining how the moral principles bear in a particular case is in disengaging himself from contemporary prejudices which are easily confused with moral principles. He must escape the passion of the moment and achieve an appropriately historical perspective. This problem is not entirely solved by the institutions we do have, but the common law manages reasonably well. Judges do not resort to moral principles in their pristine form as justification for common law rules. Rather, those principles are worked through a process which has some promise of filtering out the prejudices and passions of the moment, some promise of providing the judge with distance and a necessary historical perspective.

Id.

17. *See* Ruti Teitel, *Original Intent, History and Levy's Establishment Clause,* 15 LAW & SOC. INQUIRY 591 (1990).

proach deriving from either side of the originalism debate. In the domain of religious freedom, the Court's role has not merely been to endorse original intent, that is the history associated with the founders, but rather to give meaning to some sense of what constituted the longstanding practices of the American people. And, in this regard, the Court has largely eschewed simplistic understandings of "original intent," for a more complicated understanding of history, that appears akin to "tradition." The notion of longstanding or evolving history in constitutional adjudication is a theme that is resonant in Dean Wellington's work and has been significant in the Court's method of interpretation. Further, the idea of a sharable history that might constitute a constitutional community that shares affinities with my own thinking on constitutional interpretation.[18]

Still, notwithstanding the above, there is room to critique what I have characterized as "traditionalist" approaches to constitutional jurisprudence. While traditionalist approaches are no doubt more dynamic than "originalist" perspectives, traditionalism still retains an inherent element of conservatism that does not allow quick change. Nevertheless, rather than an entirely static approach, traditionalism allows a gradualism to constitutional change. This notion of gradual transformation has certainly emerged in the Court's decisions, particularly in the area of religious tradition. In the religion clause doctrine, the Court has extended protection to majoritarian religious practices and, in so doing, has defined our national religious heritage.[19] Thus, for example, it has supported prayers in the state legislature,[20] allowed public Christmas displays,[21] and permitted legislation of Sunday and other official holidays,[22] while denying similar protection for the religious practices of new minorities.[23] This jurisprudence clearly reflects that there are affinities between a traditionalist approach and the Wellingtonian understanding of "conventional morality." While we might well have serious concerns about the judicial deployment of a "tradition" test, Wellington's "conventional morality" still plausibly offers an underlying historical perspective, that is more dynamic than originalism, in constitutional interpretation.

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18. *See id.*
19. *See* Lynch v. Donnelly, 465 U.S. 668 (1984).
20. *See* Marsh v. Chambers, 463 U.S. 783 (1983).
21. *See Lynch,* 465 U.S. 668.
22. *See id.*
23. *See* Employment Div. v. Smith, 494 U.S. 872 (1990).

B. On Constitutional Identity

In this Part, I turn to another area where the Wellingtonian interpretative approach to constitutional common law has had enduring significance. This is the so-called "civic republicanism" debate concerning the construction of our constitutional identity and its relation to constitutional interpretation.[24] While Harry Wellington's writing on interpretation prefigures the civic-republicanism debate, it is nevertheless of relevance to this discussion in constitutional law. This debate concerns the ongoing tension between liberalism versus republicanism, individualism versus community, self-interest versus civic virtue. In this regard, the ideas Harry Wellington wrote about, both in *Constitutional Double Standards*, as well as in his book, *Interpreting the Constitution*,[25] offer a bridging function that can usefully mediate the conflicts at the heart of the so-called republicanism debate. Considered within the framework of Wellingtonian interpretive theory, this debate to some extent, raises an arguably artificial tension. Indeed, the Wellingtonian conception of constitutional adjudication—in particular, his notion of "conventional morality"—could usefully operate to mediate the tension at the heart of the civic-republicanism debate.[26] The Wellingtonian notion of "common law consensus," of adjudication over time, points to a special role for the judiciary in mediating the supposed tensions between individual rights and community, judgment and politics. Indeed, the Wellingtonian commitment to process links up judgment in the context of particular cases, to the broader societal political context, and to the political circumstances of the day.

Seen from the vantage point of these more contemporary debates, the Wellingtonian understanding of judicial process has an added profound political dimension, as it offers a basis for constitutional identity that is importantly grounded in a distinctive American idea regarding the appropriate balance between individual rights, and commitment to family, community and nation.

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24. *See generally* Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L. J. 1539 (1988).

25. *See* HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION (Yale Univ. Press 1990).

26. *See supra* n. 11.

C. On Constitutional Change

The third area where Harry Wellington's work in constitutional interpretation prefigures an important debate, that anticipates a contemporary conversation, concerns the form of constitutional change. Indeed, the question Harry poses in his scholarship, of what are the appropriate form and processes of constitutional change has been an area of important engagement in my own work.[27] In recent years, in part because of substantial political transition throughout the world, we have been experiencing a boom period in constitutionalism, what might be regarded as a third wave in new constitution-making, and in the establishment of constitutional courts, the biggest since the post World War II period.[28] Moreover, at the very time of this third wave, the United States has been celebrating its constitutional bicentennial and two hundred years of constitutional continuity. Given this constitutional legacy, our Constitution has been the subject of study and emulation throughout the world, and our constitutional scholars have been simultaneously engaged in advisory processes in the area of constitutional law. And, while all of this has been occurring, the question that inevitably arises is just how enduring is our Constitution? Isn't there something somewhat strange about the received account of our supposed constitutional continuity? Might there not be a counter account of constitutional evolution? In the last decade of the twentieth century, a myriad of questions arise regarding the character of our constitutional change, and in particular, concerning the relationship between our political and our constitutional regime, the following questions have arisen: To what extent is our constitution changing or unchanging? What counts as legitimate constitutional change? Does our constitutional system contemplate methods of constitutional change beyond the amendment process? Some of Harry's colleagues at Yale, such as Bruce Ackerman, have explored these questions, and have proposed a number of alternative forms and processes of constitutional amendment, but, more generally, contend for a clear distinc-

27. *See* Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L. J. 2009, 2057-58 (1997) (proposing theory of "transitional constitutionalism").

28. On constitutionalism in the post-war period, see CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD (Louis Henkin et al. eds., 1990).

tion between constitutional transformation and ordinary processes of political change.[29]

My understanding of the idea of "constitutional common law" itself anticipates this more contemporary debate about the character and processes of constitutional change. Wellingtonian "constitutional common law", I suggest, is not only an idea about constitutional interpretation, but it also implies a normative claim about how American constitutionalism is to develop and grow. Wellingtonian constitutional common law offers a conception about the pace, the method and even the substance of constitutional change. The idea of an adjudication-centered, process-centered model of constitutional review informs the conception of constitutional change. Indeed, by its very character, Wellingtonian interpretive theory contemplates change and is predicated upon a certain form, rhythm and tempo of constitutional change.

The notion of constitutional common law cannot help but imply a position on a related issue regarding constitutionalism, about what is the right approach to constitutional transformation.[30] While Bruce Ackerman contends prominently for an idealized vision of "constitutional moments" as the appropriate form of constitutional change, the Ackermanian view would be hard to reconcile with Harry Wellington's vision of constitutional adjudication and his contextual notion of constitutional change.[31] While *Constitutional Double Standards* certainly does not argue for a monist view of democracy, as it surely contemplates diverse forms of constitutional review; by way of contrast to the more romantic, idealized Ackermanian view of revolutionary constitutional change, on the Wellingtonian account, one can expect constitutional change to occur as an ordinary matter, through regular, ongoing processes of adjudication. To whatever degree constitutional change is predicated on the Wellingtonian account, it will be slow and gradual. This normative conception is—above all—a gradualist theory of constitutional change.

The notion of gradual constitutional change resonates in my own work. To some degree, my view of "transitional constitutionalism"[32]

29. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (Harv. Univ. Press 1991); *see generally Symposium, Moments of Change: Transformation in American Constitutionalism*, 108 YALE L.J. 1917 (1999).

30. *See id.*

31. *See* Wellington, *supra* note 2.

32. *See* Teitel, *supra* note 27, at 2057-58.

shares Harry Wellington's sense of gradual evolving change. That is, we share the view that, it is a mistake to overstate the distinction between constitutional adjudication and politics. Dimensions of Harry Wellington's writing resonate here with the account proposed in my book, *Transitional Justice*,[33] as well as in my earlier article on transitional constitutionalism.[34]

The notion of gradual, evolving constitutional change is helpful because it helps to reconcile our experience with that of other countries, allowing more meaningful comparative constitutional jurisprudence. Indeed, considered over time, it becomes evident that our Constitution has evolved and changed, and not merely in periods of explicit constitutional amendment. In *Transitional Justice*, I write about American constitutional law from a "transitional" prospective, and offer "transitionality" as a theory and method of constitutional interpretation in constitutional processes. These ideas, while drawn from an empirical study of comparative transitional phenomena, have normative implications. Namely, that we might rather think of constitutionalism not as unidirectional, forward-looking and fully prospective, but rather to conceive of a constitutionalism of diverse modalities and modes of entrenchment. And, applying this idea to our own Constitution, we see that our own Constitution reflects embedded transformative constitutional modalities. This idea is elaborated further in my book; it shares much with the Wellingtonian approach to constitutional change.

IV. CONCLUSION

In conclusion, above I have discussed the enduring influence of the Wellingtonian approach to constitutional interpretation, and, in particular, how it has affected three debates regarding the relationship of constitutionalism and democracy. Dean Wellington's work has had an important impact in offering mediating concepts of constitutional common law with ramifications for constitutional tradition, constitutional identity, and lastly, for constitutional transformation. Reappraising Dean Wellington's work, in the light of history, suggests it has had a significant and enduring influence. This symposium is truly a fitting tribute, as it invites a revisiting of Harry Wellington's earlier work, and situates it within the broader constitutional project of the last decades.

33. *See* Ruti Teitel, TRANSITIONAL JUSTICE (Oxford Univ. Press 2000).
34. *See* Teitel, *supra* note 27.