

Book Reviews

INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION. By Harry H. Wellington.¹ New Haven, Conn.: Yale University Press. 1990. Pp xii, 196. Cloth, \$22.50.

ON READING THE CONSTITUTION. By Laurence H. Tribe² and Michael C. Dorf.³ Cambridge, Mass.: Harvard University Press. 1991. Pp. 144. Cloth, \$18.95.

*Larry Alexander*⁴

These two books have several things in common. They are both short. They are both authored by well-known constitutional theorists. They both deal with constitutional interpretation. They are both moderate in tone, striking a balance between apology and criticism with respect to the Supreme Court's performance, and setting forth very middle-of-the-road-among-academics prescriptions for constitutional jurisprudence. And they are both book-form renditions of arguments that the authors have floated in other writings.

There are also some major differences between the books. Wellington's is written for a general, though educated, audience, and perhaps for students of constitutional law in disciplines other than law. Tribe and Dorf's is written largely for academics, as it is nothing more than the repackaging of two quite academic pieces: Tribe's 1988 Tanner Lecture,⁵ and Tribe and Dorf's 1990 article in the *University of Chicago Law Review*.⁶ Their styles are different. Wellington's is nonrigorous and somewhat rambling, with a number of threads that are picked up but left hanging. He fre-

1. Sterling Professor of Law, Yale Law School.

2. Tyler Professor of Constitutional Law, Harvard Law School.

3. J.D., Harvard Law School.

4. Professor of Law, University of San Diego.

5. *On Reading the Constitution*, in Grethe B. Peterson, ed., *9 The Tanner Lectures on Human Values* 3 (U. Utah Press, 1988).

6. Laurence H. Tribe and Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. Chi. L. Rev. 1057 (1990).

quently appears to be merely reporting noncontroversial facts about constitutionalism and judicial review rather than, as is the case, taking vigorously mooted positions on issues. Tribe and Dorf's style is much tighter and more clearly focused, though they deal with only part of the realm of issues that Wellington engages. The critical, prescriptive nature of their book is never hidden beneath an apparently descriptive facade.

Although Wellington's central prescription for constitutional adjudication—courts should look to “public morality,” as well as to “language, precedent, structure, and history”—differs from Tribe and Dorf's prescription of “interpolation and extrapolation,” the prescriptions have a common element. Both deal with the relationship between the facticity of the Constitution and of judicial precedents—that these are specific texts that are the datable products of identifiable human beings speaking a particular language and acting with a congeries of specific purposes—and those political/moral principles that we believe should guide the relationship between governors and governed. Both books urge judges to look both to fact and to value, to is and to ought, to the positive historical Constitution with its judicial accretions and to morality. And in the final analysis, though reflecting on these books may help us see this central problem of constitutional jurisprudence—indeed, of law generally—more clearly, neither book, in my opinion, brings us closer to a solution.

Wellington begins his book with a discussion of judicial review and the countermajoritarian difficulty. There is much here that Wellington's intended general audience will find useful, though academics will have heard it all many times before. Wellington's general points are: legislation in pursuance of the constitutional design is not itself perfectly majoritarian (because of the Senate, geographical representation, unaccountable lame duck presidents, lobbying and collective choice problems, etc.); the very Constitution that prescribes the forms of popular sovereignty also places substantive as well as procedural limits on legislation; the legislature cannot be trusted to determine the constitutionality of its own enactments; judicial review is less problematic than legislative review; and judicial interpretation of statutes, which is accepted by everyone, can be functionally just as “final” in terms of thwarting the popular will as judicial review for constitutionality. Although Wellington's argument moves much too quickly to satisfy any serious constitutional theorist, he does present to the general public a cogent case on behalf of judicial review.

As Wellington turns from the case for judicial review to his

own position on constitutional interpretation, the quality of his arguments declines. He begins with rather tired arguments against original intent and representation-reinforcement as interpretive strategies. What is particularly disappointing here is Wellington's failure to acknowledge that we cannot even identify the Constitution itself—the text—much less that it is written in English, without making some assumptions about someone's intentions. What attitude would we hold toward that piece of parchment if we discovered that it was the product of a thousand monkeys spilling ink? We cannot dispense with intentions in interpretation. Therefore, the question is not whether intentions, but which ones?

After repudiating original intent and representation-reinforcement as interpretive sources, Wellington turns to his own proposal, namely, that judges should look to public morality in interpretation. Wellington calls this the common-law method of adjudication, and he prescribes it for adjudication under statutes and the Constitution as well.

The public morality approach to constitutional (or any) adjudication leads to several fundamental problems that Wellington either does not address or does not adequately resolve. Public morality is not the sole source of constitutional law for Wellington; rather, it is to be combined with the other sources of "language, precedent, structure, and history." How does one combine such disparate elements and justify the conclusion one reaches in terms of that combination? Wellington tells us only that the adversary system, dialogue among judges, and written opinions will produce justifiable constitutional interpretation. This is really thin gruel, especially if you suspect that "combining" these elements is like "combining" pi, green, and the Civil War.

What is this "public morality" that is to be combined with language, precedent, structure, and history? Wellington is clear that it is positive public morality rather than the judge's view of correct morality. But can a judge keep her own moral views separate from her views of public morality, given that she inevitably will believe the former are nothing more than the latter purged of such impurities as faulty logic, factual errors, and failures of empathy and imagination?

Wellington wants to deny that public morality is the same thing as the moral views of the judges, but he offers no method for discerning and proving its content. Moreover, by coming down on the side of positive public morality rather than true morality, he makes this source of constitutional law timebound in a way that leads him to conclude, for example, that *Griswold v. Connecticut*

was correctly decided in 1965 but should perhaps have been decided differently had it arisen in 1879. The reason for this temporal variability in the meaning of "liberty" under the due process clause is not that facts about marriage changed significantly between 1879 and 1965, and not that Connecticut's interest in prohibiting contraception was greater in 1879 than in 1965. The only change between 1879 and 1965 that justifies a difference in outcome is that public morality supported Connecticut's legislation in 1879 but not in 1965 (notwithstanding failure to repeal).

The final chapters of Wellington's book consist of rather desultory treatment of such issues as *stare decisis* in constitutional law, jurisdiction-stripping legislation and article III, executive and legislative disregards of judicial decisions that misconstrue public morality, and the mechanisms for dialogue about public morality among the courts, the legislatures, the academic critics, and the general public. This portion of the book is even less rigorous and less thoroughly argued than the previous portions.

Tribe and Dorf's book has two parts corresponding to the two previously published works on which it is based. The first part deals with constitutional interpretation generally. Tribe and Dorf reject the Raoul Berger brand of reliance on original intent, pointing out the all-too-familiar litany of problems with such an approach (whose intent? at what level of generality? and why authoritative?) and arguing that only the text of the Constitution is law. (Of course, can the text be a text, and one in English, without reference to someone's intentions? If not, then to whose intentions? And why limit ourselves to their linguistic intentions and not look to their normative intentions as well?) But although Tribe and Dorf view only the constitutional text as authoritative, they do not espouse some wooden textualist approach to interpretation. Rather, they would look to the purposes behind the text in construing it. (Original intentions start to creep back in here, don't they?) The chief interpretive sins that Tribe and Dorf identify here, apart from Berger-type originalism, are textual disintegration and hyperintegration. The former refers to reading specific parts of the Constitution in isolation from the rest of the document and the general purposes and values that inform it. The latter refers to the opposite error of looking only to the general purposes and values and disregarding the specific ways the text prescribes for their implementation. Tribe and Dorf are surely correct that disintegration (or

7. See Larry Alexander, *Of Two Minds About Law and Minds*, 88 Mich. L. Rev. 2444, 2446-47 (1990); Larry Alexander, *The Constitution as Law*, 6 Const. Comm. 103, 111-12 (1989).

hypointegration) and hyperintegration are both interpretive errors. The problem for interpretation, as with Goldilocks and her porridge, is to find the level of textual integration that is "just right." Tribe and Dorf offer us no algorithm. The question is, have they offered us anything more than a truism?

The second part of Tribe and Dorf's book deals with the problem of the proper level of generality at which to define "fundamental rights" or the "traditions" from which those rights are to be derived. The academic reader will be quite familiar with the moves here: a right will appear to be fundamental or not depending upon how abstractly it is formulated; a practice will be part of a tradition depending upon which facts about it, and what level of generality of description, one selects as constitutive of the practice. Tribe and Dorf apply this familiar critique to the Supreme Court opinions in *Michael H. v. Gerald D.*⁸ and the question of the constitutional status of parental rights of a biological father vis-à-vis his child born while the mother was married to another man.

After exposing the arbitrariness of any stipulated definition of a tradition and the fundamental rights within that tradition, Tribe and Dorf offer us a solution to the problem they address: the method of interpolation and extrapolation. A court should begin with existing authoritative texts and precedents and, *guided by moral principles*, interpolate broader, underlying principles from these beginning points. The court should then extrapolate from these underlying principles to the result in the case before it.

Simple, right? So simple that there must be a catch. And, of course, there is. No matter how numerous, authoritative texts and precedents will always underdetermine the set of political/moral principles that might justify them. That is apparently why Tribe and Dorf urge that the inference from text and precedents to more general principles be guided by (presumably correct) moral principles. The inference-guiding principles select a unique set of principles underlying text and precedents from the indefinite number of such sets otherwise consistent with text and precedents.

But here's the problem. If correct political/moral principles guide our inference from text and precedents to underlying principles, won't they always guide the inference to themselves? In other words, won't correct political/moral principles always urge their own adoption and never the adoption of (by hypothesis) incorrect political/moral principles, *no matter how well the latter "fit" existing texts and precedents?*

8. 491 U.S. 110 (1989).

That is what I believe and have so argued elsewhere.⁹ The same point can be made from a different angle, one that denies that incorrect moral principles are stable normative entities to which we could coherently adhere. Consider in this regard the distinction between rules and principles as ideal norm types.¹⁰ Rules are posited by specific persons and have canonical formulations. They are interpretable without regard to one's values or agreement with the rules. A stop sign is a paradigmatic rule in this respect, since its meaning will be the same for both Marxists and monarchists, and for those who disagree as well as those who agree with its location. I am not arguing that the interpretation of rules is ever completely value free, but only that as a norm becomes more rule-like, the more impervious its interpretation will be to value differences among interpreters.¹¹

Principles, on the other hand, differ from rules on all these dimensions. They are not posited. They have no canonical formulation. And their interpretation will vary according to the values of the interpreters. (Marxists and monarchists *will* differ over the conduct demanded of the "reasonable" person or over what compensation is "just.") While rules, even if incorrect from a morally ideal standpoint, serve the rule-of-law values of predictability and official-monitoring, principles do not. Their only moral virtue is correctness.¹²

Construing a norm as a correct rule or alternatively as a correct principle obviously presents no conceptual or moral difficulty. The same is true of incorrect rules. Although we may believe a particular rule—say, a stop sign, a four-year term for presidents, or a sixty-day period for answering complaints—is morally inferior to an alternative rule, we have no difficulty understanding what it requires, and we may also conclude that its rule-of-law virtues morally outweigh its other moral defects.

Incorrect principles are a different story altogether. They possess neither moral correctness nor rule-of-law virtues. Moreover, given these moral deficiencies, plus their lack of canonical formulation and their independence from specific persons and acts of positing, it is not clear how one can even argue coherently over what

9. See Larry Alexander, *Striking Back at the Empire: A Brief Survey of Problems in Dworkin's Theory of Law*, 6 *Law & Philosophy* 419, 427-31 (1987); Larry Alexander, *Constrained by Precedent*, 63 *S. Cal. L. Rev.* 3, 37-42 (1989).

10. See Larry Alexander, *Modern Equal Protection Theories: A Meta-theoretical Taxonomy and Critique*, 42 *Ohio St. L.J.* 3, 12-14 (1981). See generally Frederick Schauer, *Playing by the Rules* (forthcoming Oxford U. Press).

11. See Schauer, *Playing by the Rules* (cited in note 10).

12. See Alexander, 42 *Ohio St. L.J.* at 13-16 (cited in note 10).

they require.¹³

The upshot of these observations is that there will be a tendency in interpreting a given norm to see it either as a canonical rule—and, if one disagrees with it, as a quite narrow rule—or, if one sees it as a principle, as a correct principle. Incorrect principles are unstable, undesirable, and perhaps incoherent elements that will inevitably evolve into rules or correct principles.¹⁴ That is why constitutional theorists like Epstein¹⁵ and Richards,¹⁶ when they deal with constitutional provisions, either construe them as embodiments of broad principles that they independently endorse as timelessly correct or construe them as narrow, specific rules that have a very particular history. In other words, they relate the positive elements of the written Constitution—its facticity—to morality by dividing constitutional norms into rules traceable to the positive elements and principles that are authoritative independently of the Constitution (though referred to in certain provisions).

Dworkin, of course, has built an entire jurisprudential theory on the denial of what I have asserted about incorrect moral principles.¹⁷ He contends that one's political/moral views can be combined with historical materials to produce a set of principles (not rules) that one morally rejects but from which one extrapolates "the law." But because I deny that one's political/moral views can ever lead one to endorse principles that are inconsistent with those views, I suspect that the principles that Dworkin finds "fit" with the posited, historical legal materials are principles to which he subscribes on purely moral grounds.

Tribe and Dorf's method of interpolation and extrapolation looks to be very similar to Dworkin's, and it is therefore subject to the same critique. And if Wellington's public morality turns out to be nothing more than morality *sans phrase*, it too will "combine" with language, precedent, structure, and history either to produce narrow rules traceable to these facts or correct principles that are independently valid and that therefore need not be so anchored. There is no other way that the positive, historical law that we have willed can be "combined" with what is truly good and just.

13. See Alexander, 63 S. Cal. L. Rev. at 38-39 (cited in note 9).

14. See Alexander, 42 Ohio St. L.J. at 15-16 (cited in note 10).

15. Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harv. U. Press, 1985).

16. David A.J. Richards, *Toleration and the Constitution* (Oxford U. Press, 1986).

17. Ronald Dworkin, *Law's Empire* chs. 6-7 (Belknap Press, 1986).