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RECONCILING LEGAL PROCESS AND SUBSTANTIVE DUE PROCESS

*William L. Reynolds**

INTERPRETATION is *the* hot constitutional issue these days. Justices Brennan and Scalia, for example, recently engaged in armed combat on the proper uses of history in evaluating due process claims.[1] More generally, Scalia has been pushing, with some success, a strict constructionist/plain meaning approach to interpreting the Constitution,[2] a position completely at odds with the constitutional jurisprudence of the Warren Court.[3] Scholars, as might be imagined, have also been active. Indeed, there is today a vast range of academic thought, some of it impenetrable, on the question of how the Constitution should be construed.[4]

I. INTERPRETIVISM

The present interest in statutory construction has its roots in the decisions of the Warren Court which revolutionized our constitutional jurisprudence. The seminal event of this revolution was Herbert Wechsler's wonderful article, *Toward Neutral Principles of Constitutional Law*, published in 1959.[5] Wechsler insisted that the Court must justify its decisions on the basis of neutral principles.[6] Its opinions, he wrote, should be grounded in articulated reasons, and those reasons should be sufficiently clear so that it can be determined whether they control other cases.[7] Only when that has been accomplished can the basic requirement of adjudication that "like cases be decided in like fashion" be satisfied.[8] Because Wechsler focused his analysis on

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1. *See, e.g.*, Burnham v. Superior Court of California, 495 U.S. 604 (1990); Michael H. v. Gerald D., 491 U.S. 110 (1989).

2. *See, e.g.*, Blatchford v. Native Village of Noatak, 111 S. Ct. 2578, 2584 (1991); Bowen v. Massachusetts, 487 U.S. 879, 915-16 (1988) (Scalia, J., dissenting).

3. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 640-66 (1990). Justice Thomas has also advocated this approach. *See* United States v. R.L.C., 112 S. Ct. 1329, 1339 (1992) (Thomas, J., concurring).

4. *See, e.g.*, Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Response*, 82 NW. U. L. REV. 226 (1988).

5. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Wechsler, of course, was not the first to think of these questions. His article was very important, however, in starting the current debate.

6. *Id.* at 10-20.

7. *Id.* at 15.

8. *Id.*

Brown v. Board of Education,[9] then only five years old, his writings on the methodology of interpreting the Constitution received a great deal of attention. But the use of this methodology was before its time—the focus of the legal world for the next fifteen years was the substance of the constitutional revolution wrought by the Warren Court and by the early Burger Court.[10]

Eventually, however, that revolution provoked a reaction. One of the claims of the counter-revolutionaries was that the Constitution had been misinterpreted by the Warren Court. Of course, such a charge, to be respectable, must have *some* theoretical underpinnings, and there was no shortage of persons eager to supply them.[11]

At the same time, those who admired the liberal legacy of the Warren Court tired of attempting to defend its decisions on the basis of criteria like language and history.[12] Obviously, they thought that could not be done. The result was a series of increasingly outré defenses of what I call California-style constitutional law ("if it feels good, do it") advocating constitutional protection of values amazingly similar to those held by the typical law professor (or the left wing of the Democratic party).[13]

Meanwhile, some scholars began to examine—in true Wechslerian fashion—the various types of arguments that might be advanced while engaged in constitutional interpretation. The important event here was an original casebook by Paul Brest (one of the very few casebooks about which that adjective could be used).[14] Brest helped set the stage for the debate on interpretivism by identifying four types of arguments: one can look at the language of the constitution, the history of the constitution, the structure of the document itself, or at fundamental values.[15] There has been much writing

9. 347 U.S. 483 (1954).

10. Although the accession of Burger and three other Nixon appointees to the Court was thought to herald a roll-back of Warren Court decisions, the Burger Court in its early years was every bit as activist as the Warren Court, as *Roe v. Wade*, 410 U.S. 113 (1973), illustrates. *See* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1983).

11. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 61 (1971).

12. The key article was by Thomas G. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975). Some academics conceded that the Warren Court decisions could not be defended on traditional grounds, a concession which permitted them to develop their own innovative approaches to constitutional decision making. *See, e.g.*, MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982). I have commented on Perry's book in William L. Reynolds, *The Constitution, the Courts and Human Rights*, 44 MD. L. REV. 204, 207-15 (1985) (book review). Some of those concessions are unnecessary, I believe, although they do permit the development of elaborate, if not elegant, models of constitutional decision making.

13. The high (or low) point was Mark Tushnet's statement that a constitutional decision is correct if it is "likely to advance the cause of socialism." Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981).

14. PAUL BREST, PROCESSES OF CONSTITUTIONAL DECISION-MAKING (1st ed. 1975). Unfortunately, later editions of the Brest casebook, although quite innovative themselves, have abandoned the focus on interpretive methods. *See, e.g.*, PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISION-MAKING (1st ed. Supp. 1980 & 2d ed. 1983 & 2d ed. Supp. 1986).

15. PAUL BREST, PROCESSES OF CONSTITUTIONAL DECISION-MAKING 102-893 (1st ed. 1975).

on constitutional interpretation in the fifteen years since publication of the Brest casebook, but certainly no consensus, scholarly or judicial, has emerged as to the proper method of interpreting our organic law.

II. LEGAL PROCESS

These developments in the theory of constitutional interpretation must be viewed against more general theories of judicial decision-making. There are, of course, more of these theories than a cat has loose hairs. But the predominant method of looking at decision-making problems, at least from a theoretical vantage point, was—and remains—that of the Legal Process scholars. The name comes from a casebook written by Professors Henry Hart and Albert Sacks of Harvard.[16] Although their work was never published formally, it has been enormously influential, and, I think it can fairly be said, all students of judicial decision-making for the past third of a century have worked to address the Hart and Sacks approach.

The centerpiece of their methodology is a perhaps naive belief in what they style "reasoned elaboration."[17] A court engages in reasoned elaboration when it *explains* its decision by using principles which can then be used to decide similar cases, as well as to explain how to determine *when* cases are similar. To accomplish this, the decision must provide a rationale, grounded in policy, which provides a coherent basis for resolving like matters and for determining when matters are "like".[18] Legal Process, in other words, seeks to limit judicial discretion by requiring the court to explain its decision. That explanation, in turn, makes other decisions more predictable by providing a basis for reasoning by analogy and makes the court more accountable.

Harry Wellington, former Dean of Yale Law School and a prominent Legal Process scholar, has recently applied the basic tenets of Legal Process scholarship to constitutional law. In his slim and elegant book, *Interpreting the Constitution*,[19] Wellington examines how a Justice using Legal Process methods might address contemporary constitutional issues.[20] Wellington focuses largely on *Roe v. Wade*[21] in his development of a decision-making technique he calls public morality.[22] The book is about far more than privacy, however, and illuminates many other constitutional problems, as well as areas of traditional common law decision-making. Wellington provides a

16. HENRY HART & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958). The book has been a tentative edition for over thirty years, and is likely to remain so because both of its authors are now dead. The materials are widely distributed, however, and a course based on those materials is still taught at many law schools. It is quite possibly the best casebook ever written. For more on jurisprudence according to Hart and Sacks, see G. Edward White, *The Evolution of Reasoned Elaboration*, 59 VA. L. REV. 279 (1973). *See also* Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart and Sacks*, 29 ARIZ. L. REV. 413 (1987).

17. HART & SACKS, *supra* note 16.

18. *Id.*

19. HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION (1990).

20. *Id.*

21. 410 U.S. 113 (1973).

22. WELLINGTON, *supra* note 19, at 85.

useful synopsis and critique of the main approaches to problems of constitutional decision-making.[23] This book will delight the specialist. Because it is so well-written and so free of jargon; it is readily accessible as well to any educated reader. For someone who wishes to learn of the serious issues in constitutional law today, this book is a great place to start.

III. LEGAL PROCESS AND *ROE v. WADE*

The 1973 decision in *Roe v. Wade*[24] generated an enormous amount of discussion. A prime topic was the source of the Court's authority to hold that the right to privacy included a woman's right to procure an abortion.[25] The specific right was not rooted in the literal text of the Constitution nor seemed to be fairly implied as a necessary adjunct to interpreting the text.[26] Moreover, the precedents that the Court used to support the notion that the Fourteenth Amendment created a right to privacy were not entirely untainted.[27] Some were relics of the pre-New Deal substantive/economic due process era usually referred to as the now-discredited *Lochner* era.[28] Two more were equal protection cases.[29] *Griswold v. Connecticut*,[30] the most recent precedent cited in *Roe*, had hardly won universal approval with its vague reliance on constitutional "penumbras."[31] Finally, the Court's own laconic explanation of its source of authority hardly contributed to its persuasiveness.[32] None of this exegesis could satisfy even a moderately de-

23. *Id.* Among the delights is Wellington's discussion of the influence of James Bradley Thayer's influential (but now neglected) work, THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW (1893). *See* WELLINGTON, *supra* note 19, at 72-78.

24. 410 U.S. 113 (1973).

25. The first good critical article was John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973). Ely later wrote that "writing a convincing criticism of *Roe v. Wade* was hardly an assignment requiring a rocket scientist. Merely a kamikaze pilot." Fred R. Shapiro, *The Most Cited Articles from the Yale Law Journal*, 100 YALE L.J. 1449, 1474 (1991).

26. The Court merely observed that "a line of decisions," perhaps going back to 1891, had "recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe*, 410 U.S. at 157.

27. Or on point. The criminal procedure cases cited by the Court seem particularly inapposite and, indeed, support the notion that privacy issues are too complex to fit under one all-purpose heading such as "privacy."

28. This reference is to one of the period's most notorious decisions, Lochner v. New York, 198 U.S. 45 (1905). *See* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

29. Eisenstadt v. Baird, 405 U.S. 438 (1972); Skinner v. Oklahoma, 316 U.S. 535 (1942). Today, we would have no trouble thinking of *Skinner* as a substantive due process decision. Because *Skinner* was decided immediately after the Court's wholesale repudiation in the late 1930's of substantive due process, however, the Court apparently was not willing to use the Due Process Clause as a basis for the decision.

30. 381 U.S. 479 (1965).

31. *See id.* at 483-84, 487. This was the only time penumbras saw the light of a constitutional day. Justice Douglas' majority opinion in *Griswold* would have been better served by reliance on the old doctrine of the equity of the statute as the basis for decision-making. For a discussion of the equity of statutes see Justice Harlan's opinion in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), and WILLIAM L. REYNOLDS, JUDICIAL PROCESS IN A NUTSHELL 273-74 (2d ed. 1991).

32. After mentioning (but not discussing) the precedents cited above, the Court stated laconically:

> [t]his right of privacy, whether it be founded in the Fourteenth Amendment's

manding Hart and Sacks scholar as a good example of reasoned elaboration. Neither the precedents used nor the Court's discussion of them provided a basis for deciding like cases in like fashion.

Of course, there were many who were more than willing to supply the proper *ratio decidendi*. Some have been memorable only for their quirkiness.[33] Others, however, have constructed quite cogent models of how the holding in *Roe* might be defended.[34] The most persuasive of these focus either on constitutional provisions other than those cited by the Court or rely on analysis largely freed from text (a California-style methodology).[35] These methods may lead to convenient results, but create problems of their own: analyses freed from text raise very serious questions concerning the Court's legitimacy and accountability.

Harry Wellington has attempted to steer a middle course, between text and California feel-good, to see if a concept he labels "public morality" can help us understand the constitutional problems inherent in the abortion question. Wellington begins his analysis by comparing common law and constitutional adjudication. Although the two are similar in many respects (especially in the need to ensure that like cases are treated in like fashion), Wellington observes that constitutional decision-making is distinctive because it challenges an interpretation of the Constitution already made by another government actor.[36] "Judges ought to be modest" and respect the decision of other branches unless there is some "special function" to be found in the "politics of appellate adjudication."[37] For Wellington, this function is to "articulate the principles used to elaborate text in the past, principles that often acquired their weight in *public morality* and that must be reinterpreted in terms of a contemporary understanding of that morality."[38]

This notion of public morality plays a central role in Wellington's theory. While he views public morality as neither the only source of law nor as necessarily controlling,[39] he does believe that "reasoning from these commonly

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> concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Roe, 410 U.S. at 153.

33. Discretion precludes any citation for this point.

34. *See, e.g.*, Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Susan Estrich and Kathleen Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119 (1989); Donald Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979).

35. Arguments other than those based on the due process clause (such as equal protection) can also be made, of course. *See, e.g.*, Law, *supra* note 34. This review does not address those arguments.

36. WELLINGTON, *supra* note 19, at 82.

37. *Id.* at 83.

38. *Id.* at 85 (emphasis added).

39. *Id.* at 86. Wellington uses the recent Flag Burning Cases, e.g., Texas v. Johnson, 491 U.S. 397 (1989), as counter-examples. WELLINGTON, *supra* note 19, at 88. Wellington believes that public morality strongly condemns flag burning. *Id.* Nevertheless, he contends that the Court was correct in striking down the flag burning laws because of the force of

held attitudes should be an important method for interpreting the values—the public morality—that are a source of law in elaborating the term 'liberty' in the Fourteenth Amendment."[40] "Public morality is the workhorse of interpretation."[41] This concept can then be used effectively to inform judges of the scope of due process. Moreover, it can be an effective vehicle for constitutional change,[42] as a changing public morality can help stimulate constitutional adjustment to different (and often difficult) times.

Wellington uses a series of well-constructed hypothetical situations to discern public morality on the abortion issue.[43] His approach is intuitive, not empirical. He seeks to find the occasions (although not really the reasons) why and when our society accepts and rejects abortion. He finds that the abortion question involves two different types of public morality—the right to abort and the state's interest in protecting potential life.[44] Nevertheless, this conflict has some limits. Wellington concludes:

> (1) that we do commonly draw an important moral distinction between fetal life and other kinds of human life, (2) that this distinction does not mean that fetal life may be disregarded, but that it does enable us to make other distinctions that in its absence would be morally impermissible, (3) that one such distinction, which has considerable intuitive appeal, counts the survival of a fetus that "would be born with grave physical or mental defect" less than the survival of a normal fetus, and (4) that while the chief appeal of this last distinction rests in a widely held preference for the birth of a healthy child, it also gives weight to the principle that a woman "has a right to decide what shall happen in and to her body."[45]

This conclusion, however, is both a sword and a shield. Wellington recognizes that "the weight of the principle that supports a woman's claim to an abortion . . . is also related to the state's interest in the potential for life."[46] That recognition, in turn, leads him to conclude that his "arguments do not justify the sweep of *Roe v. Wade*."[47]

That last conclusion, of course, raises the issue of whether *Roe* should be modified or overruled. Wellington admonishes the Court to be very careful:

> [S]tare decisis places the Court under an obligation to act as wisely as possible, to consider all the consequences of overruling its own interpretation of the Constitution. This requires that judicial attention be paid to the disproportionate impact that overturning *Roe* would have in some of the nation's fifty states . . . on poor women—namely, the prob-

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"structure, history, and precedent." *Id.* Unfortunately, he does not explain *why* those forces are strong enough to overcome the force of public morality.

40. *Id.* at 107.
41. *Id.* at 88.
42. *Id.* at 20.
43. *Id.* at 106-23.
44. *Id.* at 107.
45. *Id.* at 106-07.
46. *Id.* at 107.
47. *Id.* at 100. Here, Wellington is careful to point out that he is speaking from a constitutional rather than a legislative perspective. *Id.*

able increases in death caused by back-alley abortions.[48]

This very functional approach to stare decisis places a strong hand on the scales in favor of maintaining *Roe*. It also achieves, perhaps conveniently, the result Wellington suggests he would vote for if he were a legislator.[49] Wellington's *ipse dixit*, however, ignores the competing public morality he has identified in his analysis of the abortion hypothetical situations—the state's interest in the potential life of the fetus. It is difficult to understand how Wellington's pragmatic approach to stare decisis can be reconciled with that interest. He makes little effort to do so.[50]

Wellington's discussion of public morality and abortion is incomplete. A demanding Legal Process analysis of public morality and the right to privacy requires an explanation of how far the right extends. That explanation must justify both the extension and the stopping point, for without those last two pieces of analysis it is impossible to know when like cases are decided in like fashion. Wellington's conclusion, quoted above, provides a starting point. Unfortunately, the analysis leading to that conclusion is too intuitive—it fails to explain satisfactorily why the lines established by Wellington should be drawn. Nevertheless, it is a good starting point for the work of others.

IV. THE PROBLEMS WITH PUBLIC MORALITY

Wellington writes well and persuasively. The text seduces the reader into easy agreement. There are serious problems, however, inherent in establishing public morality as a component of constitutional decision-making. Where does the authority to use public morality come from, and how do the Justices know when to use it?

A. PUBLIC MORALITY AND THE DUE PROCESS CLAUSE

Part of the problem with Wellington's exposition of the virtues of public morality is that it virtually ignores the language and history of the Constitution. He does not find those sources completely irrelevant; after all, he is willing to strike down the flag-burning legislation on those grounds.[51] It is just that he does not really come to grips with the question of *how* public morality interacts with more traditional methods of interpreting the document.

This problem becomes particularly acute when the Due Process Clause is involved. There are two problems here. First, it is difficult to argue either

48. *Id.* at 112.

49. *Id.* at 108.

50. Wellington rejects Justice O'Connor's attempt in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), to separate a woman's right to an abortion from the state's interest in the potential life of the fetus. WELLINGTON, *supra* note 19, at 117-18. He finds that the two interests overlap sharply. *Id.* at 110. But he offers little in the way of reconciling the two interests.

51. *See* WELLINGTON, *supra* note 19, at 88. Wellington does not explain why public morality can be ignored in the Flag-Burning Cases. *E.g.* Texas v. Johnson, 491 U.S. 397 (1989). His failure to do so suggests strongly that to him consensus on public morality works best when that consensus is on his side.

historically or linguistically that the Clause has a substantive component. The concept of due process is deeply rooted in procedure, and the text gives little comfort to those who would use it to strike down bad legislation.[52] Second, the history of the Court's use of substantive due process doctrines has not been a happy one. There is, of course, as every law student learns, the sorry episode of economic due process exemplified by the *Lochner* decision. The Court's insistence on economic due process in this era eventually led to a major constitutional crisis. Even the privacy brand of substantive due process that supports *Roe* has given the Court trouble. These problems have not yet been addressed, however, because the Court simply has not pushed the logic of *Roe* to consistency in later decisions, where the principle of personal privacy/autonomy might well have been invoked.[53] Wellington, who is certainly aware of these problems, gives no reason to hope that a Justice applying public morality in the service of substantive due process would reach happier results.

B. WHOSE MORALITY?

Perhaps the most basic charge against substantive due process is that it permits the Justices to substitute their notions of what is correct for those notions held by the legislature. Why, after all, should the views of the non-elected judiciary prevail over the legislature on some issues? This question may not be hard to answer when rooted in constitutional text and history. Answering it for open-ended constitutional inquiries based on as amorphous a concept as public morality is another matter. It simply is not easy to understand why appointed judges can do that task better than elected legislators, when the interpreter cannot rely either on text or on history—those areas where judges and lawyers might lay claim to a special expertise.[54] Learned Hand perhaps expressed the problem best: "for myself, it would be most irksome to be ruled by a bevy of platonic guardians, even if I knew how to choose them, which I assuredly do not."[55]

Wellington does not really respond to this charge, although he does recognize it as a problem.[56] Wellington's delineation, quoted above, of the respective rights of the mother and of the state's interest in the fetus is merely

52. Justice Brandeis, among others, found this argument to be "persuasive." Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring). *But see* Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941. *See also* Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85 (examining the rationale of the constitutional dichotomy between substance and process).

53. The prime example is Bowers v. Hardwick, 478 U.S. 186 (1986), in which the Court upheld a Georgia statute criminalizing sodomy between consenting adults. *Id.* at 196. Wellington agrees that *Bowers* cannot be reconciled with *Roe*. WELLINGTON, *supra* note 19, at 120.

54. *See* WELLINGTON, *supra* note 19, at 83-85.

55. LEARNED HAND, THE BILL OF RIGHTS 73 (1958). For a similar discussion of the concept of equality in the jurisprudence of the Equal Protection Clause, see Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 539 (1982).

56. Wellington merely states that "example" and "context" are required. WELLINGTON, *supra* note 19, at 87.

rhetorical.[57] That is, Wellington does not advance arguments based on empirical data, and he does not reason from policies drawn from statutes in closely related areas. Rather, his appeal is to our intuitive sense of what is moral and what is not. In that sense, his conclusion cannot satisfy the basic tenet of Legal Process jurisprudence, of laying down a rule capable of being generalized and that can provide a basis for explaining other decisions.

C. STARE DECISIS

Wellington is on sounder ground when it comes to the wisdom of making significant changes in *Roe*. The reason, ironically enough, is due to the amorphous nature of public morality. The proponent of changing existing case law, of course, bears the burden of proof. It is difficult to see how that burden can be met, at least if the question is whether public morality on abortion has changed significantly since 1973. Resolving that question would require analysis of legislative action on abortion over the past two decades.[58] Those tea leaves would be particularly difficult to read, given that all legislation has been written in order to comply with the *Roe* protection of the right to privacy. It would be difficult, therefore, to justify any significant change in *Roe* by reference to the concept of a change in public morality.[59] The weight of stare decisis, in other words, requires strong evidence of a different public morality in order to set precedent aside.[60]

V. CONSTITUTIONAL DESUETUDE?

That there are problems with a concept, however, does not mean that it should be discarded. Perhaps its use can be limited. That is certainly true of public morality. Wellington's own examples make clear the utility of the concept in certain limited situations. Thus, he argues that laws disadvantaging women are unconstitutional because of "changing national attitudes about the importance of gender equality. These attitudes reflect widely shared public values. They constitute a public morality."[61] Similarly, Wellington writes that the ban on the sale of contraceptives to married couples struck down in *Griswold* was properly subjected to "robust" judicial re-

57. *See supra* notes 43-50 and accompanying text.

58. This was one method used in Justice Stewart's plurality opinion in Gregg v. Georgia, 428 U.S. 153 (1976), to uphold the constitutionality of state imposition of the death sentence for murder. *Id.* at 179-81.

59. Justice Marshall's dissent in *Gregg* questioned the relevance of legislative action on the ground that only the views of an "*informed* citizenry" could be relevant. *Id.* at 232 (emphasis in original).

60. Justice O'Connor's analysis of the stare decisis question in the "joint opinion" in *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791 (1992), only adverts briefly to the amorphous notion of public morality concerning abortion. Her opinion first rests on the comfortable ground that a court should not upset that which has been settled without strong reason for doing so. The stare decisis portion of the opinion then turns to the far more troubling argument that the Court should be especially reluctant to overrule when there is "an intensively divisive controversy." *Id.* at 2815. Both Chief Justice Rehnquist, *id.* at 2860-67, and Justice Scalia, *id.* at 2881-85, showed the inherent difficulties with that argument.

61. WELLINGTON, *supra* note 19, at 85-86.

view.[62] Although the statute presumably reflected a contemporary version of public morality when drafted, the public's view of morality had changed in the decades since its adoption. The "passage of time," in other words, "should have eliminated any deference that the Court might have paid toward the legislature's interpretation of public morality."[63]

The two problems of gender discrimination and ban on contraceptive sales provide easy examples of statutes where deference to legislative decisions can no longer be justified in the light of changing public morality. The *Griswold* discussion is a particularly apt example in this respect. Because the goal of that statute was to serve public morality, it was especially easy to challenge its continued existence on the ground that public morality had changed in the four decades since its adoption. In this respect, indeed, Wellington seems to be reworking at a constitutional level the notion advanced by his successor as Dean of the Yale Law School, Guido Calabresi, that the courts have the power to invalidate obsolete statutes.[64] Moreover, both situations provide easy examples of cases where the invalidation of legislation hurts no one (assuming, of course, that this kind of bringing up to date of public morality can be characterized in that fashion). It is much more difficult, however, to see how changing notions of public morality come into play when the effect of the statute is necessarily to hurt someone. Law, of course, is not always a win-win game with no losers. How would changing notions of public morality, for example, affect the decision in a case involving whether affirmative action is constitutionally permissible. After all, is not one goal of judicial review to protect the *loser* in the legislative process?

Wellington's partial reply to these criticisms would be that public morality is only one aspect of judicial decision-making. In the absence of some better criteria as to when public morality comes into play, other than to override obsolete statutes where the effect is not to harm members of another class, Wellington does not provide sufficient guidance to the contours of its usefulness. Of course, that is the subject of another book.

VI. CONCLUSION

Much of the above criticism is pure carping. Wellington did not set out to answer all questions concerning *Roe v. Wade* or even to address all questions concerning the public morality aspects of that decision. But any theory of constitutional decision-making premised on a concept like public morality carries significant liabilities. The theory's proponent must advance some method of showing when and why it works and when and why it does not. Wellington's failure to do so in the abortion and flag-burning situations makes it hard to understand the sweep of his theory. Nevertheless, the concept of public morality is an intriguing one, with significant possibilities in-

62. *Id.* at 90.

63. *Id.*

64. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982). Calabresi's book is itself a reworking of the common law notion of desuetude. *See also* REYNOLDS, *supra* note 31, at 270-73 (explaining the importance of the public's interpretation of statutes).

cluding constitutional desuetude. I hope Wellington will continue to explore this area.

This review has focused on privacy and Wellington's concept of public morality because that is what I found most intriguing about *Interpreting the Constitution*. The book is, however, much more than simple analysis of *Roe v. Wade* and its implications for privacy in the context of public morality. Wellington presents a concise, readable, and yet sophisticated synopsis of the current debate over constitutional interpretation. I recommend this work highly to both constitutional tyros and legal professionals.