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Whipping Up a Storm: Trying to Make Sense of Constitutional Law

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Book Review



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Abstract

The effort to make sense out of what the judges of any Supreme Court do is all the more pressing and acute in times of political turbulence. Lawrence Lessig's *Fidelity and Constraint* offers itself as one such effort to distinguish constitutional decision-making from "the ad hoc in politics" by its reliance upon principled and neutral reasons; it is the judges' detached and professional nature that underwrites their democratic legitimacy and institutional commitment. This review challenges those claims and demonstrates how Lessig's analysis does more to undermine that project than achieve it.

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Cover Page Footnote

I am grateful to Richard Albert, Ben Berger, Richard Devlin, Richard Haigh, Jennifer Leitch, Thomas Lundmark, Mark Tushnet, and other friends and colleagues for critical assistance and intellectual support.

Review Essay

Whipping Up a Storm: Trying to Make Sense of Constitutional Law

ALLAN C. HUTCHINSON¹

Fidelity and Constraint: How the Supreme Court Has Read the American Constitution, by Lawrence Lessig²

The effort to make sense out of what the judges of any Supreme Court do is all the more pressing and acute in times of political turbulence. Lawrence Lessig's *Fidelity and Constraint* offers itself as one such effort to distinguish constitutional decision-making from "the ad hoc in politics" by its reliance upon principled and neutral reasons; it is the judges' detached and professional nature that underwrites their democratic legitimacy and institutional commitment. This review challenges those claims and demonstrates how Lessig's analysis does more to undermine than project that achievement.

TRYING TO MAKE SENSE out of what the judges of any Supreme Court do is an enduring preoccupation of lawyers and jurists. This is especially so in the United States. This is no mere academic indulgence as the Court's work has a deep and lasting impact on many aspects of the American polity and society. Whether by way of grand theorizing or through case-by-case criticisms, academics and

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1. Distinguished Research Professor, Osgoode Hall Law School, York University. I am grateful to Richard Albert, Ben Berger, Richard Devlin, Richard Haigh, Jennifer Leitch, Thomas Lundmark, Mark Tushnet, and other friends and colleagues for critical assistance and intellectual support.
 2. (Oxford University Press, 2019) 581 [Lessig].

commentators have sought to understand and handle the tensions between power and principle, politics and personnel, tradition and change, and much else in the work of the Court. Of course, this challenge is all the more pressing and acute in times of political turbulence; the age of Trump has exacerbated an already difficult and divisive issue. In such contemporary circumstances, therefore, for good and bad, the appointment and performance of the Supreme Court's nine justices are thrust further into the critical spotlight; their credentials and their bona fides are subject to even greater scrutiny and pressure from both inside and outside the academy.

Occasioned by the fragile democratic legitimacy of the Supreme Court, Herbert Wechsler's challenge still casts a long shadow over those presuming to explain the apparent mysteries of Supreme Court decision-making in modern constitutional law—to demonstrate how judges perform their task in a way that is distinguishable from “the ad hoc in politics” by their reliance upon principled reasons that “in their generality and their neutrality transcend any immediate result that is involved.”³ And, it might be added, transcending any immediate political agenda that is involved. Lawrence Lessig places himself squarely with this Wechsler camp. For him, it is the judges' detached and professional nature that underwrites their democratic legitimacy and institutional commitment: They can engage with ideological politics, but not be consumed or captured by it. *Fidelity and Constraint* is devoted to accomplishing this delicate and difficult task as a matter of both historical practice as well as normative imperative.

I. LESSIG IS MORE

It is to Lawrence Lessig's credit that he has entered this hectic fray and taken on the daunting challenge of explaining the wiles and workings of the Supreme Court. But, as anyone familiar with Lessig's other writings know, his intervention is guaranteed to be as ambitious and challenging as it is disconcerting and disturbing. In this regard, *Fidelity and Constraint* does not disappoint. It is a no half-measures and no-stone-unturned work of enormous erudition, sparkling insight, and provocative aperçus. While it is conversational and relaxed in style and presentation, it is far from conventional or casual in its approach and conclusions. In revisiting the received wisdom on the history of constitutional law, he rewrites it. After reading *Fidelity and Constraint*, that history will not be

3. Herbert Wechsler, “Toward Neutral Principles of Constitutional Law” (1959) 73 Harv L Rev 1 at 15, 19. For the best survey of the different approaches, see Thomas E Baker, “Constitutional Theory in a Nutshell” (2004) 13 Wm & Mary Bill Rts J.

viewed or understood in the same way again. With its broad sweep and nuanced depth, it is likely as close to a jurisprudential page-turner as you could hope to read. Lessig can both soar with the theoretical eagles and get his hands dirty with the practical grubs. If “administrative law is not for cissies,”⁴ then Lessigian constitutional law is only for those who can stomach high-risk thrills and spills in the hope of experiencing some kind of intellectual apotheosis. It is a genuinely provocative performance by a singular talent.

That said, if you fly as high and as far as Lessig does, you are likely to crash and burn on more than one occasion. That is certainly the case in this book: His admirable refusal to play it safe ensures some spectacular flame-outs. However, that is not at all the main problem with his iconoclastic (or, to use one of Lessig’s own colourful terms, “funky”)⁵ approach to constitutional law and history. His self-imposed mission is to “provide an account that fits the data—the decisions by the US Supreme Court—while justifying the practice these data reveal.”⁶ Or, less formally, he offers a critical look at “the game we’ve been playing so far.”⁷ In performing this unashamedly apologetic task, he treats judges as professional and principled officials, not as politicians in robes or “party hacks.”⁸ Indeed, a major part of his explanatory endeavour is to demonstrate that it is not only possible, but also has been the case that the Supreme Court has performed its work in a legitimate, predictable, and defensible way when looked at from his account’s point of view: “[T]he judge’s decision is based ... upon law, ... [not] upon politics (or craziness).”⁹

Yet, as I read it, Lessig’s powerful probing and reading of the American tradition of constitutional law produces exactly the opposite result—he provides a cogent and compelling argument that the work of the Supreme Court can be best understood and defended as an exercise in almost self-conscious political decision making. Once his unnecessarily narrow notion of what “politics” entails is developed and expanded, it becomes obvious and undeniable that the historical arc of constitutional adjudication and doctrine is significantly driven and defined by the dynamic forces of the informing political context. While the Supreme Court’s decisions might not follow the nation’s electoral returns, nor are its judges

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4. Antonin Scalia, “Judicial Deference to Administrative Interpretations of Law” [1989] *Duke LJ* 511 at 511.
 5. Lessig, *supra* note 2 at 38.
 6. *Ibid* at 2.
 7. *Ibid* at 4.
 8. *Ibid*.
 9. *Ibid* at 17.

considered “party hacks,”¹⁰ he argues that they never stray far from conventional political views or go against society’s extant deep-seated political commitments (for both good and bad). They might sometimes be slightly behind or ahead of these trends, but not by much. Except for the die-hard formalist, this is hardly surprising. But for Lessig and others like him, this presents a confounding challenge. For all the huff and puff of constitutional jurists and judges, it is not the text, context, interpretive strategy, or judicial role that energizes the twist and turns of constitutional doctrine, but its larger ideological framing at the time of its shaping and dependence—constitutional adjudication and doctrine is a mode of politics.

In this review, therefore, I will first provide the most charitable and faithful summary of Lessig’s account. After that, I will unpack it in more critical ways and turn the tables on Lessig. Rather than accept the force of his analysis and go along with his contention that to deny the reality of the constraints that operate on the Supreme Court is “to spit in the wind of what we all know is true,”¹¹ I will show that it is Lessig himself who has whipped up a hostile jurisprudential storm and tried to spit in its face. Throughout the review, my ambition is not to grapple with the detailed accuracy or fairness of Lessig’s historical accounts of individual cases or lines of doctrine: I leave that to those more qualified to judge and contest. My focus is upon the jurisprudential appeal, validity, overall sweep, and import of his account about the apparent constraints that demand and anchor Supreme Court judges’ fidelity to the Constitution. Insofar as they exist, they are political in nature and effect.

II. BLOWING IN THE WIND

Lessig offers “a kind of econometrics brought to constitutional theory.”¹² In an unexpected evocation of the late Ronald Dworkin,¹³ he offers his account of the American constitutional tradition and legal doctrine as “a story that makes

10. *Ibid* at 4.

11. *Ibid* at 416.

12. *Ibid* at 2.

13. See *e.g.* Ronald Dworkin, *Law’s Empire* (Harvard University Press, 1986). It is a surprising reference as Lessig is adamant that he is not involved in offering a moral or prescriptive reading of the Constitution. The other two constitutional theorists that he commends are his Harvard colleagues, Cass R Sunstein and Richard Fallon. See Cass R Sunstein, *Constitutional Personae: Heroes, Soldiers, Minimalists, and Mutes* (Oxford University Press, 2015); Richard H Fallon, Jr, *Law and Legitimacy in the Supreme Court* (Harvard University Press, 2018).

the most of the practice that we're trying to understand."¹⁴ Although he can be a little preachy at times, he does have the knack of telling a good story. *Fidelity and Constraint* is an appetizing, if daunting prospect. But he is not content to tell us what has been happening. He also suggests that, in making "the most" of it, he will be defending and justifying that practice as well. In telling this kind of story, Lessig seeks to tread a very thin line. He does not claim to provide a playbook for what judges should do or to establish moral or political standards against which to judge their decisions. What he does do is explain what the Supreme Court has been doing and put forward a defence of that historical practice. This is a tall order as much of the Supreme Court's performance over the years has not always been uplifting or stellar. Indeed, many agree that it has been downright bad and embarrassing at times.

As the title of his book suggests, Lessig maintains that Supreme Court judges do and should fulfill their judicial responsibilities by following "the practice of interpretive fidelity."¹⁵ In fleshing out this effort and traversing vast swathes of constitutional doctrine, he is in an extended and thinly veiled conversation with two of his main mentors, both Justice Antonin Scalia (for whom he clerked) and Professor Bruce Ackerman (with whom he was a student).¹⁶ Although he ultimately rejects the ideas and proposals of both, Lessig's own account bears all the hallmarks of these two towering figures on the constitutional landscape; he offers important tweaks of both their work rather than an outright dismissal of them. As such, *Fidelity and Constraint* builds upon and advances many familiar motifs and tropes of contemporary constitutional theory. In particular, he looks to resist any particular pigeon-holing and claims that his account can make sense of both legal doctrine and jurisprudential insights on the political Right and Left. Lessig relies upon two primary tools or practices at work—meaning fidelity and role fidelity. The former draws upon the originalist tendency in legal hermeneutics and the latter draws on the institutional consideration of political science. Neither of these is new in either use or exposition; it is the way that they interact that gives his account its distinctive and original character.

In order to grasp the idea of meaning fidelity, Lessig works with a Scalian one-step originalism, but supplements it with a more creative second step. While traditional originalists ask themselves what the words of a particular constitutional

14. Lessig, *supra* note 2 at 422.

15. *Ibid* at 18.

16. See Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (West Group, 2012); Bruce A Ackerman, *We the People*, vols 1-3 (Harvard University Press, 1991, 1998, 2014).

text mean, his neo-version asks how that text might be applied purposefully to a changed context. This, of course, can result in some varied and different renderings across and over time. For him, as he demonstrates in his colourful tour through the search and seizure doctrine,¹⁷ blind adherence to a text can be as wrong-headed and mistaken as a novel or even “aggressive” interpretation can be illuminating and valid.¹⁸ More to the point, creative translation can actually be more faithful to the original. For him, this kind of inspired judicial work is not at all an act of betrayal, but is more fruitfully understood as a renewal in the name of preservation: It remains faithful to the text’s original meaning, not only its words.¹⁹ Throughout *Fidelity and Constraint*, Lessig provides rich and subtle accounts of how Supreme Court judges have gone about their translating task in this sophisticated, originalist mode of interpretation.²⁰ Indeed, it turns out that the originalist Scalia is the exception not the rule, even within the originalist canon.

Role fidelity operates along with meaning fidelity in the Lessigian constitutional order. By this, he intends to draw attention to how the Supreme Court has to recognize and respect its institutional limitations within a broader scheme of democratic governance. It is not for courts to usurp or trample on territory that is more appropriately trodden by the executive and legislative branches of government. For example, in the Constitution’s early days, Chief Justice Marshall solidified the Supreme Court’s role with an act of strategic “brilliance” in *Marbury v Madison*.²¹ By “bending” and “dissembling”²² the law, he committed “a sin,” but “a beautiful sin.”²³ Similarly, in the 1930s, when the Supreme Court came under enormous presidential and popular pressure to change its jurisprudential tack,²⁴ the judges took a similar institutional approach to that of Marshall, only this time it was done to preserve the Court’s role, not to establish it. As Lessig points out, “getting it right is important, but appearing non-political can be much more important”:²⁵ There are occasions where the Supreme Court has given constitutional substance a back seat to institutional survival.

17. Lessig, *supra* note 2 at 259-70.

18. *Ibid* at 255.

19. See generally Jack Balkin, *Living Originalism* (Harvard University Press, 2011).

20. Lessig, *supra* note 2 at 49-69.

21. *Ibid* at 32, discussing *Marbury v Madison*, 5 US (1 Cranch) 137 (1803).

22. Lessig, *supra* note 2 at 33, 43.

23. *Ibid* at 33.

24. *Ibid* at 160-72.

25. *Ibid* at 213.

However, the heart of Lessig's account is to be found in the way in which these two imperatives play off each other in a creative and sustaining tension: "[W]e can understand the evolution of Supreme Court doctrine as the product of the interaction between these two fidelities."²⁶ There is nothing innately conservative or progressive about how this has played out. Sometimes, role fidelity has compromised the obligation to pursue meaning fidelity as in recent efforts to turn back *Roe v Wade*.²⁷ At other times, meaning fidelity has pushed the Court to act at the limits of its institutional competence and occasionally beyond them, as in *Griswold v Connecticut*.²⁸ Indeed, Lessig is at his very best when he goes deep into in the historical thickets of constitutional doctrine to capture and describe this dynamic interaction. For instance, his evolutionary account of due process rulings from the mid-nineteenth century to the early twentieth century is an extended virtuoso performance that dances its way to stunning analytical effect over the ebb and flow of government regulation and its political underpinning.²⁹ In particular, he is entirely enlightening and convincing in showing how the Supreme Court shifted back and forth in its work between the pushes of meaning and the pulls of role in maintaining its overall constitutional faith. Accordingly, the history of legal doctrine has often been "the story of translations attempted, and then constraints of role realized."³⁰

As edifying as that account is, Lessig recognizes that, if he is to justify and not simply describe the pace and pattern of these doctrinal manoeuvres, he must pull back the curtain and look more keenly at the off-stage dynamics of the shifting constitutional and political contexts. After all, to justify the "separate, but equal"³¹ decades as being not only understandable, but acceptable is no easy feat. He does this by going beyond the internal workings of the Court and looking to the external context and forces within which the Court operates. For him, this entails an appreciation for the fact that "the Constitution gets read against the background of the dominant ideas of any age."³² He insists that the work of the Supreme Court must be understood and appreciated in terms of prevailing values and commitments: He terms these as factual or reality-based constraints on the Court. To expect the Supreme Court to ignore or side-step these Holmesian

26. *Ibid* at 71.

27. *Ibid* at 397-401, discussing *Roe v Wade*, 410 US 113 (1973).

28. *Ibid* at 392-94, discussing *Griswold v Connecticut*, 381 US 479 (1965).

29. *Ibid* at 95-136.

30. *Ibid* at 232.

31. *Plessy v Ferguson*, 163 US 537 at 552 (1896) [*Plessy*].

32. Lessig, *supra* note 2 at 442.

“felt necessities of the time”³³ would be tantamount to expecting the Court “to spit into the wind of what everyone knows is true, whether or not that ‘truth’ conforms to what the framers might have thought.”³⁴ Lessig commits himself to an account of the period between *Plessy v Ferguson*³⁵ in 1896, to *Brown v Board of Education*³⁶ in 1954, that acknowledges that racism was a fact of social life that the Supreme Court and its “normal judges” simply took for granted,³⁷ no matter how reprehensible it may seem to later and more modern sensibilities:³⁸

The social and political context is thus a constraint on constitutionalism. It is also a feature of constitutionalism, not a bug. It is an ongoing assurance that the Constitution will not become too remote. The key is to get help on any theory that treats context as compromise or an error, and instead build a theory that places context right in the middle.

Accordingly, with this combination of internal and external constraints, Lessig defends the overall thrust and merit of his account by reference to its ultimately democratic character—if the Supreme Court were to abandon its practice of fidelity, it would disrupt the delicate balance of democratic powers and responsibilities: “[T]o the extent that propriety will be measured against the background of ... public meaning, if the Court deviates from this background understanding, it risks its own institutional standing.”³⁹ In this way, according to him, the Supreme Court’s practice of interpretive fidelity in both role and meaning can not only be accurately explained, but also convincingly justified. These are powerful and provocative claims; they warrant sustained attention and critical evaluation. After offering a more searching examination of his claim that “the judge’s decision is based ... upon law ..., [not] upon politics (or craziness),”⁴⁰ I will challenge his view that these judicial practices, no matter how accurately described, can be defended as legitimate and justified.

33. OW Holmes, Jr, *The Common Law* (Little, Brown, 1881) at 1.

34. Lessig, *supra* note 2 at 232.

35. *Plessy*, *supra* note 31.

36. 347 US 483 (1954).

37. Lessig, *supra* note 2 at 344-60.

38. *Ibid* at 456.

39. *Ibid* at 351. The argument here is similar to Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar, Strauss, & Giroux, 2009).

40. Lessig, *supra* note 2 at 17.

III. SPITTING IN THE WIND

There is a somewhat baffling progress to Lessig's central argument. Although he begins with the self-imposed task of demonstrating that the Supreme Court can and does do its job as something separate and apart from politics, he ends *Fidelity and Constraint* with the clear admission that Supreme Court judges can and do engage in a profoundly political process when they craft their judgments and decisions. It is a long and winding road between "the judge's decision is based ... upon law ..., [not] upon politics (or craziness)"⁴¹ and "the Constitution gets read against the background of the dominant ideas of any age."⁴² As the old saw has it, it is difficult, if not impossible, for Lessig to get where he is going from where he starts. The critical challenge is to explain this crucial shift and its significance for his account.

The crucial issue for explaining this lies with the meaning of "politics." Whether the Supreme Court's work is or is not political depends upon what is meant by that term. Almost all agree that legal cases arise in socio-political contexts and that their resolution has an impact on those socio-political contexts.⁴³ However, the mainstream view is that the Supreme Court's actual judgment giving and decision making can be done healthily removed from those contexts. Few contend that there is no connection between decision and context; the disagreement is over the extent of that insulation or immersion. Lessig leans very much towards the insulation end of the jurisprudential spectrum. Throughout his account, he is adamant that judges do not act as "party hacks" or partisan[s].⁴⁴ But this is a very limited understanding of politics; there is more to politics than adherence to a Republican or Democratic party line and even that is far from uniform, let alone the same. Indeed, the explanation for Lessig's apparent switch can be found in an expansive and more convincing grasp of what the claim that "law is politics" is about. Those who adopt such a stance, like me,⁴⁵ treat the Republican–Democrat split as a shallower and narrower segment of a much deeper and broader continuum. So understood, it brings Lessig well within the "law is politics" fold.

Lessig draws some important distinctions about the role of social values, political norms and ideological alignments in the adjudicative enterprise. One is that between contested issues "that normal people think normal people can disagree about" and uncontested issues that "normal people think normal people don't disagree about."⁴⁶ He notes that something is contested not because "people, on average or frequently, contest it [but] ... because within a particular

social context, people understand that normal people can disagree about it.”⁴⁷ For him, therefore, “normal” simply means mainstream—if you do disagree on some issues, then you are not normal and are outside the mainstream. So, while Republicans and Democrats are normal, presumably socialists and fascists are not. Of course, across time, what falls into the contested and uncontested boxes will change. While it was uncontested at the time of *Plessy* in 1896 that segregation was acceptable, this notion had switched around and become contested by the time of *Brown* in 1954.

Another important distinction for Lessig is that between foregrounded and backgrounded issues. Whereas the former are things that are presently talked about, the latter are not. In short, this is shorthand for tracking and describing “the activity of current social discourse.”⁴⁸ Again, what is in each box will change over time. So, today, abortion is foregrounded and contentious, but sexual harassment is foregrounded and uncontested. On the other hand, while infanticide is backgrounded and uncontested, gay rights, at least in the 1970s, were backgrounded and contested. Taken together, these two distinctions do considerable work in grounding and defending Lessig’s account of Supreme Court judging and doctrine over the years. Indeed, they are the key to unlocking his claim that “law is not politics.”

For Lessig, constitutional judging takes place on the ground of these uncontested and backgrounded issues. He argues that these “social meanings are facts” and are simply taken-for-granted.⁴⁹ As such, they not only require no argument in their defence, but also mark anyone who does contest them as outside the pale of serious attention. Importantly, the “normal judge,” like the normal person, will rely on these social facts, consciously or not. So, in going about their work, the normal judge will “fit in” with and become “well-adapted” to the prevailing social discourse and understandings around the issue to be adjudicated.⁵⁰ In other words, they will not contest the presently uncontested or foreground what is presently backgrounded. Lessig hangs much of his account’s plausibility and cogency on the indubitable constraint of these social facts:⁵¹

Always the Court—including every justice—has yielded to “what we now understand” Democracy operates subject to certain constraints. The Constitution is one constraint. Reality is another. “What we now understand” . . . has formed a

47. *Ibid* at 145-46.

48. *Ibid* at 146.

49. *Ibid* at 446.

50. *Ibid* at 154.

51. *Ibid* at 420.

critical constraint on the evolution of the Supreme Court's doctrine. As ideas get thrown up for grabs, the Court's readings of the Constitution changes Those changes are not simply politics. They are not simply the political preferences of a legal elite. They are a reality—one that the legal elite processes differently from the public, no doubt. But they are part of a social reality that our Constitution is subject to.

There is so much here that needs to be unpacked and held up for criticism. There may well be certain "realities" that operate on everyone's mind, but it is difficult to view them as monolithic and fixed at any one point in time. As Lessig concedes, change occurs. But that change is not *en bloc*: The status quo or "what we now understand" is always on the move and is rarely as integrated as Lessig suggests. In a manner of speaking, it is always evolving in that the later reality grows out of the existing reality; the beginnings of the next era are in play, albeit barely and marginally, in the present era. So, again as regards racism, while the racist attitudes that generated and sustained *Plessy*-like views were dominant, they were not wall-to-wall or unchallenged; black Americans and their white allies (as Justice Harlan's famous and sole dissent revealed)⁵² were not part of that social consensus. Moreover, as elite and powerful actors, Supreme Court judges were not beholden to such views, except as it either appealed to them or suited their need to preserve their institutional power. As such, although judges are part of the existing social fabric, they are also weavers and preservers of that fabric; they cannot absolve themselves of responsibility for maintaining racist or other oppressive attitudes and practices.

The upshot is that, while Supreme Court judges might not simply legislate their own Republican or Democratic preferences,⁵³ they are influenced and driven by the larger socio-political views and forces in play. The very act of recognizing and identifying the contours of "current social discourse"⁵⁴ and that "social and political context *inevitably and appropriately* plays a significant role"⁵⁵ is profoundly political in that it involves choice and responsibility among contested alternatives about power and position in society; there is no uncontroversial or neutral way to fix that context with sufficient operational certainty. The only difference between contested and uncontested issues is not whether they are factual or not:

52. *Plessy*, *supra* note 31 at 552-64.

53. It might well be that only the academic elite are sufficiently naïve to believe this. The recent shenanigans over the appointment of Supreme Court judges, like Neil Gorsuch and Brett Kavanaugh, suggest that the political elite and the public generally realize full well the political role and performance of the Supreme Court.

54. Lessig, *supra* note 2 at 146.

55. *Ibid* at 454 [emphasis in original].

it is the visibility of each. Both are political and, therefore, not factual in the sense of having an indisputable there-ness. The uncontested are as political as the contested in that they represent always changing and, therefore, unreal or un-factual ideas; they both function at different levels of social acceptability and embeddedness. Lessig recognizes that when he observes that the Supreme Court's work can be explained as "tracking the dynamic of an evolving social meaning" and that "as [social] understanding changes, the [constitutional] doctrine gets translated to track that change."⁵⁶

Although Lessig wants to pretend otherwise, Supreme Court judges are not as constrained as he claims they are or as his account demands if it is to be persuasive. Both "reality" and "the Constitution" are not things that operate entirely outside the realm of judicial choice, but are largely inside it. It is simply unconvincing to assert that judges act appropriately when they acknowledge the reality of social understandings and display because they "cannot spit into the wind of what everyone knows is true, whether or not that 'truth' conforms to what the framers might have thought."⁵⁷ This kind of "truth" signifies less a constraint, but more a felt necessity that only has obligatory force in the there-and-then; it has no free-standing moral or political pull outside of its informing and immediate social context. Accordingly, Lessig's claim that "the Constitution gets read against the background of the dominant ideas of any age" is an acceptance, not an abandonment of the notion that the judicial development of constitutional law is at bottom a deeply and inescapably political process.⁵⁸ If anyone is spitting in the wind, it is Lessig himself.

56. *Ibid* at 372, 375.

57. *Ibid* at 232.

58. *Ibid* at 442.

IV. FLAPPING IN THE WIND

It is not only the larger political thrust of Lessig's overall account that is based on politics. Even its more local and day-to-day understanding of what judges are doing and are supposed to be doing is infused with a deep political character and colouring. Following the dictates of meaning fidelity and role fidelity is not the straightforward or non-political task that Lessig imagines or portrays it to be. Indeed, the whole case-by-case practice of constitutional adjudication is less technical and professional and more political and contestable than it is conceded.

As a neo-originalist, Lessig runs into many of the problems that accompany any mode of originalist interpretation—variable historical records; shifting discursive meanings; intransigent collective intent; disparate worldviews; and the like.⁵⁹ Indeed, his two-step approach to meaning fidelity seems to throw in a few extra difficulties for good measure. If it is taxing to locate the original intention behind the Constitution or the original public understanding of the Constitution's text, it is no less demanding to capture the contemporary zeitgeist with any degree of confidence. Furthermore, once you add these two demanding practices together, it becomes beyond the grasp of even a super-human judge, let alone any "normal" judge. Consequently, despite the originalists' claims to offer a viable escape from the tendency for judges (and jurists) to turn constitutional interpretation into a vehicle for ideological advocacy, the neo-originalists hide more than they reveal; there is a whiff of the mystical and mysterious about their craft. While there is nothing about the idea or practice of "textual translation" that is necessarily ideological (as it can be done by both Right and Left to serve their own ends), its performance in particular practical settings cannot be achieved without taking a stand on particular and divisive political issues and ideas.

Lessig's account of meaning fidelity is so open-ended as to be almost vacuous. For him, under the rubric of "translation," it would seem that two judges can reach entirely opposite understandings about the original meaning of a textual provision and its application to modern circumstances, but each be accredited with being faithful to the Constitution. This defies any serious defence, especially when such a justification is done under the name of constitutional constraint. This is exactly what happened in the *Citizens United v Federal Election Commission* case in 2010.⁶⁰ Both Justice Stevens' dissent (joined by Justices Ginsburg, Breyer, and Sotomayor) and Justice Scalia's concurrence (joined by Justice Alito and,

59. See Allan C Hutchinson, *Toward an Informal Account of Legal Interpretation* (Cambridge University Press, 2016) ch 5.

60. 558 US 310 (2010).

in part, by Justice Thomas) claimed to be taking an originalist approach; the former emphasized that the framers did not have corporations in mind when they guaranteed the right to free speech, whereas the latter argued that there was no historical evidence that the framers contemplated that the government could restrict the political speech of business corporations.⁶¹ Assuming good faith on each side, the tie-breaker was more likely not interpretive authenticity, but rather ideological resonance. As such, Lessig comes very close to preaching legal theory, but condoning political ideology.

When it comes to role fidelity, the political character of this device is even more obvious. The basic Lessigian move seems to be that while judges are and should generally be faithful to the Constitution's meaning and "decide cases correctly," they can deviate or abandon that meaning and obligation when role fidelity so demands.⁶² This will be the case even if they sometimes have to decide "in one way, even though [they] believe they would decide it differently if they didn't need to worry about the institutional costs to the court."⁶³ It is difficult to appreciate how this balancing of interpretive fidelity and institutional propriety can be accomplished without engaging in a similar kind of calculation that politicians make and without drawing upon some politically embedded standard of what will and will not fly from the public's point of view. It puts appearance and affect above substance and candour.

Examples of this abound in *Fidelity and Constraint*. Two examples will suffice. Lessig's treatment of the foundational *Marbury* judgment sets the tone for later evaluations. He praises it for its strategic "brilliance" not its legal quality.⁶⁴ In "bending" and "dissembling"⁶⁵ the Constitution (and, thereby, establishing the institution of judicial review), he holds that Marshall committed "a sin," but "a beautiful sin."⁶⁶ If this kind of rhetorical success and role building is not a quintessential political act and achievement, it is hard to know what would be. Again, the Supreme Court's judgment in *Planned Parenthood of Southeastern Pennsylvania v Casey*⁶⁷ and its reluctant refusal to overturn *Roe* shows how role fidelity has been used to eclipse meaning fidelity.⁶⁸ Although the Supreme Court judges were divided on what meaning fidelity demanded, they were relatively

61. *Ibid* at 353, 393.

62. Lessig, *supra* note 2 at 156.

63. *Ibid* at 157.

64. *Ibid* at 32.

65. *Ibid* at 43.

66. *Ibid* at 33.

67. 505 US 833 (1992).

68. Lessig, *supra* note 2 at 400-401.

united on the fact that institutional protection was more important than interpretive honesty. None of this is to suggest that such a calculation is inherently bad. However, it ill behooves a theorist, like Lessig, to run this argument in the name of demonstrating that the Court is *not* political: “[F]idelity to role forces the court to compromise on fidelity to meaning.”⁶⁹

Accordingly, although claiming to offer a distinctive and defensible account of constitutional history and doctrine, Lessig has to shave his theory so thin to explain all the twists and turns of constitutional doctrine that it becomes insubstantial. It can only encompass all by encompassing anything and everything: The constraints of meaning and role become so flexible and so loose that they lose any critical bite. The materials of constitutional law are so capacious and amorphous that almost anything short of outright manipulation or lying is acceptable. After all, if the judgments and decisions of Justices Scalia and Thomas, as well as Justices Marshall and Brennan are each and all legitimate, then Lessig’s account of constitutional doctrine has little to tell us or recommend. Fidelity turns about to be an easy virtue that places no real constraints on what constitutional judges can and cannot do and should and should not do. Indeed, looking at the constitutional world through a Lessigian lens, it is difficult to envisage what would count as playing fast-and-loose or being unfaithful. In so many ways, he leaves judges and jurists flapping in the political wind.

V. BLOWING IN THE WIND

So what is the upshot of re-casting Lessig’s account as more accurately one that explains how the Supreme Court’s development of constitutional doctrine, as a matter of pace and substance, is driven and sustained by politics? And what follows if it is accepted, as he phrases it, that “‘what we now understand’ . . . has formed a critical constraint on the evolution of the Supreme Court’s doctrine”?⁷⁰ These are important questions that deserve some serious answers. The tone of Lessig’s responses seems to be premised on the overriding fear that, if the Supreme Court is understood as being engaged in politics, the whole system of democratic governance “and the character of the court as a judicial body” will be under threat.⁷¹ This is a false and unnecessary assumption.

To begin with, it is not at all clear why Lessig feels the analytical compulsion to offer a theory that not only provides “an account that fits the data,” but also

69. *Ibid* at 256.

70. *Ibid* at 420.

71. *Ibid* at 455.

serves to justify “the practice these data reveal.”⁷² His project commits him not only to incorporate irredeemable cases like *Plessy* and *United States v Cruikshank*⁷³ into his explanatory matrix, but also to defend those decisions as being somehow justified or, at least, “understandable” and making “sense in the context within which they were rendered.”⁷⁴ This justificatory inclusion, albeit begrudgingly so, is a very high price to pay for explanatory integrity, especially when he labels such decisions, with understatement, as “not good.”⁷⁵ The effect of this is to grant an all-in legitimacy to an adjudicative process that produced these cases and, as troublingly, all other future cases that might fit within or conform with “what we now understand,” no matter how objectionable or even abominable such decisions might be. It is one thing for Lessig to warrant this by noting that the Supreme Court should not be expected “to spit in the wind of what we all know is true,”⁷⁶ but it is surely a stretch too far to condone and justify such adjudicative handiwork. In avoiding the trap of offering an account of constitutional doctrine that is a thinly-veiled story of how it all lines up with the theorist’s own political and moral lights (as Dworkin and others do), it is equally problematic to offer an account that confers on what is or has been the prized imprimatur of what should be.

Also, there is something very unsettling about Lessig’s account of why Supreme Court judges should put role fidelity ahead of meaning fidelity—“correctness alone is not enough.”⁷⁷ This leads him to approve a course of judicial action that involves foregoing “decid[ing] cases correctly”⁷⁸ if the institutional costs of doing so are too high: “[C]ourts suffer an institutional cost if their judges behave in a way that seems political.”⁷⁹ Apart from seeming to admit that courts do act politically, he is recommending that courts hide from the public exactly what they are doing and why. In a democracy, this seems a very dubious notion for an institution that already has a very suspect legitimacy in society’s eyes. If the Supreme Court is to earn or reclaim its necessary claim to moral and political authority, it does not seem advisable to deliberately keep the non-elite public in the dark. This is a patronizing response and seems to undercut, not undergird, the Supreme Court’s standing in a scheme of governance animated by democratic

72. *Ibid* at 2.

73. 92 US 542 (1875).

74. Lessig, *supra* note 2 at 331-32.

75. *Ibid* at 331.

76. *Ibid* at 416.

77. *Ibid* at 156.

78. *Ibid*.

79. *Ibid* at 157.

aspirations and public values. Candour and good faith are surely better than a closeted dissemblance.

All of this seems to be driven by Lessig's fear that all will be lost if the Supreme Court is seen to be, and actually is, acting in a political way. Although he is in good company in being motivated by such a deep anxiety,⁸⁰ democracy will not fall or be irreparably harmed if Supreme Court judges are understood to be doing something that is inside, not outside the political fray. Ironically, it might be that an open admission that "the Constitution gets read against the background of the dominant ideas of any age" that will advance, not impair the democratic project.⁸¹ Citizens might be assured that their views do count and that the Supreme Court is not only acting in society's best interest, but also doing so in a way that respects contemporary society's views about what is in their best interests; direct participation *by* the people is far superior to indirect mediation by elite actors *for* the people. This is preferable to a Lessigian-informed scheme of governance in which its elite institutions rule through professional pretense.

Of course, once the political cat is out of the judicial bag, some changes will be necessary. This may or may not involve reducing the final authority of the Supreme Court on constitutional matters⁸² and/or rejigging the process by which Supreme Court judges are appointed and hold tenure. However, the real and neglected issue on the jurisprudential agenda is not the Supreme Court's lack of democratic legitimacy and the politicization of courts, but the institutional failure of other branches of government to address their own democratic foibles and failings. If governments and legislatures were more truly responsive to popular concerns and more open to popular participation, the question of what judges do would be less pressing and more incidental. Consequently, if there is a crisis in democracy, it is that it is used more as a rhetorical cloak for elitist governmental practice than as a measure and guide for popular politics. It is present governmental processes generally, not only judicial review, that fail to satisfy or even aspire to the demands of genuine democracy. But there is absolutely no warrant to frame the democratic debate as a zero-sum choice between legislatures and courts, as presently constituted.

80. Almost all mainstream theorists are so driven. See *e.g.* Dworkin, *supra* note 13; Sunstein, *supra* note 13; Fallon, *supra* note 13.

81. Lessig, *supra* note 2 at 442.

82. See Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 1999); Larry D Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2004); Jeremy Waldron, "The Core of the Case Against Judicial Review," (2006) 115 Yale LJ 1346. For my own proposals, see Allan C Hutchinson, *Democracy and Constitutions (A Short Book of Laughter and Forgetting)*, forthcoming.

In short, there is a strong case to be made for the creation of multiple possible veto points in ensuring the fulfilment of important democratic ambitions about the protection of people's rights and political entitlements. Lessig's deference to "what we now understand" has no democratic valence on its own. While legal critics and activists must work with the justificatory tools of their society, they are not condemned to work within its past decisions or remain beholden to its present orientations. The past consensus is only a starting point and the present accord is only a temporary respite from continuing debate and engagement; Lessig acknowledges this, even as he fails to act upon it. As such, extant democratic arrangements must themselves not only allow, but also encourage and facilitate critical engagement. Justificatory standards endure only as long as they retain the confidence and support of the community as the best and most useful benchmarks available; they thrive and wither in the good-faith debate between intelligent interlocutors about what counts as "working best." Lessig would do well to be more mindful of that.

VI. CONCLUSION

Lessig ends *Fidelity and Constraint* with a plaintive lament for the present fate of the Supreme Court. As contemporary politics manages to degrade itself further, his worry is that this is infecting the workings and prestige of the Supreme Court. As such, Lessig maintains there is "no guarantee that the practice that [*Fidelity and Constraint*] describes can survive."⁸³ In particular, he frets that the naked politicization of the Court (for example, in judicial appointments) will mean that its capacity to transcend partisan politics will be lost and "the effort to keep alive commitments thought fundamental therefore could [not] flourish."⁸⁴ Yet, if the crux of that Lessigian practice is that "the Constitution gets read against the background of the dominant ideas of any age," then, if he is faithful to his account, it will likely not only accommodate such a shift, but also will judge it to be acceptable.⁸⁵ That being the case, he will be left with the uncomfortable choice of either changing his account of the Supreme Court's history to give it a more substantive and "fundamental" tilt and bite or staying with his account and simply taking what comes. Lessig will be, in a manner of speaking, spitting into his own wind of constitutional truth in the face of such a political firestorm.

83. Lessig, *supra* note 2 at 6.

84. *Ibid* at 458.

85. *Ibid* 442.