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Response to Bruce Frohnen's review of *Fidelity to our Imperfect Constitution: For Moral Readings and Against Originalisms*

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Critical Dialogue

Constitutional Morality and the Rise of Quasi-Law. By Bruce P. Frohnen and George W. Carey. Cambridge, MA: Harvard University Press, 2016. 304p. $45.00 cloth.
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— James E. Fleming, *Boston University*

It is a privilege to participate in this exchange with Bruce Frohnen concerning our books. In my *Fidelity to Our Imperfect Constitution*, I observe that in recent years, many have assumed that originalists have a monopoly on concern for fidelity in constitutional interpretation. I reject all forms of originalism and defend a moral reading of the United States Constitution. Such a conception views the Constitution as embodying abstract moral and political principles, not codifying concrete historical rules or practices. It sees interpretation of those principles as requiring normative judgments about how they are best understood, not merely historical research to discover relatively specific original meanings. I argue that fidelity in interpreting the Constitution requires a moral reading. Fidelity commits us to honoring the aspirational principles embodied in our constitutional text and practice, not merely following the relatively specific original meanings of the Founders. Only a moral reading that aspires to interpret our imperfect Constitution so as to make it the best it can be gives us hope of interpreting it in a manner that may deserve our fidelity.

In *Constitutional Morality and the Rise of Quasi-Law*, Frohnen and Carey argue that separation of powers among coequal branches of government formed the cornerstone of our original constitutional morality. But "Progressives" attacked this bedrock principle, believing that it impeded government from "doing the people's business" (p. 8). The regime of mixed powers, delegation, and expansive legal interpretation that they instituted rejected the ideals of limited government embodied in the Constitution. Instead, Progressives promoted a governmental model rooted in French revolutionary claims. They replaced a Constitution designed to mediate among society's different groups with a body of quasi laws commanding the democratic reformation of society. Pursuit of this Progressive vision, they argue, has become ingrained in our legal and political culture, thereby undermining the constitutional safeguards that preserve the rule of law.

What are the justifications for pairing these two books? For one thing, they illustrate the radical divide between liberal and conservative constitutional theory. For another, even where they might seem to stand on common ground (consider my arguments for a moral reading and Frohnen and Carey's emphasis on constitutional morality, and both of our concerns for the virtues essential for ordered liberty), closer examination shows that we understand these concepts radically differently. I sketch our differences by focusing on the issues framed in my title.

1. *Fidelity:* I distinguish two understandings of fidelity in constitutional interpretation: a) fidelity as following relatively specific original meanings (originalisms) versus b) fidelity as honoring aspirational principles embodied in the constitutional text and practice (moral readings). I argue for the latter.

Frohnen and Carey do not explicitly present themselves as originalists nor do they advance a conception of fidelity as such. They argue that to realize the benefits of the rule of law, we must follow the original constitutional design as they conceive it. They presumably would argue that what I conceive as fidelity is instead infidelity of the highest order. In their terms, it amounts to a French Revolution overthrowing our original "mediating" constitution and replacing it with a "commanding" constitution (pp. 14, 77–78).

The Constitution is hardly commanding, although it is aspirational. The Constitution proclaims itself to be an instrument aspiring to form a "more perfect union" and to pursue the noble ends stated in the Preamble. Similarly, the Reconstruction Amendments promise a "new birth of freedom" together with the status of equal citizenship for all. If we are to be faithful to our imperfect, aspirational Constitution, we should interpret it so as to make it the best it can be. Frohnen and Carey evidently see separation of powers, the rule of law, federalism, and the nature of our mediating constitution as protecting us against the very things I see the Constitution as aspiring to. Yet following relatively specific original meanings would enshrine an imperfect Constitution that does not deserve our fidelity.

2. *Our Imperfect Constitution:* Jack Balkin (*Living Originalism*, 2011) contrasts two types of originalism. "Skyscraper originalism" views the Constitution as more or less a finished product, subject to later Article V amendment. "Framework originalism" views the

Constitution as a framework for governance that must be filled out over time through constitutional construction. Later generations have to build up and implement the Constitution, but they must remain faithful to the basic framework (pp. 21–23). This contrast parallels a basic difference between our books. Frohnen and Carey view the Constitution as more or less a finished product, whereas I view it as a framework for governance that we have to build out over time in order to address future problems and to realize the best understanding of our constitutional commitments.

Accordingly, the books reflect different starting points and attitudes toward change. I begin where we are today in an ongoing constitutional practice and seek to construct the theory that best fits and justifies that practice. They begin with a conception of the original constitutional design and criticize practices they see as departing from it. I presume that we have built out our framework for governance in a spirit of fidelity to our aspirational Constitution, and that where we have departed from practices specifically contemplated by the Founders, we have done so because they have proven to be inadequate to fulfill the Constitution's aspirations. They presume that Progressives who reject the original Constitution have sought to replace it with a different constitution that cannot preserve the rule of law.

3. *For Moral Readings:* I argue for a moral reading of the Constitution. They emphasize a constitutional morality undergirding the Constitution. Judging from these formulations, we might expect to find common ground. Yet I conceive a moral reading as a theory of constitutional interpretation and a substantive theory that best fits and justifies our constitutional text and practice. They conceive constitutional morality in terms of the self-restraint of officers to honor separation of powers, the rule of law, and federalism and therewith to secure ordered liberty. This morality is in part the virtue of officers who refrain from undertaking the aspirational projects my theory prescribes. Strikingly, constitutional morality on their view would preclude the very pursuit of a moral reading!

Both books reflect conceptions of the virtues necessary to sustain our constitutional order and to secure ordered liberty. In fact, I coauthored a book entitled *Ordered Liberty: Rights, Responsibilities, and Virtues* (2013; with Linda C. McClain). But there is a wide gulf between our views. For them, those virtues are inculcated almost entirely through the institutions of civil society. They reject what I propose: a formative project of government and civil society working together to inculcate civic virtues and to develop the capacities for responsible self-government. I conceive government as compensating or correcting for the failures of civil society in order to secure ordered liberty. They see government as usurping the role of civil society and encroaching on ordered liberty.

4. *Against Originalisms:* I argue against originalism in part on the ground that it cannot fit and justify our constitutional practice, which largely has rejected it. Indeed, I observe that originalism is characteristically a call for a radical return to first principles. Nonetheless, conservative legal originalists typically start from where we are today: a) living in a modern administrative state with practices not envisioned by the Founders and b) living in a constitutional order with doctrines built out through a process of common law constitutional interpretation. Because of the "ghost of *Lochner*," most originalists have largely accepted the legitimacy of the New Deal and the modern administrative state. Moreover, most accept, as settled law, doctrines that they are not able to square with relatively specific original meanings.

Frohnen and Carey are more radical in the sense of rejecting as illegitimate many practices and doctrines they believe are incompatible with the original constitutional design. Their attack on Progressivism entails that most of the New Deal and the modern administrative state is unconstitutional. Ironically, given that they evidently view themselves as Burkeans, they are more revolutionary than typical originalists because they contemplate a radical return to first principles and rejection of long-standing, deeply ingrained practices.

When I wrote *Fidelity*, I knew that the divide between liberal and conservative constitutional theory was profound. After reading Frohnen and Carey's book, I have concluded that it is wider and deeper than I could have imagined. We hold fundamentally different presuppositions about the attitudes of actors within our constitutional scheme. I presume that liberals are committed to building out the best understanding of our constitutional commitments, whereas they presume that liberals reject the original constitutional design and seek to replace it with a Progressive design that undermines the separation of powers, the rule of law, federalism, and therewith ordered liberty. I presume that when our constitutional practice does not conform to putative original constitutional design, it is because experience has shown that it is inadequate for pursuing the aspirations proclaimed in the Preamble. I presume, in short, an attitude of fidelity to our imperfect Constitution.

Response to James E. Fleming's review of *Constitutional Morality and the Rise of Quasi-Law*

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— Bruce Frohnen

Are the American people to be ruled by laws of their own devising or according to the prejudices of a small group of lawyers and politicians who have abandoned the hard work dictated by their vocation? This is only one of the questions addressed by *Constitutional Morality and the Rise*

of Quasi-Law that is ignored in James Fleming's initial contribution to this dialogue. Others include: What is law? What is the rule of law, and why ought we to value it? What is a constitution, and what role(s) might it play in upholding the rule of law? Is justice achievable through law? And, most comprehensively: What happens when a people's expectations from their government increase to the point where that government can no longer function according to the rules and restrictions laid down in law?

Fleming makes clear his indifference to such questions when discussing his own work: "I begin where we are today in an ongoing constitutional practice and seek to construct the theory that best fits and justifies that practice." That is, he takes judicial activism as self-justifying and seeks to buttress it as necessary for its perpetuation. His theory is a tool, a means by which to justify continuing currently popular conduct.

Why ought Fleming, and those who share his vision, continue their current conduct, and why ought citizens of the American republic acquiesce in such continuation? His evidence for the claim that his conduct is justified because the Constitution is "a framework or charter of abstract aspirational principles" (p. 10) consists of vague references to the Preamble and Civil War Amendments. He barely makes the effort of asserting this justification, and it is barely worth refuting. What Fleming adds is presumption. Here I refer to this statement: "I presume that we have built out our framework for governance in a spirit of fidelity to our aspirational Constitution, and that where we have departed from practices specifically contemplated by the Founders, we have done so because they have proven to be inadequate to fulfill the Constitution's aspirations." Such presumptions are convenient, but hardly self-evident. Moreover, his assertion that George Carey and I simply "presume" otherwise constitutes a flagrant dismissal of the evidence as well as the arguments of our book.

The core of what Fleming ignores in *Constitutional Morality* is its understanding of the vocation of lawyers and statesmen. He may feel free to "philosophize" in the partial sense of justifying his own practices and political preferences. But until quite recently, lawyers were trained otherwise and, given law's historical nature and role, the people clearly have a right to expect more from them. The historical and linguistic work Fleming dismisses as worthy only of "pygmies" is neither simple nor meaningless; it is the essence of lawyering, and especially of judging—just as determining legislative priorities and design is the essence of being a legislator and executing the laws is the essence of being a chief executive. When holding public office, one's duty is to uphold the generally understood methods and goals of that office. Adjudicating under law requires working to understand the law as it is and to vindicate the reasonable expectations of the parties to any given legal action. Making law requires writing legislation that sets forth clear, consistent rules the people can follow. Executing laws requires enforcing the law as written. This is the essence of the traditional American constitutional morality, a morality that once upheld the rule of law, not the rule of would-be moral philosophers in black robes. When all those in power decide that they are moral philosophers entitled to redesign the rules that order our common life, law is reduced to will—and a contradictory, unpredictable will at that.

Virtue requires of those in power that they not abuse it, that they act within the scope of authority given them by higher authority—in the case of judges and lawyers, the Constitution, and the law. It is ironic that Fleming would so misdefine the term "fidelity" as to have it require his "moral reading"—based in nothing more substantial than a thin Rawlsian consensus—to gut the text of law, and the Constitution's higher law, in the name of reaching his preferred political goals.

Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalisms. By James E. Fleming. Oxford: Oxford University Press, 2015. 264p. $79.00 cloth.
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— Bruce P. Frohnen, *Ohio Northern University*

Methods of constitutional interpretation have multiplied in recent decades. Self-conscious "living constitutionalism," noninterpretivism, and other methods eschewing direct reliance on the Constitution's text have been overshadowed by common law constitutionalism, moral/philosophical readings rooted in the work of Ronald Dworkin, and a plethora of "originalisms" spanning the distance from late Justice Antonin Scalia to postmodernist Jack Balkin. In this book, James Fleming seeks to critique and reinterpret these various methods and their assumptions. His goal is to reconcile most nonoriginalist methods to his own Dworkin-influenced reading and in opposition to any traditional, "authoritarian" form of originalism.

Of central concern to Fleming is originalism's perceived occupation of the high ground of fidelity to our fundamental law and frame of government. His solution? Lawyers and academics must reconceptualize fidelity (and that to which it is owed) so that they can defeat, in the court of legal and academic opinion, "authoritarian" originalism—that focus on text-based, original meanings Fleming portrays as a backward-looking ideology upholding "racist, sexist, and heterosexist expectations and presuppositions" (p. 63). According to the author, constitutional interpreters should instead engage in "a moral reading or philosophic approach that conceives fidelity as honoring our commitments to abstract aspirational principles" (p. xi).

Part I of *Fidelity to Our Imperfect Constitution* outlines recent attempts to "save" originalism by expanding its list

of authoritative texts and interpreting constitutional language at a higher level of abstraction. Fleming notes that this loose originalism risks making all of us into originalists, thereby jettisoning any value to the term. As to more traditional ("authoritarian") originalists such as John McGinnis and Michael Rappaport, Fleming accuses them of supporting regressive policies on the basis of a false, if not bad faith, argument that constitutional terms enshrine concrete historical meanings and precedents.

The second part is Fleming's attempt to reclaim the notion of "fidelity" for nonoriginalists. He focuses especially on David Strauss's "common law constitutionalism." The goal is to think "self-critically about the best that the law could mean within the limits of the law's language and what the community will accept" (p. 80). Here, he assumes that 1) "the best" is discernable by judges, and 2) "the best" should shape how the law is read, not consensus, predictability, or perhaps the language of the law itself.

Part III argues for a moral reading of "living" originalists like Jack Balkin and the living constitutionalism of Bruce Ackerman, with its emphasis on progressive political movements and "superprecedents." In Part IV, Fleming restates his espousal of moral readings as preserving and perfecting the Constitution. He concludes by arguing that only such a reading and program can save us from the moral necessity of rejecting and replacing the Constitution.

Fleming's ideal, morally interpreted Constitution would: guarantee "positive benefits" rather than merely "negative liberties"; neuter the Electoral College; replace constitutional neutrality with an "anti-caste principle" in judging laws; create "an equal voice in the political process," through control of campaign spending; eliminate limits on federal powers rooted in principles of federalism; and further limit the right to bear arms. In the author's view, this list of favored progressive policies could be achieved through constitutional interpretation without going through the onerous procedures laid out in the amendment process, thus justifying retention of the Constitution itself (pp.182–84).

Fleming seeks to rework the Constitution, using it to make America what he thinks it ought to be. His constitutional interpretation would "afford everyone the status of free and equal citizenship in our morally pluralistic constitutional democracy," even as that democracy would cultivate "the civil virtues" and foster "the capacities for constitutional self-government" (pp. 175–76). This is, then, a full, normative vision of what makes for a good political society and life. The question is why we should accept this vision as our own and encourage its imposition on the nation through judicial decisions.

In making his case, Fleming asserts that the Constitution is "a framework or charter of abstract aspirational principles" (p. 10). If true, such a claim would delegitimize originalism because "original methods concerning the interpretation of text and intent, supplemented by original interpretive rules, are not going to provide determinacy in interpreting abstract constitutional commitments" (p. 57).

Are America's constitutional commitments "abstract?" Here, Fleming asserts the importance of the Constitution's Preamble, with its references to establishing justice and promoting the general welfare. Yet the Preamble, from its drafting up to the present day, has been recognized as an enacting clause and statement of general purpose, not as a Rosetta Stone of interpretive meaning, let alone a source of rights or powers. Only a few relatively recent Supreme Court justices have sought to make something more of the Preamble, while defending progressive policy goals. It is to such justices, including William Brennan and Anthony Kennedy, that Fleming turns in making the wider claim that, as Brennan wrote: "Interpretation must account for the transformative purpose of the text. Our Constitution was not intended to preserve a pre-existing society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized." That is, the Constitution should be read as a progressive document encouraging innovations aimed at increased equality and individual autonomy because it was intended to "make over their world" (p. 44).

The author seeks to imbue chosen progressive arguments and precedents with constitutional authority. But he does not make any showing as to why readers should accept twentieth- and twenty-first-century claims of the Constitution's "transformative" character; in this vein, he provides nothing beyond assertion, a few bits of judicial dicta and legislative detritus, and his own political program. Such does not constitute a counter to the plethora of contemporaneous statements and arguments justifying the Constitution as a means of achieving the goal—both truly revolutionary and intrinsically limited—of establishing, by agreement, a stable, lasting republican government under law. One obvious relevant example, here, is *Federalist* #9's argument that the Constitution's structures would allow the United States to avoid "the rapid succession of revolutions" experienced by ancient Greek and Roman republics.

In addition, Fleming makes no effort to show why his own policy goals should be raised to the level of higher law, sufficient to outweigh the historical meaning of legal terms and the right of the people to be ruled by settled, known laws. Instead, he elides interpretive issues by giving new meaning to phrases like "general welfare," and arguing for the centrality of concepts like "autonomy" found nowhere in the Constitution's text. One may choose to applaud the rise of autonomy as a political concept. But Fleming uses a far-fetched hypothetical to present the sexual autonomy cases, dating back no further than the middle of the twentieth century, as somehow embedding in our Constitution legal terms on a par with

due process and equal protection (p. 38). In so doing, he assumes the point at issue, namely, whether the Constitution provides abstract, malleable principles, or legal terms freighted with practical as well as historical meaning. It remains unclear what entitles judges to ignore the former in favor of the latter, thereby denying litigants and citizens in general their right to be ruled by settled, known rules.

The rhetorical strength of Fleming's argument lies in the clear injustice of the Constitution's protection of slavery and indifference to segregation. Why would we bind ourselves to the understandings of those who would protect such evil? Here, he simply dismisses the Constitution's provision of two potentially reinforcing means by which injustices might be abolished: legislative action and formal amendment. That the Supreme Court has further embedded injustices into our legal system through its own arrogant and policy-driven misconstructions in cases like Dred Scott v. Sandford and Plessy v. Ferguson, should give Fleming pause in his rush to enshrine "super-precedents" whose policy outcomes he approves.

Nevertheless, Fleming argues that only a "Constitution-perfecting theory" that "exhorts judges, elected officials, and citizens to reflect upon and deliberate about our deepest principles and highest aspirations as a people" can save us from the status of "pygmies" bowing down before fatally flawed ancestors (pp. 189, 191). His epistemological assumption? A judge must be capable of consistently and coherently "thinking for yourself about what constitutional provisions seem to refer to—like equal protection *itself* and due process *itself*" (p. 75, emphasis in original). Evidence offered up by Roger Taney, Henry Brown, Oliver Wendell Holmes, and their affirming colleagues suggests that Fleming assumes too much.

It would be a mistake to overlook the radical claim inherent in Fleming's vision. In thinking "philosophically" or "for yourself," judges would eschew their traditional vocation of applying the law. Reasoning by analogy, according to established rules of grammar, and in keeping with common law maxims is to be dismissed as slavish and unjust. Instead, judges are to aim at comprehending, outside of history and usage, what specific historical terms mean, taken as abstractions, then to decide how far such meanings can be pushed, given the realities of current language and politics. The justification for judges taking on this role is underdeveloped, but clearly rooted in a Rawlsian understanding of the requirements of liberal democracy (see especially the discussion of appropriate goals at pp. 175–76 and of Rawls's overlapping consensus on p. 53, as well as Fleming's bow to Rawls's constructivism at p. 20).

In the end, Fleming's progressive project adds little more than a note of caution to old-fashioned living constitutionalism. For all his insistence on his own fidelity, he sees the Constitution as little more than the commands of ancestors whose sins render their work suspect, save as a source of broad principles that judges can make conform to progressive aspirations in support of progressive policies. The fidelity of such a model attaches to the political program of its creator, not the Constitution, or even the people in whose name the interpreter seeks to make law.

Response to Bruce Frohnen's review of *Fidelity to our Imperfect Constitution: For Moral Readings and Against Originalisms*

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— James E. Fleming

Bruce Frohnen's essay confirms my analysis of the profound differences between our books. In this response, I point out three ways he force-fits my arguments into a conservative script about "Progressives" and the vilification of the founding that is alien to my project.

First, Frohnen force-fits my moral reading, with its conception of fidelity as honoring the aspirational principles embodied in the Constitution, into a conservative script about progressive living constitutionalism as rejecting fidelity to the Constitution. Progressive living constitutionalism disavows any aspiration to fidelity—it is too forward looking for that—as well as any aspiration to a moral reading—it is too pragmatic to abide any commitment to coherence and integrity in building out the best understanding of our constitutional commitments over time. Frohnen brushes these differences aside with the conclusory assertion that "Fleming's progressive project adds little more than a note of caution to old-fashioned living constitutionalism" (p. 5). With all due respect, my moral reading is as different from "old-fashioned living constitutionalism" as it is from old originalism!

Second, Frohnen strains to force-fit my book into a conservative script about progressives vilifying the Founders. He recasts my reference to "racist, sexist, and heterosexist expectations and presuppositions" that might have been "reflected in the common law and statute books in 1868" (p. 63) as a vilification of "text-based, original meanings" of the Constitution itself (p. 3). And he attributes to me, without any basis, a view that the Founders' "sins render their work suspect" (p. 5). Indeed, Frohnen is so intent on force-fitting my book into this conservative script that he literally puts words in my mouth. He writes: "Fleming argues that only a 'Constitution-perfecting theory'. . . can save us from the status of 'pygmies' bowing down before fatally flawed ancestors (pp. 189, 191)." Yet contrary to Frohnen's quotation marks, nowhere on pages 189 or 191 do I use the word "pygmies." (To be sure, I quote Bruce Ackerman's usage of that term on pages 143, 148, 154, and 185 in summarizing his argument regarding the New Deal amending the Constitution outside the formal amending procedures of Article V, but I do not endorse Ackerman's usage or his

argument. Here again, Frohnen is force-fitting my argument into his script about "Progressivism" that I do not exemplify or accept.) Nor do I say that the Founders are "fatally flawed." To the contrary, I argue that my moral reading presents "a more ennobling view of the founders" than do forms of originalism that attribute to them "an interest in imposing their will on their posterity" (p. 191). My argument is not that the Founders were sinful or fatally flawed but that they were wise, took the long view, and established a Constitution that is a scheme of abstract rights and powers to be built out over time on the basis of experience and reasoned judgments about the best understanding of our commitments.

Finally, Frohnen force-fits my project—which begins where we are today and seeks to construct the normative theory that best fits and justifies our actual constitutional practice—into a conservative narrative about a "radical claim" to make the Constitution "confirm to progressive aspirations in support of progressive policies." With misreadings this pervasive, I can only ask the reader to read my book and judge whether I make good on my aspiration to fidelity to our imperfect Constitution.

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