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*Boston University School of Law*

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**THE MORAL READING AS A PRACTICE: A RESPONSE TO  
THREE COMMENTS ON *FIDELITY TO OUR IMPERFECT  
CONSTITUTION***

**JAMES E. FLEMING\***

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INTRODUCTION

In recent years, many originalists have claimed a monopoly on concern for fidelity in constitutional interpretation. In my book, *Fidelity to Our Imperfect Constitution*,<sup>1</sup> I reject originalisms—whether old or new, concrete or abstract, living or dead. Instead, I defend what Ronald Dworkin called a “moral reading” of the United States Constitution, or a “philosophic approach” to constitutional interpretation. I refer to conceptions of the Constitution as embodying abstract moral and political principles—not codifying concrete historical rules or practices—and of interpretation of those principles as requiring normative judgments about how they are best understood—not merely historical research to discover relatively specific original meanings. Through examining the spectacular concessions that originalists have made to their critics, I show the extent to which even they acknowledge the need to make normative judgments in constitutional interpretation. I argue that fidelity in interpreting the Constitution as written requires a moral reading or philosophic approach, not any version of originalism or living constitutionalism. Fidelity commits us to honoring our aspirational principles, not following the relatively specific original meanings (or original expected applications) of the founders. Originalists would enshrine an imperfect Constitution that does not deserve our fidelity. Only a moral reading or philosophic approach, which 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.

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<sup>1</sup> JAMES E. FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS* (2015).

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I am deeply grateful to *Boston University Law Review* for publishing this Symposium on my book. I am honored, delighted, and humbled by the thoughtfulness and seriousness with which Jack Balkin, Gary Lawson, and Jamal Greene have engaged with my arguments. This is the kind of exchange authors hope to generate. It makes writing a book worthwhile. I cannot hope to do justice to their rich, insightful essays. Let me simply offer this brief appreciation and reply.

#### I. JACK BALKIN: DEMOCRACY AND THE USE OF HISTORY

In my book, I argue that Balkin's "living originalism" is best understood as a moral reading, though I acknowledge that it is importantly different from Dworkin's moral reading.<sup>2</sup> In his essay, Balkin acknowledges that his theory is a moral reading, and he emphasizes that my "philosophic approach" is importantly different from Dworkin's moral reading.<sup>3</sup>

To be sure, my work is, broadly speaking, Dworkinian in the senses that I have been influenced by Dworkin's work and that I have written the book in the spirit of his moral reading. But my book is not by any means an explication of Dworkin's work, nor is it essentially an application of his ideas. Instead, I present the moral reading, not as Dworkin's particular theory, but as a "big tent" that encompasses many different theories and approaches that ultimately acknowledge the need to make moral judgments in constitutional interpretation.<sup>4</sup> As Balkin points out, "[u]nderstood from Fleming's generous perspective, common law constitutionalists like David Strauss, living originalists like myself, and advocates of dualist democracy like Bruce Ackerman offer distinctive moral readings of the Constitution."<sup>5</sup>

What is more, Balkin states that "the most important features of Fleming's book are its differences from Dworkin's account of the moral reading," emphasizing two: (1) our understandings of democracy, and (2) our understandings of how and why history matters in constitutional interpretation.<sup>6</sup> I shall focus on these two points.

First, I appreciate Balkin's incisive observations about how my understanding of the conception of democracy embodied in our constitutional practice differs from Dworkin's. Dworkin purports to derive all of our fundamental rights—not only procedural rights like that to vote but also substantive rights like that to procreative autonomy—from democracy itself. I argue instead for conceiving the structure of our scheme of constitutional self-government in terms of two fundamental themes: the basic liberties that are preconditions for *deliberative democracy* along with the basic liberties that are

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<sup>2</sup> *Id.* at 129-33.

<sup>3</sup> Jack M. Balkin, *History, Rights, and the Moral Reading*, 96 B.U. L. REV. 1425, 1425-26 (2016).

<sup>4</sup> FLEMING, *supra* note 1, at 96-97, 160-61.

<sup>5</sup> Balkin, *supra* note 3, at 1425.

<sup>6</sup> *Id.* at 1425-26.

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preconditions for *deliberative autonomy*. I caution against Dworkin's attempt to pack the latter into the former.<sup>7</sup>

Balkin argues that my account of fundamental rights in our democracy is superior to Dworkin's. And he points out affinities between my understanding and his own account of how protecting fundamental rights promotes state legitimacy.<sup>8</sup> I relish Balkin's analysis of democracy here since in my book I had gently criticized him for not putting forward a substantive vision of the Constitution's core commitments, including a substantive theory of democracy!<sup>9</sup>

Second, I also appreciate Balkin's generous observations about how my understanding of the use of history in moral readings differs from Dworkin's. As he notes, I argue for "do[ing] as Dworkin says, not as he does"<sup>10</sup>—that is, for reckoning with "fit" with historical materials, as well as "justification" as a matter of political philosophy, in the ways Dworkin's theory recommends, even if he himself did not always do so in his own work interpreting the Constitution.<sup>11</sup>

In particular, I welcome Balkin's charitable formulations concerning how I "restate[] Dworkin's binary of fit and justification": fit and justification are not "binary" and "sequential" but are "inextricably bound together in the idea of giving the best account."<sup>12</sup> I wholeheartedly accept his rich and cogent restatement of my argument that "fit and justification . . . merge seamlessly" in our practice of interpretation and construction:

When we consider historical materials, we should view them by assuming that they bear an implicit moral or political logic, and that when we interpret, it is our job to discover that moral or political logic. These materials are not simply commands about what we must do in the present. Our goal is not simply arriving at an interpretation just because Madison said this or Hamilton said that. Instead, we should view historical materials as examples or instantiations of a prior or more general moral or political theory that underlies the Constitution. Viewing historical materials in this way causes the dimensions of fit and justification to merge seamlessly. We understand the historical materials to fit an underlying moral or political account, and we decide on the moral and political account that fits the best by contemplating the deeper significance of the historical materials.<sup>13</sup>

I could not have put it better.

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<sup>7</sup> FLEMING, *supra* note 1, at 84-88.

<sup>8</sup> Balkin, *supra* note 3, at 1428-29, 1432-35.

<sup>9</sup> FLEMING, *supra* note 1, at 133-34.

<sup>10</sup> Balkin, *supra* note 3, at 1441.

<sup>11</sup> FLEMING, *supra* note 1, at 94.

<sup>12</sup> *Id.* at 107.

<sup>13</sup> Balkin, *supra* note 3, at 1434-35.

Balkin's restatement enables me to see that I should not have said that liberal and progressive scholars who have sought to reclaim history from the conservative originalists—like Balkin himself—are “doing fit work in service of the moral reading.”<sup>14</sup> He is right to object that that way of putting things seems to demean “fit” and the use of history in relation to moral judgment.<sup>15</sup> And so, I accept his restatement concerning the moral reading's use of history as a better encapsulation of my argument than my phrase “doing fit work in service of the moral reading.”

Moreover, unlike originalist critics of the moral reading like Michael McConnell, Balkin understands that it is not a separate approach that comes in at the end of the process of constitutional interpretation and construction (only after we have consulted all the other sources of meaning and found them to be inconclusive).<sup>16</sup> Rather, he understands that as we work through the multiple modalities or styles of justification, we are building out our Constitution by making moral judgments about the best understanding of our constitutional commitments.

## II. GARY LAWSON: TWO THINGS ABOUT WHICH I AM RIGHT THIS TIME!

I laughed out loud when I read the subtitle of Lawson's paper: “Could Fleming be Right This Time?”<sup>17</sup> He is alluding to Sanford Levinson's article concerning Ronald Reagan's Attorney General Edwin Meese, who was one of the founders of what Lawson calls the “new originalism” as distinguished from the “new new originalism.”<sup>18</sup> Meese famously criticized *Cooper v. Aaron* for equating “the Constitution” with what the Supreme Court has said about the Constitution.<sup>19</sup> Levinson asked, could Meese—who was nearly always wrong about constitutional interpretation—be right this time?<sup>20</sup>

Levinson observed that even a stopped clock is right two times a day, which might lead one to expect that Meese would be right only accidentally, and only about incidental rather than important things.<sup>21</sup> And so, as I read Lawson's article, I braced myself to read what were the two times a day that I was right! In fact, Lawson says that I am right about more significant things and with greater frequency. I will mention two things.

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<sup>14</sup> FLEMING, *supra* note 1, at 92.

<sup>15</sup> Balkin, *supra* note 3, at 1435-38.

<sup>16</sup> Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745 (2015). For my critique, see James E. Fleming, *The Moral Reading All Down the Line*, 95 B.U. L. REV. 1801 (2015).

<sup>17</sup> Gary Lawson, *Reflections of an Empirical Reader (Or: Could Fleming Be Right This Time?)*, 96 B.U. L. REV. 1457 (2016).

<sup>18</sup> Sanford Levinson, *Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071 (1987).

<sup>19</sup> Edwin Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987).

<sup>20</sup> Levinson, *supra* note 18, at 1078.

<sup>21</sup> *Id.*

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First, Lawson acknowledges that I am right that originalists like Justice Scalia are moral readers, despite their vigorous protestations to the contrary. They are not simply interpreting the Constitution in the way that what Lawson calls “empirical readers” seeking to “discover its meaning” as a matter of fact would.<sup>22</sup> They are practicing a particular originalist conception of interpretation and adjudication because of their deeper normative commitments, which stem from a moral reading. Lawson writes:

For example, Justice Scalia generally insists that constitutional provisions be read, to the extent possible, in a strictly rule-like fashion. But this interpretative move is not derived from interpretation. It comes instead from a normative theory of law combined with a normative vision of the role of judges. If the Constitution, read empirically, actually prescribed those normative theories as tools for the ascertainment of meaning, Justice Scalia would be right as an interpretative matter. As Steve Calabresi and I have tried to show, however, that is not actually a correct empirical reading of the Constitution. Some provisions are best read as rules while others are best read as standards calling for the exercise of considerable degrees of judgment, and there are actually more of the latter than might appear at first glance. In order to discover how to interpret a particular provision, there is no good substitute for reading it. On that point, Professor Fleming is absolutely right.<sup>23</sup>

Second, Lawson seems to be saying that I am largely right in my account of the practice of constitutional construction or adjudication (as distinguished from what he conceives as constitutional interpretation on an empirical reading). As he puts it:

[Professor Fleming] is interested in providing guidance for real-world judgment. He wants to tell judges and other officials how to decide cases . . . . The actual empirical meaning of the Constitution sometimes plays a role in that process, but mostly not. And that is true across the board. To the extent that Fleming is concerned with describing constitutional practice rather than ascertaining constitutional meaning, it is very hard to argue that he has it wrong.<sup>24</sup>

Hold that thought for the next section.

Before leaving Lawson’s essay, I want to say that I am deeply honored that my book has “prompt[ed] deep and careful thought,” including prompting him to sketch a staggeringly ambitious research agenda for a future book of his own on constitutional interpretation.<sup>25</sup>

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<sup>22</sup> Lawson, *supra* note 17, at 1463-64.

<sup>23</sup> *Id.* (footnotes omitted).

<sup>24</sup> *Id.* at 1477 (footnotes omitted).

<sup>25</sup> *Id.* at 1459.

## III. JAMAL GREENE: THE MORAL READING IS NOT AN “ISM,” BUT A PRACTICE

Jamal Greene is one of the most astute critics of originalism. And so, it was gratifying to read that he “agree[s] with much of [my] perceptive book,”<sup>26</sup> in particular, with my argument that originalism is an “ism” or ideology.<sup>27</sup> But it gives me pause that he argues that the moral reading also is “an ism” or ideology, not a practice.<sup>28</sup> To explain: I distinguish constitutional interpretation in light of original understanding—as one source of meaning among several in an eclectic approach—from originalism as an “ism,” the view that original understanding, narrowly conceived, is the exclusive legitimate source of meaning.<sup>29</sup> Greene’s argument that the moral reading is an “ism” might imply that I contend that moral judgments are the exclusive legitimate source of meaning.

In this respect, Greene contrasts my moral reading with the “pluralism” or “bounded eclecticism” offered by Richard Fallon. “Under such an approach, constitutional interpreters use multiple modes of inquiry, including those based on constitutional text, history, and structure, on legal and political precedent, or on practical consequences, without necessarily privileging any one in particular.”<sup>30</sup> He says, moreover, that Fallon gives an account of our constitutional practice.<sup>31</sup>

I do not understand why Greene thinks the moral reading as I present it is an “ism” rather than a practice. Perhaps the hard-hitting rhetoric distilled in the subtitle of my book—“for moral readings and against originalisms”—made it sound like I was proposing to replace one “ism” with another. Or to “call the fight” for one “ism” over another.<sup>32</sup> I argue, not that the moral reading is the sole legitimate source of constitutional meaning or even that it is hierarchical over all other sources—but that it is “a fusion of approaches.” I wrote: “[M]oral readers like Barber and I deploy a fusion of approaches in what Solum calls ‘the construction zone.’ ‘Within such a fusion, we . . . understand text, consensus, intentions, structures, and doctrines not as alternatives to but as sites of philosophic reflection and choice about the best interpretation and construction of our constitutional commitments.’”<sup>33</sup>

I argue that when interpreters engage in the eclectic practice of working through and assessing the multiple modalities of argument or styles of justification, they are not seeking to discover and enforce the original

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<sup>26</sup> Jamal Greene, *A Nonoriginalism for Originalists*, 96 B.U. L. REV. 1443, 1455 (2016).

<sup>27</sup> *Id.* at 1443.

<sup>28</sup> *Id.* at 1450.

<sup>29</sup> FLEMING, *supra* note 1, at 3-4.

<sup>30</sup> Greene, *supra* note 26, at 1446, 1452.

<sup>31</sup> *Id.* at 1453-54.

<sup>32</sup> Ken I. Kersch, *Originalism’s Curiously Triumphant Death: The Interpenetration of Aspirationalism and Historicism in U.S. Constitutional Development*, 30 CONST. COMM. (forthcoming 2016) (manuscript at 2, 20).

<sup>33</sup> FLEMING, *supra* note 1, at 33.

meanings of the Constitution to the exclusion of other modalities (contra originalists like Scalia) and not simply making pragmatic judgments of common sense and policy (contra living constitutionalists like David Strauss). Instead, I argue, “they quite plainly are making normative or pragmatic judgments about the best understanding of our constitutional commitments and practice.”<sup>34</sup>

Put another way, I mean to offer the moral reading—understood as such a fusion of approaches—as an account of our constitutional practice. I contend, much like Balkin, that when interpreters engage in this pluralistic or eclectic practice, working through these multiple modalities, they are building out the best interpretation or construction of the Constitution.

At this point, I am going to resort to the familiar gambit of playing Balkin’s and Lawson’s praise of my book with respect to this very point against Greene’s criticisms of it. For they seem to be saying that I am mostly right in my account of our constitutional practice. They don’t see me as countering one ism or ideology with another.

Finally, I confess that I am not sure what Greene means by his title—“A Nonoriginalism for Originalists”—and his concluding suggestion that “Fleming might well have articulated a nonoriginalism for originalists.”<sup>35</sup> Perhaps he means simply to reformulate his suggestion that “[t]he moral reading can serve the ends of originalists as much as nonoriginalists.”<sup>36</sup> Indeed, he goes further and states that “[o]riginalism itself might be best understood as a moral reading,” suggesting that this is “a possibility that is disquieting to Fleming’s project.”<sup>37</sup> Far from being disquieting to my project, I argue for this very proposition. It would be an understatement to say that I adamantly insist upon it! As noted above, this is one of the things that Lawson says I am right about—that originalists like Justice Scalia are moral readers.

In concluding, after stating that he agrees with much of my book, Greene puzzles over “what is at stake in the label of ‘originalist’ or ‘moral reader.’”<sup>38</sup> One speculation he offers is: “[R]ecognizing that moral judgments are inseparable from constitutional law might make it all the more urgent that constitutional interpreters adopt rhetoric that masks that fact.”<sup>39</sup> This speculation recalls a point I made in the epilogue concluding my book: originalism might be a “Platonic noble lie.”<sup>40</sup> I hope that nothing I wrote in the book makes me complicit in that lie. What is at stake is nothing less than whether we as citizens, scholars, elected officials, and judges “accept our responsibility” to interpret the Constitution with fidelity in the sense of

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<sup>34</sup> *Id.* at 36.

<sup>35</sup> Greene, *supra* note 26, at 1443. 1453.

<sup>36</sup> *Id.* at 1455.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1456.

<sup>39</sup> *Id.*

<sup>40</sup> FLEMING, *supra* note 1, at 190.



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*honoring our aspirational principles*, not merely that of *following our historical practices*—not to “avoid or evade the responsibility to make normative judgments about the best understanding of our constitutional commitments.”<sup>41</sup> Accepting that responsibility rather than evading or denying it is at the heart of the practice of a moral reading of the Constitution.

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<sup>41</sup> *Id.* at 191.