FIDELITY TO THE BEST VERSION OF OURSELVES

FIDELITY TO OUR IMPERFECT CONSTITUTION. By James E. Fleming.[1] New York: Oxford University Press. 2015. Pp. xv + 243. $75.00 (cloth).

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This is in the nature of a concurring opinion. I am in general sympathy with *Fidelity to Our Imperfect Constitution,* and in awe of Jim Fleming's breadth of understanding and capacity to engage so many theorists—many of them prickly—with patience, respect, and intelligence.

A. THE PURPOSE OF OUR CONSTITUTIONAL PRACTICE

What is the purpose of our constitutional practice? That is the first, orienting question. *Constitutional practice*, rather than Constitution, because the authority of the written Constitution is derivative of its place within our practice. The text is in service of our practice; our practice is not in service of the text . . . at least not until we arrive at the conclusion that our practice is best served by an understanding that connects us to the text in this dominating way. If the text of the Constitution is appropriately understood as directing the behavior of actors in our political community, it is because the complex practice of constitutionalism—which includes that text—makes that behavior morally obligatory for such actors. This is a familiar observation, perhaps, but no less important for its familiarity.

To be sure, on any understanding of our constitutional practice the written Constitution has an important place. The text is important in a number of ways, not least of which is that, absent

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serious regard for the text, the people in their role as constituent sovereign have no way of insisting on a change of constitutional course. But the place of the written Constitution in our constitutional practice is defined secondarily, from outside the text, not commanded by the text. Like moral readers of our constitutional practice, originalists of all stripes have to argue from outside the text. This makes the new originalist turn to the theory of language come too early; the place of such theory is necessarily subordinate to a convincing moral account of our practice as a whole.

The purpose I would claim for our constitutional practice is that it is justice-seeking.[3] It aims at better aligning our institutions, policies, laws and the political community as a whole, with the requirements of justice. This, I think, is sympathetic with what Jim Fleming describes as the *aspirational* Constitution. I have only these small reasons for preferring this formulation: First, I think that it is useful to keep in mind that it is our constitutional practice that we are characterizing, not merely the Constitution. And second, justice-seeking sharpens the nature of our central constitutional aspirations; perhaps Jim prefers "aspirational" for the opposing reason, namely, that it is more capacious.

B. DELEGATORY CONSTITUTIONAL PROVISIONS

I want to turn now to a feature of the written Constitution that is morally salient to its role in our practice. Many provisions of the Constitution do not constitute encompassing commitments. For a provision of the Constitution to be "encompassing," for our purposes, it must contain or constitute a full description of the state of affairs to which it refers. A Court, which undertook to enforce an encompassing constitutional provision, would have work to do—choices to make—but those choices would be among implementing strategies, not target states of affairs. Many—perhaps most—of the liberty-bearing provisions of our Constitution are not encompassing in this way.

Actually, no legal provision can be fully encompassing; there will always need to be some normative engagement with the text to establish its meaning. But let us agree that some provisions

3. For fuller development of my account of our constitutional practice as justice-seeking, *see* LAWRENCE G. SAGER, JUSTICE IN PLAIN CLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE (2004).

reduce the amount of normative engagement to just this side of the vanishing point. This is true, for example, of the Constitution's stipulation that neither "shall any person be eligible to th[e] Office [of the President] who shall not have attained to the Age of thirty five Years."[4] Other provisions, in contrast, leave broad space that plainly requires normative engagement to fill in. This is true, for example of the First Amendment's free exercise clause: "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . ."[5] For practical purposes, we can regard provisions like the age requirement of the President as encompassing (or at least largely encompassing) and provisions like the free exercise clause as non-encompassing.

The new, language-centered, originalists implicitly disfavor non-encompassing constitutional provisions. Consider the following new originalist typology of what we have called non-encompassing constitutional provisions: A non-encompassing provision may be vague (susceptible to problematic boundaries at its margins); it may be ambiguous (susceptible to more than one meaning); it may be contradictory (in direct conflict with another provision), or it may leave gaps.[6] There are two things to note about this list: The first is that its operative terms are not flattering; "vague," "ambiguous," "contradictory," and riven with "gaps," are far from terms of praise or even dispassion. They read like a list of the deadly faults of failed expression. And, if these characterizations of the open margins of non-encompassing constitutional provisions were accurate and exhaustive, the pejorative flavor of this typology would be earned. Avoidable or not, the open margins of non-encompassing constitutional provisions could be regarded as failed attempts to communicate complete instructions.

But it is important at just this point to observe the second noteworthy feature of this new originalist list of the ways that constitutional provisions can be non-encompassing, namely, that it conspicuously omits what is by far the most important form of non-encompassing provisions in our Constitution. In an early work, and to a somewhat different end, Ronald Dworkin invoked the example of a soldier who is ordered by a superior officer to

4. U.S. CONST. art. II, § 1, cl. 4.

5. U.S. CONST. amend. I (emphasis added).

6. *See* Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 509–10 (2013).

find the best men or women for an important mission. That command clearly is not encompassing; an encompassing command would include the names of the soldiers who were to be charged with the mission. But it is not vague, ambiguous, contradictory, or gap-ridden; it is *delegatory*. Properly understood as a delegation, the command is complete; the superior officer has nothing to add, and the recipient of the command does not need anything further to fully understand his or her instruction. As a complete instruction, the command is altogether successful in communicating exactly what the superior officer wants its recipient to do. In like fashion, the delegatory provisions of the Constitution are complete and successful, notwithstanding their necessarily non-encompassing nature; to function as delegations these provisions must be non-encompassing.

Suppose we encounter a constitutional provision like the free exercise clause. The language is somewhat unfamiliar, but we conclude that the best reading is something like "Congress must not constrict religious liberty." That is surely non-encompassing. But it is best read as instructing a court or other responsible constitutional actor to fashion a jurisprudence aimed at assuring that the federal government's behavior is consistent with religious liberty. That will require providing at least a rough theory of religious liberty, workable doctrine derived from and aimed at implementing that theory, and the application of that doctrine to individual cases (this last mostly by lower courts but with occasional intervention by the Supreme Court to adjust, refine and enforce the doctrine.) Ronald Dworkin and others have described the interpretive process of moving from a general target like religious liberty to an intermediate conceptual structure as the move from concept to conception.[7] In the case of concepts as abstract as "religious liberty," an intermediate conceptual structure surely is necessary to the judicial enterprise of fashioning implementing doctrine. In principle, I think, there is no reason to exclude the possibility that there could be more than one intermediate level, nested conceptual structures bridging the gap from the abstract basal concepts to concrete doctrines and case outcomes; there is nothing magical or exclusive about the notion of a conception. The important point for our purposes is that the non-encompassing nature of an abstract constitutional

7. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134-36 (1977).

instruction of this sort is not a failure of expression; it is a complete and successful passing on of responsibility for providing encompassing content—it is a delegation.

I anticipate a reaction to this observation that takes issue with the proposition that the Free Exercise Clause should be read as a delegation of responsibility and authority. But text and context press forcibly for that interpretation. "Congress shall make no law . . . prohibiting the free exercise [of religion]."[8] If we conclude that this is equivalent to "Congress shall make no law constricting religious liberty," the most natural understanding of the provision is that anyone who is given or assumes responsibility for respecting the written Constitution has the concomitant responsibility of giving concrete content to the commitment. There is nothing surprising about this understanding; indeed it is hard to imagine what could be the content of a contrary interpretation. If, in our military example, the commanding officer handed his subordinate a written order, with a description of the mission, followed by the instruction "[w]e need the six most qualified members of your squadron for this mission," the delegation of responsibility would be plain. So too is it plain in the case of the delegatory provisions of the Constitution.

Many of the most important provisions of the written Constitution—particularly the liberty-bearing provisions—are delegatory. This not an arbitrary circumstance or simply a matter of drafter's taste. By design the Constitution is obdurate to change, and demanding of a broad national consensus for enactment and amendment. These structural features of the ratification and amendment processes encourage delegatory commitments to abstract principles of justice: Generality conduces to the necessary broad consensus; and thoughtful participants in the process of textual composition will see the virtue of abstraction in substantive commitments intended to endure for generations. Further, the use of delegatory pronouncements invites the partnership of contemporary constitutional actors, including and especially courts; thoughtful drafters could see that as a benefit.

The prevalence of delegatory provisions in our written Constitution does not insist on the moral reading of our constitutional practice. But it deprives opponents of the moral

8. U.S. CONST. amend. I.

reading of any claim of support from the text of the Constitution and the technology of linguistic analysis. Actually, the problem posed by the delegatory provisions of the Constitution for text-centered opponents of the moral reading runs deeper than that; having turned to the text for instruction, they find instructions for constitutional actors like judges that require moral judgment to fulfill the authority delegated by the text. Think again of our soldier, commanded to find the best members of his or her squadron to undertake a mission. Were the soldier to demur on the grounds that this choice belonged to the superior officer, they would be disobeying the order. This means that reflective originalists need non-textual reasons to oppose the moral reading; and further, that it is very hard indeed for reflective originalists to resist some version of the moral reading—as Jim Fleming so carefully and effectively argues throughout his manuscript.

C. COURTS

If, as I argued at the outset, the question is not how the text directs our practice, but rather, what our practice should make of the text, we need to understand what virtues and liabilities flow from the judicial undertaking to discharge the judgmental responsibility of the numerous delegatory provisions in the text. We need to think about courts: How they work and what advantages and disadvantages they offer with regard to process and outcome. This is a complex question, which is crucially important to the question of whether our justice-seeking constitutional practice is advantaged if constitutional courts robustly embrace the moral view of our constitutional practice, and with it, the written Constitution, and its many delegatory provisions. This is a question which is all too easily neglected by approaches to our constitutional practice that make the text and linguistic analysis the center of reflective attention from the outset.

Our view of courts is crucial because the moral view of our constitutional practice gives them substantial authority and responsibility to set the concrete shape of important liberties, realms of equality, and normative elements in our structure of governance (most notably, the distribution of authority between the federal government and the states). I hold our constitutional courts in relatively high regard. I want to say a little about why, because the reasons why we should hold courts in high regard give

us reasons in turn to argue for a view of the best shape of constitutional adjudication. Remember, our practice is justice-seeking and justice is both our purpose and the lens through which we consider our practice itself.

Here is a rough sketch of the case for the robust role of courts in our constitutional practice: Our constitutional courts are common law courts; they are, that is, reason-giving and precedent-drawn (We could say precedent-bound, but something less absolute—on the order of Dworkin's "gravitational pull"[9]—is apt; hence precedent-drawn.) Common law courts are obliged to give reasons grounded in general principles for the decision in the case before them; and those reasons need to account as well both for what is valued in past outcomes, and, for attractive outcomes in future, imaginable cases. The process of making all this line up is the institutional equivalent of seeking reflective equilibrium. A simple example: Think of a judge deciding whether members of the American Nazi Party have a right to march and spread their vile message of hate in Ferguson, Missouri. How do the reasons and outcome to which she is attracted in the case before her square with her court's view of the appropriate outcome in Selma, Alabama decades ago? And how would they seem in a future case, as applied, say, to war protestors in a military town in Texas in time of active national military activity? (There may or may not be convincing moral grounds for distinguishing among these cases . . . the point is that they place a burden of articulate justification on the judge.)

There are several virtues to this institutional form of reflective equilibration. First, it conduces to fairness. As despised as the American Nazi Party is, as a First Amendment constitutional protagonist, the Party potentially stands in the shoes of Martin Luther King and future anti-war protestors. Second, reflective equilibration is a staple of practical reasoning about normative questions; it gives courts a judgmental capacity not shared by other institutions of government. And third, in principle, constitutional courts have the distinct *democratic* virtue of giving each claimant the opportunity to invoke the regime of principle to which the Court is on an ongoing basis committed, without reference to the number of votes or number of dollars that support their claim. So it is possible for an accused terrorist

9. *See* DWORKIN, *supra* note 6, at 111-15.

from Yemen, with a limited education in a foreign land, to clash with the Secretary of Defense . . . to clash and to prevail in the Supreme Court. This is an important and democracy-enhancing form of equality—we can call it deliberative equality.

These are reasons to think that constitutional courts are well-suited for the role they are called upon to play by the moral reading of our constitutional practice. That role is one in which—especially with regard to the Constitution's liberty-bearing provisions—the text speaks at a relatively high level of moral abstraction, and courts have a significant role in responding to the text's moral calls with more concrete substantive understandings and still more concrete implementing doctrine. Courts do this in the name of our constitutional practice, as the most conspicuous and settled delegees of the authority conferred on the text by our practice and delegated by the text to responsible constitutional actors.

Respect for the tug of prior decisions, and, more generally, for the processes of common law adjudication, is important at every turn of this account of the virtues of the constitutional judiciary. But in the broader debate between originalist and moral understandings of our constitutional practice, this salient institutional feature of our practice may sometimes be lost to view. For the staunch originalist, what grounds an appropriate constitutional outcome is the enacted text and various facts about the world at the moment of enactment. The discovery of and respect for those textual and contextual facts is central and the process of adjudication secondary and subordinate.

The moral understanding of our constitutional practice should lead more naturally to concerns about the structure and virtue of our common law judicial practice. But even here there are potential diversions. A moral reader of our constitutional practice may well be drawn, as is James Fleming in *Fidelity to Our Imperfect Constitution,* to Ronald Dworkin's interpretive approach, which entails a balance of sorts between fit and value. (pp. 99-108) Dworkinian interpretation enters the project of understanding the law at a number of different conceptual levels. Two are important for our present purposes. First, the project of understanding law in general, or our constitutional practice more specifically is an interpretive project; and second, what courts do when they make judgments about the content of the law is itself an interpretive enterprise. Without more, the general fit/value

elements of interpretation concede a role of considerable importance to what is already in place . . . we are interpreting, not inventing. Hence the element of fit, which has both a threshold minimum requirement and continues beyond that threshold to exert important force over the shape of the interpretive outcome. But it is important to recognize that *judicial* interpretation is appropriately understood to include a distinct and robust element of regard for past adjudicated outcomes, beyond the naturally backward looking element of fit in interpretative endeavors generally. In part, that regard grows out of the nature of law generally; in part, it is particular to the nature of adjudication in a common law system. I have argued that the efficacy and legitimacy of our constitutional practice depends on the common law protocols that shape constitutional adjudication. Moral readers of our constitutional practice need to attend to the virtues and liabilities of courts and constitutional adjudication. Affording too little weight to precedent may undermine the claims for the robust role adjudication plays in the moral view of our constitutional practice.

D. FIDELITY

Jim Fleming has made fidelity the governing virtue of constitutional actors. And there is something very attractive about fidelity. It bespeaks constancy to an object worthy of it. But the sense of unwavering commitment seems somewhat at odds with what Fleming most deeply believes in, namely, constitutional progress, which implicates change. I confess that some of Fleming's formulations seem in this way misaligned, including his overarching "Fidelity to Our Imperfect Constitution." Clearly we do not aim at being faithful to imperfection or constant to change. What is it in our constitutional practice that is worthy of our fidelity? This is my suggestion: Our constitutional practice represents a sustained effort to be the best version of ourselves as a people. That is an aspiration worthy of the fidelity of all constitutional actors: judges, scholars, legislators, and members of our political community in their official capacity as voters.