

INTELLIGENT OR UNINTELLIGENT FIDELITY?*

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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The moral reading insists that they misunderstood the moral principle that they themselves enacted into law. The originalist strategy would translate that mistake into enduring constitutional law.

— Ronald Dworkin, *Freedom's Law*³

We have to choose between an abstract, principled, moral reading . . . and a concrete, dated, reading.

— Ronald Dworkin, *The Arduous Value of Fidelity*⁴

I. INTRODUCTION

Advocating a moral reading to interpretation in general, and to constitutional interpretation in particular, I cannot do anything less—as a fellow moral reader—than celebrate the appearance of

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3. RONALD DWORIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 13 (1997) [hereinafter *DWORKIN, FREEDOM'S LAW*].

4. Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *FORDHAM L. REV.* 1249, 1253 (1997) [hereinafter Dworkin, *The Arduous Virtue of Fidelity*].

James E. Fleming's *Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalisms*. I endorse completely the commendations included on its dust jacket, especially where Richard Fallon states: "James Fleming emerges in this book as the ablest current defender of a 'moral reading' approach (long championed by Ronald Dworkin) that calls upon judges to make candid moral judgments in interpreting the Constitution we have, not fashioning a new one." Michael C. Dorf also salutes: "Fleming picks up the torch laid down by the late great Ronald Dworkin as the leading champion of a moral reading of the Constitution. He is a worthy successor."

In the "Acknowledgments" section of the book, the author declares explicitly that it is a "sequel or companion" (p. xi) to one co-authored with Sotirios A. Barber, entitled *Constitutional Interpretation*,⁵ but remains implicit that it is also a "sequel or companion" to another one co-authored with Linda C. McClain on constitutional liberalism (as a form of mild perfectionism), titled *Ordered Liberty*,⁶ as well as to his own *Securing Constitutional Democracy*.⁷ Additionally, he discloses that "Fidelity to Our Imperfect Constitution,"⁸ a homonymous article, "is the inspiration not only for the name of this book but also for my longstanding conviction that it is imperative to challenge the originalists' pretensions to a monopoly on concern for fidelity in constitutional interpretation" (p. xiii).

This article was Fleming's contribution to a symposium that he co-organized on "Fidelity in Constitutional Theory."⁹ The symposium and his response were prompted by the publication of Ronald Dworkin's *Freedom's Law: The Moral Reading of the American Constitution*, and his 1996 Robert L. Levine Distinguished Lecture at Fordham Law School, entitled "The Moral Reading of the Constitution," which was published the

5. SOTIRIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* (2007).

6. JAMES E. FLEMING & LINDA C. MCCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* (2013).

7. JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* (2006).

8. James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 *FORDHAM L. REV.* 1335 (1997) [hereinafter Fleming, *Fidelity to Our Imperfect Constitution*].

9. See *Symposium: Fidelity in Constitutional Theory*, 65 *FORDHAM L. REV.* 1247 (1997).

following year as “The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve.”¹⁰

In this Article, I review James E. Fleming’s *Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalisms*. In Part II, I reassess Dworkin’s “moral reading,” and in Part III, I reevaluate Fleming’s argument both “for moral readings and against originalisms,” which can be characterized as “fidelity to our imperfect constitution.” Finally, in Part IV, I offer conclusions, including the kind of fidelity that moral readers and everyone else should adopt.

II. RONALD DWORKIN’S MORAL READING

Dworkin’s “moral reading” has been traced all the way back to the publication of *Taking Rights Seriously*, where he accentuated—in Chapter 5, “Constitutional Cases”—his concern with the “philosophy of constitutional adjudication” and argued that “[c]onstitutional law can make no genuine advance until it isolates the problem of rights against the state and makes that problem part of its own agenda. That argues for a fusion of constitutional law and moral theory”¹¹ However, the origin of this multi-cited passage actually occurred earlier, since it appeared, for the first time, in the *New York Review of Books*, as “A Special Supplement: The Jurisprudence of Richard Nixon,” which ends with a final paragraph (not included in the book version) commenting on the then recent appointment of William H. Rehnquist as Associate Justice to the Supreme Court (1972–1986).¹² Dworkin somehow anticipated that Rehnquist would later be nominated by Ronald Reagan to become the 16th Chief Justice of the Supreme Court (1986–2005):¹³

10. See Dworkin, *The Arduous Virtue of Fidelity*, *supra* note 4.

11. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 131, 149 (1977) [hereinafter *DWORKIN, TAKING RIGHTS SERIOUSLY*]. See RONALD DWORKIN, *LAW’S EMPIRE* 90 (1986) [hereinafter *DWORKIN, LAW’S EMPIRE*] (“Jurisprudence is the general part of adjudication, silent prologue to any decision at law.”). See also *DWORKIN, FREEDOM’S LAW*, *supra* note 3, at 2 (“The moral reading therefore brings political morality into the heart of constitutional law.”).

12. Ronald Dworkin, *A Special Supplement: The Jurisprudence of Richard Nixon*, *N.Y. REV. BOOKS* (May 4, 1972), <http://www.nybooks.com/articles/1972/05/04/a-special-supplement-the-jurisprudence-of-richard-/> [hereinafter *Dworkin, The Jurisprudence of Richard Nixon*].

13. *Id.*

Mr. Justice Rehnquist is relatively young, and he has demonstrated intellectual power; it is likely that he will become the intellectual leader of the Nixon court. Contrary to Nixon's advertisement, he is not, on the record, a champion of judicial restraint. He is a conservative activist, who can be expected forcefully to argue not for deference but for a narrow conception of individual rights. Liberals who oppose that conception will need more than the old rhetoric about the Court being the moral tutor to the nation; they will need a moral theory that shows why the rights they insist on are requirements of human dignity, or are for some other reason requirements that the nation must recognize to make good the promise of its constitutional system.¹⁴

In short, a moral reading is necessary to “make good” the promise(s) of a constitution. Constitutions are drafted—here, there, and everywhere—in abstract normative terms, stating not only where we are in the present and even where we were in the past, but also where we expect to be in the future. A moral reading of the Constitution as written based on the interpretation and application of abstract clauses containing principles, including moral ones, is necessary and constitutions should not be rewritten via the mutation of the old document or the invention of a new one. In Dworkin's words: “The moral reading proposes that we all—judges, lawyers, citizens—interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice.”¹⁵ Furthermore, as he insisted:

Judges may not read their own convictions into the Constitution. They may not read the abstract moral clauses as expressing any particular moral judgment, no matter how much that judgment appeals to them, unless they find it consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges. They must regard themselves as partners with other officials, past and future, who together elaborate a coherent constitutional morality, and they must take care to see that what they contribute fits with the rest. (I have elsewhere said that judges are like authors jointly creating

14. *Id.*

15. DWORKIN, *FREEDOM'S LAW*, *supra* note 3, at 2.

a chain novel in which each writes a chapter that makes sense as part of the story as a whole.)¹⁶

In that sense, Dworkin not only assumes the distinction between interpretation and invention, but also applies the dimensions of “fit” and “justification” to distinguish them.¹⁷ Whatever ‘fits’ and is ‘justified’ counts as interpretation, and whatever does not stands as invention: “The justification need not fit every aspect or feature of the standing practice, but it must fit enough for the interpreter to be able to see himself as interpreting that practice, not inventing a new one.”¹⁸

The distinction between interpretation and invention is helpful to distinguish Dworkin from some liberals who have called the Constitution a “living” document and have said that it must be “brought up to date” to match new circumstances and sensibilities. By taking an “active” approach and by accepting John Hart Ely’s characterization of their position as “noninterpretive,” they seem to suggest change and reform, i.e., “inventing a new document rather than interpreting the old one.”¹⁹

Although the distinction is enough to insulate Dworkin from the “living constitutionalists,” he introduces a further

16. *Id.* at 10. See RONALD DWORKIN, A MATTER OF PRINCIPLE 158–62 (1985) [hereinafter DWORKIN, A MATTER OF PRINCIPLE]. See also DWORKIN, LAW’S EMPIRE, *supra* note 11, at 228–38.

17. See DWORKIN, LAW’S EMPIRE, *supra* note 11, at 239 (“The judge’s decision . . . must be drawn from an interpretation that both fits and justifies what has gone before, so far as that is possible.”); DWORKIN, A MATTER OF PRINCIPLE, *supra* note 16, at 143 (arguing “there are two dimensions along which it must be judged whether a theory provides the best justification of available legal materials: the dimension of fit and the dimension of political morality.”) See also James E. Fleming, *Fit, Justification, and Fidelity in Constitutional Interpretation*, 93 B.U. L. REV. 1283 (2013), reprinted in 9 PROBLEMA: ANUARIO DE FILOSOFÍA Y TEORÍA DEL DERECHO 53 (2015).

18. DWORKIN, LAW’S EMPIRE, *supra* note 11, at 66. See RONALD DWORKIN, JUSTICE IN ROBES 15 (2006) (“Any lawyer has built up, through education, training, and experience, his own sense of when an interpretation fits well enough to count as an interpretation rather than an invention . . .”). See also Imer B. Flores, *The Legacy of Ronald Dworkin (1931–2013): A Legal Theory and Methodology for Hedgehogs, Hercules, and One Right Answers*, 9 PROBLEMA: ANUARIO DE FILOSOFÍA Y TEORÍA DEL DERECHO 157, 174–76 (2015) (accentuating the interpretive-not-inventive nature of Dworkin’s model) [hereinafter Flores, *The Legacy of Ronald Dworkin*].

19. DWORKIN, FREEDOM’S LAW, *supra* note 3, at 4. See DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). See also Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007); Charles A. Beard, *The Living Constitution*, 185 ANNALS AM. ASSOC. POL. SCI. 29 (1936).

qualification in the kind of interpretation that he has in mind to isolate himself from the so-called “originalists,” who insist on rejecting the notion of a “living constitution”²⁰ by making “the contemporary Constitution too much the dead hand of the past.”²¹ Succinctly, interpretation has to be a “creative” judicial activity—an exercise of “constructive interpretation”—that is “interpretive,” not “inventive,” “legislative,” and as such a form of “judicial invention or legislation.”²² In Dworkin’s words: “[C]onstructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong.”²³ It is worth noting that legal interpretation, including constitutional interpretation, is by definition creative and even constructive, i.e., giving meaning and sense to a legal principle or rule.²⁴

20. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). See also ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) [hereinafter BORK, *THE TEMPTING OF AMERICA*]; RAOUL BERGER, *GOVERNMENT BY THE JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976), reprinted in 29 HARV. J. L. & PUB. POL’Y 401 (2006).

21. DWORKIN, *FREEDOM’S LAW*, *supra* note 3, at 14. See JAMES E. FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION* vii (2015) (quoting Antonin Scalia: “[The Constitution is] not a living document. It’s dead, dead, dead.”).

22. See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221–22 (1917) (Holmes, J., dissenting) (“I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from ‘molar to molecular motions.’”); H.L.A. HART, *THE CONCEPT OF LAW* 200, 205 (2d ed. 1994) (“Laws require interpretation if they are to be applied to concrete cases, and once the myths which obscure the nature of the judicial processes are dispelled by realistic study, it is patent . . . that the open texture of law leaves a vast field for a creative activity which some call legislative.”). See also Imer B. Flores, *H.L.A. Hart’s Moderate Indeterminacy Thesis Reconsidered: In Between Scylla and Charybdis*, 5 PROBLEMA: ANUARIO DE FILOSOFÍA Y TEORÍA DEL DERECHO 147, 170 (2011) (criticizing Hart’s indeterminacy thesis and defending Dworkin’s determinacy thesis, by introducing a distinction between “interpretive,” “inventive,” “legislative,” or “creative judicial activity”).

23. DWORKIN, *LAW’S EMPIRE*, *supra* note 11, at 52. See Dworkin, *The Arduous Virtue of Fidelity*, *supra* note 4, at 1252 (“[Constructive interpretation] does not mean peeking inside the skulls of people dead for centuries. It means trying to make the sense we can of an historical event—someone, or a social group with particular responsibilities, speaking or writing in a particular way on a particular occasion.”). See also Flores, *The Legacy of Ronald Dworkin*, *supra* note 18, at 1173–74 (emphasizing the constructive nature of Dworkin’s model).

24. See Imer B. Flores, *¿Es el derecho un modelo aplicativo? [Is Law an Applicative Model?]*, in *LA FILOSOFÍA DEL DERECHO HOY [PHILOSOPHY OF LAW TODAY]* (Juan Federico et al. eds., 2010).

Not surprisingly, some originalists resist the idea of a “constructive interpretation,” and have tried to maintain a sharp distinction between (constitutional) interpretation and (constitutional) construction: that which is (constitutional) interpretation cannot be (constitutional) construction, and vice versa.²⁵ Hence, this argument not only claims that what courts do or should do is (constitutional) interpretation, whereas what legislatures do or should do is (constitutional) construction, but also suggests that originalist judges, by doing (constitutional) interpretation, instead of (constitutional) construction, are the only ones that can remain faithful to the Constitution, whilst the others are unfaithful and even infidels pronouncing heresies, revisions, subversions, and so on.²⁶

Actually, as Fleming points out, there are “several competing conceptions of fidelity,” namely: (1) “. . . as pursuing integrity with the moral reading of the Constitution” (Ronald Dworkin); (2) “as synthesis of constitutional moments” (Bruce Ackerman); (3) “as translation across generations” (Lawrence Lessig); (4) “as keeping faith with the founders’ vision” (Jack Rakove); and (5) “[as keeping faith] to abstract text and principle” (Jack Balkin) (p. 11).²⁷

Nevertheless, Dworkin is absolutely right when he gives a word of caution: “If courts try to be faithful to the text of the Constitution, they will for that very reason be forced to decide between competing conceptions of political morality.”²⁸ His counsel is one of fidelity, honesty and responsibility, by displaying the true grounds of judgment instead of concealing them or even pretending that no judgment was made and so no need to take responsibility for it. Let me quote Dworkin at length:

25. See Larry Solum, *We Are All Originalists Now*, in LARRY SOLUM AND ROBERT W. BENNETT, CONSTITUTIONAL ORIGINALISM. A DEBATE 3 (2011) [hereinafter Solum, *We Are All Originalists Now*] (“Many originalists believe that it is important to distinguish between two distinct aspects of constitutional practice: *constitutional interpretation* and *constitutional construction*.”) (emphasis in original). See also KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999).

26. See, e.g., BORK, *THE TEMPTING OF AMERICA*, *supra* note 20.

27. See Fleming, *Fidelity to Our Imperfect Constitution*, *supra* note 8, at 1337.

28. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 11, at 136; Dworkin, *The Jurisprudence of Richard Nixon*, *supra* note 12.

I not only concede but emphasize that constitutional opinion is sensitive to political conviction Constitutional politics has been confused and corrupted by a pretense that judges . . . could use politically neutral strategies of constitutional interpretation. Judges who join in that pretense try to hide the inevitable influence of their own convictions even from themselves, and the result is a costly mendacity. The actual grounds of decision are hidden from both legitimate public inspection and valuable public debate. The moral reading offers different counsel. It explains why fidelity to the Constitution and to law *demand*s that judges make contemporary judgments of political morality, and it therefore encourages an open display of the true grounds of judgment, in the hope that judges will construct franker arguments of principle that allow the public to join in the argument. So of course the moral reading encourages lawyers and judges to read an abstract constitution in the light of what they take to be justice.²⁹

III.FLEMING’S FIDELITY TO OUR IMPERFECT CONSTITUTION: MORAL READINGS V. ORIGINALISMS (AND LIVING CONSTITUTIONALISMS)

In his article “Fidelity to Our Imperfect Constitution,”³⁰ Fleming pointed out that the topic for the “Fidelity in Constitutional Theory” Symposium raised two fundamental questions: *fidelity to what?* and *what is fidelity?*³¹ The short answer to the first—“fidelity to the Constitution”—pointed to a further question: *what is the Constitution?*³² Similarly, the short answer to the second—“being faithful to the Constitution in interpreting it”—posed another question: *how should the Constitution be interpreted?*³³ Certainly, the two questions *what is interpreted?* and *how it is or should be interpreted?*, along with the question of *who is to interpret?*, are the basic interrogatives of constitutional interpretation.³⁴

On this regard, I would like to make the importance of the third one explicit, since I am fully convinced—following Dworkin’s lead—that in a (constitutional) democracy or

29. DWORKIN, *FREEDOM’S LAW*, *supra* note 3, at 37 (emphasis in original).

30. See Fleming, *Fidelity to Our Imperfect Constitution*, *supra* note 8, at 1335.

31. *Id.*

32. *Id.*

33. *Id.*

34. See *id.* See also WALTER F. MURPHY ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* (5th ed. 2013).

democratic system, everyone—judges, legislators, lawyers, citizens and other public officials—are to interpret the Constitution, rejecting an exclusive attribution to or the monopoly of a person or group.³⁵ In that sense, since there will be countless interpretations, the question evolves into at least two different questions: *who is to interpret authoritatively?*,³⁶ as well as, *who is to interpret correctly?*³⁷

In spite of the “majoritarian premise” and the so-called “counter-majoritarian difficulty,”³⁸ almost all of our contemporary democracies, including those in transition from authoritarian regimes, have entrusted the responsibility of authoritative interpretation to judges sitting in constitutional, higher, or supreme courts and tribunals, which Dworkin rightly conceives as “the forum of principle.”³⁹ Notwithstanding, he clarified that: “I do not mean, of course, that only judges should discuss matters of high political principle. Legislatures are guardians of principles too, and that includes constitutional principle.”⁴⁰

Dworkin was adamant in his insistence that it is imperative to reject the “majoritarian premise” and the “counter-majoritarian difficulty” that reinforces the “majoritarian

35. See Imer B. Flores, *Law, Liberty and the Rule of Law (in a Constitutional Democracy)*, in LAW, LIBERTY AND THE RULE OF LAW 78 (Imer B. Flores & Kenneth E. Himma eds., 2013).

36. See DWORKIN, FREEDOM’S LAW, *supra* note 3, at 2 (“But political morality is inherently uncertain and controversial, so any system of government that makes such principles part of its law must decide whose interpretation and understanding will be authoritative.”).

37. See DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 11, at 279 (“My argument supposes that there is often a single right answer to complex questions of law and political morality. The objection replies that there is sometimes no single right answer, but only answers.”). See also Flores, *The Legacy of Ronald Dworkin*, *supra* note 18, at 181–85; Ronald Dworkin, *No Right Answer?*, in LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 84 (P.M.S. Hacker & Joseph Raz eds., 1977) (“For all practical purposes, there will always be a right answer in the seamless web of our law.”); Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 PHIL. & PUB. AFFAIRS 87, 136 (1996) (“This ‘no right answer’ thesis cannot be true by default in law any more than in ethics or aesthetics or morals.”).

38. See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16, 18 (2d ed. 1986).

39. See Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981), reprinted in DWORKIN, A MATTER OF PRINCIPLE, *supra* note 16, at 33. See also Imer B. Flores, *Assessing Democracy and Rule of Law: Access to Justice*, in PROCEEDINGS OF THE 21ST IVR WORLD CONGRESS, LUND (SWEDEN), AUGUST 12–17, 2003, PART I: JUSTICE 146 (Alexander Peczenik ed., 2004) (responding to the counter-majoritarian objection).

40. DWORKIN, FREEDOM’S LAW, *supra* note 3, at 31.

conception” of democracy, and instead replace it with the “partnership conception” of democracy, which “means government by *all* the people, acting together as full and equal partners in a collective enterprise of self-government.”⁴¹

Accordingly, it is also necessary to transcend the debate about who is or should be the absolute or final authoritative interpreter: the legislator or the judge?⁴² Actually, both have a very important duty, either to legislate political rights (and constitutional norms that remain under-enforced) or adjudicate legal rights, in both cases according to the Constitution and the law.⁴³ In a democracy, everyone has and must have its share: it implies a division of labor.⁴⁴

Additionally, it is not a matter of *who* is or should be the absolute or final authoritative interpreter, but of *who* is or should be to interpret *correctly*? Let me suggest that this last question conflates with the question: *how* it is or should be interpreted? Or, alternatively: *which* is the best or better interpretation? In other

41. RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 358 (2000) (emphasis in original). See RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 382–85 (2011) [hereinafter DWORKIN, JUSTICE FOR HEDGEHOGS]; RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 131–37 (2006); DWORKIN, FREEDOM’S LAW, *supra* note 3, at 15–19; Ronald Dworkin, *The Partnership Conception of Democracy*, 86 CAL. L. REV. 453 (1998). See also JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 102–03 (Liberal Arts Press 1958) (1861); Imer B. Flores, *Ronald Dworkin’s Justice for Hedgehogs and Partnership Conception of Democracy (With a Comment to Jeremy Waldron’s “A Majority in the Lifeboat”)*, 4 PROBLEMA: ANUARIO DE FILOSOFÍA Y TEORÍA DEL DERECHO 65, 73–76, 79–81 (2010).

42. See John Chipman Grey, *A Realist Conception of Law*, in PHILOSOPHY OF LAW 50 (Joel Feinberg & Hyman Gross eds., 3d ed. 1986) (“Whoever hath an *absolute authority* to interpret any written or spoken laws, it is *he* who is truly the *lawgiver* to all intent and purposes, and not the person who first wrote or spoke them.”) (emphasis added). See also *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (“We are not final because we are infallible, but we are infallible only because we are final.”).

43. See DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 41, at 405–07, 412–13. See also Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410 (1993); Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

44. See Imer B. Flores, *The Quest for Legisprudence: Constitutionalism v. Legalism*, in THE THEORY AND PRACTICE OF LEGISLATION: ESSAYS ON LEGISPRUDENCE 26–52 (Luc J. Wintgens ed., 2005); Imer B. Flores, *Legisprudence: The Role and Rationality of Legislators—vis-à-vis Judges—Towards the Realization of Justice*, 1 MEX. L. REV. N. S. 91 (2009); Imer B. Flores, *The Living Tree Constitutionalism: Fixity and Flexibility*, 3 PROBLEMA: ANUARIO DE FILOSOFÍA Y TEORÍA DEL DERECHO 37 (2009) [hereinafter Flores, *Living Tree Constitutionalism*]; Imer B. Flores, *Legisprudence: The Forms and Limits of Legislation*, 1 PROBLEMA: ANUARIO DE FILOSOFÍA Y TEORÍA DEL DERECHO 247 (2007).

words: is there a right answer or not? Originalists assume that their interpretation is the best or better one—and even the only one—because they are in the grip of what Fleming calls the “originalist premise,” i.e., “the assumption that originalism, rightly conceived, *is* the best, or indeed the only, conception of fidelity in constitutional interpretation. Put more strongly, it is the assumption that originalism, rightly conceived, *has to be* the best—or indeed the only—conception of constitutional interpretation” (p. 7).⁴⁵

Clearly, Fleming reacts to the “originalist premise” and rejects all forms of originalisms, regardless of whether they are concerned with the original meaning or public meaning of the text, the original intention or understanding of the drafters, framers or ratifiers, the original applications or expectations, original methods or the like, and reconnoiters all the variants, including old or new, strong or weak, exclusive or inclusive, living or dead, broad or narrow, abstract or concrete (pp. 2-3).⁴⁶

A clarification is in order: Fleming appears to be sympathetic with some forms of originalism, i.e., inclusive, living, broad and abstract, as long as they can be reformulated as or compatible with moral readings, and as such can be welcomed into the big tent of moral readings. We will return to this point in the last part of this Article. Nevertheless, the structure of the book is quite simple and very straightforward.

In Chapter 1, “Are We All Originalists Now? I Hope Not!,” which serves as introduction to the book, Fleming expands his homonymous article⁴⁷ to update his responses to this question. Especially, to those like Lawrence Solum, who answer this question affirmatively, and to those, like William Baude, who—following Elena Kagan’s concession, at her confirmation hearing, that “we are all originalists”—reframes the question as “*Is originalism our law?*” to answer: “Yes, at least in a presumptive sense, its deep structure is a nuanced form of originalism.”⁴⁸ In this chapter Fleming also incorporates the core of another article,

45. See Fleming, *Fidelity to Our Imperfect Constitution*, *supra* note 8, at 1344 (emphasis added).

46. See *id.*

47. James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 TEX. L. REV. 1785 (2013).

48. See William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) (citation omitted).

“The Balkinization of Originalism,”⁴⁹ in which he points out the main problem of the all-inclusive tent of and for originalists, with a brilliant pun: “the *Balkanization of originalism* and the *Balkinization of originalism*”(p. 2). In a few words, he suggests: “we are witnessing the ‘Balkanization’ of originalism (when originalism splits into warring camps) and the ‘Balkinization’ of originalism (when even Balkin, hitherto a pragmatist living constitutionalist, becomes an originalist)”⁵⁰ (p. 2).

In Part One, “The New Originalism and Its Originalist Discontent,” Fleming challenges new originalism and examines its originalist discontent. Along these lines, in Chapter 2, “The New Originalist Manifesto,”⁵¹ he exposes and criticizes the “new originalist manifesto,” as redefined or refined elegantly by Solum around four basic ideas: 1) *The fixation thesis*; 2) *The public meaning thesis*; 3) *The textual constraint thesis*; and 4) *The interpretation-construction distinction*. Fleming is absolutely right that these ideas represent a problem for originalists, especially the fourth, which gives room for a “construction zone” that lies beyond originalism and requires, by definition, normative judgments, and, as such, is considered as a capitulation in favor—for different reasons—of both living constitutionalisms and moral readings, and contributes to generate discontent among old and even contemporary originalists (pp. 28–29).

Similarly, in Chapter 3, “Fidelity, Change, and the Good Constitution,”⁵² he corroborates that new originalism has provoked a pushback within originalism, with the appearance of the “original methods originalism” and the reappearance of the “old-time originalism,” and demonstrates that the reasons for aspiration to fidelity correspond to the moral reading or philosophical approach that conceives fidelity as honoring our commitments to “abstract aspirational principles,” not concrete

49. James E. Fleming, *The Balkinization of Originalism*, 2012 U. ILL. L. REV. 669 (2012) [hereinafter Fleming, *The Balkinization of Originalism*].

50. *Id.* at 670; James E. Fleming, *The Balkanization of Originalism*, 67 MD. L. REV. 10 (2007). *See, e.g.*, Mitchel N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009) (distinguishing seventy-two varieties of originalism). *See also* JACK BALKIN, *LIVING ORIGINALISM* (2011) (expressing a willingness to occupy the intermediate position between originalism and living constitutionalism by renaming his position “living originalism”).

51. *See* James E. Fleming, *The New Originalist Manifesto*, 28 CONST. COMMENT. 539 (2013).

52. James E. Fleming, *Fidelity, Change, and the Good Constitution*, 62 AM. J. COMP. L. 515 (2014).

or specific ones. As Dworkin puts it: “We have to choose between an abstract, principled moral reading . . . and a concrete, dated, reading.”⁵³

In Part Two, “A Moral Reading or Philosophical Approach,” Fleming defines and defends his moral reading or philosophical approach as an alternative to originalism. In Chapter 4, “Fidelity Through a Moral Reading or Philosophical Approach,” he develops his substantive and interpretative theory, and responds to objections to it; and in Chapter 5, “The Place of Precedent and Common-Law Constitutional Interpretation,” he reiterates a conclusion present ever since the publication of “Fidelity to Our Imperfect Constitution,” namely that, “[h]istory is, can only be, and should only be a starting point in constitutional interpretation.”⁵⁴

Let me also call your attention to a passage of Antonin Scalia’s Tanner Lecture, “Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws”:

[T]he common law grew in a peculiar fashion—rather like a Scrabble board. No rule of decision previously announced could be *erased*, but qualifications could be *added* to it. The first case lays on the board: “No liability for breach of contractual duty without privity” the next player adds ‘unless injured party is member of household.’ And the game continues.⁵⁵

As you can imagine, I am fully convinced that since history cannot be erased but only added, Fleming is certainly right: “[h]istory is, can only be, and should only be a starting point in constitutional interpretation . . . ,” and not the ending point or finishing line (p. 2). Recall Oliver Wendell Holmes’ celebrated article, “The Path of Law”, where he, on the one hand, admitted:

At present, in very many cases, if we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all we go to tradition The

53. Dworkin, *The Arduous Virtue of Fidelity*, *supra* note 4, at 1253.

54. Fleming, *Fidelity to Our Imperfect Constitution*, *supra* note 8, at 1350.

55. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 8 (Amy Gutmann ed., 1997) (emphasis in original).

rational study of law is still to a large extent the study of history.
History must be a part of the study.

On the other hand, he warned: “Everywhere the basis of principle is tradition, to such an extent that we even are in danger of making the role of history more important than it is.”⁵⁶

In Part Three, “Living Originalism and Living Constitutionalism as Moral Readings,” Fleming recasts, or at least tries to recast, some theories as moral readings and theorists as moral readers: in Chapter 6, “Fidelity through Living Originalism: Redeeming the Promises of the Constitution”—Jack Balkin’s living originalism—and in Chapter 7, “Fidelity to Our Living Constitution: Honoring the Achievements of *We the People*”—Bruce Ackerman’s living constitutionalism. The problem for Fleming is that both authors, despite assuming the existence of abstract principles, have long resisted the moral reading and its implications in favor of pragmatic considerations.⁵⁷

In Part Four, “Fidelity to Our Imperfect Constitution,” Fleming reconsiders the pragmatic argument that it is time to rewrite the United States Constitution based on the argument that it is imperfect. On the contrary, he argues that the better approach is to maintain an attitude of fidelity to our imperfect Constitution, and to apply a constitutional-perfecting theory that interprets the Constitution so as to make it the best it can be.

Finally, in “Epilogue: Accepting our Responsibility,” Fleming concludes with a call to accept responsibility for making normative judgments and welcoming those who are willing to accept it into the moral reading tent:

56. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), reprinted in 110 HARV. L. REV. 991, 1001–03 (1997). See Imer B. Flores, *The Problem About the Nature of Law vis-à-vis Legal Rationality Revisited: Towards An Integrative Jurisprudence*, in THE PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW 101 (Wil Waluchow & Stefan Sciaraffa eds., 2013).

57. I confess to at one time also thinking that Ackerman’s living constitutionalisms and Balkin’s synthesizing originalism and living constitutionalism project, *i.e.* living originalism, were compatibles with a Dworkinian moral reading approach. Since, I have come to conclude that they are not, as we will see in the last part of this Article. See Flores, *The Living Tree Constitutionalism*, *supra* note 44, at 41, 74 (commenting on WILFRID J. WALUCHOW, A COMMON LAW THEORY OF JUDICIAL REVIEW: THE LIVING TREE (2007)). By the by, the “living tree” metaphor, suggesting both fixity and flexibility, can be traced all the way back to JOHN STUART MILL, ON LIBERTY 56–57 (Hackett 1978) (1859) (“Human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing.”).

Moral readers accept our responsibility not to retreat from interpreting the Constitution so as to fulfill the promise of our commitments to abstract aspirational principles such as liberty and equality—not to retreat to originalism. We appreciate that the aspiration to fidelity requires citizens, scholars, and judges not to avoid or evade the responsibility to make normative judgments about the best understanding of those commitments (p. 191).

IV. CONSTITUTIONAL FIDELITY, INTERPRETATION, AND IMPERFECTION: INTELLEAGENT OR UNINTELLEAGENT?

Let me make explicit that Fleming's apt title for his article and book, *Fidelity to Our Imperfect Constitution*, has implicit in it three very helpful dichotomies to distinguish the different theories: (1) fidelity and anti-fidelity; (2) interpretation and non-interpretation, i.e., (re)construction, (re)invention and (judicial) legislation; and (3) perfection-imperfection.

Accordingly, "originalists" assume that they are the only ones that can have *fidelity* to the Constitution as written, by limiting themselves to the *interpretation* of the Constitution, which somehow is and remains a symbol of *perfection*. On the contrary, "living constitutionalists" assume an *anti-fidelity* position, suggesting that it is time to rewrite the Constitution, by a pragmatic process of non-interpretation through *(re)construction*, *(re)invention* and *(judicial) legislation*, due to its *imperfection*. Finally, moral readers (like Fleming and myself) assume that they (we) also have *fidelity* to the Constitution as written, to the extent that the best or better approach is to continue with its *interpretation*, recognizing that it is not a symbol of perfection, but of *imperfection*.

By now, it is clear that the kind of interpretation that moral readers and originalists have in mind is very different: a constructive interpretation for moral readers, on one side, and a mere applicative interpretation for originalists, on the other. However, the kind of fidelity in question is still not that evident. So, the remaining or underlying question is: *what kind of fidelity?* My response, following Lon L. Fuller's distinction between intelligent and unintelligent fidelity, is unsurprising: *intelligent fidelity*. The distinction can be traced to a passage of his piece "The Case of the Speluncean Explorers":

There are those who raise the cry of judicial usurpation whenever a court, after analyzing the purpose of a statute, gives its words a meaning that is not at once apparent to the casual reader who has not studied the statute closely or examined the objectives it seeks to attain. Let me say emphatically that I accept without reservation the proposition that this Court is bound by the statutes of our Commonwealth and that it exercises its powers in subservience to the duly expressed will of the Chamber of Representatives. The line of reasoning I have applied above raises no question of fidelity to enacted law, though it may possibly raise a question of the distinction between intelligent and unintelligent fidelity. No superior wants a servant who lacks the capacity to read between the lines. The stupidest housemaid knows that when she is told “to peel the soup and skin the potatoes” her mistress does not mean what she says. She also knows that when her master tells her to “drop everything and come running” he has overlooked the possibility that she is at the moment in the act of rescuing the baby from the rain barrel. Surely we have a right to expect the same modicum of intelligence from the judiciary. The correction of obvious legislative errors or oversights is not to supplant the legislative will, but to make that will effective.⁵⁸

The relevance of the distinction between intelligent and unintelligent fidelity is also captured in the following quotation from Dworkin: “The moral reading insists that they misunderstood the moral principle that they themselves enacted into law. The originalist strategy would translate that mistake into enduring constitutional law.”⁵⁹

To conclude, let me recall that I concurred with Fleming, in his response to the question: *Are we all originalists now?* “*I hope not,*” and to his rhetorical question: *Are we all moral readers now?* I answer, “*I believe not and hope not.*” Somehow my idea has been that not everyone is willing to admit that they are making moral readings, i.e., normative judgments, and much less willing to accept their responsibility for doing so. Once they admit and accept it, as Fleming suggests, we all will be moral readers, welcomed in a big tent to sing along.

58. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 625–26 (1949), reprinted in 112 HARV. L. REV. 1851 (1999).

59. DWORKIN, FREEDOM’S LAW, *supra* note 3, at 13.