

ORIGINALISM'S CURIOUSLY  
TRIUMPHANT DEATH: THE  
INTERPENETRATION OF  
ASPIRATIONALISM AND HISTORICISM IN  
U.S. CONSTITUTIONAL DEVELOPMENT

**FIDELITY TO OUR IMPERFECT CONSTITUTION.** By James E. Fleming.<sup>1</sup> New York: Oxford University Press. 2015. Pp. xv + 243. \$75.00 (cloth).

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As someone preoccupied with the nature and processes of U.S. constitutional development from an empirical, positivist as opposed to a prescriptive, normative perspective—in *is* rather than *ought*—my interest in contemporary constitutional theory of the sort practiced at a high level by Jim Fleming is oblique. I care more about history than theories of justice, about how the Constitution has actually been read to structure public (and private) authority in the United States over time than about justifying either the “best” readings of the parameters of that authority generally, or worrying in particular about what theory of interpretation can justify a judge in exercising his or her purportedly problematic “counter-majoritarian” powers of judicial review to hold legislation null and void on the grounds that it contravenes the nation’s fundamental law.<sup>3</sup> When I nod my head “yes” about constitutional theory, it is thus most immediately over what Michael Dorf identifies as the “eclectic’

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3. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962) (coining the term “counter-majoritarian difficulty”); *THE FEDERALIST* NO. 78 (Alexander Hamilton).

accounts” of Philip Bobbitt and Richard Fallon, scholars who find—usefully, but not surprisingly—that over the long course of American history, judges have used an array of “modalities,” or types of arguments, in publicly justifying their decisions in their judicial opinions.<sup>4</sup> If one moves beyond judicial opinions to constitutional arguments made in the roiling public sphere (parties, elections, social movements, interest groups, and diverse forms of individual and collective legal consciousness, including political and legal claim-making), of course, the modes of argument multiply, and the matter overflows the ambit of professional, institutional justification.<sup>5</sup> There is a lot of *is* out there.

At the same time, however, certainly in the United States—and perhaps in many other places as well—there is a lot of “ought” in the “is.” What *has* happened is, in significant part, a function of claims made, in various fora, about what *should* happen. There is thus, and always has been, a lot of empirically observable and verifiable “aspirationalism” in U.S. historical and constitutional development. At the same time, however, there are also a lot of empirically, positivistically verifiable appeals to heritage and history in American aspirationalism—and that aspirationalism also has a history. In light of these dynamics—both aspects of which Fleming helpfully recognizes in *Fidelity to Our Imperfect Constitution*—Fleming wants to call the fight for aspirationalism. But I think the book as a whole shows that we can call it a draw: there is no reason, or even grounds, for drawing a sharp distinction between one and the other. The extent we feel inclined to do so is an artifact of the trajectory of the living constitutionalist-originalist debates of mid-to-late twentieth century America, debates that Fleming’s book demonstrates, to

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4. See Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1768 (1997). See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982); Richard Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

5. See JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011); PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); GEORGE I. LOVELL, *THIS IS NOT CIVIL RIGHTS: DISCOVERING RIGHTS TALK IN 1939 AMERICA* (2012); Emily Zackin, *Lost Rights and the Importance of Audience*, 49 TULSA L. REV. 421 (2013).

me at least, are, in their most familiar forms, likely not long for this world.

The Living Constitutionalist v. Originalist binary has long seemed to me something of a parlor game: it was always a false opposition. But Fleming fails to note that Living Constitutionalism, Aspirationalism, and Constitutional Perfectionism are also “isms.” The two positions—at least in their contemporary form in recent constitutional theory, born in an age of isms—were mutually constitutive. Fleming’s *Fidelity to Our Imperfect Constitution* aspires to transcend this binary and reconcile in constitutional theory appeals to history and aspiration to the best interpretation. While in the end, he doesn’t fully succeed, I do agree with the core of the argument in this book, if not its ultimate conclusion. What pleasantly surprises me is the degree to which Fleming, a leading Rawlsian and Dworkinian constitutional theorist, has incorporated the claims of history and the insights of scholars of American political and constitutional development (and the legal scholars who commune with them) into his otherwise largely “philosophical” work. He suggests that the essentials of the key portions of that work that he adopts here—about “is,” and the concrete, and “fit”—were in Dworkin and Rawls (*Political Liberalism*) all along—a not wholly convincing bit of (creative) mopping up. But this is a matter for intellectual historians. The key point is that, as constitutional theory, what he sets out here, now, seems mostly to work.

#### HISTORY IN ASPIRATIONALISM/PERFECTIONISM

While recognizing the uses of history in constitutional argument and justification, Fleming plainly sees the book’s take-home point as involving the preeminence of aspiration. Let’s focus first on aspirationalism or perfectionism’s concessions to history. First is Fleming’s acknowledgement of what (following the later Rawls) we may call “political perfectionism.” “[T]o be persuasive in our constitutional culture,” Fleming says here, “one generally needs to argue that one’s interpretations fit with the past, show the past in its best light or fulfill the promises of our abstract moral commitments and aspirations.” (p. 108). He makes clear, however, that this is in no way a concession to originalism (or, at least, to the traditional, “old-time,” hard-form originalism of Robert Bork and Antonin Scalia). “It is a moral reading or philosophic approach that aspires to fidelity to our imperfect

Constitution” (p. 108).<sup>6</sup> And Fleming criticizes “constitutional theorists who are not narrow originalists [including his earlier self?] . . . [for] hav[ing] not paid sufficient attention to how arguments based on history, both adoption history and post-adoption history, function in constitutional law” (p. 136). Here, Fleming highly praises recent work by Jack Balkin that does precisely this.<sup>7</sup> He signs on to the criticism by Balkin and his fellow broad originalists of liberals and progressives for ignoring history and ceding it to conservatives (pp. 136-37). Fleming is thus now favorably disposed towards historical argument in constitutional debate (and adjudication) if taken to advance a moral reading and not as an alternative to it, with history acting in service to the judges engaging in their primary responsibility of exercising moral judgment (pp. 91-92).

At the same time, Fleming distances the constitution-perfecting, aspirationalist theory with which he has long been associated from its longstanding ties to theories of judicial supremacy, and takes a friendly stance toward pluralistic, “protestant,” and departmentalist models of constitutional practice<sup>8</sup> (p. 174). He also acknowledges in an unconcerned way the history of the plural constitutional forms of justification or multiple modalities that have always been used by judges in their judicial opinions—that is, the observations highlighted in the eclectic accounts of Bobbitt and Fallon. In doing this, Fleming here distances himself from living constitutionalism as an “ism” (p. 57).

Fleming’s model, however, retains a clear hierarchy of values, with history in the subservient or instrumental role, honored rather than (necessarily) followed, servant, not rival, to justice. While he certainly affords a role to historical arguments in American constitutionalism, he is express—and emphatic—about their subsidiarity: they are at most minor premises to philosophy’s major premises about justice and the nature of the good.

This is problematic. I agree with Fleming’s conclusion that fidelity is indispensable to any plausible constitutional theory: I, for one, count this commitment to a duty to fidelity as yet another

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6. For more on “inclusive originalism,” see William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015), which Fleming cites for this point. (p. 193 n.2).

7. See Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641 (2013).

8. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988).

of originalism's victories—though Fleming insists it was there in Dworkin all along.<sup>9</sup> It was, after all, originalists who most centrally and insistently tied the duty of fidelity to the Constitution's status as law, arguing that it was inherent in the very concept of the rule of law (though, to be sure, they were hardly the only to note or mention it). Law as fidelity was originalism's great thrust.<sup>10</sup>

But Fleming's position on history as handmaiden underplays its indispensability as living constitutionalism's life force. Fleming's failure to afford this reality its due highlights his vestigial monism, in a book that breaks new ground in his theoretical project in reconciling itself with constitutional pluralism. Monism is hierarchical. And Fleming's fondness for philosophical clarity, for setting out hypotheses, premises, major and minor, and the like in the form of formal logic, necessarily entails this monistic hierarchy of values, in which justice is the major premise and history the minor one. This is, I submit, the wrong way to look at it.

There is a history here that Fleming does not tell in *Fidelity to Our Imperfect Constitution*, perhaps because that history is about the relationship over time between academic (and particularly legal academic) constitutional theory and party/movement politics driven by an underlying politics of conservatism v. progressivism/liberalism. While he takes some steps in the direction of emphasizing a non-binary, interpenetrating complexity, Fleming's hierarchy remains wedded to an ostensibly history-spurning "living constitutionalism," set in opposition to an aspiration-spurning originalism. But this is a relatively contemporary construction, pitting "ism" against "ism." I will discuss conservatism later. But let's take progressivism/liberalism first.

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9. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* (1986).

10. This was true as well for the earlier liberal originalism of Hugo Black, who was disturbed, for example, by Earl Warren's casual indifference to its rule of law claims in his opinion for the Court in *Brown v. Board of Education*, 347 U.S. 483, 492–93 (1954) ("In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."). See generally JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1979); JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* (2000).

If living constitutionalism is understood as a common modality involving adjustment of constitutional understandings to take into account altered conditions, it, in fact, has a history that dates back to the beginning of the country, and doubtless before—which is why it is easy enough to go back and cherry-pick ancient quotations to hurl at originalist opponents in contemporary constitutional controversies (for example, “It is a *constitution* we are expounding . . . adapt[able] to the various *crises* of human affairs.”).<sup>11</sup> It is also why there is truth underlying David Strauss’s model of living constitutionalism as common law constitutionalism. But living constitutionalism as an “ism”—that is, as the one right way to do things, as forged against some intransigent, conservative roadblock/barrier school of thought that insisted otherwise—was born in the late nineteenth/early twentieth centuries, and issued from two different and distinctive wellsprings. The first was indubitably morally aspirationalist: it involved aspirationalist conceptions of justice and equality, as read into (typically) the rights provisions of the Civil War Amendments (particularly the Fourteenth) and the invocation in constitutional argument of the natural rights claims of the Declaration of Independence. This aspirationalism was reformist, and reform/social movement aspirationalism, as pioneered by women’s rights advocates and abolitionists before the Civil War, maintained its momentum in an ongoing trajectory, following these textual additions, after the War.<sup>12</sup> While commonly considered an approach of the reformist left, this same moral aspirationalism was applied to the concept of liberty/freedom by the Supreme Court’s Lincoln appointees like Justice Stephen Field and subsequent Republican appointees like (Ulysses S. Grant appointee) Joseph Bradley and other “Lochner era” conservatives. While random natural law claims, of course, dated back to the country’s beginning and before (natural law as a modality in a generally pluralist framework) when it was joined

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11. *McCulloch v. Maryland*, 17 U.S. 316, 407, 415 (1819).

12. See J. DAVID GREENSTONE, *THE LINCOLN PERSUASION: REMAKING AMERICAN LIBERALISM* (1993); Michael Vorenberg, *Bringing the Constitution Back In: Amendments, Innovation, and Popular Democracy During the Civil War Era*, in *THE DEMOCRATIC EXPERIMENT: NEW DIRECTIONS IN AMERICAN POLITICAL HISTORY* 120 (Meg Jacobs, William J. Novak & Julian E. Zelizer eds., 2003); Hendrik Hartog, *The Constitution of Aspiration and “The Rights that Belong to Us All,”* 74 J. AM. HIST. 1013 (1987); see also ALEXANDER TESIS, *FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE* (2012).

with the reform movement thrust of abolitionism, natural law as natural rights became a way of life for many U.S. constitutionalists, and a cause—it became an “ism”.<sup>13</sup>

The second wellspring of modern living constitutionalism was quite different. This was progressive majoritarianism, premised on a robustly democratic reading of the (best) constitutional order—the very reading Fleming rightly recognizes in the recent work of Sandy Levinson. This democratic/majoritarian living constitutionalism had an anti-legal (or anti-fidelity) thrust, at least as applied to the powers of the courts to police constitutional boundaries. This progressive living constitutionalism came in different forms, of course, from the minimally legalist (Thayer’s “clear mistake” rule, and Holmes’s similar approach) to anti-constitutionalist/pure majoritarianism of some of that era—nicely canvassed recently by Aziz Rana—that Fleming rightly recognizes in the recent work of Mike Seidman. From a populist constitutional perspective, of course, majoritarianism can be morally aspirational, with the populace making moral arguments in the public sphere for legislation. But it is not so much a moral reading of the Constitution as a call for the Constitution to get out of the way of the aspiring, perfectionist, justice-seeking people.<sup>14</sup>

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13. See, e.g., *Fletcher v. Peck*, 10 U.S. 87, 133 (1810); *Calder v. Bull*, 3 U.S. 386 (1798). While an issue in an array of contexts, the problem natural law foundations posed for chattel slavery was always beneath the surface in the early republic, and only rose higher over time. See, e.g., *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 836 (D. Mass. 1822); *Somerset v. Stewart*, 98 Eng. Rep. 499, 500 (1772); see also ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); JUSTIN BUCKLEY DYER, *NATURAL LAW AND THE ANTISLAVERY CONSTITUTIONAL TRADITION* (2012). In a recent book, John Compton has provocatively traced the living constitutionalism underlying the expansion of the modern New Deal state to evangelical reformist origins. See JOHN W. COMPTON, *THE EVANGELICAL ORIGINS OF THE LIVING CONSTITUTION* (2014). Oddly, his book largely omits a discussion of abolitionism and slavery, but usefully focuses on late nineteenth century religious reformism as applied to drinking and gambling. See *id.* at 3–6 (describing national morals regulation as breakthrough/critical juncture to expansions of the powers of the central administrative/social regulatory state).

14. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006); LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* (2012); Aziz Rana, *Progressivism and the Disenchanted Constitution*, in *THE PROGRESSIVES' CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MAKING OF THE AMERICAN STATE* (Stephen Skowronek, Stephen Engel, & Bruce Ackerman eds., 2016); James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). There are, of course, moral arguments for democracy, but I will demur on those here. It is worth noting that, while they welcome change and evolution, these two forms of living constitutionalism, the legalist and the anti-legalist, can

There is then the middle ground—close to Fleming (and Balkin’s) middle ground today—which takes the text as the starting point of constitutional interpretation, but holds that much of the text is either deliberately (or simply factually) broad and indeterminate and recommends that we should—indeed, must, inevitably—interpret it in light of our current needs, objectives, and aspirations.<sup>15</sup> Like Jack Balkin today, Woodrow Wilson, writing almost exactly one century before (borrowing, I believe, from Dicey), set out the metaphor of the Constitution as a house that needs to be “built out” over time. Wilson too wrote about the “construction zone”:

Sometimes, when I think of the growth of our economic system, it seems to me as if, leaving our law just about where it was before any of the modern inventions or developments took place, we had simply at haphazard extended the family residence, added an office here and a workroom there, built up higher on our foundations, and put out little lean-tos on the side, until we have a structure that has no character whatsoever. Now, the problem is to continue to live in the house and yet change it. Well, we are architects in our time, and our architects are also engineers. We don’t have to stop using a railroad terminal because a new station is being built. We don’t have to stop any of the processes of our lives because we are rearranging the structures in which we conduct these processes. What we have to undertake is to systematize the foundations of the house, then to thread all the old parts of the structure with the steel which will be laced together in modern fashion, accommodated to all the modern knowledge of structural strength and elasticity, and then slowly change the partitions, relay the walls, let in the light through new apertures, improve the ventilation; until finally, a generation or two from now, the scaffolding will be taken away, and there will be the family in a great building whose noble architecture will be at last disclosed, where men can live as a single community, co-operative as in a perfected, coordinated beehive, not afraid of any storm of nature, not afraid of any artificial storm, any imitation of thunder and lightning, knowing that the foundations go down to the bedrock of principle, and knowing that whenever they please they can

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also be read in stark opposition to each other (see, for example, Lincoln and his commitment to the equality of natural rights as a representative of the first, and Stephen Douglas, and his commitment to popular sovereignty, as a representative of the second).

15. See Charles A. Beard, *The Living Constitution*, 185 ANNALS AM. ACAD. POL. & SOC. SCI. 29, 34 (1936).



change that plan again and accommodate it as they please to the altering necessities of their lives.<sup>16</sup>

It is notable that all of these first generation of living constitutionalists were famous adepts at embedding their theories in history. They all told stories, stories about the founding, stories about the Civil War, stories about the progress of man. Many—perhaps most—of these stories had a strong patriotic theme (it is worth noting that while Balkin teaches us about construction zones in an academic journal, Wilson set out his theory in public speeches, subsequently assembled into a presidential campaign manifesto, *The New Freedom*, which he leveraged to win the White House). Progressives, in particular, were highly nationalistic and patriotic. Herbert Croly's *New Nationalism*, to take just one (triumphant) example, justified change by re-narrating the founding and its relation to necessary changes in the present, calling famously for the achievement of Jeffersonian ends by Hamiltonian means.<sup>17</sup> None insisted on justice as major premise and history as minor premise: they were two sides of the same coin. This is not unrelated to their ultimate success. Accordingly, while Fleming has gone a long way in the right direction, this, in my view, is the next step: his next book should take it.

Although he can't quite break with a monism that makes history the handmaiden of philosophy, Fleming does evince an understanding of this in this book in a way much more pronounced than he ever has before. He acknowledges originalism's appeal not just as a matter of the philosophy of the rule of law, and hermeneutics, but in the United States in particular, as a concrete country, with a history and a tradition—indeed, a heritage: what Fleming calls “*our* constitutional practice” (p. 60). He says “it is . . . likely that there are contingent reasons for originalism's normative appeal . . . in the United States”—as if this “contingency” itself were a flaw in what would otherwise be the glassy smooth surface of principle, rather than what countries and peoples actually *are*<sup>18</sup> (pp. 65-66). Still, Fleming rightly acknowledges that contemporary originalists, all

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16. WOODROW WILSON, *THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE* 50–52 (1914).

17. HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* (1909).

18. In this, he is following the path of the later Rawls (of *Political Liberalism* (1993)) as against the earlier Rawls (*A Theory of Justice* (1971)), in his own constitutional sphere.

theories of legal obligation and judicial role and duties aside, are appealing to the constitutional nationalism and “constitutional patriotism” of Americans, a point earlier noted by both Dorf and Balkin, which Fleming acknowledges and adopts.<sup>19</sup> While it is worth qualifying this point by remembering that, to some extent, this too is a construction—see Michael Kammen’s cultural history of Constitution-worship as trajectory, and Madison’s efforts to set the public off the scent (to a certain extent) of the sayings and doings of the Founders—it is still very much there, and as much more than just a theory informing approaches to interpretation by professionals.<sup>20</sup> It is a political vision. When this vision was employed by conservatives to oppose the rulings and reasoning of the liberal, living constitutionalist Warren Court devoted to “the pursuit of justice,” in the (ostensible) defense of an abandoned/betrayed (and, later, a “lost” or “exiled” Constitution), the living constitutionalists were both (initially) triumphant, and set for a major fall. Fleming himself (and Dworkin, Frank Michelman, and the rest) were once very far out on that plank. *Fidelity to Our Imperfect Constitution* is Fleming’s laudable attempt to walk himself back.<sup>21</sup>

And so we get a new seriousness about history, in what Fleming is careful to ascribe as its proper place. His philosophic approach “would use history for what it teaches rather than for what it purportedly decides for us. In a constructivist world, we would understand that history is a jumble of open possibilities, not authoritative, determinate answers” (p. 22). He gives high praise to “constructivist” constitutional theory, describing it as the best new work in the field, work that “acknowledges the place of history—most notably, original meaning, post-adoption history, and precedent—as sources of constitutional interpretation. It not only recognizes the limitations of history but also appreciates the uses of history (which are different from conventional originalist

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19. Balkin reaffirms Dorf on “ancestral” and “heroic” originalism. See Balkin, *supra* note 7, at 682 n.120.

20. MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (1986). *But see* DAVID J. SIEMERS, *RATIFYING THE REPUBLIC: ANTIFEDERALISTS AND FEDERALISTS IN CONSTITUTIONAL TIME* (2002).

21. See MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* (1998); Justice William J. Brennan, Assoc. Justice, U.S. Supreme Court, *The Constitution of the United States: Contemporary Ratification* (Oct. 12, 1985), [staffweb.wilkes.edu/kyle.kreider/Brennan.doc](http://staffweb.wilkes.edu/kyle.kreider/Brennan.doc) (last accessed Apr. 18, 2016); *see also* LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000).

uses of history)” (p. 20). Fleming appropriately analogizes this constructivism to the turn taken by Rawls in *Political Liberalism*, characterizing it as a quest for the best interpretation, with history a part of the quest, while carefully noting that “[h]istory is, can only be, and should only be a starting point in constitutional interpretation” (p. 21).

#### ASPIRATIONALISM IN HISTORICISM

Following the scholarship in what I recently learned is a new scholarly literature in “the history of originalism,” Fleming rightly notes that originalism as an “ism”—as opposed to one longstanding modality of constitutional interpretation—is actually a relatively new phenomenon: it essentially begins with Robert Bork, Edwin Meese, and Raoul Berger, forged in reaction to the Warren Court. Part of my own contribution to that new literature has been to underline the degree to which newish originalism as an “ism” (what Whittington calls “old” originalism, and I have called “reactive” originalism) is only contingently linked to conservatism, theoretically and historically. This old, reactive originalism by the Right represented, in many respects, a revival of majoritarian, democratic, judicial-restraintist, “clear-mistake” progressivism: the charge against Warren Court liberals by the Old/Reactive originalists was hypocrisy (“you criticized judicial activism and *Lochner* and judges reading their own politics into law—and, look, you are doing the same thing!”).<sup>22</sup> In this majoritarian, democratic, anti- or minimally constitutionalist guise, originalism as an “ism” was the antithesis of aspirationalist/perfectionist moral readings of the Constitution.

In chapter one of *Fidelity to Our Imperfect Constitution*, Fleming has his own charge of hypocrisy to lodge against contemporary conservative originalists like Michael McConnell, Steven Calabresi, and others, faint-hearted in the face of charges that strict originalism would de-legitimize things like *Brown v. Board of Education* (1954)’s reading of the Fourteenth

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22. Ken I. Kersch, *Constitutional Conservatives Remember the Progressive Era*, in *THE PROGRESSIVES’ CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MAKING OF THE AMERICAN STATE*, *supra* note 14 [hereinafter Kersch, *Constitutional Conservatives Remember the Progressive Era*]; Ken I. Kersch, *Ecumenicalism Through Constitutionalism: The Discursive Development of Constitutional Conservatism in National Review, 1955–1980*, 25 *STUD. AM. POL. DEV.* 86 (2011) [hereinafter, Kersch, *Ecumenicalism Through Constitutionalism*].

Amendment's equal protection clause to bar sex discrimination, and/or (for some) due process liberty to protect against sexual orientation discrimination. Fleming charges them with adopting the view, virtually indistinguishable from Dworkin's aspiration/moral concept/conception approach, that purports to be grounded in the authority of these relatively abstract textual constitutional provisions, but recognizes, implicitly, that the provisions must be read in light of updated understandings of the requirements of justice, liberty, and equality.<sup>23</sup> In doing so, these originalists have forfeited the claim for originalism as a stay against (supposedly unconstrained, free-wheeling, subjective/political) living constitutionalism in its moral reading guise. Fleming's argument here is dead-on—exactly right.

The problem, however, is that, as I have emphasized in recent work, conservatives as a group, and conservative constitutionalists, have never claimed to be opposed to moral readings of the Constitution: this opposition is an artifact of constitutional theory as practiced in the law schools by law professors. While that might have seemed to be the world to legal academics, it was never the world of either the wider conservative movement, or even conservative constitutional theorists, many of whom were not law professors, but political scientists and political philosophers.

Of course, the early modern constitutional conservatives like Justice Field were aspirationalist moralists about individual liberty: it was Field, after all, who in his *Slaughterhouse* dissent (1873) insisted on an expansive—indeed, revolutionary—reading of the Fourteenth Amendment's new rights provisions. To read it otherwise, Field said, would render the Amendment's adoption "a vain and idle enactment."<sup>24</sup> This is the reason that Justice Hugo Black, who knew whereof he spoke, insisted that any ruling that smacked of *Lochnerism* amounted to a return to "natural law." But there is a much more proximate aspirationalist/moralist conservative constitutionalism to be found in the postwar constitutional theory of the Straussians—of men like Martin Diamond, Harry V. Jaffa, and Walter Berns. These people sometimes disagreed vehemently, at times viciously, about many

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23. Baude, *supra* note 6; see Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 101 (2011); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1140 (1995).

24. *Slaughterhouse Cases*, 83 U.S. 36, 96 (1873) (Field, J., dissenting).

things (the antagonism between the East Coasters (Allan Bloom and Walter Berns, for example, and the West Coasters (Jaffa) was especially pronounced). But Straussianism was defined by its insistence on substantive moral ends in politics and constitutionalism, the source of the foundational distinction Straussians drew between ancient and modern political thinkers (Plato and Aristotle, e.g., versus Machiavelli and Hobbes). These mid-century constitutional theorists were quite explicit in opposing the pure majoritarianism and legal positivism they associated with Progressivism.<sup>25</sup> Since Bork and Scalia's originalism is positivism, and genealogically Progressive, these conservative constitutional theorists have always set themselves in opposition to Bork and Scalia (on the current Court, Clarence Thomas is their man). Let me emphasize that, while these people may be largely unknown to constitutional theorists in the legal academy, they are, and have long been, major thinkers on the constitutional Right. As men trained in political philosophy (mostly) at the University of Chicago, it is worth adding, they brought an immense intellectual sophistication to their constitutional theory: this is not fringe constitutional theory, or lesser constitutional theory, but very serious stuff.

Fleming's focus on the recent updating originalism of McConnell, Calabresi, and others raises a different dimension of all this, and one that sounds in legal theory, intellectual history, and American constitutional development. As a matter of legal theory, this development was inevitable. While it is true that an intransigent fundamentalism that brooks no adjustment or accommodation to change can be surprisingly durable—and, to some fanatics, holds an enduring appeal<sup>26</sup>—this is less than likely

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25. The same was true of the Roman Catholic constitutional theory of roughly the same period. It is no coincidence that, these days, many Straussians are housed at Catholic universities. See JOHN COURTNEY MURRAY, SJ, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* (1960); Kersch, *Constitutional Conservatives Remember the Progressive Era*, *supra* note 22; Ken I. Kersch, *Beyond Originalism: Conservative Declarationism and Constitutional Redemption*, 71 MD. L. REV. 229, 249 (2011); see also EDWARD A. PURCELL, JR. *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973).

26. Consider, for example, the problem of Islamic fundamentalism—one of the chief scourges of our time, or the Roman Catholic extreme Right (though even they, conveniently, don't argue today, as Catholic theology once did, that any artificial form of pain relief or sedations, for a headache, surgery, or an excruciating disease, contravened natural law, and the naturalness of human suffering, as lived and exemplified by Christ on the Cross). See JOANNA BOURKE, *THE STORY OF PAIN: FROM PRAYER TO PAINKILLERS* (2014).

to appeal to the mass in a modern liberal democracy (or perhaps even a religion) over the long term. Change will be accommodated: what will be debated is the pace of that change. Any institution or institutional actor charged with interpreting the law, cleric or jurist, who refuses on principle (in a liberal, democratic state) to accommodate significant social change, to an extent that they arrive at a position wholly divorced from the ambient social order will see his or her authority undermined—just as it would be undermined by the assertion of their authority in a progressive way that takes flight from the law they are charged with interpreting in a way so far in the vanguard as to be divorced from the prevailing social order in precisely the opposite direction.<sup>27</sup> There have always been conservatives who have recognized this: this, after all, is Burkeanism, the philosophy of prudent, incremental adjustment and reform, such as, for example, in the constitutional theory of, earlier, Philip Kurland, and, today, James R. Stoner, Jr. Stoner is a political scientist and, once again, if one looks at conservative constitutional theory outside of the law schools—where, until very recently, most conservative constitutional theory was written and practiced in modern, postwar United States—the opposition between the conservatives and the liberals (for example, David Strauss) is not all that stark.<sup>28</sup>

But there's more to it than (conservative) Burkeanism. The most prominent postwar non-legal academy constitutional theorists—theorists as visible and influential as Martin Diamond, Walter Berns, and Brent Bozell—were consistent and express in holding that the Constitution would have to be interpreted to take into account social change. As philosophers rather than lawyers (Bozell being the exception), these conservatives preferred subtlety to throwing down the gauntlet on behalf of an extreme and intransigent position and then daring their opponents (as lawyers tend to do) to take a diametrically opposite point of view

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27. See MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981).

28. For examples of conservative constitutional theory, see generally PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* (1970); JAMES R. STONER, JR., *COMMON LAW AND LIBERAL THEORY: COKE, HOBBS, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM* (1992); JAMES R. STONER, JR., *COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM* (2003); Philip B. Kurland, *American Systems of Laws and Constitutions*, in *AMERICAN CIVILIZATION* 141 (Daniel J. Boorstin ed., 1972).

(e.g. fidelity v. morality). Long before Dorf, Balkin, and Fleming, Martin Diamond argued that we owed the Founders immense respect both because they illuminated the principles upon which our political order rests and because they were learned and wise, but that we are not in any strict way bound by a duty of blind obeisance to follow their dictates.<sup>29</sup> Viewed in this context, the charge lodged against conservatives that they too are aspirationalists and moral readers, and take into account social change over time, is both right and beside the point. It is a very useful point to make as law professors are poised to write the next, and perhaps the final, chapter in the “ism” v. “ism” debates that have driven constitutional theory in the law schools for more than a generation. But in the broader ongoing debates between conservative and liberal constitutionalists in politics—in a context in which conservative aspirationalism is ascendant and the concern for “judicial restraint” is waning—the gotcha charge is likely to be greeted by little more than a shrug. As Reva Siegel and Robert Post have rightly emphasized, the battle now is over the substantive liberal and conservative visions.<sup>30</sup>

#### CONCLUSION

Fleming's *Fidelity to Our Imperfect Constitution* is both highly significant and a sign of the times. Starting from the Dworkinian/aspirationalist/moral perfectionist premises where he has situated his normative constitutional theory across his distinguished career, Jim Fleming has now moved to consider in a sustained way the appropriate place of history in constitutional interpretation. While it *may* be true that, in some sense, the school to which Fleming has long belonged acknowledged history (in its proper place), denied judicial supremacy, accepted the premises of departmentalism, popular constitutionalism, and “protestant” constitutional pluralism—as Fleming staunchly insists here—against longstanding, widespread (and, he insists, mistaken) scholarly perception, moral aspirationalists can certainly not be taken to have been preoccupied or identified with these positions

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29. See Kersch, *Constitutional Conservatives Remember the Progressive Era*, *supra* note 22; Kersch, *Ecumenicalism Through Constitutionalism*, *supra* note 22, at 99.

30. See Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, at 25, 26 (Jack M. Balkin & Reva B. Siegel eds., 2009); see also Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 *HARV. C.R.-C.L. L. REV.* 373, 373 (2007).

over the years. But in a conservative era these preoccupations and premises have now set the agenda for the field for more than a generation. It is at this point that Fleming, in this book, steps in to, at length, fashion his reckoning with this reality.

In a sense, Fleming here holds the line: aspiration, he argues, is, and must be, primary. Historicism is “subsidiary,” and instrumental, playing a supporting role in the quest for moral perfectionism. My comments here looked at this the other way round, emphasizing, in an empirical and positivist spirit, that aspirationalism and moral perfectionism are history. And they are a particularly prominent part of American history. In interesting ways, they are baked into the core of the American national and constitutional experiment, which is both liberal and providentialist. Moral aspirationalism took center stage with the waxing of disputes over chattel slavery, the Civil War, and the addition of the Constitution’s Civil War Amendments. It was the Union victory in the Civil War that launched aspirationalism, constitutional perfectionism, and living constitutionalism as “isms.” But it wasn’t until much later—with the political theory of John Rawls (*Theory of Justice* (1971)), the legal theory of Ronald Dworkin (*Taking Rights Seriously* (1977)), and their progeny—which prominently includes Fleming himself—that a more rooted, nationalist, patriotic, historically-minded, story-telling and narrating aspirationalism/perfectionism/living constitutionalism insisted in a sustained way that, in the realm of constitutional theory and politics, philosophy was higher and better, and history was lesser and lower. This, of course, was a recipe to both mandarin academic detachment and public irrelevance. Conservative originalists seized upon this presumptuous, self-satisfied detachment, riding the vulnerabilities of Fleming’s school all the way to the top—to the point where, as Fleming himself acknowledges, the best new work on constitutional theory (that reaches, by his lights, the right results) starts from historicist—and, purportedly, originalist—premises. What Fleming does in *Fidelity to Our Imperfect Constitution* is make the case that work by Balkin, Amar, Ackerman, and other “liberal originalists” is actually suffused with—he insists, more formally, starts from—moral or philosophical premises. At the same time, Fleming recognizes the value of liberal originalists attending to history in selling those premises, particularly in American political/constitutional culture. And he emphasizes the degree to



which even the best new *conservative* originalism has also adopted moral, philosophical aspirationalism in taking right results positions on core issues like racial segregation and women's equality, the rejection of which would be politically fraught, if not ultimately de-legitimizing and discrediting. Fleming reads these developments as demonstrating that we must now all acknowledge the primacy of moral readings of the Constitution.

My conclusion, however, is different. I have noted that the binary between living constitutionalism and historicism that Fleming seeks to transcend here by calling the fight for moral readings, while acknowledging the (instrumental/subsidiary/provisional) significance of historicism, is and has always been false when viewed from the broader perspective of the history and trajectory of U.S. constitutional thought and development and of the contention between progressivism/liberalism and conservatism in the United States. This binary is an artifact of the hermetic theoretical debates of the mid-to-late twentieth century legal academy, which, in a classically legalist battle, pitted a morally aspirationalist (or majoritarian positivist) living constitutionalism as an "ism" against a historicist originalism as an "ism." Long before this in theory and politics, progressives (especially) and liberals, and even radicals (see the speeches of the anarchist Emma Goldman and the Socialist Eugene V. Debs!), were *also* robustly historicist, and conservatives—very prominent and influential conservatives, and particularly the leading conservative constitutional theorists (who, in lots of cases, of necessity, given the hegemony of liberalism in mid-to-late twentieth century U.S. law schools, plied their trade outside the law schools) were *also* aspirationalists and moral perfectionists. The two points of view are, as a matter of fact—and theory—interpenetrating and interpenetrated. They always have been and always will be, at least over the long term, in our actual constitutional life and practice. As such, Fleming's important book breaks new ground in its prominent attempt at synthesis. But it cannot resist pulling back before a full—and accurate—synthesis to call the fight for the philosophical, moral readings camp. This is an unfortunate conclusion to what is ultimately a thoughtful, timely, and engaging contribution to understanding the way we live now in the United States, and in U.S. constitutional theory.