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## A NONORIGINALISM FOR ORIGINALISTS

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Originalism is an ideology, not a practice. It is a brand, an affiliation, a set of background principles, an often unstated set of restorative commitments. As James Fleming says in his book, *Fidelity to Our Imperfect Constitution*, originalism is an “*ism*.”<sup>1</sup> As an “ism,” Fleming writes, originalism did not exist before the 1970s: “Constitutional interpretation in light of original understanding did exist, but original understanding was seen as merely one source of constitutional decision-making among several—not as a general theory of constitutional interpretation, much less the exclusive legitimate theory.”<sup>2</sup>

This brief Comment on Fleming’s book takes the *practice* Fleming identifies—“constitutional interpretation in light of original understanding,” or what I will call CILOU—as its starting point. As masterfully as Fleming upbraids originalism as an *ism*, he wishes to leave untouched, indeed celebrates CILOU.<sup>3</sup> What accounts for this normative disjuncture? Is it defensible? Fleming does not give us the resources to answer this question.

Fleming gives three reasons to be opposed to originalism. First, he finds it authoritarian and insulting.<sup>4</sup> It insults the founders by suggesting that they would have insisted on our following their expectations, and it insults all of us in the here and now by “attributing to us, a self-governing people, a subservience to such founders’ authoritarian, arrogant will.”<sup>5</sup> Second, Fleming objects to the idea, which he ties to originalism, that constitutional interpretation does not require the exercise of moral and political judgment.<sup>6</sup> He argues that such judgments are both inevitable and desirable.<sup>7</sup> Finally, Fleming believes that originalism rejects the idea of fidelity “as *honoring* our

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<sup>1</sup> JAMES E. FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS* 3 (2015); *see also* Jonathan R. Macey, *Originalism as an “Ism”*, 19 HARV. J.L. & PUB. POL’Y 301, 301-02 (1996).

<sup>2</sup> Fleming, *supra* note 1, at 3-4.

<sup>3</sup> *See id.* at 10 (“[G]eneric consideration of original meaning takes an eclectic approach and regards it as one among several available sources of constitutional interpretation . . . [and] is not what we mean by originalism.”).

<sup>4</sup> *See id.* at 20.

<sup>5</sup> *See id.* at 19-20.

<sup>6</sup> *See id.* at 20.

<sup>7</sup> *See id.*

aspirational principles . . . rather than as *following* our historical practices,” which are imperfect.<sup>8</sup> Fleming rejects the notion that the only way to honor the Constitution is to understand it in narrow historical terms.<sup>9</sup>

Part I outlines two distinct ways of understanding the prominence of CILOU in U.S. constitutional interpretation. Its dominant manifestations are interpretive pluralism and the use of original sources to resolve ambiguity over relatively specific constitutional provisions. Part II shows that each of Fleming’s criticisms of originalism applies to CILOU. Rejecting the ideology of originalism on the grounds Fleming urges seems to entail rejecting the practice of CILOU, which both originalists and nonoriginalists seem to accept. Part III suggests that Fleming’s failure to account for the shortcomings of CILOU follows from the fact that his proposed moral reading is, like originalism, an ideology. It is an *ism* rather than a practice and so has more to say about how judges affiliate than about how they behave in the wild. Indeed, we can understand originalism itself as a moral reading whose attraction, like Fleming’s own theory, depends on its power to persuade.

## I

During the 2016 presidential primary campaign season, a question arose over Ted Cruz’s eligibility for the office.<sup>10</sup> The Constitution requires, among other things, that the president be “a natural born Citizen,”<sup>11</sup> a term the document does not define. Cruz was born in Canada. At the time of Cruz’s birth, his mother was a U.S. citizen and his father a Canadian resident and Cuban expatriate.<sup>12</sup> Under a federal statute in effect at the time, birth abroad to a U.S. citizen-parent conferred U.S. citizenship at birth assuming certain other

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<sup>8</sup> *Id.*

<sup>9</sup> *See id.* (“A moral reading, because it understands that the quest for fidelity in interpreting our imperfect Constitution exhorts us to interpret it so as to make it the best it can be, offers hope that the Constitution may deserve our fidelity, or at least may be able to earn it.”).

<sup>10</sup> *See, e.g.,* Jonathan H. Adler, *Yes, Ted Cruz is a ‘Natural Born Citizen’*, WASH. POST (Jan. 7, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/07/yes-ted-cruz-is-a-natural-born-citizen> [<https://perma.cc/4NWF-G4GE>] (“The bottom line: There is no question about Ted Cruz’s constitutional eligibility to be elected president.”); Robert Clinton, U.S. NEWS, *Ted Cruz isn’t a ‘Natural Born’ Citizen*, (Jan. 27, 2016, 7:00 AM), <http://www.usnews.com/opinion/articles/2016-01-27/ted-cruz-is-not-a-natural-born-citizen-according-to-the-constitution> [<https://perma.cc/A232-VUJ3>] (“According to the Constitution, because Sen. Ted Cruz was not born in the United States, he is not eligible to run for president.”).

<sup>11</sup> U.S. CONST. art. II, § 1, cl. 5.

<sup>12</sup> *See* Manuel Roig-Franzia, *Cruz Looks for a Fight, Finds Spotlight*, WASH. POST, May 7, 2013, at C1.

conditions were satisfied.<sup>13</sup> It is an open question whether citizenship at birth conveyed by statute makes one a “natural born Citizen” for the purposes of presidential eligibility.<sup>14</sup>

My interest is not in the answer to this question but rather in how it has customarily been debated among constitutional scholars. Along with much of the punditry around this issue, all sides have generally assumed that the appropriate sources for ascertaining the meaning of the Natural Born Citizen Clause are historical ones, and that the correct answer follows from analysis of those materials and little else.<sup>15</sup> In an online essay written before the primary season, former Solicitor General Paul Clement and former Acting Solicitor General Neal Katyal claimed that “the relevant materials clearly indicate that a ‘natural born Citizen’ means a citizen from birth with no need to go through naturalization proceedings.”<sup>16</sup> The “relevant materials” for them were British common law and enactments of the First Congress, along with private correspondence between John Jay and George Washington said to be illustrative of original purposes.<sup>17</sup> On the other side, Mary Brigid McManamon has argued based on her own reading of eighteenth-century British common law and on statements by James Madison and other founding era figures that Cruz “is not a natural-born citizen and therefore is not eligible to be president or vice president of the United States.”<sup>18</sup>

As this discourse suggests, and as Fleming recognizes, the use of original understanding in constitutional interpretation is neither new nor rare. It shows up in at least two ways. First, it is one element of a pluralistic or eclectic approach to constitutional interpretation.<sup>19</sup> Under such an approach,

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<sup>13</sup> Immigration and Nationality Act of 1952, as amended, § 301(a)(7), Pub. L. 82-414, 66 Stat. 163, 236 (requiring that the citizen parent have been physically present in the U.S. for a total of ten years, at least five of which must have been after turning fourteen).

<sup>14</sup> For extended discussion of this question, see Michael D. Ramsey, *The Original Meaning of “Natural Born”*, (Jan. 7, 2016) (unpublished manuscript), <http://ssrn.com/abstract=2712485> [<https://perma.cc/BW3K-N7DA>].

<sup>15</sup> See, e.g., Adler, *supra* note 10.

<sup>16</sup> Paul Clement & Neal Katyal, *On the Meaning of “Natural Born Citizen”*, 128 HARV. L. REV. FORUM 161, 161 (2015).

<sup>17</sup> See *id.* at 161-63.

<sup>18</sup> See Mary Brigid McManamon, *Ted Cruz Is Not Eligible To Be President*, WASH. POST (Jan. 12, 2016), [https://www.washingtonpost.com/opinions/ted-cruz-is-not-eligible-to-be-president/2016/01/12/1484a7d0-b7af-11e5-99f3-184bc379b12d\\_story.html](https://www.washingtonpost.com/opinions/ted-cruz-is-not-eligible-to-be-president/2016/01/12/1484a7d0-b7af-11e5-99f3-184bc379b12d_story.html) [<https://perma.cc/GR5D-QE8Z>]; see also Mary Brigid McManamon, *The Natural Born Citizen Clause as Originally Understood*, 64 CATH. U. L. REV. 317, 330 (2015).

<sup>19</sup> See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7 (1982) (arguing that there are five types of constitutional argument: historical, textual, structural, prudential, and doctrinal); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1787 (1997) (“Depending on the context, the Court will sometimes favor one form of argument, but at other times favor others.”); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of*

constitutional interpreters use multiple modes of inquiry, including those based on constitutional text, history, and structure, on legal and political precedent, or on practical consequences, without necessarily privileging any one in particular.<sup>20</sup> Take, for example, *City of Boerne v. Flores*.<sup>21</sup> There, the Court invalidated the Religious Freedom Restoration Act (“RFRA”) as exceeding Congress’s power to enforce the constitutional prohibition on religious discrimination under § 5 of the Fourteenth Amendment.<sup>22</sup> The *City of Boerne* Court engaged with the meaning of the word “enforce” in § 5, with previous precedents applying constitutional enforcement provisions,<sup>23</sup> with congressional debates in the process of drafting the Fourteenth Amendment,<sup>24</sup> with structural arguments about the Constitution’s supremacy over ordinary legislative acts,<sup>25</sup> with consequentialist arguments about the costs RFRA would impose on states,<sup>26</sup> and with what Philip Bobbitt would call ethical arguments about the constitutive nature of the separation of powers in the American system of government.<sup>27</sup> Fleming seems to have pluralism of this sort in mind when he refers to CILOU.<sup>28</sup>

The second way in which CILOU has generally shown up in actual cases is when the Court interprets relatively specific constitutional provisions. Take, for example, the 2015 case of *Arizona State Legislature v. Arizona Independent Redistricting Commission*.<sup>29</sup> At issue was whether Arizona’s use

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*Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189-90 (1987) (explaining that “most judges . . . recognize the relevance of at least five kinds of constitutional meaning” including the plain or original meaning of the text).

<sup>20</sup> See Fallon, *supra* note 19, at 1189-90.

<sup>21</sup> 521 U.S. 507 (1997) (hearing a challenge to a “decision by local zoning authorities to deny a church a building permit” under the Religious Freedom Restoration Act).

<sup>22</sup> *Id.* at 535 (“Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.”).

<sup>23</sup> See *id.* at 516-19, 524-29.

<sup>24</sup> See *id.* at 520-24.

<sup>25</sup> See *id.* at 529.

<sup>26</sup> See *id.* at 534-35 (“[T]he statute . . . would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.”).

<sup>27</sup> See *id.* at 535-36 (“When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including stare decisis, and contrary expectations must be disappointed.”).

<sup>28</sup> See FLEMING, *supra* note 1, at 3-4 (“[O]riginal understanding was seen as merely one source of constitutional decision-making among several.”).

<sup>29</sup> 135 S. Ct. 2652, 2658 (2015) (analyzing an amendment to the Arizona Constitution to “remove redistricting authority from the Arizona Legislature”).

of an independent redistricting commission violated the Elections Clause.<sup>30</sup> The Elections Clause assigns to “the Legislature” of each state the power—in the first instance—to prescribe the “Times, Places and Manner” of holding congressional elections,<sup>31</sup> but the Arizona commission was established via ballot initiative to remove from the Arizona Constitution the state legislature’s role in redistricting.<sup>32</sup> Writing for a 5-4 majority, Justice Ginsburg relied largely on period dictionaries,<sup>33</sup> the Convention debates,<sup>34</sup> the state ratification debates,<sup>35</sup> and Lockean views of popular sovereignty embodied within the Declaration of Independence<sup>36</sup> to make the point, in essence, that the Framers would have approved of commissions such as the one before the Court.

Fleming’s book does not discuss the use of originalist methods to recover the original expectations about relatively specific constitutional language as a guide to solving modern problems. Like other critics of originalism, though, Fleming implies that his own preferred reading leaves intact specific constitutional language that is clear and not susceptible to a political workaround.<sup>37</sup> A standard example here is the requirement that the President be at least thirty-five years old.<sup>38</sup> However, the Natural Born Citizen Clause and the Arizona case are less standard examples because these texts are ambiguous with respect to the meaning of birthright citizenship and the word “legislature.” The text cannot answer the question clearly, and yet, as a matter of positive practice, we observe judges and scholars across the political spectrum reflexively turn to CILOU.<sup>39</sup> This turn to CILOU reflects a practice, not an ideology.

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<sup>30</sup> *Id.* at 2659 (“The Arizona legislature’s complaint alleged that . . . the [Elections] Clause precludes resort to an independent commission, created by initiative to accomplished redistricting.”).

<sup>31</sup> U.S. CONST. art. I, § 4, cl. 1.

<sup>32</sup> *See Ariz. Indep. Redist. Comm’n*, 135 S. Ct. at 2671 (discussing how the Arizona Legislature could have delegated redistricting power to a commission if it so chose).

<sup>33</sup> *See id.* at 2671.

<sup>34</sup> *See id.* at 2672.

<sup>35</sup> *See id.*

<sup>36</sup> *See id.* at 2674-75.

<sup>37</sup> *See* FLEMING, *supra* note 1, at 176-79.

<sup>38</sup> U.S. CONST. art. II, § 1, cl. 5; *see also* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 305 (2007) (“Underlying principles are necessary to constitutional interpretation when we face a relatively abstract constitutional command rather than language that offers a fairly concrete rule, like the requirement that there are two houses of Congress or that the President must be 35 years of age.”); Ronald Dworkin, *Fidelity as Integrity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1252 (1997) (using the Constitutional requirement that the President be at least thirty-five years old as an example).

<sup>39</sup> *See* Jamal Greene, *Rule Originalism*, 117 COLUM. L. REV. (forthcoming 2017) (on file with author).

## II

Fleming's criticisms of originalism appear to apply as well to both of the aforementioned ways in which our practice has long resorted to CILOU. Fleming's first argument against originalism is that it is authoritarian and removes popular agency from the practice of constitutional interpretation. Fleming is a proponent of democratic deliberation<sup>40</sup> and worries that linking interpretation to the practices and expectations of the founders constitutes a form of undue subservience to the past.<sup>41</sup>

Fleming is right about this, but his criticism seems to extend beyond what he calls the "aspirational" aspects of the Constitution. Why should we *ever* consider the framers' expectations in constitutional interpretation, as Fleming concedes we sometimes do and indeed should? As Fleming writes, "[h]istory is, can only be, and should only be a starting point in constitutional interpretation. It has a threshold role, which is often not dispositive."<sup>42</sup> Fleming believes that history can help to preclude "off-the-wall" interpretations of the Constitution that do not "fit" within our constitutional tradition.<sup>43</sup> But we best avoid undue subservience to history if history plays no role whatsoever in constitutional interpretation. At the same time, it is question-begging to say that history is not often dispositive. When history should or should not be dispositive—and why or why not—are the meta-interpretive questions we are trying to answer. Why should the framers get to decide what is an on- or off-the-wall interpretation two centuries after their deaths?

Second, Fleming argues that originalists err in believing that moral and political theory should be banished from constitutional interpretation, given that the Constitution "establishes a scheme of abstract aspirational principles and ends, not a code of detailed rules."<sup>44</sup> Plainly, the Constitution establishes both abstract principles—"[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws"<sup>45</sup>—and a code of detailed rules—"[t]he President shall have Power to fill up all Vacancies that may happen

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<sup>40</sup> See generally JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* (2006).

<sup>41</sup> See FLEMING, *supra* note 1, at 19-20 ("Originalism insults the founders by attributing to them authoritarianism and arrogance—that they presumed to decide our constitutional questions for us and to insist on our following their definitions or original expected applications of our constitutional commitments, rather than to establish a framework or great outline for a self-governing people to be built out over time in light of our experience and our moral and political leaning. Originalism insults us by attributing to us, a self-governing people, a subservience to such founders' authoritarian, arrogant will.").

<sup>42</sup> *Id.* at 95. Fleming also says that "we must reject any idea of an obligation to follow original expected applications or precedents as such." *Id.* at 103. If that is true, it would suggest that history is *never* dispositive.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 20.

<sup>45</sup> U.S. CONST. amend. XIV.

during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”<sup>46</sup> But both the principles and the rules often require interpretation. Even the meaning of the detailed rule just stated was bitterly contested in *NLRB v. Noel Canning*.<sup>47</sup>

It is not clear to me whether Fleming believes moral and political theory are—and should—be relevant because the Constitution includes abstract principles or instead because the meaning and scope of its provisions are subject to reasonable disagreement that may be resolved only through moral reasoning. The former reason, which Fleming’s book suggests repeatedly, does not tell us what the role of moral theory is—or should be—in a case like *Noel Canning*. The latter reason would suggest that the presence, or not, of abstract principles is irrelevant because the application of all such principles is subject to reasonable disagreement, and the presence of disagreement *vel non* is all we need to ascertain. But the view that ambiguity is a sufficient ground to ignore founding expectations, even as to detailed rules, subscribes to a curious definition of constitutional fidelity, one that Fleming’s book does not defend and that our constitutional practice betrays.<sup>48</sup> Justice Breyer did not feel liberated to ignore the original understanding of the ambiguous phrase “the recess of the Senate” in *Noel Canning*, and indeed the merits of the case seemed not to engage his or anyone else’s *moral* instincts at all.<sup>49</sup>

To wit, Fleming’s third overarching criticism of originalism is its impoverished understanding of constitutional fidelity. Fleming is perhaps the greatest living proponent of the view that referring to moral values or political theory when filling in the content of the Constitution’s more abstract provisions qualifies as a form of constitutional fidelity.<sup>50</sup> But what about the Constitution’s specific provisions, which overwhelm the abstract ones in quantity if not in prominence? Would reference to moral theory—rather than to our best judgment as to original understanding—in resolving *Noel Canning* or in resolving Cruz’s constitutional fitness to be president be faithful to the Constitution? Certainly it seems immoral and undemocratic to deny the presidency to a U.S. citizen based on Blackstone’s views of *jus soli* principles, and yet that is where the debate around Cruz’s eligibility has been centered. The text in Cruz’s case is ambiguous. Does that ambiguity alone convert the inquiry into a moral one? What about the presidential age requirement? Or the requirement that each state have two Senators? Is moral theory ever defeasible by original understanding? If so, when? If not, why not?

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<sup>46</sup> *Id.* art. II, § 2, cl. 3.

<sup>47</sup> 134 S. Ct. 2550, 2556 (2014).

<sup>48</sup> See generally Greene, *supra* note 39.

<sup>49</sup> See *Noel Canning*, 134 S. Ct. at 2561-62, 2567-68.

<sup>50</sup> See Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 65 n.155 (2015) (“The phrase ‘moral reading’ is Dworkin’s . . . but it is now strongly associated with James Fleming’s Dworkinian theory of constitutional interpretation and construction.”).

## III

Fleming's moral reading, like originalism, is an ideology, not a practice. An ideology reasons deductively from the top on down rather than inductively from the bottom on up. As an ideology, originalism means understanding the Constitution as a text rather than as a set of practices. Thus, originalists draw distinctions between interpretation and construction,<sup>51</sup> between sense and reference<sup>52</sup> and between original meaning and original intent.<sup>53</sup> Interpretation is ascertaining the linguistic meaning of a text; construction is giving "legal effect" to that meaning. The sense of a word is "what is strictly conveyed and expressed by the language alone,"<sup>54</sup> the reference is "the tangible actual thing in the world that the word picks out,"<sup>55</sup> which depends on facts about the world. Determinations of original meaning are about ascertaining the communicative content of a word; references to intent, which litter the U.S. Reports, are merely evidentiary or rhetorical.<sup>56</sup>

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<sup>51</sup> See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 118-22 (2003); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 5-7 (1999); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 *CONST. COMMENT.* 95, 100 (2010).

<sup>52</sup> See Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 *ST. LOUIS L.J.* 555, 558 (2006).

<sup>53</sup> See BARNETT, *supra* note 51, at 92-93; Antonin Scalia, Address Before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986), in *OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK* 106 (1987) ("I suppose I ought to campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning. . . . [T]erminology is destiny.").

<sup>54</sup> Green, *supra* note 52, at 563.

<sup>55</sup> *Id.* As Green explains, he is applying taxonomies well known to philosophers of language to constitutional law. See *id.* at 559 ("[D]istinctions of long standing in the philosophy of language can present a compelling distinction between which of the Constitution's attributes change and which do not"); see also, e.g., Gottlob Frege, *Sense and Reference*, 57 *PHIL. REV.* 209 (1948).

<sup>56</sup> See Jamal Greene, *The Case for Original Intent*, 80 *GEO. WASH. L. REV.* 1683, 1685 (2012) ("[O]riginal intent not only matters but it matters more than original meaning."); Vasana Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 *GEO. L.J.* 1113 (2003) ("If the project of constitutional interpretation is to determine the original meaning of the Constitution . . . and not to determine either the Framers' or Ratifiers' subjective intention, it is not at all clear that it is 'cheating,' or even ill-advised, to use the secret drafting history of the Constitution as another extratextual source of constitutional meaning."). Some originalists continue to focus on original intent based on a theory of the identity between intent and meaning, not because they believe in giving substantive weight to intentions as expected application. See, e.g., KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 163 (1999) ("The goal of originalism is not to imagine the subjective intent of members of the ratifying convention but to seek evidence of the objective intent that informs the meaning of the text."); Larry Alexander & Saikrishna

In practice, even those judges who are associated with originalism as an ideology do not typically draw self-conscious distinctions between interpretation and construction, sense and reference, or meaning and intent. They temper their originalist commitments with *stare decisis*,<sup>57</sup> they ignore original understandings when inconvenient,<sup>58</sup> and they make concessions to common sense and their place on a multimember Court.<sup>59</sup>

As an ideology, the moral reading views the Constitution as a set of aspirational principles. Those principles need not be inconsistent with the text, but the text is often beside the point.<sup>60</sup> The ideology of the moral reading cautions against relying on the dead hand of the past<sup>61</sup> and the competence of lawyers to do serious legal history.<sup>62</sup> The ideology of the moral reading supports progressive results in court decisions without worrying about the need to articulate serious limitations on judicial power.<sup>63</sup> Critics of Ronald Dworkin argued that he too often ignored the dimension of what he called “fit.”<sup>64</sup>

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Prakash, *“Is That English You’re Speaking?” Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 969 (1996) (arguing that “that one cannot interpret texts without reference to the intentions of some author”); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 704 (2009) (arguing that “in the actual course of adjudication by honest and competent judges, original intention and original public meaning interpretation should usually yield the same result”).

<sup>57</sup> See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (“I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging. But then I cannot imagine such a case’s arising either.”); see also *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 348 (2007) (Scalia, J., concurring) (acknowledging a willingness to rely on *stare decisis*); *United States v. Lopez*, 514 U.S. 514, 601 (1995) (Thomas, J., concurring) (“This extended discussion of the original understanding and our first century and a half of case law does not necessarily require a wholesale abandonment of our more recent opinions.”).

<sup>58</sup> See generally Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978 (2012).

<sup>59</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

<sup>60</sup> See David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 2, 4 (2015) (“Clear text does not always govern, as the anomalies show; there are times when established principles are simply inconsistent with the text. Beyond that, constitutional “interpretation” usually has little to do, in practice, with the words of the text.”).

<sup>61</sup> See FLEMING, *supra* note 1, at 19-20.

<sup>62</sup> See Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 549-55 (1995).

<sup>63</sup> See FLEMING, *supra* note 1, at 89; Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 353 (1981).

<sup>64</sup> See RONALD DWORIN: FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 36 (1996); William N. Eskridge, Jr. & Sanford Levinson, *Antigone and*

Fleming is sensitive to this dimension and criticism, but he also is circumspect in saying when, precisely, the Court has gone—or would go—too far in applying moral or political theory to achieve constitutional justice.<sup>65</sup> The absence of real limits is immanent within the ideology of the moral reading.

In practice, even those judges associated with the moral reading as an ideology are sometimes “originalist” and often cautious. As mentioned, Justice Ginsburg wrote an originalist opinion in the Arizona redistricting case.<sup>66</sup> Justice Stevens wrote an originalist dissenting opinion in *District of Columbia v. Heller*,<sup>67</sup> which concerned the scope of the right to bear arms under the Second Amendment.<sup>68</sup> Fleming cites both Justice Ginsburg and Justice Stevens as examples of “moral readers.”<sup>69</sup> Earl Warren wrote an originalist opinion in *Powell v. McCormack*,<sup>70</sup> on the ability of the House of Representatives to exclude a member because of allegations of corruption.<sup>71</sup> Chief Justice Warren of course authored the Court’s unanimous opinion in *Brown v. Board of Education*,<sup>72</sup> which Fleming uses as a core illustration of his philosophic approach.<sup>73</sup>

There are several possible lessons we can draw from the observation that the ideologies of originalism and the moral reading do not appear to match their practice. The most convenient explanation is that judges are politically expedient institutional players and face constraints that weaken their resolve.<sup>74</sup>

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*Creon*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 248, 248 (William N. Eskridge & Sanford Levinson eds., 1998).

<sup>65</sup> See FLEMING, *supra* note 1, at 89.

<sup>66</sup> See *Ariz. State Legis. v. Ariz. Indep. Redist. Comm’n*, 135 S. Ct. 2652, 2671 (2015) (deferring to the “history and purpose” of the Elections Clause and to definitions of “legislature” in dictionaries in circulation at the time of ratification to find that the people of Arizona were constitutionally permitted to create “a commission operating independently of the state legislature to establish congressional districts”).

<sup>67</sup> 554 U.S. 570 (2008).

<sup>68</sup> See *id.* at 637 (Stevens, J., dissenting) (“Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.”).

<sup>69</sup> See FLEMING, *supra* note 1, at 44.

<sup>70</sup> 395 U.S. 486 (1969).

<sup>71</sup> See *id.* at 502 (relying on the history and original purpose of the Speech or Debate Clause to provide protection under the clause not just to debate, but also to “[c]ommittee reports, resolutions, and the act of voting”).

<sup>72</sup> 347 U.S. 483 (1954).

<sup>73</sup> See FLEMING, *supra* note 1, at 44, 75-76.

<sup>74</sup> Cf. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 65-72 (1962) (describing the relationship between President Lincoln and the Supreme Court in the wake of the *Dred Scott* opinion and criticizing the court for legitimizing certain practices when it could have otherwise left the issue undecided).

On this telling, the Court contains originalists and moral readers in exile,<sup>75</sup> and it is appropriate to criticize or at least to draw attention to the discontinuity between their practices and the ideologies we ascribe to them. That discontinuity renders them impure.<sup>76</sup>

I suspect, though, that the vast majority of judges, including those on the Supreme Court, do not understand themselves or their practices in these polemical terms. Rather, they are socialized into a culture of bounded eclecticism. It is eclectic in that it includes multiple modes of inquiry and does not systematically prioritize any one over any of the others. Indeed, we might say, with Richard Fallon, that a judge's modes of interpretation are mutually constitutive.<sup>77</sup> Judges do not interpret text, structure, history, precedent, or consequences sequentially or hermetically; instead, they interpret text *in light of* history, precedent, structure, consequences, and so forth.<sup>78</sup>

That eclecticism is bounded in at least two ways, one internal and the other external. First, the use of particular modes of interpretation is not random but may depend on the susceptibility of certain questions to harmonious multimodal construction. According to Fallon, text and history take precedence in such circumstances.<sup>79</sup> Strauss would suggest that precedent has priority over both text and history.<sup>80</sup> Regardless of who is correct, they agree that U.S. constitutional judges are internally motivated to prioritize particular

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<sup>75</sup> Cf. Stephen E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2255 (2014) (defining a "constitution in exile" as "the 'real' or 'true' law, obscured by usurping courts and officials" or as "a plan for law reform, an attempt to revise the law under the cover of restoring it").

<sup>76</sup> See, e.g., Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7 (2006).

<sup>77</sup> See Fallon, *supra* note 19, at 1193 ("The various kinds of constitutional argument are substantially interrelated and interdependent. Reciprocal influences among them make it possible most of the time to achieve constructivist coherence.").

<sup>78</sup> See *id.* (asserting that the "norms of our constitutional practice call for a constitutional interpreter to assess and reassess the arguments in the various categories in an effort to understand each of the relevant factors as prescribing the same result"); Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1286-87 (2015) (explaining that perception of consequences, history, and the specificity of the text can influence constitutional construction).

<sup>79</sup> See Fallon, *supra* note 19, at 1193-94 (arguing that "the implicit norms of our constitutional practice accord the foremost authority to arguments from text, followed, in descending order, by arguments concerning the framers' intent, constitutional theory, precedent, and moral and policy values").

<sup>80</sup> See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 35 (2010) (arguing that precedents are "indispensable" in understanding "the constitution as it actually operates, in practice" and attributing the protection of freedom of speech and the decision in *Brown v. Board of Education* not to "careful reading of the text" or "adherence to original understandings," but to "the evolution of precedents"); Strauss, *supra* note 60, at 17 ("[T]here are important domains of constitutional law in which the common law—the precedents and the policies—comes first, and the text follows.").

interpretive modes under conditions of uncertainty. It might also be the case, as I have argued elsewhere, that there are default modes of interpretation, the choice of which depends on the kind of question judges confront.<sup>81</sup> It appears, for example, that judges are relatively more likely to excavate specific historical understandings to answer relatively specific constitutional questions such as the meaning of “legislature” in the Arizona case or the meaning of “natural born Citizen” in Cruz’s.<sup>82</sup> They are relatively less likely to use specific understandings to answer questions pertaining to relatively open-ended provisions such as those found in Section 1 of the Fourteenth Amendment.<sup>83</sup>

Second, as with all else constitutional judges do in the course of adjudication, a court’s opinion-writing practices are constrained by judges’ need to persuade. This source of constraint is external rather than internal. Constitutional law imposes rhetorical demands upon judges that condition and even compete with any independent sense they might have as to what the law requires of them.<sup>84</sup> The most important audience for judicial persuasion on a multimember court is likely to be the opinion-writer’s colleagues, whom he or she wants to join the opinion or at least not to object too strenuously.<sup>85</sup> Opinions that do not appear to fit the modes of reasoning into which judges are socialized will be less likely to succeed at attracting joins or discouraging strong dissents.<sup>86</sup>

In addition, federal judges may also seek to persuade elements of the public. This includes the lawyer professional class from which they are typically drawn and may also, at times, include the broader public.<sup>87</sup> Support from the public, perhaps refracted through the prism of intermediaries in the professional class, is necessary to validate constitutional law. And so even if a judge has persuaded herself that the moral reading is the one true path to

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<sup>81</sup> See Greene, *supra* note 39.

<sup>82</sup> See *id.*

<sup>83</sup> See *id.*; see generally STRAUSS, *supra* note 80, at 85-92.

<sup>84</sup> See Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1452-58 (2013).

<sup>85</sup> See RICHARD A. POSNER, HOW JUDGES THINK 31-33 (2008) (suggesting that the panel composition influences decision outcomes because of “differences among panel members in intensity of preference for a particular outcome, coupled with the phenomenon of ‘dissent aversion’”); Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 107 (2002) (“The most important audience is likely to be that of other judges.”).

<sup>86</sup> See Bainbridge & Gulati, *supra* note 85, at 107-09 (describing the incentives for judges to produce opinions that are “good enough” to avoid negative attention from other judges).

<sup>87</sup> See *id.* at 106-07 (listing “the public, lawyers, other judges, academics, and the legislature” as potential audiences for judicial opinions); Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 813-14 (1961) (relating judges’ response that they write their opinions, in part, for the public).

constitutional interpretation, she cannot usually behave as if that is true, any more than she can behave as if the Bible or the Republican Party platform guides his or her decisions.

Focusing in this way on the practices of judges, which I have described as a bounded eclecticism, offers a possibility that is disquieting to Fleming's project: Originalism itself might be best understood as a moral reading. Like Fleming, originalists are also "thinking for themselves about what constitutional provisions seem to refer to"<sup>88</sup> and "making philosophic choices in elaborating the meanings of our constitutional commitments."<sup>89</sup> As it turns out, their moral readings lead them to conservative or libertarian outcomes, whether in favor of gun rights or school prayer or against campaign finance restrictions or the regulatory state more generally, but the moral reading does not exclude these outcomes as a conceptual matter.

Of course, with limited exceptions,<sup>90</sup> originalists do not explicitly endorse the moral reading or anything like it. They claim that judges should be faithful to the original understandings of the framers. But of course they claim that; they are attempting to stay within the bounds of acceptable constitutional argument, all the while nudging it towards their own preferred substantive positions. Like moral readers, originalists are incorporating moral judgments into the Constitution, trying to make it best by their own considered lights, even as they rhetorically mediate those judgments through a language of original meaning and constitutional fidelity. The moral reading can serve the ends of originalists as much as nonoriginalists.<sup>91</sup>

In the end, I agree with much of Fleming's perceptive book, but I find myself asking what is at stake in the label of "originalist" or "moral reader." Fleming disputes Jack Balkin's claim to being an originalist and argues that Bruce Ackerman is far less distant from Dworkin than he claims to be.<sup>92</sup> Both, Fleming says, are in fact engaged in the same big-tent project of moral reading.<sup>93</sup> In seeking converts to the ideology of moral reading, just what is it that Fleming is seeking to maximize? Progressive outcomes? Not likely, for he concedes that the project is the same, and indeed that there may be rhetorical

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<sup>88</sup> FLEMING, *supra* note 1, at 22.

<sup>89</sup> *Id.* at 22-23.

<sup>90</sup> See JACK M. BALKIN, *LIVING ORIGINALISM* 277 (2011) ("[F]idelity to original meaning and the idea of a living Constitution that adapts to changing times and conditions are not rival theories of constitutional interpretation; they are actually compatible positions.").

<sup>91</sup> See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 218 (2008); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 546 (2006).

<sup>92</sup> See FLEMING, *supra* note 1, at 156-61.

<sup>93</sup> See *id.* at 96, 160-61 ("[W]e should conceive the moral reading as a big tent that can encompass broad originalist, living originalist, or living constitutionalist conceptions such as those developed by Ackerman and Balkin.").

benefits to Ackerman and Balkin presenting their theories as they do.<sup>94</sup> Candor? Perhaps, but the value of candor in constitutional adjudication must be defended.<sup>95</sup> Likes? Maybe, but as noted, recognizing that moral judgments are inseparable from constitutional law might make it all the more urgent that constitutional interpreters adopt rhetoric that masks that fact. Fleming might well have articulated a nonoriginalism for originalists.

#### CONCLUSION

Judges have a job to do. That job sometimes involves making moral judgments and it sometimes involves using history to reach sound resolutions of constitutional controversies. Were they to abandon either moral judgments, pace originalists, or the use of history, pace moral readers, they would cease to be judges within the American system.<sup>96</sup> And so the current battle between originalists and moral readers occurs in an ideational space outside of adjudicative law, perhaps outside of law altogether. That is not to say that law is not ideological or worthy of study. It is, rather, to say the opposite. We might profit from turning our microscope from the discourses that surround the law and back to the law itself.

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<sup>94</sup> See *id.* at 158 (“[E]ven some living constitutionalist critics of originalism are in the grip of the ‘originalist premise’—the premise or assumption that the best understanding of fidelity . . . is necessarily originalist.”).

<sup>95</sup> See Jamal Greene, *The Meaning of Substantive Due Process*, 30 CONST. COMMENT. (forthcoming 2016) (manuscript at 31), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2717255](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2717255) [<https://perma.cc/PL5B-Y7MZ>].

<sup>96</sup> See generally BOBBITT, *supra* note 19.