Originalism's Curiously Triumphant Death: The Interpenetration of Aspirationalism and Historicism in

been inextricably intertwined – inseparable -- and that, going forward, U.S. constitutional historians and theorists would do better by forthrightly acknowledging and accounting for this fact, and dynamic.

Key Words: Constitutional Interpretation; Constitutional Law; Originalism; Living Constitutionalism; Historicism; Conservatism; Liberalism; Progressivism; U.S. Constitutional Development

Resumen

Uno de los debates centrales entre los constitucionalistas estadounidenses por más de un generación ha sido entre (conservadores) 'originalistas' quienes aseguran que, al interpretar y aplicar la constitución, los jueces están obligados a adherirse al entendimiento original en el momento en el que la Constitución fue adoptada y (liberales/progresistas) 'constitucionalistas vivientes' quienes aseveran que, cuando sea apropiado, los jueces debería leer la Constitución a la luz de las necesidades contemporáneas y aspiraciones morales. Aun cuando reconoce la importancia y la legitimidad del llamado originalista a fidelidad a la historia y a los nuevos elementos que incorporan argumentos a sus teoría, Fleming, en *Fidelity to Our Imperfect Constitution*, reafirma el aspiracionalismo moral como la base última del proyecto interpretivo. Argumento contra Fleming, que la oposición que él (y otros constitucionalistas estadounidenses) han esbozado entre el historicismo del originalismo y el aspiracionalismo moral del constitucionalismo viviente es un binario falso --el producto contingente de la sucesión evolutiva de las batallas políticas entre los conservadores y los liberales/progresistas estadounidenses durante el siglo veinte. Así

- y que, para ir hacia delante, los historiadores constitucionales y constitucionalistas estadounidenses harían mejor al reconocer y responsabilizarse directamente por este hecho, y su dinámica.

Palabras claves: Derecho constitucional; interpretación constitucional, originalismo, constitucionalismo viviente, historicismo, conservadurismo, liberalismo, progresivismo; desarrollo constitucional estadounidense

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 U.S. over time than about justifying either the 'best' readings of the parameters of that authority generally, or worrying in particularly about what theory of interpretation can justify a judge in exercising his or her purportedly problematic 'countermajoritarian' powers of judicial review to hold legislation null and void on the grounds that it contravenes the nation's fundamental law.[1] When I shake my head 'yes' about constitutional theory, it is thus most immediately over what Michael Dorf identifies as the 'eclectic accounts' of Phillip 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

[1] See Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill 1962)(coining the phrase 'counter-majoritarian difficulty'); Federalist # 78 (Alexander Hamilton).

their decisions in their judicial opinions.[2] 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 overspills the ambit of professional, institutional justification.[3] There is a lot of *is* out there.

At the same time, however, certainly in the U.S.,

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

The Living Constitutionalist v. Originalism binary has long seemed to me something of a parlor game: it was always a false opposition, albeit fought out on a scale as large as League of Legends. Fleming (rightly) makes much of the notion of 'originalism as an *ism*.' But he 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 Rawslian and Dworkinian constitutional theorist, has incorporated the claims38 (o) -0.1T 595700 0 0 50 0 0 Tm /TT2 1 Tf [(p) -0.1(l) 0.2 595700 0ET -0.1T

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.' 'To be persuasive in our constitutional culture,' Fleming says here, 'one generally needs to argue that one's interpretations fits with the past, shows the past in its best light ... or redeems the promises of our abstract moral commitments and aspirations.....'[4] 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.'[5] 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.' Here, Fleming highly praises recent work by Jack Balkin that does precisely this.[6] 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.[7] Fleming is thus now favorably disposed towards historical argument in constitutional debate (and adjudication)

history acting in service to the judges engaging in their primary responsibility of exercising moral judgment.[8]

At the same time, in the new book Fleming distances the

were hardly the only to note or mention it). Law as fidelity was originalism's great thrust.[12]

But Fleming's position on history as handmaiden underplays its indispensibility as living constitutionalism's life force. Fleming's

construction, pitting ‘ism’ against ‘ism.’ I will discuss conservatism later. But let’s take progressivism/liberalism first.

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 (e.g. ‘It is a Constitution we are expounding, adaptable to the various crises of human affairs.’[13]).

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 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.'[16]

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

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anti-fidelity) thrust, at least as applied to the powers of the courts to

light of our current needs, objectives, and aspirations.[18] 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

[18] Charles Beard, 'The Living Constitution' (1936) 185 *Annals of the American Academy of Political and Social Science* 29.

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 change that plan again and accommodate it as they please to the altering necessities of their lives.[19]

It is notable that all of these first generation of living

'exiled' Constitution), the living constitutionalists were both (initially) triumphant, and set for a major fall. Fleming himself (and Dworkin, 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.[25]

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.'[26] 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,

that originalism as an ‘ism,’ –

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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 things (the antagonism between the East Coasters (Allan Bloom and Walter Berns, e.g., 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 moderns 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.[31] Since Bork and Scalia's originalism is positivism, and genealogically Progressive, these conservative constitutional theorists have

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 which brooks no adjustment or accommodation to change can be surprisingly durable and, to some fanatics, holds an enduring appeal,[32] this is less than likely to appeal to the mass in a modern liberal democracy (or perhaps even a religion) over the long term. Change will be accommodated:

today. 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 U.S. -- the opposition between the conservatives and the liberals (e.g. David Strauss) is not all that stark.[34]

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 (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.[35] 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

[34] Philip Kurland, 'A Changing Federalism: American Systems of Laws and Constitution' in Daniel Boorstin, editor *American Civilization: A Portrait From the Twentieth Century* (McGraw Hill 1972), 127-48; Philip Kurland, *Politics, the Constitution, and the Warren Court* (University of Chicago Press 1970); James R. Stoner, Jr. Stoner, *Common-Law Liberty: Rethinking American Constitutionalism* (University Press of Kansas 2003); Stoner, *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (University Press of Kansas 1992).

[35] See Kersch 'Conservatives Remember' (n 24); Kersch, 'Ecumenicalism' (n 24).

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 Seigel and Robert Post have rightly emphasized, the battle now is over the substantive liberal and conservative visions.[36]

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 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,

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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 both 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 live now in the U.S., and in U.S. constitutional theory.

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