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On Jim Fleming's Anti-Originalism*

Sobre el anti-originalismo de Fleming

Sotirios A. BARBER**

Resumen:

La nueva contribución de James E. Fleming al debate interpretativo evidencia exitosamente las fallas del “originalismo nuevo” en la búsqueda de un término medio defendible entre la aproximación dworkiniana a la interpretación constitucional y el ahora ampliamente desacreditado originalismo de Raoul Berger. Fleming también expone la ironía de los esfuerzos del “nuevo originalismo” en reivindicar la democracia y el estado de derecho. Menos persuasivas son las razones para el optimismo de Fleming acerca del futuro de la teoría constitucional y de la fidelidad a una Constitución que parece crecientemente más allá de la reforma.

Palabras clave:

Fidelidad en la interpretación constitucional, fracaso constitucional, originalismo, originalismo nuevo, lectura moral de la Constitución, aproximación filosófica a la interpretación constitucional.

Abstract:

James E. Fleming's new contribution to the interpretive debate successfully exposes “new originalist” failures to find defensible middle ground between a Dworkinian approach to constitutional interpretation and the now widely discredited originalism of Raoul Berger. Fleming also exposes the irony of

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“new originalist” efforts to vindicate democracy and the rule of law. Less persuasive are Fleming’s reasons for optimism about the future of constitutional theory and fidelity to a constitution that seems increasingly beyond reform.

Keywords:

Fidelity in constitutional interpretation, constitutional failure, originalism, new originalism, moral reading of a Constitution, philosophic approach to constitutional interpretation.

ON JIM FLEMING'S ANTI-ORIGINALISM

When Jim Fleming and I completed our 2007 book on constitutional interpretation (CIBQ)¹ we left the interpretive debate and turned to other projects, Jim to his book with Linda McClain on ordered liberty,² and I to an essay on states' rights.³ After his book with Linda, Jim returned to the interpretive wars, and now we're gathered in appreciation of his analysis and critique of the so-called new originalisms,⁴ theories built on the ruins of the old originalisms. I excused myself from the debate until now because I thought that there was little to be said about constitutional interpretation that hasn't been said. I thought the debate was over, at least as an intellectual matter. I thought this because Michael S. Moore convinced me that there is a limited number of possible answers to what expressions like due process and equal protection mean;⁵ answers to this question entail different approaches to constitutional meaning; and Ronald Dworkin and Moore have shown that one and only one approach to interpreting such expressions makes sense.⁶ Dworkin called this approach the moral reading; Jim and I call it the philosophic approach.⁷

Our choice of "the philosophic approach", as distinguished from "the moral reading", reflected our positive view of the Constitution as a whole. Influenced by writers like Frank Michelman, Lawrence Sager, Walter Murphy, and Martin Diamond,⁸ we concluded that an ends-ori-

¹ Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* (Oxford University Press 2007).

² James E. Fleming and Linda C. McClain, *Ordered Liberty: Rights, Responsibilities and Virtues* (Harvard University Press 2012).

³ Sotirios A Barber, *Fallacies of States' Rights* (Harvard University Press 2013).

⁴ James E. Fleming, *Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalisms* (Oxford University Press 2015).

⁵ Michael S. Moore, 'A Natural Law Theory of Interpretation', (1985) 58 Southern Cal L R 277, 291-301.

⁶ See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 131-49; Moore (n 5).

⁷ Barber and Fleming (n 1) 15, 29-30, 155-60.

⁸ See Frank I. Michelman, 'States' Rights and States' Roles: Permutations of Sovereignty in National League of Cities v. Usery', (1977) 86 Yale L J 1165; Lawrence G. Sager, *Justice in Plain Clothes: A Theory of American Constitutional Practice* (Yale University Press 2004); Walter F. Murphy, *Constitutional Democracy: Creating and*

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ented or, if you prefer, an aspirational or justice-seeking view of the Constitution, as distinguished from dominant emphases on rights and processes, was the only defensible view of the Constitution as a whole. In CIBQ Jim and I combined the aspirational view of constitutional ends with the moral-reading of constitutional rights and called it the philosophic approach to constitutional meaning. We added a chapter on *The Federalist* to show how our views both on substance and interpretive approach reflected the thought of the American founding and the constitutional text. Additional chapters showed how leading writers on the other side of the issues fell short of simple coherence, not to mention fidelity to textual and historical sources, and, as far as I was concerned, that was that. There was nothing more to be said, or so I thought, and so I continue to think.

I continue to think this because whether you're talking about the meanings of drafters or ratifiers or the general public or all the world (today, yesterday, or tomorrow) – the word or phrase “x” can refer either to (1) “x itself”, or (2) some “*definition* of x itself”, or (3) some “*example* (or *application*) of x itself”. And since *how* you approach x depends on *what* you think you're approaching, any possible approach to the meaning of x can be reduced to one of the three approaches that Jim and I describe in CIBQ.⁹

But if there's nothing new to say about the correct approach to constitutional interpretation, there are questions to ask about the persistent recurrence of originalism. What exactly is it that keeps originalism alive? Can it define or redefine itself in a form that avoids the fatal criticisms of its original form? Can there be a non-original originalism, or is the only truly nonoriginal originalism an abstract originalism that's equivalent to the philosophic ap-

Maintaining a Just Political Order (John Hopkins Press 2007); Martin Diamond, *The Founding of the Democratic Republic* (Wadsworth Press 1981).

⁹ Sub-approaches will depend on what you regard as evidence of what you're looking for. If, for example, you think meaning lies in how a word or phrase is applied and you seek Gertrude's meaning of “due process”, you could seek evidence in third-person descriptions of her conduct. Or you might be able to interview her. Or you could examine her writings, published and private. Thus you might find yourself engaged in several specific activities in search of “her meaning”. Yet all of these research methods serve an “applications approach” to meaning.

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proach, as Jim and I argued in 2007? Jim's new book answers these questions. He explains the reluctance of writers like Jack Balkin and Bruce Ackerman to abandon originalism altogether by their commitments to democracy and the rule of law. These writers try to rehabilitate originalism because they see the alternative, *i. e.*, the philosophic approach, as licensing unelected judges to freight constitutional language with their partisan preference, to the detriment of both democracy and the rule of law. In response, Jim notes that unlike the old originalists, who claimed to find constitutional meaning in expected applications of constitutional provisions, the new originalists seek constitutional meaning in original public meanings or broad constitutional principles as originally understood. Yet, says Jim, correctly, the abstract nature of original public meanings and general principles leaves no other way to apply them except through controversial moral choices. And because responsible judges — judges responsible to the public they serve— would be prepared to defend their choices with public arguments, the new originalism, honestly deployed, would merge with the very philosophic approach that it seeks to reject.

I completely agree with this part of Jim's approach to the new originalism. My reason is partly a simple matter of logic. Consider again the notion of due process. Maybe "due process" is an empty vessel into which we individually or collectively pour any meaning that, from time to time, suits our individual or collective purposes. We can profess this kind of skepticism, but we can't really believe it. Whatever we profess for some purpose or other on different occasions, we can't help believing that due process refers to something other than opinions about itself. If we believed otherwise opinions about due process would be opinions about nothing at all. But this would be impossible: you can't have an opinion about nothing at all. Well, you might say: What about ghosts or unicorns? To which I'd respond that though unicorn doesn't exist in nature, you can still have opinions about it, because unicorn has an existence separate from opinions about it. Unicorn exists in fiction as a kind of thing made up of things that exist separately in nature, namely horse and horn. A unicorn is thus a fictional horse-like animal with one horn protruding from the center of its forehead or the top of its head (forehead,

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head, center, and top being ideas abstracted from things and relationships of things in the world as ordinary humans everywhere and at all times seem to understand the world). So fictional thing though unicorn is, opinions about it can be wrong, and the thing itself (*i. e.*, unicorn) is universally taken to exert a normative influence on opinions about it. This last contention is an empirical proposition that you can test for yourself. Mention to a dozen people of appropriate experience that on your last visit to the Metropolitan Museum of Art you saw a Roman crater depicting a hornless unicorn with black and white stripes being attacked by a lion. We can all predict the response, in substance if not in exact wording.

So opinions about due process must be taken to be opinions about something other than the opinions. That something can only be either about (1) “due process itself”, or (2) a definition (conception) thought to be of due process itself, or (3) a concrete historical application thought to be of due process itself, or (4) a string of such applications. If (1) isn’t thought to exist, then (2) is impossible, for one can’t have an opinion of what is thought to be nothing at all. If (1) isn’t thought to exist then (3) and (4) are also impossible, for they involve a premise (of law) that contains a conception of due process and an additional premise (of fact) describing an act, event, or practice in terms of the conception of due process. Thus, all possible opinions of “due process” presuppose the existence of “due process itself”, as distinguished from any opinions “about it”. And all possible opinions of due process presuppose “due process itself” as normative on those opinions – as correctable in light of better opinions and ultimately the truth about “due process itself.” Due process itself thus exerts a normative pull on opinions about due process. One response to this normative pull is Dworkin’s “moral reading” and Jim’s “philosophic approach.” Deny the moral reading or the philosophic approach and you’re reduced to silence, or you should be reduced to silence, for no one, including the public of “original public meaning” can have an opinion about what one thinks is nothing outside that opinion.

Then there’s “democracy,” ostensibly the highest political good of the originalists, old and new, even though it was not the highest good of such originalist sources as the Constitution, the Declaration of In-

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dependence, and *The Federalist*. Originalism won't die because its alternative, the moral reading, is thought to license unelected judges to impose their values on the rest of us, and that would be undemocratic, or so it is claimed. Jim's response to this claim is to observe an irony, an irony that originalists have created for themselves. They assume, to begin with, and *pace* the living constitutionalists, that the popular sovereign is the constituent sovereign. Then in the name of the constituent sovereign, they reject the word of the constituent sovereign. That word is what Dworkin called the "Constitution as written", a safe judgment on Dworkin's part since the word of the constituent sovereign is by definition the "Constitution as written". And, in relevant part, the Constitution is written in abstract language, language that takes ideas like due process as normative for fallible opinions about due process – language that compels the moral reading, a self-critical effort to do the right thing in constitutional cases.

Jim revisits the interpretative debate to save new originalists from themselves. He tries to do this by showing that writers like Balkin and Ackerman are closer to Ronald Dworkin, the moral reader, than to Raoul Berger, the old originalist. Jim assumes that if he proves to the new originalists that there's no real middle way between Berger and Dworkin, they'll go with Dworkin. But that there's no middle way has been evident for more than a generation, and yet writers still try to occupy it. So there may be something at work other than untenable conceptions of democracy and the rule of law.

I can't be confident about what this something is, but my guess is that the idea of an elusive moral truth that's normative for our opinions sits uneasy in a culture that depends on relaxing moral and aesthetic impediments to growth, reduces citizens to consumers, and encourages consumers to believe they know what they want and that what's good is a matter of individual preference, not genuine knowledge. This culture is inhospitable to the moral reading because, as Dworkin observed long ago, the moral reading presupposes moral objectivity and demands an attitude of self-critical striving.¹⁰ Where new originalists go next depends on where they may come to stand on moral objectivity. Jim takes ample notice of

¹⁰ Dworkin (n 6) 134,138.

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the historicism that turns Balkin and Ackerman away from moral objectivity.¹¹ What I fail to understand is Jim's optimism about the future of constitutional theory in the face of the cultural and intellectual barriers to the one mode of interpretation that makes sense.

My failure to appreciate Jim's optimism brings reservations about Jim's subject: fidelity to our imperfect constitution. To me the Constitution is what Balkin calls "the Constitution in practice", or, simply, the actual workings of our government.¹² If the government is following all the rules and is still imperfect, it must be failing to approximate the ends for which it was established. What reason, then, could there be for fidelity to such a government? I can see why one would be faithful to a government that's better than available alternatives. One can also be faithful to an imperfect government whose prospects are improving. But these forms of fidelity are contingent on progress toward the ends of government. Whether we should be faithful to our Constitution in practice depends on how well it's doing, and right now it's not doing well, and there's a good chance that it will soon do worse.

Jim may disagree with all this. I say "may disagree", for I'm not sure. Sometimes he thinks in terms of what I'll call the "causal theory of constitutional failure", as distinguished from what I've called an ends-oriented or instrumental theory.¹³ Jim agrees that our government is dysfunctional. But, he says at one point that the Constitution isn't responsible for the dysfunction, and therefore the Constitution isn't failing.¹⁴ But this conception of constitutional failure clashes with what I consider a test of any proposition of constitutional theory: Can we imagine the proposition as part of an argument for making (or remaking) a constitution? Who, then, would argue for a constitution whose sole virtue was that it didn't cause bad things? Our national experience features no such argument. *The Federalist* doesn't rest its case for a new constitution on the promise

¹¹ Fleming (n 4) 95-96,128,131,157.

¹² Jack Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Harvard University Press 2011) 124.

¹³ Sotirios A Barber, *Constitutional Failure* (Kansas University Press 2015) 51-52.

¹⁴ Fleming (n 5) 169.

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that it won't cause bad things. We the People wanted to hear that the proposed constitution would prevent bad things *and* facilitate good things, and good things is what Publius promised. The Preamble of the Constitution does the same: We ordain and establish this Constitution "in order to form a more perfect Union, establish Justice", etc. I should have thought Jim's aspirational view of the Constitution would have brought him to the same conclusion.

And at several places Jim does so conclude. At one point he says a constitution fails if its institutions prove inadequate to constitutional ends, especially if the constituent authority (in our case the sovereign people) fails to replace inadequate institutions with adequate ones.¹⁵ A few pages later he says a clear form of constitutional failure would be a people's loss of the capacity to change or reform a constitution.¹⁶ And he may ultimately locate constitutional failure or success where it belongs: in the political psychology of the American people – the character and habits of mind and that make the nation capable or incapable of structural reform.¹⁷ His concluding thought on the subject is that while we should be faithful to our imperfect constitution by improving it where we can through means inside and outside the Court (moral readings by common-law judges along with critical elections and social movements that change constitutional practice outside Article V), we should also seek ways to "cultivate the civic virtues and foster the capacities needed to maintain constitutional self –government".¹⁸

Jim may disagree, but his concluding advice suggests that constitutional fidelity rests on hopes for cultural change. I'd say dramatic cultural change – change well beyond the capacity of our institutions. (Think of problems like climate change, the income gap, and advancing oligarchy; then think Article V, the Electoral College, and the composition and internal rules of the U. S. Senate.) I can see an argument for trying to live with the present constitution in view of no hope for anything better, but any such argument would rest on a

¹⁵ *Ibidem*, 172.

¹⁶ *Ibidem*, 175.

¹⁷ *Ibidem*, 178.

¹⁸ *Ibidem*, 186-87.

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standard of judgment other than the Constitution itself. It would fall short of a real argument for constitutional fidelity.

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