
SYMPOSIUM

A SYMPOSIUM ON JAMES E. FLEMING'S *FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS*

HISTORY, RIGHTS, AND THE MORAL READING

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INTRODUCTION

James Fleming's book, *Fidelity to Our Imperfect Constitution*,¹ offers a moral reading of the Constitution, which he also calls a "philosophic approach" to interpretation.² By this, Fleming means that we should view the Constitution "as embodying abstract moral and political principles."³ To interpret the Constitution, we must make "normative judgments about how [these principles should be] best understood."⁴ This, in turn, will require more than "merely historical research to discover relatively specific original meanings."⁵

Ronald Dworkin coined the term "moral reading,"⁶ and, not surprisingly, Dworkin's scholarship has influenced Fleming's approach. But the most important features of Fleming's book are its differences from Dworkin's account of the moral reading. Fleming offers a "big tent" approach: he argues persuasively that it is reasonable to describe many different scholars with many

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¹ JAMES E. FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS* (2015).

² *Id.* at xi, 3.

³ *Id.* at 3.

⁴ *Id.*

⁵ *Id.*

⁶ See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

different methodological commitments as having a moral reading.⁷ Understood from Fleming's generous perspective, common law constitutionalists like David Strauss, living originalists like myself, and advocates of dualist democracy like Bruce Ackerman offer distinctive moral readings of the Constitution.⁸

Many constitutional scholars, Fleming acknowledges, may avoid using Dworkin's terminology because they do not want to be associated with what they regard as Dworkin's mistakes.⁹ Fleming responds that they need not worry. Many different kinds of scholars have "a" moral reading of the Constitution; they do not have to agree with Dworkin or even with each other.¹⁰

Fleming repeatedly advises us not to use Dworkin's body of work as the sole way to engage in a moral reading of the Constitution. Instead, scholars should feel free to use Dworkin's more abstract accounts of what a moral reading entails as a jumping-off point for their own work. As Fleming says more than once in this book, it is far more useful to consider what Dworkin says than to follow what Dworkin actually does.¹¹

Perhaps equally important, Fleming's own version of the moral reading differs from Dworkin's in significant respects, and I will spend the rest of this essay describing some of the differences. In particular, Fleming's account differs from Dworkin's on two important questions. The first question is how moral readings of the Constitution are consistent with democratic self-government. The second question is how moral readings of the Constitution should use history.

I. THE MORAL READING AND DEMOCRACY

A moral reading of the Constitution must explain how the protection of fundamental rights, derived from the best available political and moral theory, is consistent with popular self-government. Dworkin attempted to solve this problem by distinguishing between a constitutional conception of democracy and a majoritarian conception of democracy.¹² A majoritarian conception views democracy as the expression of majority will.¹³ By contrast, a constitutional conception holds that a democracy, in order to *be* a democracy,

⁷ See FLEMING, *supra* note 1, at 74, 96-97.

⁸ See *id.* at 115 (interpreting Strauss's theory as a moral reading); *id.* at 126 (interpreting my theory as a moral reading); *id.* at 158 (interpreting Ackerman's theory as a moral reading).

⁹ See, e.g., *id.* at 132.

¹⁰ See, e.g., *id.* at 131-32 (distinguishing between "the moral reading" associated with Dworkin and "a moral reading," which might be different in important respects).

¹¹ See, e.g., *id.*, at 94, 101-02.

¹² DWORKIN, *supra* note 6, at 17-18.

¹³ *Id.* at 15-16.

must always operate within a constitutional framework of structures and rights.¹⁴

This leads naturally to the question of what background conditions, structures, and rights are implicit in the concept of democratic self-government. Dworkin's scholarship, perhaps not surprisingly, tended to focus more on rights protections than on structural features. In particular, he argued that rights guarantees that ensure equal concern and respect for citizens are necessary for democratic decision-making to be legitimate.¹⁵ Under a constitutional conception of democracy, therefore, there is no conflict between rights protection and democracy. Quite the contrary: democratic legitimacy presumes and requires the protection of rights that secure equal concern and respect.

Fleming does not object to the constitutional conception of democracy, and he does not deny that the proper functioning of a democracy requires the protection of some rights.¹⁶ But he doubts that one can show why all of the rights and liberties that a reasonably just system requires follow from a commitment to democratic self-government.¹⁷ Dworkin's solution, he argues, forces theorists to pack too many kinds of rights into the background conditions of democracy.¹⁸ Some kinds of rights—like the right to vote—fit easily into this project. Even some kinds of reproductive rights might fit into the democratic model if we can argue that they are really about gender equality, and that equal citizenship for women requires their protection. But other rights, like the right to confront witnesses in a criminal trial, the right to self-determination in medical treatment, and some reproductive rights, like the right of couples to use in vitro fertilization techniques, do not fit as well. Indeed, large portions of the Bill of Rights concern fairness in criminal procedure, and—with the notable exception of jury trial rights—they are not directly related to democratic self-governance.

¹⁴ See *id.* at 17 (“[T]he defining aim of democracy [under the constitutional conception is] that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect.”).

¹⁵ *Id.* at 21-31 (describing substantive conditions of liberty and equality, protected by judicial review, necessary in order for democracies to be legitimate under the constitutional conception).

¹⁶ See FLEMING, *supra* note 1, at 84.

¹⁷ *Id.* at 88.

¹⁸ *Cf. id.* (“Process-perfecting theories are vulnerable to the criticism that they reject certain substantive liberties (such as privacy, autonomy, liberty of conscience, and freedom of association) as anomalous in our scheme, except insofar as such liberties can be recast as procedural preconditions for democracy.”); *id.* at 87 (explaining that focusing on both deliberative democracy and deliberative autonomy “protects us against taking flights from substance to process by recasting substantive liberties as procedural liberties or neglecting them”).

Explaining all of these rights in terms of securing democratic self-government becomes increasingly strained. Moreover, in the quest to re-characterize all of these rights as supporting democracy, there is the danger that we will distort their most valuable features.

Instead of trying to squeeze every type of valuable right into the logic of democracy, Fleming argues that we should distinguish between “deliberative democracy” and what he calls “deliberative autonomy.”¹⁹ Deliberative autonomy is the ability of individuals and groups to decide what is best for their particular plans and goals for life.²⁰ A just constitution, he argues, should certainly protect democratic self-government. This is the concern of deliberative democracy. But it should also protect basic civil freedoms whether or not they have strong connections to democratic self-government. This is the concern of deliberative autonomy.

Put another way, democracies, like all forms of government, must satisfy conditions of political legitimacy. But democracies do not solve all of the problems of legitimacy merely by being democracies. Political legitimacy requires *both* a well-functioning democracy *and* respect for the freedom and equality of the citizens who live under a democratic government.

Both concerns—deliberative democracy and deliberative autonomy—may require certain structural and rights protections. The kinds of rights (and structural) guarantees required by deliberative democracy may overlap with the guarantees required by deliberative autonomy. But the guarantees required for deliberative democracy and autonomy may have a different emphasis, because they serve different functions. Therefore, the scope of the guarantees necessary for deliberative democracy and autonomy may be different because of these different concerns. The requirements of each will not completely overlap. In particular, deliberative autonomy may require a broader set of guarantees than deliberative democracy.

Let us consider a specific example—the First Amendment’s guarantees of freedom of speech and press. It is easy to see how democratic self-government requires freedom of speech and press. And for that reason, many of the most important free speech theories of the twentieth century have been democracy-based theories.²¹ These theories have argued that we protect freedom of speech not because it secures and respects individual liberty but because it is necessary for a well-functioning democracy.

¹⁹ *Id.* at 87-88, 175.

²⁰ *Id.* at 87 (“[T]he basic liberties that are preconditions for *deliberative autonomy* . . . enable citizens to apply their capacity for a conception of the good to deliberating about and deciding how to live their own lives.”).

²¹ *See, e.g.*, OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1998); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960) (republication of ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948)); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 23 (1971).

Nevertheless, democracy-based accounts of freedom of speech have always faced serious problems. Democracy-based theories are very good at explaining why we should protect people's opinions about politics and public issues. But the vast majority of what people like to talk about and listen to has very little to do with democratic deliberation about issues of public concern. The rise of the Internet has made this even more obvious, because it has allowed us to discover what people really want to talk about when they are freed from the decisions of traditional media gatekeepers. It turns out that a lot of what people like to watch, listen to, and talk about are (a) celebrities; (b) sports; (c) videos, movies, and television shows; (d) music; (e) hobbies; (f) gossip; (g) relationships; (h) shared photographs, memes, and jokes; and (i) pornography.

Faced with this difficulty, democracy theorists have bravely tried to explain why Americans' fascination with the Kardashians, cute cat videos, purely instrumental music, and pornography further democratic self-government. Alexander Meiklejohn, for example, argued that people need poetry in order to be able to vote wisely.²² This explanation tends to privilege high art and culture, and treats most of popular culture as a distraction, which we protect only because it is too difficult to separate out the kind of culture that might help inform the public about political questions.²³

Robert Post takes a different approach. He argues that what we should be concerned with is not democratic *competence*—the ability to be informed and vote wisely—but democratic *legitimacy*.²⁴ Democratic legitimacy requires that people identify with their government. This can only happen if people have a warranted belief that the government is responsive to public opinion over time.²⁵ Therefore, Post argues that we must protect the circulation of ideas and opinions in society—what he calls “public discourse”—to give people this warranted belief.²⁶ Protecting freedom of speech gives people reasons to identify their collective will with that of the government and to feel that the

²² Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 263 (“[T]he people do need novels and drama and paintings and poems, because they will be called upon to vote.” (internal quotation marks omitted)).

²³ See Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 29-30 (2004) (criticizing democracy-based theories for their views on popular culture).

²⁴ See, e.g., ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 33-35 (2012) (distinguishing between democratic legitimacy produced by the circulation of opinion in public discourse, and democratic competence, which concerns the production of knowledge, especially within professions and institutions).

²⁵ ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 49-50 (2014) (explaining that the First Amendment's protection of the right of participation in public discourse underwrites citizens' belief that their government is responsive to them); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 7 (2000) (same).

²⁶ Post, *supra* note 25, at 7.

government is their government. Yet even under this test, which justifies a broader scope of First Amendment freedoms than Meiklejohn's, it is not clear why many features of popular culture and instrumental music must be protected for people to have the warranted belief that the government is their government and that the government is responsive to public opinion over time.²⁷

A third account of freedom of expression, however, fits quite well with Fleming's notion of deliberative autonomy. This is my own theory of freedom of speech as the right to participate in a democratic culture.²⁸ The Constitution protects freedom of speech because freedom of speech allows people to participate in culture. Cultural participation is important because we are made of culture, and culture exercises power over people that in some contexts is far greater and more pervasive than the power of the state. People have the right to participate in the forms of meaning making that constitute them as individuals.²⁹

The protection of democratic participation in culture protects a public sphere of discussion. Therefore it also protects and supports political democracy. But the freedom to participate in culture has a broader significance.

The right to participate in culture is a form of civil freedom. It supports democracy but has independent value. To understand this independent value, consider how what we now call "the public sphere" came about in the first place. It first developed in monarchies, not democracies. The justification for protecting freedom of speech in such regimes cannot be because freedom of speech is necessary for democratic decision-making, because these regimes did not accept democracy.³⁰ Rather, the justification for freedom of speech is that protection of public opinion is an important aspect of a free society. Even if a government is not a democracy, or not very democratic, it still is more legitimate if it respects civil freedoms than if it does not. Think of the United States for most of its history. By modern standards, it was not very democratic. But it was a free society in contrast to most other places in the world that did not respect basic civil freedoms.

Even when a country becomes democratic, it still faces a problem of political legitimacy. For democracies to be legitimate, it is not enough that they protect political rights. They must also protect and respect civil freedoms, even if those freedoms have little to do with participation in democratic self-government. Something like Fleming's account of deliberative autonomy is necessary for even democracies to be legitimate.

Rights can contribute to the legitimacy of a political system in three different ways. First, a right might further political legitimacy because

²⁷ See Jack M. Balkin, *Cultural Democracy and the First Amendment*, NW. L. REV. (forthcoming 2016).

²⁸ See *id.*; Balkin, *supra* note 23.

²⁹ Balkin, *supra* note 27 (manuscript at 10, 19, 47).

³⁰ See *id.* (manuscript at 29-30).

protecting the right helps the government pursue its appropriate and constitutional ends more effectively or efficiently.³¹ (That qualifier is important: helping government further inappropriate or unconstitutional ends does not further political legitimacy.) Second, protecting a right might further legitimacy because this keeps people from feeling alienated from their government, and it helps them identify the government's decisions as their decisions.³² Third, protecting a right might further legitimacy because it shows proper concern and respect for the people who live under the state's rule, and it treats them appropriately and fairly by respecting their freedom.³³

Alexander Meiklejohn's theory of free expression is an example of the first account of how protecting constitutional rights promotes state legitimacy: rights further the realization or efficacy of constitutional ends and functions.³⁴ In this case, the constitutional end is representative democracy. Protecting freedom of speech promotes an informed citizenry. This, in turn, helps citizens vote more wisely, holds government officials accountable, and encourages government officials to govern more effectively.

Robert Post's theory of free expression is an example of the second account of how protecting constitutional rights promotes state legitimacy: rights prevent alienation from, and encourage identification with, the government.³⁵ Protecting freedom of speech allows the formation of public opinion. Protection of public opinion, in turn, gives people a warranted belief that the government will be responsive to public opinion, and therefore prevents them from feeling alienated from government.

My theory of democratic culture is an example of the third account of how protecting constitutional rights promotes state legitimacy. Guaranteeing freedom of expression allows people to participate in the creation and development of culture, including the creation and development of public opinion. Protecting these freedoms shows proper concern and respect for the people who live under the state's rule by securing and protecting their civil freedom.

You might assume from this example that the first two accounts of how rights further state legitimacy concern what Fleming calls deliberative democracy and that only the third account speaks to deliberative autonomy. But that is simply because of the example I chose. These three supports of state legitimacy apply even when constitutional freedoms have relatively little to do with representative democracy.

Take, for example, the Fourth Amendment's guarantee against unreasonable searches and seizures. Suppose the state looks the other way when police officers harass and instill fear in minority communities through unreasonable

³¹ *Id.* (manuscript at 21).

³² *Id.*

³³ *Id.* (manuscript at 21-22).

³⁴ See *supra* text accompanying notes 21-23.

³⁵ See *supra* text accompanying notes 24-26.

stops, searches, and arrests, and through unjustified acts of violence. These policies undermine state legitimacy in each of the three ways mentioned above.³⁶

First, when governments fail to respect guarantees against unreasonable searches and seizures, they are likely to make bad decisions about law enforcement and about how to maintain social order. Second, when police target minority communities by violating their Fourth Amendment rights, members of these communities are likely to become increasingly alienated from the state, and to feel that they are being occupied and harassed by a malign display of state power in which they have no say. Third, police misconduct shows lack of equal concern and respect for minorities, violates their practical freedom, destroys their peace of mind, places continuous obstacles in the path of their lawful pursuits, and, in some cases, takes their lives.³⁷

In sum, both the scope of constitutionally protected freedoms, and the reasons why protecting these freedoms is necessary to state legitimacy, transcend the values of democratic legitimation. Fleming is correct that Dworkin's constitutional conception of democracy is either incomplete or will inadequately explain why certain rights are constitutionally valuable. A moral reading of the Constitution cannot pack all important rights into the goal of democracy-promotion. It also needs an account of civil freedoms.

II. THE MORAL READING AND HISTORY

A moral reading of the Constitution must also explain how and why history matters to constitutional interpretation. Dworkin had two basic positions on this question. First, although he was not an originalist himself, he argued that the most plausible version of originalism was semantic originalism.³⁸ That is, he distinguished between the semantic meaning of the words and phrases in the Constitution and what the people who drafted or ratified the text believed would be the consequence of including those terms in the Constitution.³⁹ My own theory of framework originalism develops this Dworkinian insight. I distinguish between original public meaning and the original expected application of the Constitution.⁴⁰ My account of original public meaning, although thin, is still a bit more robust than the way Dworkin described semantic originalism. In addition to semantic meanings, I argue that

³⁶ Balkin, *supra* note 27 (manuscript at 23).

³⁷ *Id.*

³⁸ Ronald Dworkin, *Comment*, in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 119 (Amy Gutmann ed., 1997).

³⁹ *Id.* (distinguishing between “semantic” originalism, which looks to the semantic meaning of rights-granting clauses, and “expectation” originalism, which holds that rights-granting clauses “should be understood to have the consequences that those who made them expected them to have”).

⁴⁰ JACK M. BALKIN, LIVING ORIGINALISM 6-7 (2011).

interpreters must also pay attention to generally recognized legal terms of art and inferences from background context sufficient to understand the text.⁴¹

Dworkin's second basic idea was that all legal materials, including historical materials, could fit within his general theory of law as integrity. This theory argues that the best interpretation of the law must consider two different dimensions of fidelity. The first is what Dworkin called "fit" with existing legal materials; the second is "justification" according to the best available moral and political theory.⁴²

In his writings on constitutional theory, Dworkin does not spend much time working through historical materials, other than to explain, in various contexts, why some of these materials do not bind us in the present. This is hardly surprising. Dworkin argued that the moral concepts embedded in the Constitution are part of the law, but not the historical understandings and conceptions of past generations. As a result, when Dworkin wrote about the dimension of fit, he usually focused on case law and statutory or constitutional text, rather than on history.

Dworkin was not a legal historian, and he did not pretend to be. Other than noting that historical inquiry might establish the original semantic content of the law, he rarely asserted that historical materials answered important legal questions for the present.⁴³ Nevertheless, to the extent that Dworkin considered historical materials important sources of law, he would likely have regarded them as raising questions of fit, which must be integrated with questions of justification.⁴⁴

The subtitle of Fleming's book is "for moral readings and against originalisms." Not surprisingly, a great deal of his argument critiques originalist scholarship. Like Dworkin, Fleming distinguishes between the abstract moral and political ideas in the Constitution's text and the particular historical conceptions of the adopting generation.⁴⁵ Moreover, he emphasizes that interpretation "require[s] normative judgments about how [constitutional principles] are best understood—not merely historical research to discover relatively specific original meanings."⁴⁶ Fleming rejects what he calls the

⁴¹ Jack M. Balkin, *Must We Be Faithful to Original Meaning?*, 7 JERUSALEM REV. LEGAL STUD. 57, 61-62 (2013).

⁴² RONALD DWORKIN, *LAW'S EMPIRE* 139, 230-32 (1987).

⁴³ See FLEMING, *supra* note 1, at 94 (noting that Dworkin may not have done the historical work necessary to convince others that his theoretical approach was sound).

⁴⁴ In *Law's Empire*, for example, Dworkin spends almost no time discussing history and is primarily concerned with how theories of equality and judicial review fit precedents and current practices. See DWORKIN, *supra* note 42, at 355-99 (using racial equality as the central example of constitutional interpretation).

⁴⁵ FLEMING, *supra* note 1, at 3.

⁴⁶ *Id.*

“originalist premise” that arguments must be phrased in terms of text, history, and structure in order to be taken seriously as faithful to the Constitution.⁴⁷

Despite his many objections to originalism, Fleming spends far more time than Dworkin considering how history might actually work within a moral reading. To be sure, Fleming’s initial claims about history are not altogether encouraging. He argues that history has, and should have, only a limited role in constitutional fidelity:

We should acknowledge the place of history in constitutional interpretation—as a source that comes into play in the dimension of fit—but should keep it in its place. Originalists—narrow and broad, old and new—exaggerate the place of history and give it a greater role than it deserves and that it is capable of playing.⁴⁸

To say that something should be “kept in its place” usually means that it should be subordinated; or that, like an unruly child, it should be seen and not heard. All of this might suggest that Fleming, like Dworkin, merely gives lip service to history and wants to spend as little time worrying about it as possible. But as his argument proceeds, it becomes clear that Fleming’s account of history is different and far more respectful.

To understand what Fleming is getting at, consider how Fleming restates Dworkin’s binary of fit and justification. Fleming argues that we should not think of these two dimensions of interpretation as sequential or as a two-step process.⁴⁹ We shouldn’t first investigate how well our interpretation fits existing legal materials and then consider whether legal materials are sufficiently justified and pare them back accordingly. Thinking that way will lead people to argue that either fit or justification “is primary. . . [T]hey might argue that fit is everything,”⁵⁰ or “that fit has primacy over justification.”⁵¹ “Or, to the contrary, [they might argue] that justification has primacy over fit.”⁵² Instead, following Sotorios Barber, Fleming argues that “interpretation is just a matter of giving the best account of honoring constitutional commitments and furthering constitutional ends.”⁵³ Fit and justification are “inextricably bound together in the idea of giving the best account.”⁵⁴

Here is how we might restate Fleming’s argument. When we consider historical materials, we should begin by assuming that they bear an implicit moral or political logic, and that when we interpret, it is our job to discover that moral or political logic. These materials are not simply commands about

⁴⁷ See *id.* at 7.

⁴⁸ *Id.* at 21.

⁴⁹ *Id.* at 106.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 107.

⁵⁴ *Id.*

what we must do in the present. Our goal is not simply arriving at an interpretation just because Madison said this or Hamilton said that. Instead, we should view historical materials as examples or instantiations of a prior or more general moral or political theory that underlies the Constitution. Viewing historical materials in this way causes the dimensions of fit and justification to merge seamlessly. We understand the historical materials to fit an underlying moral or political account, and we decide on the moral and political account that fits the best by contemplating the deeper significance of the historical materials.

This approach is especially important when we encounter historical materials—as we often do—that apologize for or assume the legitimacy of unjust acts and institutions, or that are premised on factual assumptions that no longer obtain. We should neither reject these materials as irrelevant nor treat them as binding commands that we must blindly follow regardless of their injustice or their morally compromised character. Instead, we should strive to consider how, viewed with sufficient charity, they might still point to a moral and political logic that we can accept today.

This seems to be the best account of what Fleming means when he argues that we must “take fit seriously.”⁵⁵ If we wish to offer a liberal theory of constitutional democracy, we must show how that theory fits our constitutional traditions as well as the materials of American constitutional law. “Instead of simply making a normative argument that justice requires protecting a right to autonomy,” Fleming contends, “I undertake an archeological excavation of the legal materials of our constitutional practice and culture.”⁵⁶ He points to the substantive due process cases protecting individual liberty as an example: “I ask, what constitutional theory would best fit and justify these cases?”⁵⁷ He calls this approach “constitutional constructivism” and argues that it “better fits and justifies these cases than do competing theories of originalism” and process protection.⁵⁸

Fleming makes a similar point about judicial precedent. Precedents, Fleming argues, are “factors or resources, not obligations.”⁵⁹ A moral reading therefore “build[s] out the best understandings of our constitutional commitments through a process of common-law constitutional interpretation that works the Constitution pure, striving for greater coherence, integrity, and perfection.”⁶⁰ For this reason neither doctrinal frameworks nor historical materials can “displace or avoid normative judgments in elaborating [constitutional] commitments.”⁶¹

⁵⁵ *Id.* at 101.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 121.

⁶⁰ *Id.*

⁶¹ *Id.*

Fleming sums up his position by arguing that history should do “‘fit’ work” for moral readings of the Constitution.⁶² This metaphor, which draws on Dworkin’s account, is unfortunate and may distract from Fleming’s deeper point. In fact, many of Dworkin’s metaphors about interpretation have the capacity to mislead us.

When Dworkin spoke of faithful interpretation, he employed spatial metaphors; for example, he spoke of two dimensions of fit and justification.⁶³ The metaphor of *dimension* suggests both that the two considerations are orthogonal to each other—like the *X* and *Y* axes on a sheet of graph paper. The metaphor of dimension also suggests that we should try to push as far out on the separate frontiers of fit and justification as possible. As Fleming points out, this is not the best way of understanding how fit and justification work together.

The metaphor of *fit* is also a spatial metaphor. It suggests the idea of pieces in a jigsaw puzzle that must fit together properly. The pieces have predetermined shapes, and the interpreter’s task is to try to make arguments that are as consistent with as much of the prior history as possible. You may not be able to fit all of the pieces together, but you should try to fit as many as you can to form a picture while maintaining consistency with a satisfying moral and political theory.

The metaphor of fit is misleading—or at least, awkward—in three respects. First, if you cannot fit all of the pieces of a jigsaw puzzle together, you have done the puzzle wrong. Hence, using the metaphor of fit pushes us toward the objection that fit should always be the primary criterion and that justification should be subservient to it. This is, of course, precisely what Fleming argues against.

Second, speaking about interpretation in terms of fit tends to privilege either doctrinalism or originalism. It privileges doctrinalism because previous cases become pieces of the puzzle and the goal becomes making all the cases (or as many as possible) fit within our story. Given Dworkin’s preoccupations, this tendency is hardly surprising. His famous metaphor of legal interpretation as a chain novel explains how judges fit new decisions into the matrix of older decisions.⁶⁴ His instinctive approach to legal interpretation was a common-law approach, which used past judicial decisions and doctrines as grist for his philosophical mill.

⁶² See *id.* at 92 (“Why not conceive the turn to history as doing ‘fit’ work in support of a liberal or progressive moral reading rather than as a broad form of originalism that rejects the moral reading?”); *id.* at 133 (describing my historical studies as examples of “fit work”); *id.* at 138 (arguing approvingly of Christopher Eisgruber’s view that judges should use history to do “fit work in service of a moral reading” by “show[ing] the grounding in our constitutional practice of the best normative understanding of our constitutional commitments”).

⁶³ See, e.g., DWORKIN, *supra* note 42, at 239, 257.

⁶⁴ *Id.* at 228-32 (comparing judicial decision-making to the serial composition of a chain novel with different authors).

When we turn to history, the metaphor of fit tends to privilege originalism because it treats historical materials as authorities (like common law decisions), and, once again, we have to make as many of them consistent with our justificatory story (and with each other) as possible. Ironically, then, the metaphor of fit subtly pushes us toward the very “originalist premise” that Fleming wants to reject. Indeed, the problem is even worse. If we view historical materials like precedents, as pieces that have to be fit together with our justificatory theories, then we are especially likely to focus on adoption history as the central example of historical investigation. Again, this is not what Fleming has in mind.

Third, and perhaps most important, the notion of fit applied to history can be misleading because history does not come in discrete pieces or slices. History is more than a list of true facts, and the meaning of history does not have a predetermined shape. Even at the moment events happen, their significance is often contested by participants and contemporaries: as history proceeds, events take on new meanings for later generations in light of their cumulative experience.⁶⁵ Even what constitutes an event—including its boundaries and its duration—may look different over time. Today, we lump together a period of several decades as “The Founding,” but to people living in the eighteenth century it was not a single event, but composed of multiple events occurring in many different places.

In legal argument, history has meaning only relative to particular background theories of justification. We care about history *in virtue of* a background theory of why the past is important to us in the present.⁶⁶ If we are doctrinalists, we care about history because we assert that we must follow—or at least work within—the history of past decisions. If we are originalists, we care about adoption history because we believe that the correct interpretation of the Constitution depends on the original meaning (or intention or understanding) and that adoption history gives us evidence of that meaning (or intention or understanding).

In short, lawyers never simply focus on history—much less follow history—as history. They focus on particular kinds of history against the background of standard forms of legal argument, each of which presumes reasons and justifications.

This realization brings us to Philip Bobbitt’s and Richard Fallon’s theories of modalities of constitutional argument.⁶⁷ Bobbitt and Fallon pointed out that

⁶⁵ Dworkin would have understood this point well. In his model of the chain novel, later readers are permitted to reinterpret what went before and give it new meanings. *See id.* at 232-35 (suggesting multiple ways that later authors might reinterpret the opening chapters of Dickens’s *A Christmas Carol*).

⁶⁶ Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641, 663-66 (2013) (describing the interdependence of history and justification).

⁶⁷ PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7-8 (1982) [hereinafter BOBBITT, *CONSTITUTIONAL FATE*]; PHILIP BOBBITT, *CONSTITUTIONAL*

when lawyers argue about the Constitution, they usually employ a standard set of arguments.⁶⁸ Each of these modalities of argument depends on a background theory of justification—that is, a theory (often incomplete or unstated) about why a certain kind of argument is valid or legitimate. Doctrinal arguments, for example, rest on the assumption that we should follow precedents for rule of law reasons; structural arguments rest on the assumption that the best interpretation is the one that is most consistent with the Constitution's functions; arguments from consequences assume that when the text is otherwise unclear we should adopt the interpretation that is likely to have the best consequences, and so on.

In my own work, I have expanded Bobbitt's and Fallon's lists to include eleven different modalities of justification.⁶⁹ These include arguments from (1) text; (2) structure; (3) purpose; (4) consequences; (5) judicial precedent; (6) political convention; (7) custom and lived experience; (8) natural law or natural rights; (9) national ethos; (10) political tradition; and (11) culture heroes and honored authorities.⁷⁰ I argue that the vast majority of arguments about the proper interpretation of the Constitution fall into one of these categories, and, in some cases, more than one.

Whether one accepts this categorization or divides up the forms of legal argument differently is not important. What is important are three basic points about how lawyers argue about the Constitution.

First, each form of argument corresponds to a different set of reasons for why this kind of argument is an appropriate way to interpret the Constitution.⁷¹ That is, the reasons why lawyers should make and accept arguments from structure are different from the reasons that justify arguments from tradition or custom. Moreover, different forms of argument may draw on different kinds of reasoning. Arguments from structure, for example, often reason in terms of good design, and the best way to fulfill particular constitutional functions, while arguments from precedent may employ analogical reasoning, abductive reasoning, reasoning from principles and policies, and so on. Different kinds of reasons (and reasoning) may draw on and use facts—including historical facts—in different ways.

Second, contrary to Bobbitt's and Fallon's accounts, history itself is not a distinct modality of legal argument.⁷² Rather, history is a resource for making arguments. One can use history to support each and every one of the eleven modalities of argument listed above.

INTERPRETATION 12-13 (1991); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1244-46, 1252-58 (1987).

⁶⁸ BOBBITT, *CONSTITUTIONAL FATE*, *supra* note 67, at 7-8; Fallon, *supra* note 67, at 1194-1209.

⁶⁹ See Balkin, *supra* note 66, at 659-60.

⁷⁰ *Id.*

⁷¹ *Id.* at 658-59.

⁷² *Id.* at 660-61.

Third, history supports each kind of argument in a different way. For each kind of argument, we may look to different kinds of history. Even when we look at the same historical records, what we are looking for and why we regard it as important may be quite different.⁷³

For example, when we make structural arguments, we use history to show lessons about the proper design or functioning of a constitutional scheme. When we make arguments from ethos or tradition, we use history to show deep moral and political commitments in the American regime. History matters differently to each modality of argument because of the modality's implicit theory of justification.

This account of how legal argument works helps us understand what it might mean to use history for "fit work." Whenever lawyers use history to make a structural argument, they are implicitly also making an argument that a certain interpretation is most consistent with the Constitution's proper functioning, and this claim, in turn, presupposes a political theory of how government should be organized. Similarly, whenever lawyers use history to show purpose, they are implicitly making an argument that the best reading of a text is one that fulfills the purposes of the statute or constitutional provision, and this claim, in turn, presupposes a theory of how laws should be applied.

To employ history to make any standard form of argument is already to vouch for (implicitly or explicitly) the underlying theory of justification that authorizes that particular form of argument. That theory of justification, in turn, is an element of moral and political theory, even if it is not a complete theory by itself. This feature of legal argument is most obvious in arguments from consequences and natural rights, which often speak forthrightly about what is good or just. But it is also true of all of the other modalities of legal argument. The political and moral assumptions of constitutional arguments appear once we press more deeply and ask why a particular form of argument is valid or appropriate in interpreting a constitution.

The modalities of constitutional argument, in short, are the ways that lawyers make arguments of moral and political philosophy, tailored to the particular forms of constitutional reason that lawyers characteristically employ. Thus, there is a deep connection between the acceptable forms of legal argument in a constitutional culture and the moral and political ideas that underwrite them. Lawyers do not always explicitly call up these justifications—indeed it might often prove too cumbersome to do so in every case—but they are always there, lurking beneath the surface of legal discourse.

This account of legal argument helps resolve a puzzle that many lawyers have had about the moral reading, especially in the version popularized by Dworkin. The puzzle is that there seems to be a disconnect between how Dworkin described the moral reading of the Constitution and how lawyers actually make constitutional arguments.

⁷³ *Id.* at 664-65.

What explains this disconnect? First, although Dworkin was trained as a lawyer, he spent much of his career as a philosopher, and so when he wrote about the Constitution he often found philosophical styles of argument most natural and agreeable.

Second, when Dworkin introduced the idea of the moral reading, he focused almost exclusively on the Constitution's rights guarantees: "Most contemporary constitutions declare individual rights against the government in very broad and abstract language,"⁷⁴ Dworkin argued, offering the First Amendment's guarantee of "freedom of speech" as his central example. "The moral reading," Dworkin explained, "proposes that we all—judges, lawyers, citizens—interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice."⁷⁵

But not every part of the Constitution has such an obvious connection to "moral principles" of "political decency and justice."⁷⁶ In Dworkin's expositions of the moral reading, you will find very little on structural constitutional law or the powers of Congress and the President, much less the many technical questions of the law of federal courts. And most lawyers, I expect, would have no idea how to even begin to apply Dworkin's accounts of the moral reading to say, the Dormant Commerce Clause or the Recess Appointments Clause.

When lawyers argue constitutional cases, they usually do not sound like Dworkin does. Moreover, it is obvious to most lawyers that they do not—and should not—simply engage in moral and political theorizing when they argue about the Constitution, at least if they want to persuade other lawyers and judges. Instead, well-trained lawyers reason through the discussion of purposes, structures, traditions, conventions, precedents, and so forth. Many lawyers will reasonably assume that moral readings of the Constitution require the kinds of overtly philosophical and moral arguments that Dworkin made, and this seems false to their own experiences as lawyers.

But a better account of the moral reading of the Constitution is that arguments of morality and political theory are always mediated by the modalities of legal argument that lawyers customarily and instinctively employ whenever they engage in constitutional controversies. In some of those modalities, political and moral theory lie close to the surface, but in others they are submerged in the norms of professional discourse.

When lawyers argue about structural issues, for example, they are arguing about political theory, but not about political theory in general. They are arguing about the particular political theory of the United States Constitution. They draw on conventions, precedents, and historical materials to buttress their structural claims. Lawyers are trying to give the best account of the structural

⁷⁴ DWORKIN, *supra* note 6, at 2.

⁷⁵ *Id.*

⁷⁶ *Id.*

logic of the American Constitution. In doing so, they are making fit and justification work together.

Indeed, on the few occasions when Dworkin discussed structural constitutional law, he sounded very much like an ordinary lawyer. In his discussion of the health care case, *NFIB v. Sebelius*,⁷⁷ Dworkin offered a straightforward structural argument for the constitutionality of the individual mandate to purchase health insurance. Dworkin argued that by design the federal government had the power to address distinctively federal problems, while states retained the power to address matters of local concern.⁷⁸ This argument is not all that different from the one that Justice Ginsburg made in her dissent in *Sebelius*.⁷⁹ And, if he had wanted to, Dworkin might have easily offered multiple historical sources to support this view of the political theory of the Constitution.⁸⁰

Understood charitably, therefore, there is no particular reason why a moral reader has to sound like Dworkin usually does. It is enough to engage in the standard forms of legal argument; for behind them lie considerations of moral and political theory, which come to the surface when we explicitly question them. Dworkin argued that, whether or not they realized it, lawyers always have to make “fresh” judgments of moral and political theory when they decide concrete controversies.⁸¹ But to do this, it is hardly necessary to stray outside the familiar modalities of legal argument.⁸²

This is perhaps the best way to understand Fleming’s project of “[d]o[ing] as Dworkin says, not as he does.”⁸³ Fleming wants to expand the idea of a moral reading so that it encompasses more of what constitutional lawyers and theorists actually do. He wants a theory of the moral reading, in short, that even ordinary lawyers could love.

⁷⁷ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

⁷⁸ Ronald Dworkin, *Why the Mandate is Constitutional: The Real Argument*, N.Y. REV. BOOKS (May 10, 2012), <http://www.nybooks.com/articles/2012/05/10/why-mandate-constitutional-real-argument/> [<https://perma.cc/UZ8Z-J9XA>].

⁷⁹ *Sebelius*, 132 S. Ct. at 2609, 2612-18 (Ginsburg, J., dissenting) (arguing that the Framers designed the Constitution to give the federal government the power to solve national problems, especially through its power to regulate interstate commerce).

⁸⁰ *See, e.g.*, BALKIN, *supra* note 40, at 138-82 (showing how a similar theory was implicit both in the Virginia plan and in the enumeration of powers in the 1787 Constitution, and gives the most satisfying explanation of the modern scope of the Commerce power).

⁸¹ DWORKIN, *supra* note 6, at 3.

⁸² Dworkin, I expect, would have agreed—he believed that lawyers were theorists in spite of themselves. *See id.*

⁸³ FLEMING, *supra* note 1, at 94.