

2016

# The Document and the Drama

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## Recommended Citation

Bennett, William, "The Document and the Drama" (2016). *Constitutional Commentary*. 13.  
<http://scholarship.law.umn.edu/concomm/13>

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## THE DOCUMENT AND THE DRAMA

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

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Contemporary scholarly discourse on American constitutional law is fixated on the document. Particularly when the role of the courts is examined, the fixation is associated with what is likely the most quoted sentence in Chief Justice Marshall's opinion in *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is."<sup>3</sup> *Marbury* also explained that the Constitution is part of American law, and so this sentence articulating a judicial "duty" seems to suggest to scholars at least that courts have to dig deep to figure out just how that entire piece of "law" can be coherently "interpreted." This fixation is perhaps apparent in the rush to embrace the label "originalism" by scholars espousing quite a variety of approaches to constitutional interpretation, including some "new" ones that disdain the force of all sorts of evidence about the "original" understanding of what the document would accomplish. The title of James Fleming's new book makes a similar embrace quite explicit: "Fidelity to Our Imperfect Constitution." Even beyond the courts, moreover, Fleming tells us in quite grand terms that the Constitution is to be understood as establishing "a framework or great outline for a self-governing people<sup>4</sup> (p. 20)."

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3. 5 U.S. 137, 177 (1803).

4. Fleming actually adverts to an appeal that originalism has on account of its "aspiration of fidelity" to the Constitution (p. xi).

There is an obvious awkwardness in this fixation with the document. Unlike scholars, federal courts emphatically refuse to grapple at large with what the Constitution is about. Thus they have long refused to issue “advisory opinions” about the Constitution (or any other elements of the law with which they deal). Instead, they interpret the document only in the service of dispute resolution, to resolve what the Constitution refers to as “cases” and “controversies.”<sup>5</sup> And that seems to have been what Marshall had in mind as well. Immediately following the sentence quoted above, he explained why the courts have that “duty”: “Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”<sup>6</sup>

Interpreting the document in resolving an ongoing succession of disputes substantially complicates the process of ascribing “meaning” to the document. Fleming is most certainly appreciative of complexity in interpreting the document. The subtitle of the book is “For Moral Readings and Against Originalisms,” and he does tell us that with appropriate “moral reading” of the Constitution, it embodies “abstract moral and political principles” (p. xi). But the “moral readings” (or, as he sometimes puts it, the “philosophic approach” (pp. xi, 3)) he has in mind also draw on information other than the text and abstract moral and political principles. Instead, “fit work” must be done (p. 137). Thus under Fleming’s notion of “moral reading,” “the best interpretation of the Constitution should [also] fit and justify the legal materials [available to the interpreter], including the text, original meaning, and precedents” (p. 99).<sup>7</sup>

How to deal with precedent has roiled the originalism world, but Fleming’s embrace of a role for precedent is particularly intriguing—and a bit puzzling. The usual justification advanced for following precedent is the reliance that it may have generated.<sup>8</sup>

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5. U.S. CONST. art. III, § 2.

6. 5 U.S. (1 Cranch) at 177.

7. At another point, Fleming writes approvingly of interpretation as taking account “of our constitutional text, history, and structure, together with our constitutional practice, tradition, and culture” (pp. 20-21). And at still another, quoting an earlier work, he puts it this way: “understand text, consensus, intentions, structures, and doctrines . . . as sites of philosophic reflection and choice about the best interpretation and construction of our constitutional commitments” (p. 33).

8. See Robert W. Bennett, *Originalism and the Living American Constitution*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM: A DEBATE* 78, 115 (2011).

That justification is easy to appreciate if one thinks of constitutional interpretation in dispute resolution terms. For both parties to a dispute may at the time they interacted have had information about judicial precedents that dealt with earlier interactions bearing some similarity to the one they were contemplating. If one party may have taken note of the similarities and plausibly have relied upon the precedent, while the other party simply ignored it, that seems pretty compelling as an argument for the relying party when addressing the dispute between them, at least once—a la Fleming and most of the rest of us—a decisional role for precedent is understood as part of the process.

To be sure, the contrast between the parties will not typically be so stark, and there might be occasions where palpable reliance on precedent might not seem sufficiently compelling to cause a court to favor the relying party. It might be, for instance, that the precedent was itself a distortion of some constitutional language. If that makes the relying party's reliance seem "unreasonable," that could be a justification for doubting its persuasive power. But that is to implement a "reasonable" version of the reliance justification, not to discard it. Or it might be that some gross injustice would result from following the precedent. That would also likely make the reliance unreasonable, but if not, there might then be an independent justification for refusing to follow the precedent. There could even be less strong a case than "gross injustice" that would persuade a court that it would be best to change the "law" represented by a precedent. And then there may be occasions to doubt that there was any reliance on precedent. The ways in which precedent filter through to people's consciousness can be subtle, however, and hence confidence that there was no reliance on some precedent that seems relevant will not come easily. But in any event, the reliance-based justification for deference to precedent is readily apparent. For Fleming, however, following precedent is not valued—apparently not one whit—on account of reliance it may have stimulated.

Instead, Fleming seems to see a role for precedent in making the larger interpretational enterprise more attractive. The title of his book acknowledges that the Constitution is "imperfect," but Fleming's "moral reading" approach is aimed at making the document the "best it can be" (p. 184). Just why it matters that the Constitution is to be made "the best it can be" is, however, left

unexplained. In particular Fleming pays no attention to the dispute resolution function to which both the document itself and Marshall's justification for judicial review direct us. At one point I almost thought that Fleming would take the judicial dispute resolution task to heart, but then he let me down. In discussing why judges should not adopt "the mindset of a philosopher," Fleming tells us that "[t]o begin with, judges have a job to do, a job they're paid to do." But then effectively all he tells us about that job is that it "involves fidelity to the law" (pp. 79, 80).

The distinction between a focus on dispute resolution, on the one hand, and on a more detached search for what the Constitution is all about, on the other, is not a trivial one. And there is peril that lurks in the scholarly fixation with the document. For while, following Marshall, the Constitution is an important part of our law, it is not the same thing as the drama of one dispute resolving decision after another that is pursued in its name.

Thus, for several reasons dispute resolution draws attention to the specific facts of those disputes. Most fundamentally, perhaps, the most general constitutional language will typically have been "originally" motivated by much more particularized problems. One obvious example is provided by sweeping generalities found in the Fourteenth Amendment. While the amendment nowhere mentions the problem of slavery, there is no doubt that those generalities were in large part responsive to the then looming questions of how the recently emancipated slave population was to be treated. As William Rehnquist once put it, "the Civil War Amendments . . . were enacted in response to practices that the lately seceded states engaged in to discriminate against and mistreat the newly emancipated freed men."<sup>9</sup> And those specific problems continue to affect dispute resolution decision making over time, in good part by generating arguments about similarities and differences between those animating problems and the disputes courts are called upon to resolve.<sup>10</sup>

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9. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 699 (1976). Terry Sandalow made much the same point: "Intentions do not exist in the abstract; they are forged in response to particular circumstances . . ." Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1046 (1981).

10. Indeed over time the courts may even renounce an original intention or expected application of general constitutional language. Forbidding racial segregation of schools is sometimes cited as an example of such renunciation (pp. 4, 17).

To be sure, the contemporary dispute resolution reach of the general language of the Fourteenth Amendment extends well beyond problems of the newly freed slaves, none of whom are alive today. But how did that extension come about? Fleming is at times disdainful of “historical research to discover relatively specific original meanings” (p. xi), but in his extensive discussion of originalism(s), Fleming himself refers to “analogies” between those newly freed slaves and other groups that have more recently claimed protection under the Amendment’s Equal Protection Clause. African Americans who had never been enslaved are perhaps the most obviously analogous, but so, according to Fleming, are other groups to which the clause has been extended, like women, immigrants, and gays (pp. 58-60). I have no problem with seeing these other groups as “analogous,” though like Fleming I recognize that analogies draw on normative judgments. But analogies require both starting points and ending ones. In reaching contemporary problems by analogical reasoning, Fleming would seemingly employ original expected applications as starting points—and then, once the process gets going, later “applications” reached by earlier analogical steps.

It is not only the historical origins of constitutional language where the influence of specificity is apparent. That influence is in fact pervasive in the dispute-resolution decisional process. The role of judicial precedent that we touched on above is actually a many-layered thing. Judicial precedents are sometimes invoked on account of the generalities the earlier courts articulated in explaining their decisions, but often they are invoked on account of their specific facts and analogies (or differences, for that matter) that might be drawn with the dispute under consideration.

There are still other inputs into the dispute resolution process that draw attention to the factual details of disputes. Given the refusal to issue advisory opinions, no federal court has anything approaching sole control over the occasions when it opines on the Constitution. The trial courts, and even to a great extent intermediate appellate courts, must resolve all—and only—those disputes that litigants bring to them. To be sure, in more recent times at least, the Supreme Court has been able largely to pick and choose those disputes it will resolve from among a much larger number it is urged to consider. And no doubt its choices will sometimes be influenced by an inclination by one or more Justices to say something about the constitutional enterprise writ

large. But the disputes the Court does take on will still have been initiated by litigants. And those litigants seem largely to think that the specific facts of their cases can have a large effect on outcomes.

This is no doubt because the facts presented in cases do influence the deciding courts. Some evidence of that influence is right out in the open as courts in the opinions they produce rely not only on general statements of law but on the specific facts the litigants have presented to them. The result is that litigants and lawyers considering the possibility of court resolution of some disputes will to one degree or another shape their factual situations to make them more appealing. The most extreme example of this is in class action and other “test case” litigation where appealing factual settings will be selected as vehicles for presenting more general claims. But even for litigants not so readily associated with similar unresolved claims, a great deal of effort is expended to present appealing facts to the deciding courts.

With all these influences drawing courts’ attention to the specificities of the disputes they are called upon to resolve, what role does *The Constitution* play in the process? There is no simple answer to that question, particularly when the language of the document does not point directly to some result (and if it does, the dispute would likely not have been brought to court in the first place). And much of the constitutional language that is invoked in contemporary litigation—like “due process of law,” “equal protection of the laws,” “unreasonable” searches and seizures, “cruel and unusual” punishments, and the like—provides scant direction in resolving disputes. We saw that Fleming himself recognizes that courts give heed to interpretational influences other than the language of the document.

With constitutional interpretation by the courts understood as a means to dispute resolution, however, and with dispute resolution encouraging a role for specific facts of disputes, one might wonder just what the point is of insisting that courts should make the Constitution writ large the “best it can be.” I suppose it is hard to quarrel with making something better, including the Constitution. But the costs of any undertaking must also be taken into account. So one should ask whether the effort to make the Constitution its best might bring costs as the courts grapple with the disputes they are charged with resolving. To put the point

another way, the rampant uncertainty of what a “best it can be” Constitution would be like raises a question of whether the energy of courts should be spent on that task if it gets in the way of fair resolution of those disputes they are required to decide. Fleming’s take on precedent itself suggests that there may well be some dissonance in trying to combine the two tasks.

But then again perhaps I misunderstand Fleming’s criteria for excellence, that “best” the Constitution can be. While there is some ambiguity in his presentation, I do not take the “moral readings” he favors to dictate a single approach. He clearly disfavors some contemporary moral readings (thus he tells us that the contemporary so-called “Tea Party” has “a deficient, unjust normative theory” (p. 107)), but he seems more generally to think that “moral reading” is an approach to interpretation, not a set of “right answers.”<sup>11</sup> If that is so, then perhaps the constitutional “interpretation” he has in mind need not be aimed at a coherent account of the document writ large. Instead, perhaps Fleming would permit a moral reader addressing a particular dispute to focus on the constitutional language that seems most directly pertinent to the dispute and make that language into the “best it can be” for resolving that dispute, without concern for how the interpretation given that piece of language “fits” with the document as a whole.

Such a dispute resolution focus need not lose sight of how the constitutional language it applies will be understood for future disputes. That is what the force of precedent dictates. Nor need the interpretation of the most directly relevant language ignore possible spillover effects for other constitutional language. Obvious examples are where identical or similar language appears more than once in the Constitution (“due process of law,” “privileges and immunities”), but there could well be spillover effects for constitutional language that wasn’t so obviously implicated by a given interpretation. But for (conceptually) remote parts of the document, the future dispute resolution reach of a decision would be of attenuated concern at best, so that the dispute resolution concern might stop well short of trying to make the document as a whole “the best it can be.”

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11. Fleming does mention several recent Supreme Court decisions as “egregiously erroneous” (p. 167). But at the same time, he refers to the “big tent of the moral reading” (p. 161).

If Fleming would permit (dare I say, insist on) a judicial approach to “moral reading” that is concerned with the real world drama that occasions the judicial interpretational enterprise, then I would have no problem with his thesis. But I don’t read Fleming’s presentation to provide room for this sort of focused concern with the constitutional language that bears most directly on the dispute before the court. I think he would disparage such an approach to interpretation as giving in to misbegotten “pragmatic judgments,” instead of seeking “how best to elaborate the abstract moral and political principles to which the Constitution commits us” (p. 110).<sup>12</sup>

At the same time, it is important to keep in mind, as Fleming does repeatedly emphasize, that dispute resolving courts are not the only actors who interpret the Constitution. Legislatures and executives (including administrative agencies) do so as well as part of their jobs, sometimes with pressures of dispute resolution, but sometimes not. Ordinary citizens can also grapple with constitutional interpretation, though count me as dubious that many of them do so with the aim of understanding “a great outline for a self-governing people.” But in any event a multitude of academic commentators like Fleming and others he discusses in the book take on the larger interpretational enterprise with relish. At one point, Fleming tells us that “[a] moral reading is not inherently court-loving” (p. 153). But Fleming does not acknowledge that different influences will operate on the various actors that may importantly shape their interpretational efforts. Indeed, he seems to want to assimilate the various interpretational efforts into a common enterprise. “Instead of judicial monopoly,” he tells us, he “embrace[s] departmentalism, that is, dividing yet sharing interpretive authority among courts, legislatures, executives, and the citizens” (p. 173).<sup>13</sup>

To the extent that those other actors have the luxury of freedom from dispute resolution influences, it should not be surprising if they occasionally reach conclusions in some tension with those of the courts. I do not doubt that those other efforts—most certainly including the scholarly ones—may occasionally

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12. See also p. 111, where he puts emphasis on “coherence” and “integrity” in the interpretational enterprise.

13. In not mentioning scholars as a separate category—presumably lumping them with “the citizens” more generally—Fleming’s detachment from the real world of constitutional engagement comes through.

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affect the judicial interpretational efforts. At the same time, there are influences in our larger system that keep the non-judicial actors from pursuing a host of disparate interpretational adventures, whether or not styled as “moral readings.” Since the courts are the most regular interpreters, our system seems to encourage deference by others to what the courts say about the Constitution. In that way, the judicial dispute resolution pressures of the constitutional law drama may influence efforts to interpret the document by all manner of interpreters. In any event, putting all the various interpretational efforts together as an all-hands-on-board effort of “moral reading” focused on the document as a whole does not, I fear, greatly advance the cause of understanding what is going on.