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# COMMENTS

## TIME, INSTITUTIONS, AND ADJUDICATION

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Some of my earliest and fondest memories regarding constitutional theory involve Mike McConnell. He was a participant at the very first Federalist Society conference in 1982, at a time when the entire universe of conservative constitutional theorists fit comfortably in the front of one classroom. More importantly, at another Federalist Society conference in 1987, he gave a speech on constitutional interpretation that, unbeknownst to him, profoundly shaped my entire intellectual approach to the field by emphasizing the obvious but oft-overlooked point that different kinds of documents call for different kinds of interpretative methods.<sup>1</sup> In 2015, it is more than an honor and a pleasure to be able to comment on *Time, Institutions, and Interpretation*,<sup>2</sup> Professor McConnell's Distinguished Lecture at Boston University School of Law.

There are, in fact, many continuities between that 1987 speech (of which I still have remarkably vivid memories) and Professor McConnell's elegant 2015 exposition of the roles of time and institutional roles in constitutional theory. In his present Lecture, Professor McConnell sets out a five-factor framework across three dimensions of time—the founding, the in-between, and the present—and two sets of institutions—relatively democratic legislatures, executives, and state courts on the one hand and relatively insulated federal courts on the other<sup>3</sup>—both to describe constitutional theory and to prescribe a consistent and coherent methodology for constitutional decisionmaking. Assembling those five factors into their various combinations yields an admirably comprehensive picture of the landscape of constitutional theory:

Originalism looks to the understandings of democratically accountable institutions . . . when the constitutional provision was adopted. Longstanding practice looks to the understandings of democratically

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<sup>1</sup> Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359 (1988). Needless to say, Professor McConnell bears no responsibility for, and indeed may be utterly appalled by, what I have done with that inspiration in the ensuing three decades.

<sup>2</sup> Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745 (2015).

<sup>3</sup> See *id.* at 1746-47.

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accountable institutions . . . over time. Judicial restraint, by which I mean the disposition to defer to the decisions of elected bodies when constitutional principles are not clearly to the contrary, looks to the understandings of politically accountable institutions in the present. Precedent looks to the understandings of life-tenured courts over time. The normative approach looks to the understandings of life-tenured courts in the present.<sup>4</sup>

The Lecture packs an enormous amount of both material and sophistication into a compact presentation, and I am envious of Professor McConnell's talent for parsimony. I will accordingly try to confine myself here to a few short observations about his thoughtful scheme and its implications. I will offer one observation about his descriptive project, one comment on his prescriptive project, and one friendly (I hope) amendment.

As a descriptive matter, Professor McConnell thinks that virtually all theorists share some common ground: "Almost all interpreters, whatever their school of thought, agree that the constitutional text . . . is the place to begin, and that when it is clear it is binding."<sup>5</sup> This assumption gives rise to a number of complications that Professor McConnell does not have space in this format to address but which are critical to an assessment of his descriptive project (and, I believe, his prescriptive project as well).

The most important complication concerns what it means for a constitutional text to be "clear." That is not, by any understanding of the term, itself clear. The clarity of any textual provision is a function of (1) what you think counts toward a correct textual answer (principles of admissibility), (2) how heavily those various considerations count (principles of significance or weight), (3) how much of that evidence is required in order to pass the relevant threshold of clarity (the standard of proof), (4) the presumptive baseline from which clear meaning is required in order to move in any direction (the burden of proof), and (5) how complete an evidence set one has and is willing to assemble.<sup>6</sup> At least some of those elements, most notably the standard of proof and the boundaries of the evidence set, fall outside the traditional purview of what Professor McConnell describes as constitutional theory, but they likely dictate the application of Professor McConnell's framework in any instance. Is textual meaning "clear" only if no reasonable person could advance a contrary interpretation with a straight face? Only if an interpretation is immune from even Cartesian-style doubts? Or does clarity require some lesser degree of certainty? If the standard for certainty is high enough, virtually nothing in the Constitution is textually "clear," and if it is low enough (something on the order of "better than available alternatives"), virtually everything in the

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<sup>4</sup> *Id.* at 1748.

<sup>5</sup> *Id.* at 1747.

<sup>6</sup> For detailed examination of this structure of proof in the context of legal claims, including but not limited to claims about constitutional meaning, see GARY LAWSON, EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS (forthcoming 2016).

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Constitution is “clear.” The hidden battleground in constitutional interpretation is often the standard of proof, which typically operates beneath the surface. If Professor McConnell wants to make clarity a central feature of his framework, that hidden battleground needs to be brought to the fore. Similarly, whether something is “clear” or “unclear” may depend on what universe of materials one examines; clarity, as with any other judgment, is always a function of the evidence set that forms the basis for the judgment. People looking at different bodies of evidence, just as people who are applying different standards of proof, may have very different ideas about what is clear or not clear, and they may have very different ideas about what constitutes an adequate evidence set.

Thus, even if people profess agreement about the role of “clear textual meaning,” they may have very different referents for that term. Professor McConnell may too quickly pass over the quite complex problem of giving an account of clarity in constitutional interpretation, and that is important given that clarity is one of the linchpins of his framework.

A second complication concerns the degree to which Professor McConnell accurately describes the landscape of constitutional theory when he suggests agreement about the controlling character of clear text (assuming, in can-opener fashion, agreement about what it means for text to be clear). There is no way to rigorously test this hypothesis, but I posit that agreement on that point is much thinner than Professor McConnell evidently believes.

There is a potentially quite large zone in which clear text will, as a matter of practice, control *only* when (1) there is very little at stake and/or (2) people think that ignoring the text will do more harm than good to their political agendas. If the stakes are high enough, both (2) and the constitutional text will disappear from the scene. Take the seemingly straightforward case of the thirty-five-year-old president.<sup>7</sup> Does anyone seriously doubt that if a far-left president succeeds in packing the Supreme Court with far-left social justice warriors, and the far-left agenda is thought to depend on a thirty-three-year-old president, a majority could be found to “modernize” the principles in the clause to take account of longer life spans?<sup>8</sup> Or that an equal protection, or due process, or sweet-mysteries-of-life, principle could be found to override or amend even an apparently unamendable Senate Clause if it gets too much in the way? Are those prospects really any more bizarre than any of dozens of text-eviscerating moves that have already taken place—including some in which the stakes were sufficiently low to make the obliteration of text seem

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<sup>7</sup> See McConnell, *supra* note 2, at 1747.

<sup>8</sup> Could something equivalent happen on the far right? I suppose it is possible (remember that Robert Bork was prepared to write off the Ninth Amendment as an ink blot), but I think it is less likely—if only because the Constitution is more inhospitable to the present agenda of the left. The Constitution hardly enacts the agenda of the twenty-first century far right, but especially on the large issues of federal power, the Constitution could serve as a pretty fair manifesto for the Tea Party. But readers are certainly invited to consider their own examples on any side of any spectrum to illustrate the general point that I am making.

almost pathological? In a world of *Home Building & Loan Ass'n v. Blaisdell*<sup>9</sup> (annihilating the text of the Contracts Clause), *United States v. Ptasynski*<sup>10</sup> (destroying the text of the Uniformity Clause), and *Tashjian v. Republican Party of Connecticut*<sup>11</sup> (laying utter waste to the text of the Qualifications Clause), it is hard to imagine anything that is really off limits. Parchment barriers, as the founding generation knew quite well, are about as firm as the 2015 Seattle Seahawks offensive line.<sup>12</sup>

In short, the premise that clear text governs may not, as a descriptive matter, carry nearly as much load as Professor McConnell imagines. And any normative argument for why clear text *ought* to govern must, as with any normative argument on any subject, be grounded in a foundationally sound moral theory rather than anything distinctively legal or interpretative. Interpretation can tell you what a text means. It cannot tell you what to do with that meaning once you have it—or even whether obtaining that meaning is worth the effort.

From a prescriptive standpoint, the real key to Professor McConnell's Lecture is his program for integrating the various methodologies (or modalities) in his five-factor framework into a cohesive approach to adjudication. Professor McConnell has concluded that "it is unlikely in theory—and impossible in practice—to employ only one methodology."<sup>13</sup> No methodology "will necessarily produce a single right answer to the disputed legal question,"<sup>14</sup> but instead any single methodology will likely "produce a range of plausible answers."<sup>15</sup> Thus, he opines, "the most important and neglected task of constitutional theory is to prioritize the methodologies in a way that can be consistently applied in the real work of constitutional adjudication."<sup>16</sup> Specifically, one needs to sort out the respective roles of precedent, practice, and judicial restraint or normativity in deciding cases when text does not provide the "clear" answer. Professor McConnell's solution is to have the various methodologies work "as a series of successive filters."<sup>17</sup> One starts with text, then moves to original meaning if necessary, then goes to precedent and practice (or "liquidation") if necessary, and then, if no answer emerges, "[e]ither the court will follow the logic of judicial restraint, and will

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<sup>9</sup> 290 U.S. 398 (1934).

<sup>10</sup> 462 U.S. 74 (1983).

<sup>11</sup> 479 U.S. 208 (1986).

<sup>12</sup> These words were written after the tenth game of the 2015 season, at which point the most elusive quarterback in two generations has been sacked thirty-five times. *Seattle Seahawks Statistics—Team and Player Stats*, ESPN (Nov. 23, 2015), [http://espn.go.com/nfl/team/stats/\\_/name/sea](http://espn.go.com/nfl/team/stats/_/name/sea) [<http://perma.cc/9Y4B-7ZV3>].

<sup>13</sup> McConnell, *supra* note 2, at 1786 .

<sup>14</sup> *Id.* at 1787.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1785.

<sup>17</sup> *Id.* at 1787.

hold that the action under review is constitutional, or it will follow the normative approach and choose the interpretation that seems best for the nation.”<sup>18</sup> In any event:

The important point here is the sequencing. If text is clear, there is no need to look beyond it. Where the original meaning of the text is clear, there is no need to consult practice and precedent, let alone judicial restraint or normativity. If the original meaning of the text is not clear, but practice and precedent have produced an answer, that is the answer the court should follow. It is wrong to jump from any ambiguity in the text immediately to normativity because this short-circuits the democratic process built into practice and precedent.<sup>19</sup>

Assume for the moment that one can secure agreement that clear text, however “clear” is ultimately defined in this context, is controlling. What accounts for the sequencing of methodologies after that point? Why is precedent or practice higher on the scale than, say, restraint or normativity? It cannot be because precedent and practice are sources of actual meaning, because they are not—they are decision tools employed apart from, or perhaps even in opposition to, actual meaning. And once one has exhausted meaning, the assumed agreement about the hierarchical role of meaning is also exhausted. If agreement does not fix the rest of the sequencing, there must be some reason for choosing one sequence over another. I do not believe that Professor McConnell has provided a strong argument for choosing his sequence over others—such as going straight to normativity once a clear answer is unavailable. Professor McConnell is, in essence, re-creating the now-famous (or now-infamous) “construction zone” of the new originalism, which takes over where interpretation-as-ascertainment-of-meaning comes to an end.<sup>20</sup> By definition, interpretation does not help much with construction, because construction only comes into play when interpretation gives out. Any argument for a particular construction—and Professor McConnell’s preferred sequencing is a construction—must be grounded in foundationally sound moral arguments. Professor McConnell’s construction certainly does not fare worse than others that I have seen, but I am not sure that it fares better.

To be sure, perhaps Professor McConnell’s point is only to highlight the need for some consistent and coherent sequence rather than to establish one sequence as uniquely correct. But I think he is making a stronger point than that, and I am not sure that he has successfully made it.

With that in mind, I want to offer what I think is a friendly amendment to Professor McConnell’s framework that might do at least some of the necessary work.

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<sup>18</sup> *Id.* at 1788.

<sup>19</sup> *Id.*

<sup>20</sup> See Gary Lawson, *Classical Liberal Constitution or Classical Liberal Construction?*, 8 N.Y.U. J.L. & LIBERTY 808, 814-16 (2014).

Professor McConnell is concerned with theories of adjudication rather than with theories of interpretation. That was true in 1987<sup>21</sup> and it is true today. He is not analyzing constitutional meaning. He is analyzing constitutional decisionmaking. The question that Professor McConnell claims, in his opening paragraph, to address is: “what methodology should courts, and especially the Supreme Court, employ when interpreting the constitutional text in disputed cases?”<sup>22</sup> That, however, is not quite the question that he actually addresses. The more precise formulation of the question would be: “[W]hat methodology should courts, and especially the Supreme Court, employ when deciding disputed constitutional cases?” Those are not the same two questions. They are the same if, but only if, one believes that cases should be decided solely on the basis of constitutional meaning. But almost no one in the modern world actually believes that. As Professor McConnell observes on several occasions, almost everyone gives some kind of weight to precedent, practice, consequences, or some kind of normative commitment (whether to democracy, the rule of law, a limited judicial role, the platform of the liberal wing of the Democratic Party, or anything else is beside the point), all of which are considerations other than and apart from constitutional meaning. The “constitutional theory” that is the subject of Professor McConnell’s attention is not, strictly speaking, theory regarding constitutional meaning. It is theory regarding constitutional action.

That focus opens the door to a potential tweak to the framework that to some extent brings together the conceptually quite different worlds of interpretation and adjudication. “The big question,” says Professor McConnell, “is what to do when ‘fit’ runs out.”<sup>23</sup> That is, what does one do when all sources of meaning have been exhausted and no clear answer emerges? At that point, the conventional view says that one must choose between “judicial restraint” and “the normative approach”—which, in terms of time and institutions, means choosing between “the current view of the political institutions with authority over the matter . . . [and] the current view of the judiciary.”<sup>24</sup> If one gets to that point, Professor McConnell says to choose judicial restraint:

Constitutional cases always begin with a governmental act—a statute, an executive action, or a common law decision. If the judge doesn’t “know what the right answer” is, there is no need to grab inapt tools to form an answer. The judge can always say: “[T]here is no legal basis for finding the government action unconstitutional, whatever I might think of it as a matter of policy.” For that reason, I think Posner is wrong to assume that the normative approach is inescapable in constitutional cases.<sup>25</sup>

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<sup>21</sup> See McConnell, *supra* note 1, at 359-60.

<sup>22</sup> McConnell, *supra* note 2, at 1745.

<sup>23</sup> *Id.* at 1776.

<sup>24</sup> *Id.* at 1777.

<sup>25</sup> *Id.* at 1785.

From a purely interpretative standpoint, Professor McConnell is partly right.

By “[f]rom an interpretative standpoint,” I mean that *if* one accepts the premise that clear constitutional meaning is controlling when it is available (and I am not assuming that anyone must or should accept that premise but am simply taking it as a foundational principle of Professor McConnell’s project), that meaning provides an answer to the adjudicative puzzle that Professor McConnell is trying to solve. Let us assume that we have exhausted all legitimate sources of meaning when trying to answer a constitutional question. (This assumes away all of the myriad questions concerning how one ascertains constitutional meaning; for instance, some people might consider precedent and practice significant sources of meaning while others generally would not, people might disagree on the appropriate standard of proof for claims about meaning, and people might construct evidence sets very differently.) Before resorting either to restraint or normativity as a decision tool, perhaps one first should ask whether the Constitution itself prescribes a decision mechanism for resolving interpretative uncertainty.

To be sure, there is no “Uncertainty Clause” in the Constitution. But that does not mean that the Constitution does not contain its own prescribed answer, in some subtler form, for resolving uncertainty. (Again, we are assuming that constitutional meaning controls when it is available.) Professor McConnell actually has the answer before him in discussing Richard Posner’s argument that judges “when faced with a case that is indeterminate from the standpoint of conventional legal reasoning . . . cannot throw up their hands and say, ‘I can’t decide this case because I don’t know what the right answer to the question presented by it is.’”<sup>26</sup> Professor McConnell, as we have already seen, points out that judges in constitutional cases can simply note the fact that they are being called upon to overturn a decision of a political actor and leave that prior decision alone absent an affirmative reason in the constitutional text to act.<sup>27</sup> In other words, Professor McConnell notes that judges can decide *cases* without definitively pronouncing *interpretations* by reference to burden-of-proof principles. Inertia counsels against judicial action until some affirmative legal reason impels motion, and if a legal reason in a constitutional context requires clear meaning, the absence of clear meaning leads to inaction. In other words, Judge Posner is just flat-out wrong: judges really can throw up their hands in the face of uncertainty, provided only that some party bears the burden of proof. As long as the burden of proof is allocated, decisions can always be made, without resort to judicial lawmaking, even in the face of the most radical interpretative uncertainty.

I have elsewhere spelled out how this principle applies to constitutional adjudication as a matter of constitutional meaning.<sup>28</sup> It yields something very

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<sup>26</sup> Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 539 (2012).

<sup>27</sup> See McConnell, *supra* note 2, at 1785.

<sup>28</sup> See generally Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L.

much like Professor McConnell's restraint principle when (most) actions of state governments are challenged on federal constitutional grounds. That is because state governments do not get their powers from the Federal Constitution (except in a few cases involving federal elections, federal constitutional amendments, and the like). Anyone challenging a state act as violative of the Federal Constitution is thus advancing an affirmative claim about the law, in the face of legal inertia in favor of the state action. In those contexts, Professor McConnell's principle of restraint is interpretatively derivable as a matter of constitutional meaning. On the other hand, when federal action is at stake, the principle of enumerated federal power means that the force of inertia operates *against* exercises of federal power, so that there must be an affirmative showing of a grant of federal power in order to validate federal action. In those contexts, there is no room for a principle of restraint. The legal baseline is absence of federal power until an affirmative demonstration of such power has been made. Once that demonstration is made, the burden of proof shifts to the challenger of the government action. If, for example, one can find an authorization for federal action, such as the commerce power, but it is claimed to violate an affirmative constraint on that otherwise general authorization, such as the Ex Post Facto Clause or the Second Amendment, the force of inertia works in favor of the federal action and it can be overturned only in the face of clear meaning.

Thus, I would propose a modest alteration to Professor McConnell's preferred sequencing of methodologies. One needs only one methodology—original meaning—and one normative assumption—that cases should be decided on the basis of original meaning. Once one has ascertained original meaning, there is either a clear answer or there is not. If there is no clear answer, the original meaning tells you how to decide the case: rule against whichever party bears the burden of proof on the relevant legal proposition. Sometimes that will be the government and sometimes that will be the challenger, depending on what government entity is involved and the precise nature of the claim at issue. Methodologies such as precedent or practice enter the picture only if they can be justified as valid sources of original meaning.

In short, Professor McConnell's framework is, with some very modest qualifications, an apt description of much of modern constitutional theory and an illuminating vehicle for exploring fundamental questions of both interpretation and adjudication. But the Constitution has its own framework in mind.