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THE MORAL READING ALL DOWN THE LINE

JAMES E. FLEMING*

INTRODUCTION

Michael W. McConnell has written an elegant and illuminating article about constitutional interpretation.¹ He seeks to show how five major methodological approaches fit together. The five approaches he discusses are: “originalism, precedent, longstanding practice, judicial restraint, and living constitutionalism (here called the normative approach).”² He distinguishes two camps with respect to these approaches. One camp, he notes, “advocates for (or against) a particular approach . . . on the assumption that these approaches are mutually inconsistent and that the task is to determine which is best”³ The other camp “treats the various common approaches as mere tools in the lawyerly toolbox.”⁴

As against the first camp, McConnell writes: “Although I am primarily an originalist, I have come to believe that, with the possible exception of the normative approach, all of the five methodologies necessarily have a legitimate place in constitutional interpretation.”⁵ Unlike the second camp, he advances “a plausible (and . . . attractive) understanding of how these methodologies should work together, in what order, and with what priority.”⁶ In short, he sets out “to prioritize the methodologies in a way that can be consistently applied in the real work of constitutional interpretation.”⁷ He argues that these approaches “should therefore be seen as a series of successive filters.”⁸ Thus, in interpreting the Constitution, we should begin with originalism. If that proves not to resolve the case at hand, we should work through the successive filters of precedent, longstanding practice, and judicial restraint, and rarely, if ever, come to the normative approach.

* The Honorable Paul J. Liacos Professor of Law and Associate Dean for Intellectual Life, Boston University School of Law. Professor McConnell’s Article is a revised version of his Annual Distinguished Lecture given at Boston University School of Law. I am grateful to Mike DiMaio, Ashley Novak, and Sarah Schimmel for helpful comments.

¹ Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745 (2015).

² *Id.* at 1746.

³ *Id.* at 1745.

⁴ *Id.* at 1746.

⁵ *Id.* at 1786-87.

⁶ *Id.* at 1750.

⁷ *Id.* at 1785.

⁸ *Id.* at 1787.

I appreciate the opportunity to offer this brief comment on McConnell's Article. I shall make two points. One, McConnell's analysis of how the five major approaches fit together has surprising affinities to the moral reading of the Constitution I have defended—surprising considering that he expresses reservations about what he understands to be the “normative approach.” Two, McConnell's discussion of the “normative approach,” or moral reading, shows that he misunderstands what a moral reading is: perhaps that is why he wishes to exclude it as illegitimate. Contrary to McConnell, I shall argue that a moral reading is not a particular approach that comes in, if at all, at the end of the line. Instead, a moral reading operates all down the line, as interpreters make moral and philosophic judgments in applying all of the sources or approaches McConnell distinguishes, orders, and prioritizes.

In my recent book, *Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalisms*, I defend what Ronald Dworkin called a moral reading of the Constitution and what Sotirios A. Barber and I have called a “philosophic approach” to constitutional interpretation.⁹ By “moral reading” and “philosophic approach,” I refer to conceptions of the Constitution as embodying abstract moral and political principles—not codifying concrete historical rules or practices—and of interpretation of those principles as requiring normative judgments about how they are best understood—not merely historical research to discover relatively specific original meanings. I argue that a moral reading or philosophic approach, not any version of originalism or living constitutionalism, is the most faithful to the Constitution's commitments. Through examining the spectacular concessions that originalists have made to their critics, I show the extent to which we all now acknowledge that constitutional interpretation requires normative judgments.

I. MCCONNELL'S INCLUSIVE ORIGINALISM

In my book, I distinguish between exclusive and inclusive conceptions of originalism. Conventional, strong originalists define it exclusively: “The only legitimate source of constitutional interpretation is the relatively specific original meanings and original expected applications of the founders.”¹⁰ Inclusive originalists incorporate or permit the familiar sources and “modalities” of constitutional interpretation excluded by the strong originalists as incompatible with originalism: for example, the very sources or approaches that McConnell includes within legitimate constitutional interpretation.¹¹

⁹ JAMES E. FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS* 3 (2015) (discussing SOTIRIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS*, at xiii, 155-70 (2007); and RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 2-3 (1996)).

¹⁰ *Id.* at 1.

¹¹ *Id.*

Thus, McConnell is an inclusive originalist, as are many other leading originalists. Keith Whittington has taken a similar approach by recognizing “pluralism within originalism” and acknowledging that originalist arguments exist in an environment of “pluralism in constitutional interpretation.”¹² Likewise, Lawrence Solum has argued that originalists “can and should agree that constitutional construction (as currently practiced) involves a plurality of methods” or “multiple modalities.”¹³ These methods or modalities, Solum concedes, lie beyond originalism in the sense that they do not involve interpretation of the original meaning of the text.¹⁴

In my book, I have argued that such new, inclusive originalists share common ground with a moral reading of the Constitution of the sort that I defend. Moral readers like Dworkin, Barber, and me deploy a fusion of approaches in what Solum calls “the construction zone.” “Within such a fusion, we . . . understand text, consensus, intentions, structures, and doctrines not as alternatives to but as sites of philosophic reflection and choice about the best interpretation and construction of our constitutional commitments.”¹⁵

These inclusive originalists make spectacular concessions to the moral reading without acknowledging or perhaps even realizing that they are doing so. For they cannot plausibly claim that when judges and scholars find original meaning indeterminate or inconclusive—and move on through what McConnell conceives as the sequence of other legitimate sources or approaches such as precedent and longstanding practice—that they are seeking to discover and enforce the original meanings of the Constitution. Instead, they quite plainly are making normative or pragmatic judgments about the best understanding of our constitutional commitments and practice as we have built them out over time. These are the very judgments that the moral readers have insisted were necessary and that the conventional, exclusive originalists have disparaged as illegitimate.¹⁶ This pluralism, even if its practitioners follow a certain sequence or prioritizing of modalities (rather than being eclectic and unstructured), seems to be very like the fusion of approaches that constitutes a moral reading. Thus, without saying so, McConnell practically makes peace with moral readings concerning the multiple sources for or approaches to constitutional interpretation.

¹² Keith E. Whittington, *On Pluralism within Originalism*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 70 (Grant Huscroft & Bradley W. Miller eds., 2011).

¹³ Lawrence B. Solum, *We Are All Originalists Now*, in *Constitutional Originalism: A Debate* 1 59-60 (Robert W. Bennett & Lawrence B. Solum eds., 2011) (alluding to PHILIP C. BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982) for the idea of multiple modalities of constitutional interpretation).

¹⁴ *Id.* at 60.

¹⁵ BARBER & FLEMING, *supra* note 9, at 190.

¹⁶ FLEMING, *supra* note 9, at 36.

II. MCCONNELL'S MISUNDERSTANDINGS OF A MORAL READING

This brings me to my second point: McConnell's discussion of the "normative approach" or moral reading indicates that he does not understand what it is. Again, he initially presents it as one of the particular approaches or sources. In his sequencing, he presents it as the last source. He says that we should turn to it only as a last resort, after all the other approaches or sources have run out or proven to be indeterminate. He suggests that, even then, it may be illegitimate.¹⁷ I believe he says this because he is thinking of "the normative approach" as unbounded normative judgment: the subjective normative judgment of the individual judge.¹⁸

But that is not the moral reading as Barber and I conceive it or as Dworkin defended it. Again, the moral reading we defend is a fusion of approaches that interpreters work through in making moral and philosophic judgments about the best understanding of our constitutional commitments and practice. Thus, contrary to McConnell's suggestion, the moral reading is not a specific approach that we do not come to until the very end as a last resort. It is not a separate and independent source that we reach only when every other source has been exhausted.

My view, and Dworkin's view, is that interpreters are engaged in the moral reading from the beginning to the end. They make moral and philosophic judgments all along as they work through the fusion of approaches to constitutional meaning. The moral reading comes into play in the very conceptions of text, original meaning, precedent, practice, and democratic deference that the interpreter brings to bear in constitutional interpretation.

- When you look at the text, you face a moral and philosophic choice concerning its very nature: Is the text a charter of abstract moral principles or a code of detailed legal rules (and a deposit of concrete historical practices)?¹⁹
- Likewise, when you seek to determine the original meaning of the text, you face a moral or philosophic choice concerning what counts as the original meaning: Is the relevant original meaning the abstract commitments embodied in the text or the relatively concrete expectations in the minds of the historical framers and ratifiers?²⁰
- In interpreting precedents and traditions, we will have to make moral and philosophic choices concerning the nature of precedents and traditions. We will have to decide how abstractly or concretely to conceive precedents and traditions: Do we limit precedents to specific holdings and traditions

¹⁷ McConnell, *supra* note 1, at 1786-87.

¹⁸ *Id.* at 1787.

¹⁹ FLEMING, *supra* note 9, at 13-15.

²⁰ *Id.* at 9-10.

to the deposit of concrete historical practices, or do we build upon them through making recourse to the basic reasons underlying precedents and the abstract aspirational principles embodied in traditions?²¹

- Furthermore, as we proceed through common law constitutional interpretation applying precedents from one case to the next, we will have to make moral and philosophic choices concerning the best account of what the line of decisions comes to. In applying precedents to new cases, interpreters will have to decide which analogies are persuasive and which are not, which will require moral and philosophic choices.²²
- In deciding when to defer to democratic processes, we will have to make moral and philosophic choices about the best understanding of the form of democracy embodied in our constitutional practice. For example, do we have a majoritarian democracy with simple majority rule unconstrained by rights, a representative democracy with only procedural rights limiting majority rule, or a constitutional democracy with substantive rights along with procedural rights limiting majority rule?²³

And so, on my understanding of a moral reading, interpreters are making moral and philosophic choices throughout McConnell's sequence of approaches, not just at the end in the event that the other sources prove to be inconclusive.

Now, it is understandable that an inclusive originalist like McConnell would seek to avoid the eclecticism or pluralism of the toolbox approach by proposing a priority or sequence. I am dubious about the plausibility and desirability of such sequencing in actual judging. I am especially dubious about whether such sequencing captures the phenomenology of actual judging, as it is or as it should be. One might argue that I should defer to McConnell on the plausibility of sequencing for actual judging since he was a distinguished federal appellate court judge for seven years. But I believe that constitutional interpretation involves more holistic, all-things-considered judgment, taking all of the sources into account. I doubt that it does or should follow a prescribed sequence. And I believe that the primary pull in such judgment is toward the decision that puts our constitutional practice in its best light.

We are back to the moral reading pervading the process of making judgments in applying the sources or approaches all down the line. This process is not a prescribed sequence with an illegitimate "normative approach" at the end of the line, as an illegitimate last resort to be avoided if possible.

²¹ *Id.* at 44.

²² *Id.* at 57-60.

²³ BARBER & FLEMING, *supra* note 9, at 129-33; JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY 80-81 (2006).

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