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Textualism and the Dead Hand of the Past

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The first question any advocate of constitutionalism must answer is why Americans of today should be bound by the decisions of people some 212 years ago. The Framers and Ratifiers did not represent us, and in many cases did not even represent people like us, if we happen to be Catholic or Jewish, or female or black or poor. What is most devastating to any claim of authority on their part is that the Framers and Ratifiers are long dead. Why should their decisions prevent the people of today from governing ourselves as we see fit? This is commonly known as the "dead hand problem." Most often, the dead hand argument is aimed at originalism—the view that the Constitution should be interpreted as the people who enacted it would have understood it. But in truth, the dead hand argument, if accepted, is fatal to any form of constitutionalism. To whatever extent our present-day decisions are shaped or constrained by the Constitution—however interpreted—we are governed by the dead hand of the past. How can this be justified?

In his paper published elsewhere in this Symposium Issue, Jed Rubenfeld reminds us that the dead hand problem was recognized from the very beginning of the Republic. Not only do some people today chafe at governance by Framers and Ratifiers long dead, but some of those dead people themselves doubted the legitimacy of attempting to govern unborn future generations. "[T]he earth belongs in usufruct to the living," Jefferson declared, and "the dead have neither powers nor rights over it." Jefferson accordingly thought that the Constitution (any constitution, indeed any law) should expire at the end of a generation, which he calculated to be nineteen years. Similarly, Tom Paine wrote that "[e]very age and generation must be as free to act for itself, in all cases, as the ages and generations which preceded it," and Noah Webster declared that "[t]he very attempt to make perpetual constitutions, is the assumption of a right to control the opinions of future generations; and to legislate for those over whom we have as little

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4 See id. at 396.

authority as we have over a nation in Asia.” If these arguments are right, then the Founders’ very attempt to “form a more perfect Union” for the benefit of “ourselves and our Posterity” was presumptuous and unjust. Likewise, fidelity to that Constitution on our part is profoundly misguided.

The dead hand problem thus raises the first question for constitutional theory. We cannot address the question of how to interpret the Constitution for the purpose of resolving present-day disputes without first understanding why we should consult the decisions of persons long dead for that purpose. Moreover, it turns out that our answer to the “why” question has implications for the “how” question. We can determine the method to interpret the Constitution only if we are first clear about why the Constitution is authoritative.

It is, of course, no answer to the dead hand problem to point out that the Constitution says it will govern the future, nor to prove that this was the Founders’ intention. No document is authoritative because it says so. If the faculty of the George Washington University Law School drew up a “constitution” that purported to control the decisions of the rest of the world, no one would give it the slightest attention—no matter how explicit its assertions of its own authority might be. The answer to the dead hand problem, assuming there is an answer, must be found in the realm of political theory, and not in that of constitutional interpretation.

In principle, there might be any number of possible responses to the dead hand problem, but five strike me as the most common, the most plausible, and the most important to constitutional theory.

First, one might defend the authority of the Constitution on the ground that it expresses principles of political morality and organization that continue to command our assent and agreement. If the provisions of the Constitution were inefficient, evil, or unjust, we would be fully justified in scrapping it; it is only the happy contingency that the Framers, Ratifiers, and Amenders of our Constitution did such an excellent job on the merits that justifies constitutionalism today. In other words, the authority of the Constitution is attributable not to any authority the dead have over the living, but to the enduring validity of its principles.

Implicit in this answer is the notion that we should enforce only those portions of the Constitution that are valid, according to our present judgment, and we should modify or ignore those portions that are not. If the Contracts Clause has become an obstacle to salutary economic regulation in our modern economy, then the Contracts Clause should be left unenforced; if the idea of widespread gun ownership is scary in modern urban America, then the Second Amendment should be treated as a dead letter. Conversely, if the intrusive capabilities of government present more of a problem to us than they did to our forebears, or if sexual or other intimate forms of

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6 Noah Webster (writing as Giles Hickory), On Bills of Rights, 1 AM. MAG. 13, 14 (Dec. 1787).
7 U.S. CONST. preamble.
9 I hasten to state that I am expressing no view on the desirability of these constitutional provisions under original or modern conditions.
personal autonomy seem more essential to our post-Freudian sensibilities than they did to Americans steeped in Calvinist conceptions of the self, then we might conjure up a constitutional right of “privacy” whether it can be fairly located in the constitutional text or not. This approach to the text goes by the name of the “living Constitution.”

Whatever the attractions of this approach to constitutional disputes, we should recognize that it is not an answer, but a capitulation to the dead hand argument. If the Constitution is authoritative only to the extent that it accords with our independent judgments about political morality and structure, then the Constitution itself is only a makeweight: what gives force to our conclusions is simply our beliefs about what is good, just, and efficient. Taken to its logical conclusion, this line of argument does not provide a reason for treating the Constitution as authoritative; it instructs us to disregard the Constitution whenever we disagree with it.

In practice, this approach to the dead hand problem could lead in two seemingly opposite directions, depending on which institutions are entitled to speak for “us” in determining which parts of the textual Constitution we should disregard or supplement. If “we” speak through our elected representatives in the political branches of government, then this interpretive approach prescribes democratic majoritarianism, with little or no role for judicial review. If “we” speak through the judiciary, however, as advocates of the “living constitution” and its many cognates seem to assume, then the result is discretionary rule by judges. According to this latter view, the job of courts is to keep the Constitution contemporary, and the constitutional text and history will play little role in determining the outcome of hard cases. Neither of these polar opposites is recognizable as constitutionalism, if by “constitutionalism” we mean that the authoritative decisions of the past constrain (to at least some degree) the authority of government officials today.

In practice, this approach leads to deception. Most members of the public, especially those unburdened by a legal education, assume that when they are told that something they want—prayer in the schools, for example—is “unconstitutional,” this means that there is something in the Constitution prohibiting it. All the apparatus of Supreme Court opinions is designed to create the appearance that the Justices are following the law, not making it up. When the late Justice William J. Brennan, Jr. was asked in a television interview why the Nazis should be permitted to march through a neighborhood inhabited by Holocaust survivors, he responded: “the First Amendment, the First Amendment, the First Amendment.” In other words, judges

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10 One might argue that in the absence of a formal constitutional amendment, we must accept or reject the authority of the Constitution in its entirety, neither disregarding the parts we think are wrong nor supplementing it in those respects we think are deficient. In this way, one might derive the principle of textualist fidelity from the premise that the Constitution is authoritative only because it is good. But this position fails to explain why we, today, should be forced to choose between accepting or rejecting the Constitution in its entirety, merely because the dead hand of the past presented us with a package deal. If the Constitution is authoritative only because of its intrinsic justice and efficiency, and if the Constitution would be better if stripped of outmoded parts and supplemented with new provisions, what is the logical ground for adhering to a less just and efficient Constitution than the one we could create?

are not responsible for this outcome; the Framers of the First Amendment are responsible. If it turns out that the Justices are bound by the Constitution only to the extent that they agree with it, however, constitutional adjudication is a fraud. The Justices should not blame unpopular outcomes on the First Amendment. They should issue opinions explaining why they think certain outcomes are just or efficient, and omit the misleading references to a document that has no genuine authority.

A second, more promising, answer to the dead hand problem is that (at least to a significant extent) the legacy of the dead hand may be enabling rather than constraining. The rules of basketball do not merely constrain those who wish to play the game, but also make the game possible. If the rules were constantly up for grabs, players would be forced to spend their time in rulemaking rather than in playing basketball. Similarly, the rules of grammar do not merely constrain the speaker or writer, but make communication possible. For much the same reason, it is simplistic to treat constitutional rules solely as constraints on our ability to govern ourselves today: without constitutional rules, we would have no institutions through which self-government could take place. Rules such as the requirement of periodic elections, the separation of powers, and the freedom of political speech are necessary if democratic self-government is to work. In this sense, as Stephen Holmes has argued, the dead do not "govern the living" but "make it easier for the living to govern themselves."

To the extent that this response provides an answer to the dead hand problem, it implies a form of constitutional interpretation in which it matters more that issues be decided in a stable, consistent, and predictable fashion than that they be decided in accordance with any particular methodology. It therefore supports a strong doctrine of stare decisis and the view that the Supreme Court is supreme in its exposition of the Constitution (as opposed to the view that each branch of government has the responsibility to interpret the Constitution for itself, within the range of its own powers). But this response also suggests that constitutional law should be confined to essentially process-based issues such as election rules and government structure. It provides no justification for allowing the dead hand of the past to impose substantive limitations on policy—such as economic rights, privacy, criminal procedure, nonpolitical free speech, egalitarianism, or the like. There are, after all, relatively few issues that require constitutional precommitments to ensure democratic self-rule to ourselves and our posterity. Most of what we now think of as constitutional law lies outside this justification.

A third response to the dead hand problem is simply to defend the legitimacy of the dead hand. One may plausibly argue that a nation's right of self-determination includes its right to create lasting governmental institutions; accordingly, Jefferson, Paine, and Webster were wrong. Despite Jefferson's rhetoric, there is nothing troubling or unusual about the idea that today's

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13 This is John Hart Ely's basic argument in DEMOCRACY AND DISTRESS, supra note 1, though it seems to me that Dean Ely was somewhat more willing to allow his theory to be used to generate substantive results than the theory genuinely would support.
generation is constrained, for better or worse, by the decisions and actions of people who came before. How could it be otherwise? It is the nature of people to make promises, and of groups of people to make promises that may apply not only to current members, but to future members as well (provided they avail themselves of the group’s membership benefits). No one doubts the authority of a corporation to make binding commitments for the future—extending even beyond the expected lives of current shareholders. Parents can bequeath debts to their heirs—as long as the estate contains assets valuable enough that the heirs agree to accept them. By the same token, countries, as corporate bodies, can make commitments for the future, subject only to the power of future generations to change those rules in accordance with the procedures by which they were set in the first place. The Founders ordained and established the Constitution of 1787 first by fighting and winning a war of independence (which abrogated the prior British Constitution), and then by winning unanimous consent of the states for the new arrangements. The people of today could ordain and establish a new Constitution by means either of revolution or of the Article V amendment procedures. Indeed, I agree with Akhil Amar that the people of today could create a new Constitution by any means that would command overwhelming popular consent, sufficient to establish a Union in fact. But until the people take such steps, the dead hands of Madison, Washington, Wilson, Hamilton, Pinckney, Morris, and the other Framers and Ratifiers continue, quite legitimately, to rule us from the grave.

This self-evidently was the view of the constitutional drafters themselves, most of whom had no qualms about establishing a perpetual union with onerous amendment procedures. It was the view of Chief Justice John Marshall, who declared as “the basis, on which the whole American fabric has been erected,” the idea that “the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness.” Because the “exercise of this original right is a very great exertion,” Marshall further explained, it cannot and ought not “be frequently repeated. The principles, therefore, so established, are deemed fundamental [and] . . . are designed to be permanent.” This also is the view of democratic peoples all over the world, who are busily engaging in the task of constitutional draftsmanship as they emerge from Second or Third World tyranny. And it appears to be the view of the vast majority of the

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14 To be sure, the Framers specified that the Constitution would go into effect when ratified by as few as nine of the thirteen states. See U.S. Const. art. VII. But it would only go into effect for the states that ratified. They asserted no authority to compel unwilling states to enter into their “more perfect Union.” For this reason, I think Bruce Ackerman greatly exaggerates the unconstitutionality problem of the original Constitution. See Bruce Ackerman, 1 We the People: Foundations 41 (1991). The Articles of Confederation required unanimous consent for ratification; and the Constitution was (by 1790) unanimously ratified.


17 Id.

18 The last few years have seen an explosion in constitution drafting, in South Africa, the post-Communist states of Central and Eastern Europe, and other nations escaping from oppres-
American people today, who revere the Constitution almost to the point of civil religion (without much knowledge of what it contains), and who seem utterly unaware that the ideal of constitutional government is subject to any problem of the dead hand.

This defense of the legitimacy of the dead hand underlies the perspective of constitutional positivism: All power stems from the sovereign people, and the authority of the Constitution comes from their act of sovereign will in creating it.\(^\text{19}\) It follows that the Constitution should be interpreted in accordance with their understanding. This is the theoretical foundation of originalism. If the Constitution is authoritative because the people of 1787 had an original right to establish a government for themselves and their posterity, the words they wrote should be interpreted—to the best of our ability—as they meant them.

A fourth answer to the dead hand problem lies in the notion of implied ratification. Under this view, the Constitution originally derived its authority from the will of the Framers and Ratifiers, but it derives its continued authority from the implicit consent of the people in each subsequent generation. For the claim of implicit consent to be persuasive, it must rest on more than the mere fact that the people have not often amended the Constitution through the Article V procedures.\(^\text{20}\) The Article V process is sufficiently onerous that the mere lack of amendments cannot, without more, be taken as proof of continued popular satisfaction with the Constitution. If there were persistent demands for significant constitutional amendment, backed by a majority of the people but blocked by the two-level supermajority requirements of Article V, we would have a genuine crisis of legitimacy. In actuality, however, the American people venerate the Constitution,\(^\text{21}\) and even the more popular amendment proposals—school prayer, flag protection, and balanced budget—amount to tinkering around the edges.\(^\text{22}\) Americans whose predecessors were excluded from voting on the original Constitution—such as women and African-Americans—apparently venerate the Constitution no less ardently than propertied white males.\(^\text{23}\) For this reason, the oft-heard complaint that the Constitution has no legitimate claim of authority to bind us because blacks and women were excluded from the franchise in 1787, seems beside the point. No one now alive was represented in 1787, and blacks and women today are no more inclined than any other portions of the

\(^{19}\) See generally Frederick Schauer, Constitutional Positivism, 25 CONN. L. REV. 797 (1993).


\(^{21}\) See Sanford Levinson, Constitutional Faith, 3-17 (1988).

\(^{22}\) The Equal Rights Amendment, in most of its applications, has been adopted by the Supreme Court.

population to jettison the Constitution.24 If implicit consent is a valid basis for authority, our Constitution is surely valid.

This approach to the dead hand problem suggests a mode of constitutional interpretation that gives weight not only to constitutional principles as they were conceived at the founding, but also to those principles as they have been conceived by successive generations of Americans in the years since the founding. Those subsequent generations of Americans also “ratified” the Constitution, and their understandings should also count. In practical terms, that means the Constitution should be interpreted in accordance with the long-standing and evolving practices, experiences, and tradition of the nation. I refer to this constitutional methodology as “traditionalism.” In recent years, it has been championed by the second Justice Harlan, revived by Justice Scalia, and adopted by the Supreme Court in Washington v. Glucksberg.25 Traditionalism is controversial because it assigns to courts the task of preserving continuity with the past, rather than fostering social change.

In his paper,26 Jed Rubenfeld proposes a fifth answer to the dead hand problem, which might be seen as an amalgamation of the last two answers set forth above, but which might be better understood as an attempt to transcend the question. He argues that the dead hand problem, based on what he calls the “presentist . . . conception of [democratic] self-government,”27 is a misguided way to think about constitutional legitimacy. Thomas Jefferson’s notion that each generation has the moral right to create a new constitutional order, Rubenfeld suggests, is simply an adolescent fantasy. It is the nature of human persons to conduct our lives through temporally extended projects, building upon what has come before us, building toward what will come after us.28 As Rubenfeld observes, “[t]he freedom to act on nothing but present will is animal freedom.”29 Living in the present may accord with some kind of nature, but it is not human nature.

It is no insult to Rubenfeld to say that Edmund Burke put the same point better, some 200 years ago. Burke’s Reflections on the Revolution in France30 is an extended critique of the notion that constitutional legitimacy is solely based on the will and choice of present-day majorities. Burke’s target was precisely the doctrine of Jefferson, Rousseau, and Webster—and Richard Price—that Rubenfeld has called to our attention. Burke explained that if

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24 This is not to deny that some subgroups of blacks or women would happily amend the Constitution in various respects if they could do so. But it is hard to imagine a constitutional amendment that they would support that would also command majority support among the population as a whole. On balance, I would speculate that even the most disaffected subgroups in America prefer the Constitution as it now exists to unbridled rule by the majority, or by the alternative constitution that might be adopted by the majority if we were freed from the dead hand of the past.
26 Rubenfeld, supra note 2.
27 Id. at 1089, 1095-97.
28 See id. at 1097-99.
29 Id. at 1100.
the presentist notion of legitimacy were accepted, "the whole chain and continuity of the commonwealth would be broken. No one generation could link with the other. Men would become little better than the flies of a summer."\(^{31}\)

Burke's image—"the flies of a summer"—is wonderfully apt. Flies are unburdened by the past or the future. Flies do not know their parents, and they do not know their descendants. No knowledge, no culture, no limits, no obligations are passed down from one generation to the next—only genetic material. Each generation of flies is "as free to act for itself, in all cases, as the ages and generations which preceded it."\(^{32}\)

That is not so with humans. We are born into families, communities, and nations not of our making and not of our choosing. Long before we can conceive of the possibility of freedom, we have been given a language and a set of cultural assumptions; we have accepted benefits and incurred obligations. We are not alone in the present, but part of a historically continuous community.

This is not to say that there is no freedom in the present. We are free to reject our inheritance. We can turn our backs on our parents. We can become traitors or revolutionaries. But we do not do these things, and cannot do these things morally, without a powerful reason. The inheritance must be tainted; our parents must be awful; our country must be evil. In Burke's words, "[i]t is the first and supreme necessity only, a necessity that is not chosen but chooses, a necessity paramount to deliberation, that admits no discussion and demands no evidence, which alone can justify" the dissolution of the web of rights and obligations into which we were born.\(^{33}\)

Rubenfeld is also right to emphasize the inconsistency between Jeffersonian presentism and written constitutionalism. If Jefferson were right, there would be no point in talking about textualism or any of the competing approaches to constitutional interpretation, for it would all be illegitimate. It is important to understand why Jefferson may be wrong if we are to understand how to engage in a serious study of written constitutionalism. As Rubenfeld points out, "Jefferson lost the battle over the basic shape of American constitutionalism."\(^{34}\) The Constitution begins "We the People," claims the right to act on behalf of "ourselves and our Posterity," and "ordain[s] and establish[es]" a Constitution designed to endure for the ages.\(^{35}\) Contrary to Jefferson, "[c]onstitutional law does not live in the moment—not in any moment, past, present, or hypothetical. It embodies a generation-spanning struggle—the historical struggle of a nation to be its own author."\(^{36}\) As Rubenfeld says, "[w]ritten constitutionalism can only be properly understood, it can only claim legitimate authority, as an effort by a nation to achieve self-government over time."\(^{37}\) This concept of "self-government over time" does not refer

\(^{31}\) Id. at 83.
\(^{32}\) Paine, supra note 5, at 251.
\(^{33}\) Burke, supra note 31, at 85.
\(^{34}\) Rubenfeld, supra note 2, at 1111.
\(^{35}\) U.S. CONST. preamble.
\(^{36}\) Rubenfeld, supra note 2, at 1111.
\(^{37}\) Id. at 1105.
to an ideal of governance at each successive moment by the will of
the governed at that moment, nor to the imposition of one mo-
ment's democratic will on the rest of the nation's future, but rather
to the nation's struggle to lay down temporally extended commit-
ments and to honor those commitments over time.\textsuperscript{38}

Burke put it this way:

[W]orking after the pattern of nature, we receive, we hold, we trans-
mit our government and our privileges in the same manner in which
we enjoy and transmit our property and our lives. The institutions
of policy, the goods of fortune, the gifts of providence are handed
down to us, and from us, in the same course and order. Our polit-
ical system is placed in a just correspondence and symmetry with
the order of the world and with the mode of existence decreed to a
permanent body composed of transitory parts, wherein, by the dis-
position of a stupendous wisdom, molding together the great myste-
rious incorporation of the human race, the whole, at one time, is
never old or middle-aged or young, but, in a condition of unchange-
able constancy, moves on through the varied tenor of perpetual de-
cay, fall, renovation, and progression. Thus, by preserving the
method of nature in the conduct of the state, in what we improve we
are never wholly new; in what we retain we are never wholly
obsolete.\textsuperscript{39}

In short, the dead hand is not a problem. Not for human beings, who are
historical animals.

But what mode of constitutional interpretation follows from this re-
response to the dead hand problem? One might think that once we are disa-
busied of the dead hand problem, we would adopt some version of
"textualism," which Rubenfeld defines as interpreting the text as it was un-
derstood by the ratifying public, and which he identifies with Justice Antonin
Scalia and Judge Robert Bork.\textsuperscript{40} After all, the principal counterargument to
textualism is that we should not be bound by a document that embodies out-
moded principles at odds with today's political morality. Once we recognize,
with Rubenfeld and Burke, that this is a misguided objection, one would
think that textualism would emerge as the most plausible approach to consti-
tutional interpretation. Surprisingly, however, Rubenfeld claims that textual-
ism itself is infected by Jeffersonian "presentism." He says that a textualist
"understands the Constitution just as Jefferson or Rousseau would have un-
derstood it—as a declaration of the then-present will of the then-living peo-
ple."\textsuperscript{41} According to Rubenfeld's analysis, the method of interpretation that
follows from a proper understanding of the dead hand problem is based on
the "core or paradigm cases" that inspired the constitutional provision in
question.\textsuperscript{42} I will examine this method below, but first it is necessary to point

\textsuperscript{38} Id.
\textsuperscript{39} Burke, supra note 30, at 29-30.
\textsuperscript{40} See Rubenfeld, supra note 2, at 1102-03.
\textsuperscript{41} Id. at 1103.
\textsuperscript{42} See id. at 1107.
out that Rubenfeld's assertion that textualism is a form of Jeffersonian presentism is without foundation. If a person believed that the present generation must be free of the dead hand of the past, it would be completely illogical—absurd—for that person to say that our national life should be governed by the original meaning of the constitutional text. In light of his rejection of the dead hand fallacy, Rubenfeld should direct his ire against the philosophical offspring of Jefferson and Rousseau: those critical legal theorists, progressives, utilitarians, feminists, and post-modernists who scorn the dead hand of the past. It is wrong for Rubenfeld to accuse modern textualists of the presentist fallacy. They do what Rubenfeld preaches. Rubenfeld, by his own account, does what he accuses them of.

To understand where Rubenfeld goes wrong, we need a fuller account of the logical underpinnings of textualism. Textualists, like Justice Scalia, are committed to popular sovereignty—to rule by the people. Contrary to Rubenfeld, they are not committed to rule by the people in the present—but they are committed to rule by the people over time—not just at the founding, not just in the present, and not just at any point in between. Constitutions, as practiced by textualists like Justice Scalia, mediate between past and present—it allows us to recognize the legitimate claims of the past as well as the ongoing authority of the present. What Scalia rejects is the idea that the nation should be governed not by the will of the people over time, but by the opinions of judges, or of the legal elite.

Scalia is a textualist because he is a democratic positivist: "The text is the law, and it is the text that must be observed." When a judge goes beyond the meaning of the words that were enacted—to the unexpressed intentions of the legislature, or to what the courts think would meet the needs and goals of society—the judge has no democratic warrant. The constitutional text is, therefore, the first and foremost consideration in judging. But the text is not always clear, and does not always provide answers to constitutional questions. Justice Scalia, therefore, interprets the text in light of three supplemental jurisprudential principles: originalism, traditionalism, and restraint. Originalism is the idea that the words of the Constitution must be understood as they were understood by the ratifying public at the time of enactment. Traditionalism is the idea that the words of the Constitution should be understood as they have been understood by the people over the course of our constitutional history, from enactment through the present. To accomplish this, the interpreter looks at what decentralized and representative bodies have done, over time, and treats their consensus as authoritative. Restraint is the idea that unless the text and history of the Constitution are tolerably clear, judges should defer to the decisions of present-day representative institutions.

43 See id. at 1103-04.
Admittedly, these aspects of Justice Scalia's jurisprudence are sometimes in tension. It is not always clear when he believes judges should insist upon original meaning in the face of opposition by current democratic majorities; when judges should look to the unfolding interpretations of tradition instead of the meanings at the moments of enactment; or how much deference to give to the legislatures of today. Issues like the free exercise of religion and affirmative racial preferences highlight these tensions. I do not claim that Justice Scalia's resolution of those tensions is always satisfying or consistent. Maybe it is not possible to be entirely consistent. Maybe the task of constitutional law, in hard cases, is figuring out the relative weight that should be given to the founding, the tradition, and the present. That would be consistent with Jed Rubenfeld's excellent insight that self-government over time cannot "be reduced to the will of the people at any particular moment."

What all three aspects of Scalia's jurisprudence have in common, however, is that all are dimensions of self-government. Originalism refers to the will of the people at the founding; traditionalism refers to the will of the people throughout the decades of our constitutional history; and restraint refers to the will of the people today. At no point does Scalia stand above the people, dictating that they should govern themselves according to a higher theory of justice, human dignity, or the common good. Scalia is committed to the idea of republican self-government over time. That is why I say that Scalia does what Rubenfeld preaches; the method of interpretation that Rubenfeld's response to the dead hand problem suggests is one that combines original understanding, the traditions and experience of the nation, and deference to legislative judgments.

Why do I say that Rubenfeld does what he accuses the textualists of doing? If we examine Rubenfeld's process of reasoning in particular cases, we see that he is a Jeffersonian "presentist" in disguise. How so? Rubenfeld maintains that a judge who respects written constitutionalism should start with the "paradigm cases" that gave rise to the constitutional provision. "The meaning of a constitutional right," he says, "is forever anchored by these core or paradigm cases." So far, the argument seems to follow from Rubenfeld's anti-presentist premises, for the analysis that he recommends is consistent with the anti-presentist interpretations of the Constitution that he advocates in particular cases. But by failing to articulate the connection between these methods, or to explain how to decide cases when they are in conflict, Justice Scalia leaves himself open to the charge of inconsistency.
tied to the actual historical commitments of the American people, and is not based merely on the ideals of the present age. But, contrary to Rubenfeld, there is no persuasive reason to *confine* our interpretation to those paradigm cases. It is just as important to know the boundaries or limits to constitutional principles as it is to know their core, and it would be foolish to disregard legal and linguistic conventions that informed the Framers’ choice of words, or the philosophical or ideological origins of the ideas reflected in the text. This requires a broader and more sophisticated historical study than Rubenfeld appears to contemplate. Rubenfeld’s sole reason for confining the historical analysis to paradigm cases is that deferring to “original intentions *in toto*” would “reduce the constitutional text to the voice of a particular historical moment.” But although this may be a reason to *supplement* originalism with traditionalism and restraint, which reflect the voice of other historical moments, it is not a reason to truncate our understanding of the original understanding by artificially limiting our investigations to one source, the paradigm case. If our purpose is to “preserve the core historical meaning of a constitutional commitment,” as Rubenfeld avers, we should be open to all of the evidence bearing on what that historical meaning is.

But Rubenfeld’s interpretive method departs from his own theory in a more fundamental sense. In choosing and analyzing paradigm cases, Rubenfeld is guided not by a historical understanding of the “principles and propositions that commit[ted] the nation in writing never again to permit certain evils,” as his theory demands, but by present-day conceptions of those principles and those evils. That this is “presentism” in disguise is clear from his examples of affirmative action and the equality of women under the Fourteenth Amendment.

As Rubenfeld says, the paradigm cases for the Fourteenth Amendment were the prohibitions on slavery and Black Codes. He begins his argument about affirmative racial preferences by citing specific actions of the Thirty-sixth Congress that, he says, were inconsistent with the view that benefits given exclusively to “colored persons” are unconstitutional. I will not attempt to assess the validity of this historical argument because Rubenfeld provides only the faintest sketch of the evidence. The important point is that, methodologically, it is an orthodox originalist argument. But Rubenfeld is not content with this argument; he offers a second argument based on the “paradigm” case of segregation. He argues that the same reasons that made segregation unconstitutional make affirmative action constitutional. Obviously, that is highly debatable. But the more important point, methodologically, is Rubenfeld’s choice of segregation as the “paradigm” case. When setting out his theory, Rubenfeld explained that interpretation must begin with “certain laws or practices” that the constitutional Framers sought to abolish because those paradigm cases “give constitutional law its interpretive

49 *Id.*
50 *Id.*
51 *Id.*
52 See *id.*
53 See *id.* at 1106-07.
54 See *id.* at 1109-10.
anchor and its root in the nation’s history, rather than in mere philosophy.” Only thus, he says, can “the core historical meaning of a constitutional commitment” be preserved. Yet, he selects as his paradigm case for analyzing affirmative action the proposition that *de jure* segregation is unlawful—a position that certainly was not the paradigmatic case at the time of “constitution-writing,” and indeed, was not authoritatively accepted until 1954. Rubenfeld offers no explanation for this remarkable departure from his own stated method. He offers only the bare assertion that “it is today proper” to include the anti-apartheid principle as among the “paradigm” cases of the Equal Protection Clause. His invocation of what is proper “today” betrays the fact that his analysis is presentist and not historical. By adopting a non-historical paradigm, Rubenfeld throws overboard his “anchor” to the nation’s history (which he earlier said was essential to written constitutionalism) and substitutes a modern principle in its stead—presumably because the principle of *Brown v. Board of Education* is normatively compelling to an audience in 1998. If that is not “presentism,” I do not know what would be.

Rubenfeld’s second example, the equality of women, also suffers from a reliance on presentist sensibilities. He argues that excluding women from the professions (an example he takes from *Bradwell v. Illinois*) is unconstitutional on the ground that there is no coherent interpretation of the Fourteenth Amendment that would forbid Black Codes but not require equality of women. Today, of course, no legislature would keep a law barring women from the professions on the books; such laws are antithetical to deeply held modern principles of justice. It is hard to imagine a law that would be enforced today that discriminates against women in a way that is indistinguishable from the Black Codes of the 1860s. The only instances of state-mandated sex discrimination that survive today’s political climate are those, such as not drafting women into combat or establishing single-sex schools, in

55 *Id.* at 1107.
56 *Id.*
57 I have argued elsewhere that a prohibition of segregation was indeed understood to fall within the core of the original meaning of the Fourteenth Amendment. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995). Apparently, Rubenfeld does not accept that reading of the history, but even if he did, it would not provide support for his argument about affirmative action. Indeed, the reasons the opponents of segregation thought that it was barred by the Fourteenth Amendment are entirely consistent with (even if they do not compel) the view that affirmative action is also unconstitutional, at least insofar as it involves differential treatment with respect to the fundamental rights of citizens. See *id.* at 990-1043 (discussing the arguments of members of Congress who sought to outlaw public school segregation as part of the Civil Rights Act of 1875).
58 See Rubenfeld, *supra* note 2, at 1109.
60 83 U.S. (16 Wall.) 130 (1872).
61 See Rubenfeld, *supra* note 2, at 1108 (“[I]f states violate the Fourteenth Amendment when they bar *blacks* from the professions, as that Amendment’s paradigm cases make unequivocally clear, there is every reason to hold that states also deny equal protection when they bar *women* from the professions. . . . [F]or what interpretation would a judge have to give to the Equal Protection Clause if he sought to explain why prohibiting women from practicing law did not violate that clause?”).
which the issues are complicated and there are arguably noninvidious bases for differential treatment.

In any event, Rubenfeld's claim that exclusion of women from the professions is morally indistinguishable from the Black Codes isn't a historical claim: reasonable people in the past, indeed until the very recent past, thought otherwise. That was true when the Fourteenth Amendment was adopted, and has been true for most of the decades since. Rubenfeld's conclusion, therefore, must be based either on the present-day consensus that state-mandated sex discrimination is unjust (presentism), or on an assertion of the absolute truth of the matter (natural law). Neither alternative is faithful to Rubenfeld's ostensible vision of a written constitutionalism based on the will of the people over time. The will of the people (other than in the present) turns out to be irrelevant to his argument.

Let us contrast this with the approach that a textualist, like Justice Scalia, would use. Scalia would ask three questions: (1) How would a person at the time of enactment have thought the text of the Fourteenth Amendment applied to the issue? (2) What does this nation's history and tradition have to say? (3) Is there any basis in the constitutional text or the constitutional tradition for displacing the judgment of the legislature today? In this way, the textualist respects the principle of written constitutionalism, which, as Rubenfeld eloquently reminds us, is the process of self-government over time.

So, my suggestion is to adopt Rubenfeld's diagnosis, but to reject his prescription. Written constitutionalism, as he says, can claim legitimate authority only as an effort by a nation to achieve self-government—meaning government of and by the people—over time. That means that the only legitimate sources for constitutional judgment are the will of the people at the beginning, the will of the people over time, and the will of the people in the present. In other words: originalism, traditionalism, and restraint.


**PANEL II**

**TEXTUALISM AND THE BILL OF RIGHTS**

**Moderator**  
Renee Lettow

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