Fordham Law Review

Volume 65 | Issue 4 Article 11

1997

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Recommended Citation
Jed Rubenfeld, *On Fidelity in Constitutional Law*, 65 Fordham L. Rev. 1469 (1997).
Available at: https://ir.lawnet.fordham.edu/flr/vol65/iss4/11

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Cover Page Footnote
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ON FIDELITY IN CONSTITUTIONAL LAW

*Jed Rubenfeld**

INTRODUCTION-FIDELITY

BEETHOVEN wrote a single opera, named *Fidelio*. As its name suggests, the opera is about fidelity—in particular, the fidelity owing between husband and wife. Fidelity may never have been expressed so exquisitely as it is by *Fidelio*.

But fidelity *to Fidelio* is another matter. Because *Fidelio*, Beethoven's only opera, turns out not to be Beethoven's only opera; it turns out not to be an opera at all. It is two operas: The original but long-forgotten *Fidelio* that Beethoven wrote in 1804, and then a second, substantially amended *Fidelio*—with its arias shifted around, its action altered, its music fiddled with (would a translator find an etymological link between fiddling and fidelity?)—that appeared ten years later.

The result in opera-land has been the formation of a purist party, which puts on the original *Fidelio*, conforming as closely as possible to Beethoven's "original intentions" (yes, that's the term they use), in competition with a progressive party, which not only mounts the amended version, but inevitably translates or updates the opera's 1789, French Revolutionary setting into something much more contemporary. The apogee of progressivism was the *Fidelio* performed recently at Lake Constance in Austria. The trouble for the Constance producers was that the Nazi concentration camp *Fidelio* had been done so many times it was already a cliche. And someone had already announced a Stalinist gulag *Fidelio*, so that was out. As a result, the Constance producers put on a space-ship *Fidelio*, by all accounts utterly baffling and a stunning commercial success. Rebuked for putting novelty before constancy, the Constance producers replied that when jaded operagoers attend a standard like *Fidelio*, they need to see something totally new if they are to see the opera at all.

So we have here two familiar strategies—a 1789 purism versus a modernizing translationism—for interpreting a two-centuries-old text. And we might say that the question before us is which of these two approaches offers better guidance for constitutional law?

But the answer of course is neither.

How might the Supreme Court follow the Lake Constance translationists, for whom fidelity requires interpretation to break with all precedents? Well, the Court might hold for example that love—monogamous love—is a form of slavery and hence unconstitutional under the Thirteenth Amendment. The opinion would explain that

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the Justices felt a need to say something new, in order to bring the Constitution home, to bring it alive, for people today.

And what of the purists? Now the analogy might be a Supreme Court decision ruling that slavery itself is constitutional, the opinion in this case explaining that the Court had decided to ignore the Reconstruction Amendments, and not because the Justices had been reading Bruce Ackerman, but because they had decided that the unamended Constitution, like the unamended *Fidelio*, was the truer, the purer, text.

The moral, then, does not have to do with "translation" as a good or bad account of fidelity to an aged text. The moral is that fidelity itself, fidelity as such, is far too capacious a concept to be the starting point for constitutional theory. Fidelity has no single true meaning. If constitutional judges may not favor the original over the amended text, if judges may not always say something new, the reason cannot be derived from the concept of fidelity as such. Constitutional law must begin a step back from fidelity: it must step back from fidelity-as-originalism, fidelity-as-integrity, fidelity-as-representation-reinforcement, fidelity-as-contemporary-ratification, fidelity-as-following-the-Voice-of-the-People-expressed-at-constitutional-moments, and every other version of fidelity that might be inferred from the constitutional or other interpretive literature. The true question for constitutional law is how—through what methodology, with what criteria—ought we to determine the kind of fidelity that constitutional law requires?

That is the question I want to address here. Let me summarize the answer first and then present an argument for it. My answer is that everything depends on putting together the two foundational questions of constitutional law—rather than treating them separately, and in a particular order of separateness, as they usually are. This Symposium is an apt illustration.

Every panel of this Symposium but the last asks how judges ought to maintain fidelity to the Constitution. Which is to ask: how ought the Constitution to be interpreted? That is one foundational question of constitutional law, and it tends to have the lion's share of attention. The last panel, however, asks whether the Constitution "deserves" fidelity. Which is to ask (among other things): on what ground can the Constitution, this document enacted long ago in conditions so different from our own, claim legitimate authority in the here and now? That is the other foundational question of constitutional law, and it is generally bracketed, left to the political philosophers or assumed to be the province of those interested in constitutional critique rather than constitutional interpretation. I submit that this is all wrong. The question of constitutional interpretation cannot be answered without an answer to the problem of constitutional legitimacy. We will never be able to say what sort of fidelity is appropriate to written constitu-

tionalism unless and until we can say how a written constitution can legitimately demand our fidelity. Or so I shall argue.

I. UNIVERSAL HERMENEUTICS

I am hardly the first to insist on a strong connection between legitimacy and interpretation in constitutional law. On the contrary, many contemporary approaches to constitutional interpretation make explicit appeal to legitimacy.[1] But not every approach to constitutional interpretation makes a legitimacy argument, and many schools of interpretation that do make the legitimacy argument also have proponents who argue on other grounds. I want to start with these other grounds. I want to consider those approaches to constitutional interpretation that seek as far as possible to bracket the question of constitutional law's legitimacy. I do so in order to make the point that such bracketed approaches cannot succeed.

What do people say when they try to get at constitutional interpretation while bracketing constitutional legitimacy? One strategy—I will call it the universal hermeneutic strategy—runs as follows. It says: "Interpretation is interpretation. What constitutional law needs is not political theory, but interpretive theory. It needs to understand what is true of all interpretation. It needs to understand what all textual interpretation consists of. It needs, in two words, a universal hermeneutics."

We may wonder that anyone would turn to hermeneutics to solve the riddles of legal interpretation, when not too long ago hermeneutics turned to legal interpretation to solve its own difficulties.[2] Nevertheless, this remarkable ambition—to understand constitutional interpretation in light of a unified account of all interpretation—is in fact pursued in several different quarters today.

There is, for example, a universal intentionalist position, according to which all interpretation must consist of an effort to determine the speaker's or author's original intent. It follows (we are told) that constitutional interpretation must be intentionalist too.[3] This hermeneu-

1. For example, originalists typically argue that non-originalist interpretation "violates the basic principles of government by the consent of the governed." Raoul Berger, Government by Judiciary: The Transition of the Fourteenth Amendment 296 (1977). All who decry judicial "activism" do so on legitimacy grounds. *See, e.g.*, Robert Bork, The Tempting of America: The Political Seduction of the Law 16-18, 160 (1990) (attacking judicial activism as illegitimate).

2. *See* Hans-Georg Gadamer, Truth and Method 324-30 (1994). Gadamer entitles this section, "The Exemplary Significance of Legal Hermeneutics," and finds in legal interpretation "the model for the relationship between past and present that we are seeking." *Id.* at 324, 327-28.

3. *See, e.g.*, Stanley E. Fish, There's No Such Thing as Free Speech, and It's a Good Thing, Too ch. 12 (1994); Steven Knapp & Walter B. Michaels, *Intention, Identity, and the Constitution: A Response to David Hoy*, *in* Legal Hermeneutics 187 (G. Leyh ed., 1992); Paul Campos, *Against Constitutional Theory*, 4 Yale J.L. & Hum. 279 (1992).

tic argument for originalism differs from familiar originalist argumentation. The familiar originalist freely concedes the existence of a variety of forms of textual interpretation; as far as he is concerned, there may be no objection to a space-age interpretation of a Beethoven opera. But when it comes to constitutional law, he says, originalism is the only *legitimate* interpretive method that judges may engage in.[4] By contrast, the universal intentionalist says that originalism is the only *possible* or the only *conceptually tenable* mode of interpretation, whatever text is to be interpreted.

Universal intentionalism is not, however, the only unified account of interpretation, nor is it the only one that has been applied to constitutional law. Another is what we might call vulgar deconstruction, according to which there is no such thing as a correct or incorrect interpretation: all interpretation is construction; all interpretation is misinterpretation.[5] The implications of this position for constitutional law are a little unclear, but a typical claim is that judges should more explicitly recognize the elements of play, indeterminacy, and ideology in their adjudications.

A third—and more important—universal hermeneutics has been suggested by Ronald Dworkin. On this view, all interpretation consists of striving to make the interpreted object "the best it can be."[6] It follows that legal interpretation must aspire to make the law the best it can be, which in the case of constitutional law turns out to entail a largely moral-philosophical (or "justice-seeking") approach, joined with a process of judicial opinion-writing analogized to a "chain novel."[7]

These three positions—universal intentionalism, vulgar deconstruction, and best-it-can-be interpretation—arrive at constitutional law by way of a common strategy. They do not rest on claims about the distinctive features of this revolutionary institution called constitutional law; they do not emerge from a political theory specifying the place of written constitutionalism in democratic self-government. They rest rather on claims about the nature and requirements of interpretation.[8]

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4. *See, e.g.*, Richard Posner, Law and Literature 228-29 (1989).

5. No one affirmatively endorses vulgar deconstruction, just as no one affirmatively endorsed vulgar Marxism. But the following works fall at least on occasion into vulgar deconstruction. *See, e.g.*, Jonathan Culler, On Deconstruction: Theory and Criticism After Structuralism (1982); Gary Peller, *The Metaphysics of American Law*, 73 Calif. L. Rev. 1152 (1985).

6. Ronald Dworkin, Law's Empire 53 (1986).

7. *Id.* at 228-32, 380.

8. Of course, to make sense at all, the universal hermeneutic approaches to constitutional law must start with the premise that judges are to *interpret* when deciding constitutional cases. At bottom, therefore, these approaches too may rest on minimal claims about the legitimate role of judges in a democratic system, although the premise that judges should be interpreting could also be defended on other grounds. The point is that these approaches do not make legitimacy drive the kind of interpretation—the interpretive method—that they would apply to constitutional law. They

To analyze these positions, we could take the bait and plunge into interpretive theory, to see whether we agree with any of the proffered hermeneutics. Instead, I want to hazard a very different argument. In every one of these positions, a certain fatal incompleteness—a self-referential incompleteness—is inherent in the argumentation. In every case, the would-be universal hermeneutics turns out to presuppose the possibility of another mode of interpretation, independent of the one advocated. And this other mode of interpretation, that should have been ruled out but instead turns out to have been presupposed, makes it impossible to claim that the interpretive theory dictates a specific methodology for constitutional law. Instead, we are left in every case with at least two possible modes of interpretation, and only independent considerations—only considerations, I shall argue, of legitimacy—could adjudicate between these two modes of interpretation when it comes to constitutional law.

Think about universal intentionalism. Suppose that a judge is attempting to read a text using a methodology that he says is non-intentionalist. Perhaps he is seeking to make the text the best it can be. Perhaps he is seeking to arrive at the reading that will best further justice. Or perhaps he just skips every two words and makes the best sense he can of what is left over.

The universal intentionalist must respond in one of two ways. He could say that every one of these manners of reading the text, along with every other imaginable way of reading it, is in fact intentionalist. That claim would keep his thesis intact, but render it trivial. Or he could argue that non-intentionalist readings are possible, but that they are not "interpretation" at all, properly understood. This is just what Stanley Fish, in his universal intentionalist mode, says:

> [S]omeone committed to the distinction between intentionalist and nonintentionalist interpretation might reply . . . that one can always find meanings in a text other than the ones intended by the author. This statement is undoubtedly true, but the question is, in what sense would that action be an instance of interpreting? Suppose, for example, my method of interpreting a text consists of taking every third word of it and seeing what patterns of significance then emerged. . . . [In that case,] I am playing with the text . . . . I am not trying to figure out *what it means* but trying to see what meanings it *could be made to yield*. I have no necessary quarrel with those who want to do that . . . , but *I do not think it should be called interpreting*.[9]

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rather insist that constitutional interpretation, insofar as it is to be interpretation, must follow a specified method.

9. Fish, *supra* note 3, at 185 (emphasis added). I have omitted sentences in which Fish considers the possibility that the every-third-word reader imagines that the author wrote the text in an every-third-word code. *Id.* As Fish observes, on that supposition, the reader is engaging in a straightforwardly intentionalist decoding. *Id.*

There is a difficulty in this passage. What we are reading is itself an interpretation—of "interpretation"—and it is not an intentionalist one.

Here is what it means to "interpret" a text, we are told, but the *here* is not located in any particular speaker's intentions. Here is what it means to say of a text "what it means." This is not a claim about what you or I or any particular author intend or intended when using the word "interpretation." Nor is Fish saying merely, "This is what *I* intend when *I* say 'interpretation.'" We are told rather what interpretation *really* means: what conduct counts as "interpretation," properly so called. For the universal intentionalist, therefore, all instances of proper interpretation are intentionalist—but one.

We might call this incompleteness Godelian, because it consists of a failure by a purportedly all-embracing formula to cover the self-referential case. Perhaps it may seem at first a technicality, a clever point with no real consequences. But it is no technicality. If "interpretation" has a true or proper meaning, regardless of what a given user has in mind, then why not the "freedom of speech" or "the equal protection of the laws"? Universal intentionalism, through its own propositions, opens up a mode of interpretation—a mode of interpreting something rightly, of getting it right—that is not intentionalist.

A similar self-referentiality problem is notorious in vulgar deconstruction. For vulgar deconstruction also offers an interpretation of interpretation, and it not only asks us to read for the meaning that its author intended, but it also purports to get interpretation right. But this means that there must, within vulgar deconstruction, be at least one set of propositions falling outside the domain of vulgar deconstruction: namely, the propositions of vulgar deconstruction itself. To understand these propositions as their proponent would have us understand them, we must both take them for what he means to say and take them as an effort to interpret interpretation rightly. Vulgar deconstruction cannot say, "Oh by the way, everything we tell you about interpretation is also just another ideological construct, with no claim whatsoever to truth." For then vulgar deconstruction is saying nothing at all, as if I should say to you, "Your father has just died, but by the way, what I am saying makes no claim whatsoever to being true." Vulgar deconstruction cannot make itself understood without establishing at least the possibility of a mode of interpretation—actually, two modes of interpretation—that its putatively universal hermeneutics was supposed to have ruled out.

The same is true of Dworkin's account. Suppose we insisted on interpreting the Constitution in a fashion we conceded to result in making the Constitution something other than the best it could be: say, in accordance with the original intentions (even in cases where we conceded that a different rule was possible and would have made the Constitution a better one), or in such a way as to make it the worst

Constitution it can be. Dworkin would be obliged either to reply that these possible approaches to interpretation (and all other possible approaches) were in fact disguised methods of striving to make the Constitution the best it can be (which would render his claim trivial), or else to say that we were not interpreting correctly. He would then need to validate his claim that interpretation, correctly understood strives to make the interpreted object the best it can be. How would he do so?

Dworkin can and does say that his interpretation of interpretation makes interpretation the best it can be.[10] He thereby avoids inconsistency. But he does not thereby avoid incompleteness. For Dworkin cannot say that his interpretation of interpretation is correct *because* it makes interpretation the best it can be. With respect to everything but interpretation, Dworkin can equate rightness in interpreting with making the interpreted object the best it can be. This notion of right interpretation is intelligible, however, only if it makes an exception in one case—the case of interpretation itself.

For even if Dworkin's interpretation of interpretation *did* make interpretation the best it could be, it could not claim correctness on this ground. That would make the argument circular. As one who said: "Interpretation properly consists of treating every text or practice as something whose principal purpose is to reveal the nature of God. To interpret something correctly just is to interpret it as having this purpose. How do I validate this assertion? Nothing could be easier: This interpretation of interpretation makes interpretation into a practice whose principal purpose is to reveal the nature of God. Therefore, it is the correct interpretation of interpretation." Or: "Interpretation properly consists in making the interpreted thing the worst it can be. To interpret something correctly just *is* to interpret it in such a way as to make it the worst it can be. How do I validate this assertion? Nothing could be easier: This interpretation makes our practices of interpretation the worst they can be. Therefore, it is the correct interpretation of interpretation, don't you see?"[11]

To validate his interpretation of interpretation, Dworkin cannot *merely* say that it makes interpretation the best it can be. He must

10. To avoid self-contradiction, Dworkin must claim that his interpretation of interpretation *does* make it the best it can be. This requirement he recognizes. *See* Dworkin, *supra* note 6, at 49 ("[A]ny adequate account of interpretation must hold true of itself."). He apparently thinks that this requirement exhausts the self-referentiality problem. It does not.

11. During the colloquy after oral presentation of this paper, Professor Dworkin replied that math and science are also subject to a similar circularity or incompleteness. *See* Remarks, *Fidelity as Translation: Colloquy*, 65 Fordham L. Rev. 1507, 1515-16 (1997). With respect to Professor Dworkin, math and science stand on a somewhat firmer footing, making somewhat firmer claims on our belief, than does *Law's Empire*. We cannot all go around making circular arguments and then, when this circularity is pointed out, reply that math and science are circular too.

also say: *and*—not "hence," but "and"—this is the *right* interpretation of interpretation. He must invoke (implicitly or explicitly) some criteria of rightness that identify the right interpretation of interpretation *as* the one that makes it the best it can be, standing independent of the argument showing that his interpretation of interpretation *is* the one that makes it the best it can be. Which means: to validate his interpretation of interpretation, he must rely on criteria of interpretive correctness independent of those given by his theory of correct interpretation. In Dworkin's writings, these independent criteria appear in the form of broad-brush empirical claims, suggesting that when we interpret things, we do in actual fact try (whether we know it or not) to make the interpreted object the best it can be. Which is to say: he claims to have identified the actual purposive structure of the actual practice of interpretation. I am highly skeptical of this claim, but its correctness is not at issue here.

The point, rather, is that if there are independent criteria for identifying the right interpretation of interpretation—if there are criteria of rightness in identifying the actual purposive structure of interpretation—then we should in principle be equally able to follow these same criteria in interpreting the actual purposive structure of the freedom of speech or the equal protection of the laws. Thus, to make himself understood, Dworkin must open up the possibility of a mode of interpreting rightly that his universal hermeneutics was supposed to have ruled out. What would this mode of interpreting be? It would be something like intentionalism: but not a crude intentionalism in which certain authors (or participants in a practice) are permitted to tell us what they intend, but rather a penetrating intentionalism, in which we tell them what they *really* intend, whether they think so or not. (This feature of Dworkin's interpretive practice becomes quite apparent in *Law's Dominion*, where his argument turns out to take the surprising form of an empirical claim about what individuals today actually believe, whether they admit it or not.)

Now, what should we make of this incompleteness that appears and reappears in every one of these universal hermeneutics? There are three lessons:

(1) A universal interpretation of interpretation that purports to get interpretation right cannot without self-referential incompleteness tell us that right interpretation always consists of determining a speaker's or writer's intentions.

(2) A universal interpretation of interpretation that asks to be understood in accordance with its author's intentions and offers to get interpretation right cannot without self-referential incompleteness tell us that there is no such thing as right intentionalist interpretation.

(3) No universal interpretation of interpretation that purports to say what right interpretation consists of can achieve closure.

Conclusion: Interpretive theory cannot dictate a single methodology of right interpretation. There will always be more than one possible mode of interpretation, for all that theorizing about the concept or practice of interpretation can reveal. In particular, at an absolute minimum, it would seem that there must always be at least these two possible modes of interpretation, neither of which can be ruled out *a priori*: interpretation in conformity with authorial intention, and interpretation that purports to get the interpreted object right independent of intentions. I do not mean that these two modes of interpretation are themselves singular rather than plural (there could be quite a few different intentionalisms, just as there could be quite a few versions of right interpretation independent of intentions). I do not suggest that there are no modes of interpretation that can combine the two in fruitful ways. I merely say that neither can be ruled out in advance.

If this is right, then constitutional law must look to criteria outside the philosophy of interpretation to decide what sort of interpretation is appropriate to it. It must turn its attention to what kind of text the Constitution is and who its interpreters are.

II. LEGITIMACY

Why, to take what is at once the simplest and hardest of questions, can't judges apply the unamended text when they render constitutional decisions, if that text seems to them the truer or purer national charter? Why can't judges rule love unconstitutional if that's what it takes to bring the Constitution alive for a contemporary audience? What does it mean to say with certainty that judges cannot do these things? It does not imply a set of premises concerning the nature of interpretation. It implies a set of premises concerning legitimacy: a set of premises concerning the legitimate role of judges in a democratic polity when rendering decisions irreversible through the ordinary political process. In constitutional law, legitimation precedes interpretation.

But if the constraints of legitimacy incumbent on constitutional judges are put in question, as they must be, there can be no answer to this question without asking further what gives constitutional law as such—this past-enacted, historically-given law—legitimate authority in the present? No one can say "a judge who does X with the Constitution acts legitimately" without providing an account of why the Constitution's having any result (whether X or not-X) is legitimate. (It is just the mistake of typical originalists—Raoul Berger and Robert Bork are good examples—to suppose that they can argue about the requirements of legitimacy that apply to judges when engaging in constitutional adjudication without thinking through the legitimacy of constitutional adjudication or constitutional law as such.)

Constitutional interpretation is not to be derived from interpretive theory, nor even from legal theory (jurisprudence), but from political theory: from a theory accounting for the revolutionary place of written constitutionalism in democratic self-government. In the second half of this paper, I summarize one such theory and the implications it would have, if accepted, for constitutional interpretation.

A. *The Problem of Time*

The chief difficulty in trying to say why or how constitutional law could claim legitimate authority is simple to identify: the difficulty is that no account of political legitimacy could ever yield the conclusion that this aged text (even on the heroic supposition that it represented the legitimate democratic will of America a century or two ago) exerts any legitimate authority over American citizens today. The past is past. It is not a source of legitimate authority in the present.

Or so we have been told, and with considerable confidence. For example, Joseph Raz states, "[t]ake a law made at the beginning of this century. No account of legitimate authority can yield the conclusion that we are now subject to the authority of the long-defunct maker of that law."[12] Raz can make this claim without feeling the embarrassment of offering no argument to prove his negative because he merely states what many take for granted: that political legitimacy, whatever it may be, is a thing of the here and now.[13]

Nor is this a view that came into fashion recently. "[T]he earth belongs in usufruct to the living," wrote Jefferson. "The dead have neither power nor rights over it."[14] A written constitution is, therefore, a scandal, a deviant institution, an offense against nature. "[B]y the law of nature, one generation is to another as one independent nation to another."[15]

The basic problem identified in these positions, past and present (notwithstanding the significant differences among them), is the same. It is the constitutional problem of time. We *here and now* (the implication always seems to be) could govern ourselves by giving ourselves law *here and now* (provided that certain deliberative conditions are met, that we define this "we" appropriately, that we reason properly,

12. Joseph Raz, *Why We Interpret* (unpublished manuscript on file with the author).

13. This premise, for example, underlies the whole idea of the "countermajoritarian difficulty" so influential in American constitutional thought. *See* Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16-17 (1962).

14. 5 The Writings of Thomas Jefferson, 1788-1792, at 116 (1895).

15. Thomas Jefferson, Letter of Sept. 6, 1789 to James Madison, *in* Thomas Jefferson: Writings 959, 962 (M. Peterson ed., 1984). *See also* Thomas Paine, *The Rights of Man*, *in* The Life and Major Writings of Thomas Paine 251, 251 (P. Foner ed., 1961) ("[E]very age and generation must be free to act for itself, *in all cases*, as the ages and generations which preceded it.") (emphasis added).

or that other stipulated conditions were met). But even if we imagine an American "People" in the most romantic (Bickel called it "mystic"[16]) constitutional sense—as inclusive, collective, and participatory as you like—this people would not be self-governing if its governance were governed by law the people gave itself two hundred years ago. Only we here and now have legitimate authority over ourselves here and now.

We should have to go back beyond Jefferson to get to the beginnings of this view. Hobbes, for example, made a similar point:

> The Soveraign of a Common-wealth, be it an Assembly or one Man, is not Subject to the Civill Lawes [sic] . . . . For he is free, that can be free when he will: Nor is it possible, for any person to be bound to himself; because he that can bind, can release; and therefore, he that is bound to himself onely, is not bound.[17]

No sovereign self can bind himself "to himself." If so, then a written constitution, precisely insofar as it represents an attempt by sovereign people today to make its own present will binding tomorrow, is absurd and contradictory.[18] It violates the very principle of self-government on which the Constitution claims legitimacy in the first place.

What principle? Rousseau stated it in exact if exacting terms: "[T]he general will that should direct the State is not that of a past time but of the present moment, and the true characteristic of sovereignty is that there is always agreement on time, place and effect between the direction of the general will and the use of public force."[19] The operative principle is nothing other than government by the will of the governed—the present, living will of the present, living governed.

B. *Superficial Rejoinders*

There are familiar, superficial answers to this conundrum. (What conundrum? The conundrum of the Constitution's legitimacy, given its historical givenness and hence its manifestly anti-democratic consequences.) One such answer is that the Constitution escapes the snare of time by the simple expedient of providing for its own amendment. Through Article V, which sets out an amendment procedure available to the people at any moment, the Constitution disclaims "perpetual" authority. It never purported to bind subsequent generations or even the same generation at a later point in time. It does not bind the sov-

16. Bickel, *supra* note 13, at 17.

17. Thomas Hobbes, Leviathan pt. 2, ch. 26, at 204 (1965).

18. For an excellent discussion of this line of thought, as it relates to constitutionalism, see Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* Constitutionalism and Democracy (J. Elster & R. Slangstad eds., 1988).

19. Jean-Jacques Rousseau, *On the Social Contract*, *in* On the Social Contract 157, 168 (Judith R. Masters trans., 1978).

ereign, only the politicians. Citizens can amend whenever they choose, and the conundrum thereby disappears.

But citizens cannot amend the Constitution whenever they choose. On the contrary, amendment is very difficult: Article V imposes stringent supermajority requirements and onerous procedural obstacles before it permits amendment. As a result, as a practical matter, constitutional law in America does override popular will on any given day. And that is part of its point. When it comes to certain elemental matters of political power, justice and liberty, we are in fact governed, and designedly so, by reference to a text enacted generations ago and interpreted by a judiciary insulated from popular will.

It might yet be tempting to declare, all the same, that the majority of Americans today do in fact consent to being ruled by the Constitution in this way. Hence there is no true temporal conflict after all. So long as the Constitution retains current popular consent, all the temporal difficulties again disappear.

But this is no answer. Assuming it could overcome the usual weaknesses in arguments from tacit consent,[20] the claim still would not answer the problem of time. By locating legitimate authority in present majority will, it would concede the following: if today's majority genuinely, deliberately wanted to establish a church or enslave a minority, there would be no reason of constitutional principle why this majority should not have its way. But American constitutionalism stands precisely for the principle that there *is* a reason why such a majority should not have its way: it would violate the Constitution. Constitutionalism affirms that there are limits *legitimately and rightfully* imposed on majority will by virtue of the democratic enactment of a text a century or two ago. The problem of time is nothing other than the problem of explaining how the majority today can rightfully and legitimately be bound by—held to, *against its will*—limits on its power enacted generations ago. Invoking current majority consent as the source of the Constitution's legitimacy does not save constitutionalism from the problem of time. It repudiates constitutionalism, implicitly conceding that the problem of time is insuperable.

In other words, if we say that a constitution can escape the problem of time just insofar as it continues to comport with present majority will, we are saying that a constitution remains fully legitimate only to that extent. But a fully legitimate constitution, so defined, could not

20. The putative grounds of implied consent are typically failure to amend, failure to leave the country, or failure to take up arms. It is not hard to show that each of these "failures" is too weak a reed on which to sustain a legitimate inference of present majority consent. But I don't rest the argument on these points. Suppose we grant that, as a matter of fact, a majority of Americans today, in an up or down vote on the Constitution as a whole, would vote in favor of it. I hope and expect they would. The real question is whether the existence of current majority consent to the Constitution somehow does away with the constitutional problem of time. For the reasons that follow in the text, it does not.

fully function *as* a constitution. It could, to be sure, impose restraints on local or individual actors who acted contrary to the present will of the national majority. But it could not perform at least one definitive constitutional function: it could impose no restraints on governmental action that accurately represented national majority will. If the Constitution's purchase on legitimacy depends on its conformity with present majority will, the price of attaining this legitimacy would be constitutionalism itself.

The embarrassing conclusion is that constitutional thought in America has never answered Hobbes's conundrum. Constitutional law has no account of its own legitimacy.

C. *Democracy as Demo-graphy*

Constitutionalism's relationship to democratic self-government will never be understood until we rid ourselves root and branch of the premise that democratic self-government consists ideally in government by the will or consent of the present-day governed. This premise, common to virtually all thinking about self-government in the modern era, is what produces a seeming antithesis between constitutionalism and democracy; it is what underlies Bickel's countermajoritarian difficulty, and it is what motivates most of the contemporary schools of constitutional interpretation.[21]

Government by the will of the governed has a certain temporal orientation. It is a present-tense orientation. On this view, we are ideally self-governing if we are governed at each successive moment by nothing but our own will at that moment. I have called this view "speech-modeled" because its present-tense orientation invariably leads it to a rhetoric of popular voice, or dialogue, or speech, when articulating the core meaning of democracy.[22] From this perspective, a constitutional text, handed down to us from the past, necessarily confronts freedom as an external threat, a dead letter that would choke the living voice of the people. It follows, from an interpretive point of view, that constitutional law must take the position either that the "voice of the people" from the moment of ratification somehow remains supreme today (originalism), or that constitutional law must become the vehicle of present popular voice (representation-reinforcement; contemporary-ratification), or perhaps that constitutional law must endeavor to hand down decisions to which citizens would give their consent at some predicted moment (early Bickel; hypothetical-consent models). None of these positions can do justice to written constitutionalism.

21. *See* Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 Yale L.J. 1119, 1127-34 (1995).

22. *See id.* at 1123-24.

There is another conception of self-government we might have, which is temporally extended rather than oriented to the will of the governed at any particular moment. On this alternative view, self-government is a project in which a people attempts to govern itself over time: to live up over time to principles to which it has committed itself in writing, apart from or even contrary to its will at any particular moment—including its will at the present moment, and including its will at the so-called "constitutional moment."

Contrast two images of self-government. In the first, the citizenry gathers in a polis every day—or at regular, frequent intervals—to deliberate on public affairs and ultimately to deliver up the voice of the people (to which governance must then conform). In the second, a people struggles through a time-consuming politics of constitution-making to commit to writing a set of foundational principles to govern the life of the nation for a long period of time. The first image aspires after the Rousseauian ideal of conforming governance as nearly as possible to present will or voice of the governed. The second does not. It aspires rather toward the uniquely human freedom to give one's life a purpose, a meaning, a text: the freedom to write, rather than the freedom of speech.

Man does not achieve liberty by acting on his own will at each successive moment. Animals have such liberty. Man's peculiar relation to time is a condition of his being and his freedom. Of all animals, only man makes history; only man makes himself over time. This condition of human being and human freedom has its own condition: writing. Man alone can write. Man relates to himself over time through writing. Autonomy is always auto-biography: It is self-life-writing—not after the fact, but before and during the fact as well.

This means that freedom is possible for us only over time. A being is free in the human sense when holding itself to a commitment laid down by itself for itself over time, even if this holding happens to run against its desires at any particular moment. Man must commit himself to be free. He must give his life character. Which is to say, he must give it a text.

And this means that for persons to be politically self-governing, they must have more than a politics permitting themselves to give voice to their will. If that were all they had, their political order might be able to deliver law (by making the will of a past moment govern), it might be able to deliver self-rule (by making the will of the present moment govern), or it might be able to deliver justice (by making the perfected will of a predicted moment govern). But it could never do justice to self-government under law. Political legitimacy consists in a confluence of just these three aspirations: law, self-rule, and justice. Speech-modeled self-government relentlessly disjoins them in a competition among past, present, and predicted will.

To be free, a people must attempt the kind of self-government that can be realized only over generations. It must attempt the reins of time.

American constitutionalism broke from the two-thousand year history of democracy by virtue of its effort to exercise the freedom to write: to make a politics of popular authorship (rather than popular voice) the foundational or constitutional politics of the nation. Before late-eighteenth-century America, political theory had sometimes found political liberty to require a democratic constitution, but had never supposed that a democratic constitution had to be formed through a democratic politics. What was genuinely revolutionary in the American Revolution was its creation of a constitutional politics—a democratic politics of constitution-writing.[23]

There is no antithesis between written constitutionalism and democratic self-government. Constitutionalism—that is, written constitutionalism of the American variety—*is* democratic self-government. It is democracy not on the model of popular voice, but on the model of popular authorship or writing. It is democracy as *demo-graphy*. It is self-government over time.

To make good on this picture of self-government, I would have to persuade you that there is such a thing as a people that exists over time and that is properly regarded as the temporally extended subject of self-government. I would also have to persuade you that there is such a thing as a commitment, which is properly regarded as a normative operation irreducible to any act of will. And I would have to tell you more about the difference between voice-modeled democracy and demo-graphic democracy.

But I won't try to do any of that here and now. Instead, I want to skip directly to the problem of interpretation. Assuming I could render a compelling account of demo-graphy, what sort of interpretation would follow from it?

III. PARADIGM-CASE INTERPRETATION

Demo-graphy insists on two essential requirements for constitutional interpretation. First and foremost, interpretation must always respect the revolutionary politics of constitution-writing introduced by American constitutionalism in the late eighteenth century. This means that interpretation must always remain faithful in a determinate, recognizable way to the actions, the achievements, and the text wrought by those who fought for and memorialized our constitutional enactments. At the same time, however—and this is the second requirement of demo-graphic interpretation—interpretation cannot be wholly reduced to the original will or intentions, for then it would

23. Madison was well aware of the world-historical character of this innovation. *See* The Federalist No. 38 (James Madison) (Gary Wills ed., 1982).

have privileged a single moment of democratic will and thereby contradicted its fundamental premise, which is that self-government must never be reduced to government in accordance with the will of the governed at any particular time.

How are these two demands to be satisfied? The answer lies in the use of *paradigm cases.*

Demo-graphy insists that the interpretation of a constitutional enactment must always adhere to and take its shape from the original paradigm cases: the core applications that the enactment was originally intended to have. Consider the following example. In 1999, Alabama enacts a statute barring blacks from becoming members of the Bar, from serving on juries, and from owning property. The Supreme Court finds no Fourteenth Amendment violation.

What is wrong with the Supreme Court's interpretation?

Well, one thing we might say is that the Court's interpretation is grotesque as a matter of justice or morality. But we should also be able to say that the Court's decision is grotesque as a matter of interpretation. If the Fourteenth Amendment means anything, we ought to say, it means that such a statute is unconstitutional. But this is so not as a matter of logic, nor as a matter of incontrovertible plain meaning, nor as a matter of the requirements of interpretation as such. It is so as a matter of history. The Fourteenth Amendment has certain paradigm cases, and all interpretation of that Amendment must adhere to and take its shape from them.

Adhering to paradigm cases respects the popular politics of constitution-making, but also accounts for the exercise of normative judgment in constitutional law. The judge's task is to extrapolate from the paradigm cases—to formulate principles or rules that capture these paradigm cases within the language of the text committed to writing, and then to apply those principles or rules to every other case, regardless of the original intentions. Thus in the case of the Fourteenth Amendment: what rules or principles does the guarantee of "equal protection" stand for if it prohibits at its core imposing on blacks the kinds of disabilities we have just described? This question can be answered in more than one way. The paradigm cases will rule out many possible interpretations of constitutional provisions, but they will not rule only one in. The place of normative judgment in constitutional interpretation is the place at which a principle is settled upon for a constitutional guarantee: a principle that must capture the provision's paradigm cases and that must, to be successful, offer itself as an account of what made this guarantee worthy of constitutional struggle—an account of what the guarantee means in the life of the nation.

To understand the phrase "what the guarantee means in the life of the nation," think for a moment of a personal (rather than a constitutional) commitment. You are married; perhaps you have had a child. You wonder what obligations are entailed by your commitment(s).

There will be certain right and wrong answers to this question, but there will be many answers neither ruled out nor ruled in. One thing is clear, however: the correct interpretive methodology for you to pursue cannot be to inquire into what you intended, or said to yourself, or would have said to yourself, at the "original" moment. To make a commitment is to engage oneself to something in part outside oneself, and hence the interpretation of a commitment is always interpretation of that to which you committed yourself, rather than an interpretation of your mental state at any particular time.[24] At the same time, however, interpretation of a commitment is not abstract philosophy: The question is not, ultimately, what child-rearing must mean to any rational being, or what child-rearing ought to mean to everyone, but what the meaning of children or family is in your life (even if its meaning might be something quite different in someone else's). Through this activity of interpretation and living-under, you draw together or re-collect your temporally distant experiences. You give your life character; you give it a text.

Constitutional interpretation serves the same function, and it is likewise not moral philosophy, even while its task, most broadly stated, is to elaborate on the meaning of sweeping constitutional principles. What keeps the interpretation of a constitutional commitment anchored as interpretation of this nation's commitment (rather than what the same guarantee might mean in the life of some other nation) are the paradigm cases. In one particular, however, a judge's interpretation of a constitutional commitment differs fundamentally from your interpretation of a personal commitment. You are free in most cases to repudiate your commitments entirely. But you are also free to rebuild your commitment (as it were) one plank at a time: in this way, without ever repudiating your familial commitments, you might find yourself living three thousand miles away from your family, perhaps calling by telephone once every six months. As it happens, the rebuilding-while-afloat metaphor was the one that Beethoven haled in describing the updated *Fidelio* of 1814: "[B]y your work," Beethoven wrote in gratitude to the person most responsible for the changes, "you have salvaged a few good bits of a ship that was wrecked and stranded."[25]

Judges have no authority to remake the ship, even if it is done plank by plank, even if it will be stranded otherwise. Judges have the authority neither to repudiate a constitutional commitment, nor to preside (through a process of gradual interpretive substitution) over its transformation into something altogether different from what it was.

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24. Robert Cover made a very similar point fifteen years ago. *See* Robert Cover, *Nomos and Narrative*, *in* Narrative, Violence and the Law: The Essays of Robert Cover 93, 144-46 (M. Minow et al. eds., 1995).

25. *Tentimento: This Summer the Lincoln Center Festival Offers a Study in Contrasts*, Opera News, July 1996, at 42.

Judges are bound, in preserving the *identity* of the commitment over time, to preserve something more than just its *continuity* over time. Day can turn to night by infinitesimal degrees, but judges have no authority to sail off into that darkness, not even by a slow, crepuscular passage. So long as interpretation adheres to the paradigm cases, so long as it takes its shape from them, it will remain recognizable as the interpretation of the principles to which the nation committed itself—rather than as creations of, or evolutions into, brand new ones.

The paradigm-case method is, however, far from originalism. For example, the protection of women from sex discrimination can easily be derived from the paradigm case of protecting blacks from race discrimination, even if every single framer and ratifier of the Fourteenth Amendment intended that amendment to permit sex discrimination. What the framers intended a constitutional right *to permit* is of no consequence from the point of view of demo-graphy; but what those who fought for a constitutional right intended it to forbid, at its core, is ineradicable.[26]

If these conclusions seem rather predictable and straightforward, I want to say two things. They should be predictable and straightforward: constitutional interpretation should be structured by its history in the way described, and in this country it has been shaped in large, conspicuous ways by the paradigm-case method throughout its development (examples will have to await another occasion). But observe that the current dominant schools of constitutional interpretation fail to arrive at what ought to be predictable and straightforward.

A strict originalism is able (like demo-graphic interpretation) to insist on the unalterability of the paradigm cases, but it must twist and turn in agonies of rationalization if it wants to account for the great departures from original intent—the single example of *Brown v. Board of Education*[27] is sufficient here—that demo-graphic interpretation can wholeheartedly embrace. The "softer" versions of originalism (advocating fidelity to the originally understood "principles"[28] or purposes[29] of the framers, even if the framers' specific intentions have to be discarded along the way) may be able to cover cases like *Brown*, but in doing so they lose their hold on the paradigm cases. For if the judge's job is to fulfill the general principles or purposes of the framers, without anchoring these principles or purposes in any specific applications, then, given today's "superior" understanding and changed

26. Just the opposite is true in the case of a constitutional grant of power. Here the paradigm cases are cases of what those who fought for the constitutional provision intended most centrally to permit (what acts they intended most centrally to authorize). Here, what they intended to be prohibited is of no consequence.

27. 349 U.S. 294 (1955).

28. *See* Bork, *supra* note 1, at 169.

29. *Id.* at 82. Here Bork argues that originalism actually compels the result in *Brown* because "equality and segregation were mutually inconsistent, though the Ratifiers did not understand that." *Id.*

circumstances, no particular result is secure. (Perhaps a modern judge, having read the *Bell Curve*, will assert that the "equal protection" of different racial groups now requires a paternalistic attitude toward certain of these groups according to their abilities.)

And all the non-originalist versions of judicial review, from processualist to fundamental-values to pure justice-seeking approaches, fail entirely to guarantee the paradigm cases. They could say, of the hypothetical given above, that a court upholding a new set of black codes had not made the Constitution the most just, or the most representative, or the most congruent with current values, and so on. But they could not see that such a court had committed an inexcusable *interpretive* offense preceding all inquiry into whether the result was otherwise justifiable or unjustifiable. And in this blindness, these schools of interpretation fail to give us any adequate criteria to distinguish between interpreting our constitutional commitments and creating brand new ones.

The predicament of modern constitutional interpretation is as follows. An account of constitutional interpretation must be able (1) to distinguish interpreting from rewriting, rooting interpretation somehow in text and history; and yet (2) to explain and incorporate the undeniable role of normative judgment in constitutional law, beyond the letter of the law, and sometimes in defiance of the original intentions. None of the dominant schools of interpretation can negotiate this double demand. Thus originalism satisfies the first, but goes into furious denial when confronted with the second. The situation is just the reverse with the fundamental-values approaches. The reason is that all these schools are speech-modeled, and this double demand is but one manifestation of constitutionalism's simultaneous dedication to legality and justice—twin aspirations that the model of speech must invariably disjoin.

But demo-graphy, which joins the aspirations of law and justice into a single project of temporally extended self-government, can negotiate this double demand. The paradigm cases serve always to supply criteria to distinguish interpreting from rewriting, while their under-determinacy (and the concomitant need for interpretation of foundational commitments) always requires normative judgment beyond the letter and original intentions.

Let's not ask judges to hear the "Voice of the People" supposedly expressed at constitutional moments that fail to eventuate in a constitutional text. Let's not look at our judges as chain novelists of constitutional law. Let us rather look at the Constitution as a set of written political commitments whose definitive structure is and always remains given by what those who fought for the constitutional commitment fought most centrally to accomplish. And let us ask our judges to elaborate those commitments, never fearful of finding that these

commitments commit us to more than what was originally supposed, so long as they are not held to commit us to less.