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Textualism and the Dead Hand

Frank H. Easterbrook*

There is much in Professor Rubenfeld's paper that is interesting but unrelated to law, and there is some that is related to law but not to the subject of textualism. In what space remains the paper makes an audacious claim: that textualists are trapped in Jeffersonian thought despite themselves, and that the sole basis for textualism is a belief that people at each instant are free to decide for themselves. A belief in the present paradoxically imprisons textualists in the past:

> I am saying that the textualist—who regards the Constitution as the expression of the voice of the people of 1789, and who does so because he ultimately believes constitutional law ought to express nothing other than the democratic will at the time of enactment, with the people left free at each succeeding moment to change their minds as they please—has no explanation for the rule of the dead.[1]

In other words, textualists are positivists, and positivists can't explain why things *ought* to be one way rather than another. The faculty of Yale little loves positivists, but Rubenfeld's claim is bolder, that textualists as a group "never had any account—no account at all—explaining why the will of the dead should govern."[2]

This sweeping claim is wrong, and not simply because all generalizations are false. This particular generalization is false and irrelevant at the same time, and let us start with its irrelevance. Textualists have no account for allowing the "will of the dead" to govern because textualists *deny* that the will of *any* person or group, living or dead, should govern. "Will" means intent or hope or expectation or belief. Yet the project of textualism is to deny that intent should matter (and not only because collective bodies lack any intent)[3] and to affirm the primacy of *text*, the joint product of a group in a constrained political system. For the textualist a theory of political legitimacy comes first, followed by a theory of interpretation that is appropriate to the theory of obligation. Our particular Constitution is a social contract that establishes rules for the making and enforcement of law. In this system what counts as law is texts enacted by two branches of the legislature and signed by the President (or enacted by supermajority over his veto), and these laws are effective from the date of their enactment until their repeal. To carry forward the program of such a constitution, which limits what counts as law

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1 Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085, 1105 (1998).

2 *Id.* at 1104.

3 *See* MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY 257-471 (1997).

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and makes laws hard to enact and change, the judicial branch serves best by enforcing enacted words rather than unenacted (more likely, imagined) intents, purposes, and wills. An interpreter who bypasses or downplays the text becomes a lawmaker without obeying the constitutional rules for making law. *That* is what textualists say, and it is antithetical to the proposition that "will" matters—or that death is relevant.

Textualism is an approach to the allocation of power over time and among the living. Decisions of yesterday's legislatures (and the 104th Congress is as "dead" for this purpose as the 50th or the 10th) are enforced not only because the Constitution does not treat laws as radioactive (there is no legal half-life) but also because affirming the force of old laws is essential if sitting legislatures are to enjoy the power to make new ones. It is hard to tackle a problem if your law winks out of existence in two years or less (much less, since most laws are enacted in a legislature's final weeks or months). Wags may say that laws are not sold but only rented, and this is so in the sense that sitting legislatures can undo yesterday's interest-group deal (or charge a political price for leaving it alone), but the lease is generally long-term, in order to promote political and social stability. To say that "the dead" thus govern is word play. We the living enforce laws (and the Constitution that provides the framework for their enactment and enforcement) that were adopted yesterday because it is wise for us to do so today. Old laws are enforced not because their authors want, but because the living want. This isn't a theory of *interpretation* but of political legitimacy. Textualists generally accept the Constitution's theory of political obligation, but it is important to separate the theory of justification from the theory of interpretation appropriate to that theory of justification. Textualism concerns only the latter step. Perhaps, then, all Rubenfeld means is that textualism does not justify the rule of the dead because it is "only" a theory of interpretation. Guilty as charged. Courts and law schools surely have a little room for those who want to make the law work, in addition to the refugees from political theory departments.

Still, there is Rubenfeld's charge that the textualists just aren't thinking along these lines—effectively, that no textualist ever has tried to put political theory together with a program of interpretation. Professor Rubenfeld identifies only two persons as textualists (Robert Bork and Antonin Scalia) and only one of those (Scalia) actually *is* a textualist. Bork is an originalist but not a textualist.[4] Bork's book *Slouching Towards Gomorrah* (1996), which Rubenfeld cites, lacks an account of originalist thought, but his book *The Tempting of America* (1990), which Rubenfeld does not cite, has one, and is at pains to refute the proposition that originalism implies a dead hand.[5]

4 Originalists make more than textualists of the drafters' imputed intents or expectations. Rubenfeld treats Bork as a textualist because he lumps together everyone who thinks that texts have primacy. But Professor Eskridge invented the term "new textualism" precisely to denote the difference between originalism and textualism. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1990).

5 Robert H. Bork, The Tempting of America: The Political Seduction of the Law 167-71 (1990).

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Scalia's essay in *A Matter of Interpretation*,[6] which Rubenfeld cites, lacks an account of textualism; elsewhere Scalia has supplied and defended one,[7] though Rubenfeld slights those essays. I've given a few accounts myself.[8] So have Professors BeVier and McConnell, the other two members of this panel. Justice Thomas, the Supreme Court's most thoroughgoing textualist, and the one who makes the most explicit connection between theories of interpretation and theories of political obligation,[9] is not mentioned in the essay—although Rubenfeld finds space to cite Jürgen Habermas repeatedly. Rubenfeld ought to confront the justifications textualists give for their position, rather than to assert that they give none and then make hay.

A comment at a symposium is not the place to develop a full theory of interpretation, so I shall offer a sketch of two major strands of textualist thought and then subside.

The fundamental theory of political legitimacy in the United States is contractarian, and contractarian views imply originalist, if not necessarily textualist, interpretation by the judicial branch. Otherwise a pack of lawyers is changing the terms of the deal, reneging on behalf of a society that did not appoint them for that purpose. This is not a controversial proposition. It is sound historically: the Constitution was designed and approved like a contract. It is sound dispositionally: it is the political theory the man in the street supplies when he appeals to the Constitution (or to the legitimacy of the electoral process, even though his candidate lost). It is even a favored line of argument in modern philosophy departments, such as the Yale Law School (recall Bruce Ackerman's *Social Justice in the Liberal State* (1980)). It is even popular in the scholarly part of the university.[10]

Contractual rights are inherited. If I buy a house with borrowed money, the *net* value of the house is what my heirs inherit; they can't get the house free from the debt. This is so whether my heirs consent to the deal or not; contract rights are passed from one generation to another as written.

Both private and social contracts are hard to change, but only someone distracted by babble about "contracts of adhesion" would think this an objection rather than a benefit. These days even left-wing judges enforce forum-

6 Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Guttman ed., 1997).

7 *See* Scalia, *supra* note 6; *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

8 *See, e.g.*, *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992); *Alternatives to Originalism?*, 19 HARV. J.L. & PUB. POL'Y 479 (1996); *Method, Result, and Authority: A Reply*, 98 HARV. L. REV. 622 (1985); *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1989-90); *The State of Madison's Vision of the State*, 107 HARV. L. REV. 1328 (1994); *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); *What's So Special About Judges?*, 61 U. COLO. L. REV. 773 (1990). A longer version will appear one of these years in a book with the tentative title *Legal Interpretation*.

9 *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590, 1615-28 (1997) (Thomas, J., dissenting); United States v. Lopez, 514 U.S. 549, 584-602 (1995) (Thomas, J., concurring); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 358-69 (1995) (Thomas, J., concurring).

10 *See, e.g.*, F.A. HAYEK, The Constitution of Liberty (1960); ROBERT NOZICK, Anarchy, State, and Utopia (1974); John Rawls, A Theory of Justice (1971).

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selection clauses in tiny type on the back of steamship tickets.[11] We the living accept the power of contract *because* contracts (both social and private) are hard to change. Stability in a political system is exceptionally valuable. Someone who loses a legislative battle today accepts that loss in exchange for certainty that next year's victory on some other subject will be accepted by other losers in their turn. People accept old contracts and old laws because they know that this is the only way to ensure that promises *to them* are kept; if all is up for grabs, they are apt to lose both coming and going. The constitutional contract is no more hypothetical than the losers' willingness to accept the election results today, in the belief that they may win tomorrow. Today's majority accepts limits on its own power in exchange for greater surety that its own rights will be respected when, sometime in the future, power has shifted. An inflexible system of interpretation makes this allocation of power over time, and across groups, work.

Our constitutional order does not depend on hypothetical contracts. There are actual contracts. Like other judges, I took an oath to support and enforce both the laws and the Constitution. That is to say, I made a promise—a contract. In exchange for receiving power and lifetime tenure I agreed to limit the extent of my discretion. Sneering at the promise in the oath is common in the academy, but it was an important part of Chief Justice Marshall's account of judicial review in *Marbury v. Madison*[12] and matters greatly to conscientious public officials. It should matter to everyone. Would *you* surrender power to someone who can be neither removed from office nor disciplined, unless that power was constrained? The constraint is the promise to abide by the rules in place—yesterday's rules, to be sure, but rules.

This leads us to a second account of textualism, or rather a second family of accounts. Professor Rubenfeld asks about the meaning of the Constitution as if meaning were divorced from real people, as if we had never learned from Wittgenstein that language depends on a community of readers rather than speakers' intent. Political society has multiple users of legal words. Public officials must give an account, not simply of meaning, but of why their view of meaning should be accepted. Why, in other words, should judges be obeyed? This is a serious question for a nation whose Constitution lacks a judicial-review clause, and whose judges have long tenure. Interpretive rules may differ according to the source of the demand to be obeyed. When the demand depends on recent election, a flexible contemporary reading may suffice. When the demand depends on a commission from a dead president, a more textual reading may be necessary as a *constraint* on the dead hand.

So much has been understood from the time of the first great textualist, John Marshall. His opinions rest squarely on constitutional text—not on imputed intent, not on *The Federalist*,[13] not on the debates in the Convention (which had been kept secret), not on the debates of the ratifying conventions

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11 Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991); *see also* Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997).

12 5 U.S. (1 Cranch) 137 (1803).

13 Professor Lupu's paper for this Symposium finds that Marshall cited *The Federalist* only once, and then only to explain why they are not authoritative. *See* Ira C. Lupu, *Time, the Supreme Court, and* The Federalist, 66 GEO. WASH. L. REV. 1324, 1329 (1998).

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(though these were public, and Marshall attended Virginia's), and not even on the opinions he had written for the Supreme Court.[14] He relied on text (including the context that gives text meaning).

The core original prescription is organization of the government as an indirect, representative democracy. States, Congress, the President, and the People acting through legislation and constitutional amendments are always in control; they need only follow the prescribed procedures. The largest threat to modern law for an evolving world is a judiciary claiming to act in the name of the Constitution. Democracy by the living is not an alternative to originalism and the rule of the dead; these are two aspects of the same thing, and an emphasis on "the dead" when it comes to judges is essential to the power of "the living" when it comes to governance.

John Marshall offered us *two* pictures of constitutional interpretation. *Marbury* is the one we remember today: the Constitution is a set of laws, superior to statutes; having deciphered the meaning of both we need only apply standard choice-of-law principles. *Marbury* depicts the Constitution as a catalog of rules, with a meaning comprehensible to all who take the trouble to read and think carefully. Rubenfeld calls this approach textualism, but it is not a theory of *interpretation* at all; it is a political theory about *what kinds of interpretive strategies justify judicial power.* Listen to John Marshall the originalist in another context.

The Bank of the United States was created in 1791; its charter expired in 1810, with debate on extension during Jefferson's second term (which ended in 1809). In 1816 President Madison concluded that public and political acceptance of the Bank settled constitutional questions in its favor, and he signed the bill renewing its charter. States replied with punitive taxes, and litigation ensued.

When the case came before the Court in 1819, the opponents pointed to two things: the Constitution is a charter of limited federal powers, and nothing gave the national government the ability to create financial intermediaries. Congress could lay taxes and regulate commerce, but to charter a bank it needed to rely on the grant of power to enact laws "necessary and proper" to put the other powers into effect. But how could the Bank be "necessary"? The nation could survive without a central bank; between 1810 and 1816 it did (and would again between 1836 and 1913). By taking "necessary" strictly, the Court could have set itself up as a potent political force, reviewing the wisdom of laws. John Marshall and his colleagues resisted:

> Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that every thing granted shall be expressly and minutely described. . . . A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be car-

14 *See* David P. Currie, The Constitution in the Supreme Court: The First Hundred Years 196-98 (1985).

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ried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language.... It is also, in some degree, warranted, by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a *constitution* we are expounding.[15]

There is that famous phrase: "we must never forget, that it is a *constitution* we are expounding." But now you see its context: not to assert that law is mush, but to say that the Constitution allows the living legislature to govern. Marshall was explaining why the political branches have power and judges do not! He had *two* theories of interpretation—one for Congress, which wields explicit grants of power, and the other for the judiciary, which has only the "judicial Power." There is a real Necessary and Proper ("Sweeping") Clause, but there is no judicial review clause. That leads to major differences in authority—including authority to interpret. Congress could disagree with the Court, and so could a President. In 1836 President Jackson did, vetoing a further extension for the Bank.[16]

In *McCulloch*[17] Chief Justice Marshall observed that "necessary" has many possible meanings:

> The word 'necessary' is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases.[18]

What followed from this is that the people, through their representatives, could choose.

> The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to

15 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406-07 (1819).

16 For more details see Easterbrook, *Presidential Review*, *supra* note 8.

17 17 U.S. (4 Wheat.) 316 (1819).

18 *Id.* at 413-14.

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> adopt any which might be appropriate, and which were conducive to the end.[19]

This implies a very limited judicial role in assessing validity. Here is the final famous passage:

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.[20]

In this vision courts serve to enforce laws and private bargains. As conditions change, the living change their institutions and laws. The Constitution sets up a permissive framework through which the living may govern their own affairs.

Evolution is a democratic process, and either the political variety or the hermeneutic variety defeats the premises of judicial review. If the living are to decide, then what's the judicial role. It is only when, for reasons of political legitimacy, that the living are *not* to decide that judicial review is justified. Then faithfulness to the premises of judicial review implies textualism. You can't have a hierarchy of law, with the Constitution prevailing by virtue of its pride of place, unless there is genuine meaning *in* that document. When form comes from evolving institutions and ideas, then the living must decide by elections—through the Constitution's explicit process of majority vote, divided constituencies, and agreement among multiple branches. For one branch, the judiciary, to claim the final word about debatable propositions is not only un-originalist but also contra-constitutionalist.[21] Nothing beats textualism *in court*, because nothing else is capable of supporting a judicial veto.

Let me try another way to put this. Many constitutional theories compete in the intellectual marketplace. They are not valid or invalid. The Constitution itself is not based on a unitary theory; the Framers did not share a single vision but reached a complex compromise; and even if they had a unitary theory, we must always ask why we should respect that theory today. After all, the Framers were revolutionaries, and we have the right to be revolutionaries too if the document they wrote no longer supplies satisfactory answers to our controversies.

Each nontextual theory comes, however, with its own set of implications for proper scope and usage. Truly revolutionary theories do not justify any judicial role, because Article III is part of the same Constitution the revolu-

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19 *Id.* at 415.

20 *Id.* at 421.

21 *See* Bork, *supra* note 5, at 55, 166-67

tionaries would throw over. I do not know and cannot imagine any non-originalist theory in which only Article III and *Marbury* are sacrosanct—or any in which the portion of *McCulloch* enlarging the powers of the legislature is sacrosanct, while the corollary that open-ended legislative power implies restrictions on judges is reversed. No more need be said to account for textualism by the judicial branch of the federal government—though cities, states, and the political branches of the national government may legitimately adopt other approaches to interpretation. Meaning depends on the purpose to which we put it. It is not silly to maintain that the Constitution can mean one thing in a classroom, another in the legislature, still another in civic debate, and yet another in a courtroom. But each means of understanding the Constitution has implications. Judicial review came from a theory of meaning that supposed the possibility of right answers—from an originalist theory rooted in text.

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