

The Moment and the Millennium

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Every age, it is said, gets the savior it deserves. Who then would be recognized as a deliverer for our millennium? The answer is pretty clear. Our redeemer would have been a programmer, a cyber-savior, walking forth upon the worldwide web with a cheap fix for the so-called Year 2000 problem.

Surely it is a matter of cultural concern when the only millennial event anyone can talk about is the coming of a bug—a computer bug. How much will it cost to exterminate this little Year 2000 bug? Only, according to one estimate, about \$600 billion¹—and that's for the United States alone. Given that I am supposed to be addressing constitutional textualism today, you will probably be surprised—you will probably not even believe me—when I say that the aim of this paper is to discover a deep truth buried in this chiliastic coding fiasco, the reflection it casts upon our entire democratic culture, and the hidden secret it reveals about constitutional law in general and textualism in particular. (I said you wouldn't believe me.) But to make this connection between the Charter of 1787 and the codes of the Year 2000, I need to introduce another text, a famous thesis of Thomas Jefferson's. Jefferson's thesis encapsulates not only a particular view of constitutionism (a view, as we shall see, that underlies a variety of interpretive schools, including textualism), but also at the same time, a particular imperative concerning the proper human relationship to time (an imperative, as we shall see, that underlies a variety of social phenomena, including the Year 2000 problem). It is Jefferson's second declaration of independence—this time from time itself.

Here is Jefferson's simple thesis: "the earth belongs to the living."² Not to "the dead," nor to "the unborn," but rather, "in usufruct," only to us, only to those in being here and now.³ This anti-millennial thesis will be our anti-millennial text as we investigate textualism at the millennium.

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¹ Chris O'Malley, *Apocalypse Not*, TIME, June 15, 1998, at 62, available in 1998 WL 11648857.

² Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 396 (Julian P. Boyd ed., 1958).

³ See *id.* at 392. The term "unborn" appears in a text of presumably nearly contemporaneous date by Jefferson's physician and friend, Dr. Richard Gem, which evidently spurred Jefferson's thinking. See Proposition Submitted by Richard Gem, in 15 THE PAPERS OF THOMAS JEFFERSON, *supra* note 2, at 391, 392 ("The earth and all things whatever can only be conceived to belong to the living, the dead and those who are unborn can have no rights of property."). For more on the influence of the somewhat mysterious Gem, or Gesme, Ghym, Gamm, Gam, or Gom, as his name is occasionally rendered, see ADRIENNE KOCH, JEFFERSON AND MADISON: THE GREAT COLLABORATION 84-88 (1950).

I. The Revelation of the Present

Jefferson's thesis appears in a letter addressed to Madison, written in Paris, and dated September 6, 1789—a year of intense constitution-writing activity on both sides of the Atlantic. There is speculation that the document is not an authentic letter to Madison, but a brief for the use of Jefferson's French friends, with the address to Madison serving as cover in case the document came to light.⁴ But whether drafted for France or America, or both, the letter is undoubtedly a testament to some of Jefferson's deepest political convictions, stating principles to which he recurred and adhered throughout the rest of his life.⁵

The letter begins by announcing that it is going to treat of a proposition that, although heretofore undiscussed “either on this or our side of the water,” deserves a “place . . . among the fundamental principles of every government.”⁶ What principle? Jefferson comes right to the point. “I set out on this ground, which I suppose to be self evident,” he writes, and the echo of the Declaration cannot have been accidental, “*that the earth belongs in usufruct to the living.*”⁷

There is a hint of religion here, as there often is when Jefferson speaks of “the earth” of those who labor in it. “Those who labor in the earth are the chosen people of God, if ever He had a chosen people, whose breasts He has made His peculiar deposit for substantial and genuine virtue.”⁸ In the letter to Madison, Jefferson will say that “the living” hold their rights to the earth by “the law of nature,”⁹ a phrase that not only further echoes the Declaration, but does so in a way that further conjures with divinity (“the Laws of Nature and of Nature's God,” according to the Declaration, entitle the American people “to assume among the powers of the earth” the independence they claim¹⁰). Professor Lynd is not wrong, therefore, to link Jeffer-

4 “Already too much involved in the internal affairs of the sovereign to whom he was accredited, Jefferson, in advancing arguments subversive of that sovereign's power, may have used this indirect method because a direct one was interdicted.” 15 THE PAPERS OF THOMAS JEFFERSON, *supra* note 2, at 384, 390 (editorial note). For a contrary view, see Herbert Sloan, *The Earth Belongs in Usufruct to the Living*, in JEFFERSONIAN LEGACIES 281, 305 n.18 (Peter S. Onuf ed., 1993) (evidence surrounding letter “hardly excludes the possibility of its being genuinely intended for Madison”).

5 Jefferson's continuing reliance on the thesis is visible in his Second Inaugural Address, March 4, 1805, and in various letters. See, e.g., Letter from Thomas Jefferson to John W. Eppes (June 24, 1813), in 11 THE WORKS OF THOMAS JEFFERSON, 297, 298-301 (Paul Leicester Ford ed., 1905); Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 12 *id.* at 3, 11-14; Letter from Thomas Jefferson to Joseph C. Cabell (July 14, 1816), in EARLY HISTORY OF THE UNIVERSITY OF VIRGINIA, AS CONTAINED IN THE LETTERS OF THOMAS JEFFERSON AND JOSEPH C. CABELL 67 (Nathaniel F. Cabell ed., 1856).

6 Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *supra* note 2, at 392 (footnote omitted).

7 *Id.* (internal quotation marks omitted).

8 Thomas Jefferson, *Notes on Virginia* (1787), in BASIC WRITINGS OF THOMAS JEFFERSON 161 (Philip S. Foner ed., 1944).

9 Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *supra* note 2, at 395, 397.

10 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

son's thesis to "the ancient conception that the earth was given by God, its ultimate owner, to mankind in common."¹¹

But if there is a Christian root in Jefferson's "earth," this root is radically unearthed as well. For Jefferson's thesis is also a refutation, almost a point-by-point repudiation, of an important Christian tenet—that the "meek" "shall inherit the earth."¹² Forget the meek, Jefferson says: the earth belongs to the living. Forget inheritance: as Jefferson sees it, there can be no inheritance between generations. The living "derive these rights not from their predecessors, but from nature."¹³ Most important, forget *shall*: it is not that the earth *shall* go to the living, tomorrow, in some millennial future. The earth *belongs* to the living. It does so in the present tense as a matter of right here and now, a matter of the right *of* the here and now *to* the here and now. The earth belongs to us today, if only we are not meek, but rather strong enough to see and to seize what is ours.

But if Jefferson's thesis rejects a certain futurism, it equally rejects the past, the governance of old law, and the authority of the dead. A corollary of the living's sovereignty over the earth is that "the dead have neither powers nor rights over it."¹⁴ The letter repeatedly denies the authority of one generation to saddle the next with debt,¹⁵ a problem with which Jefferson had personal acquaintance.¹⁶ Generalizing from the case of debt, Jefferson argues against all inherited obligations, including those of inherited laws. Because the living are "masters" of "their own persons" as well as of the earth, they are not bound by the previous generation's legal legacy.¹⁷ Relying on European mortality tables, Jefferson famously establishes the longevity of a generation at eighteen years and eight months—"or say 19. years as the nearest integral number."¹⁸ "Every constitution then, and every law, naturally expires at the end of 19 years."¹⁹ To say that "the earth belongs to the living" is, therefore, to say that the present must be its own "master[]," casting off "in a constant course of decay and renewal" the dead hand of the past.²⁰

Jefferson does not imply that the living may act altogether selfishly, heedless of the interests of the future. The rights of the living are usufructu-

11 STAUGHTON LYNND, *INTELLECTUAL ORIGINS OF AMERICAN RADICALISM* 69 (1968). Professor Sloan goes further, saying that Jefferson's letter on this point merely repeats the "cliché" that "God, after all, gave the earth to Mankind." Sloan, *supra* note 4, at 293.

12 See *Matthew* 5:5 (King James) ("Blessed are the meek; for they shall inherit the earth."). The gospel here quotes from more ancient scripture. See *Psalms* 37:11.

13 Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *supra* note 2, at 394-95.

14 *Id.* at 392.

15 See *id.* at 393 ("For if the 1st. [generation] could charge [the next generation] with a debt, then the earth would belong to the dead and not the living generation."); *id.* at 394-95.

16 For an account of the letter stressing its genesis in Jefferson's personal financial position, and particularly in his inherited encumbrances, see Sloan, *supra* note 4, at 288-91.

17 See Letter from Thomas Jefferson to James Madison (Sept. 6, 1789) *supra* note 2, at 396.

18 *Id.* at 394. The reasoning was as follows. "[G]enerations, changing daily by daily deaths and births, have one constant term, beginning at the date of their contract, and ending when a majority of those of full age at that date shall be dead." *Id.* According to the mortality tables that Jefferson consulted, "the half of those of 21. years and upwards living at any one instant of time will be dead in 18. years 8. months." *Id.*

19 *Id.* at 396.

20 *Id.* at 394, 396.

ary; we hold the earth in a kind of trusteeship (“in usufruct” means roughly “in trust”) for those who will be alive tomorrow. Hence the living have certain duties: we must not saddle the future with debt; we must not damage the earth. As Professor Sloan observes, there is an affiliation here between Jefferson and, of all people, Burke, who two years later would write: “With respect to futurity, we are to treat it like a ward. We are not so to attempt an improvement of his [sic] fortune, as to put the capital of his estate to any hazard.”²¹

But Jefferson’s thesis has an additional corollary, against which Burke would direct all his eloquence: that the present must not *identify* with what is to come; we, the present citizens of America, must not suppose that we—unlike, say, the present inhabitants of Japan—stand in a special relationship of identity to America’s future citizens, such that we would be entitled or called upon to regard America’s future as in some sense our own. Instead, the relation between the present generation and the next is like that of one individual to another or, as Jefferson says, like that of “one independ[e]nt nation to another.”²²

The link, then, between the anti-Christian and the anti-old-law implications of Jefferson’s thesis is the insistence on the priority of the present’s rights and needs, as opposed to a worshipped past or a worshipped future. Jefferson speaks here for a resolutely present-tense temporality, equally incompatible with the millenarianism of religious faith and with the traditionalism of pre-modern legal orders. In this respect Jefferson’s letter explodes from the context of 1789, expressing a thought capable of reshaping an entire culture: a thought that remains even two centuries later perfectly in tune with the present day; a revolutionary thought whose time had come in 1789 and still clings to us in 1998.

The idea was not new with Jefferson. On the contrary, others can be found on both sides of the Atlantic expressing much the same thought at much the same period: Webster²³ and Paine,²⁴ for example, in America,

21 Edmund Burke, *An Appeal from the New to the Old Whigs* (1791), in FURTHER REFLECTIONS ON THE REVOLUTION IN FRANCE 91 (Daniel E. Ritchie ed., 1992). See Sloan, *supra* note 4, at 298-300.

22 Letter from Thomas Jefferson to James Madison (Sept. 6, 1789) *supra* note 2, at 395. For more on Jefferson’s idea of “usufruct,” see Sloan, *supra* note 4, at 298-300.

23 See Noah Webster (writing as Giles Hickory), *On Bills of Rights*, 1 AM. MAG. 13, 14 (Dec. 1787) (“The 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 authority as we have over a nation in Asia.”). For more on Webster’s views, see GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787*, at 376-83 (1969).

24 See THOMAS PAINE, *Rights of Man*, in *THE LIFE AND MAJOR WRITINGS OF THOMAS PAINE* 251, 254 (Philip S. Foner ed., 1961) (“Every age and generation must be as free to act for itself, in all cases, as the ages and generation which preceded it. . . . [A]s government is for the living, and not for the dead, it is the living only that has any right in it.”). For an argument that Paine was Jefferson’s source, even though *Rights of Man* was published in 1791, see A. OWEN ALDRIDGE, *THOMAS PAINE’S AMERICAN IDEOLOGY* 265 (1984). For an argument that Jefferson inspired Paine, who visited Jefferson in France before writing *Rights of Man*, see KOCH, *supra* note 3, at 75-88. Perhaps Lynd is correct: “we are clearly dealing with an idea which was in the air among an international circle of intellectual friends and cannot, without misplaced concreteness, be attributed to any single author, time or place.” LYND, *supra* note 11, at 79.

Condorcet in France.²⁵ Indeed, if Jefferson was exercised by the problem of inherited debt, the *Encyclopédiste* Turgot had been similarly exercised thirty years earlier by testamentary charitable foundations, which not only “subsidise[d] idleness,”²⁶ but worse, placed the living under the yoke of the dead, “as if ignorant and short-sighted individuals had the right to chain to their capricious wills the generations that had still to be born.”²⁷ For Turgot, the very act of memorializing the dead, the mere wish of the dying to rest in peace below a small gravestone, became an affront to the rights and needs of the living: “If all the men who have lived had had a tombstone erected for them, it would have been necessary, in order to find ground to cultivate, to overthrow the sterile monuments and to stir up the ashes of the dead to nourish the living.”²⁸

Nor was Jefferson the first to make the priority of the present into an axiom of self-government, such that self-government would have to be conceived as governance by present popular will and governance under old laws would have to be regarded as antithetical to political freedom. Indeed, at almost the same moment that Turgot wrote, Jean-Jacques Rousseau, composing a manuscript of what would become the *Social Contract*, gave this present-oriented conception of self-government its most exact and exacting statement:

Now the 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 force²⁹

So Jefferson’s declaration that the earth belongs to the living was hardly the first statement of the supremacy of the present and its right to be its own master.³⁰ The present was being revealed—it was revealing itself to itself—throughout the second half of the eighteenth century.³¹ But this revelation of

²⁵ See M. de Condorcet, *Sur la Nécessité de Faire Ratifier la Constitution par les Citoyens*, in IX OEUUVRES DE CONDORCET 415-16 (A. Condorcet O’Connor & M. François Arago eds., 1847) (“Les bornes de la durée des lois constitutionnelles ne doivent pas s’étendre au delà d’une génération.”); see also IX *id.* at 210-11, 367-68, 371, 388-91, 447-48; X *id.* at 39-40.

²⁶ JACQUES TURGOT, *Endowments*, in THE LIFE AND WRITINGS OF TURGOT, COMPTROLLER-GENERAL OF FRANCE 1774-6, at 219, 221 (W. Walker Stephens ed., 1895).

²⁷ *Id.* at 227.

²⁸ *Id.* at 228.

²⁹ JEAN-JACQUES ROUSSEAU, *On the Social Contract or Essay About the Form of the Republic* (*Geneva Manuscript*), in ON THE SOCIAL CONTRACT 157, 168 (Roger D. Masters ed. & Judith R. Masters trans., 1978).

³⁰ Smith too had expressed a nearly identical thought in the 1760s. See ADAM SMITH, *Private Law*, in LECTURES ON JURISPRUDENCE 459, 468 (R.L. Meek et al. eds., 1978) (“The earth and the fullness of it belongs to every generation, and the preceeding [sic] one can have no right to bind it up from posterity.”).

³¹ As is always the case, the roots of the idea can be pressed back still further. Hume in the 1740s had argued that the reliance of “republican writers” on an original social contract was contradictory, because it “supposes the consent of the fathers to bind the children, even to the most remote generations (which republican writers will never allow).” DAVID HUME, *Of the Original Contract*, in ESSAYS: MORAL, POLITICAL AND LITERARY 452, 457 (Oxford Univ. Press 1963) (1741). As Hume suggests, in a sense all the contractarians, including Locke and even

the moment, this demand for government of the present, by the present, for the present, in its break with Christianity and in its break with the past, was indeed new for Western thought. It signaled the discovery, or self-discovery, we might say, of modernity itself.

II. Modern Times

That modern times involve a new temporality, a new relation to time as compared to pre-modern societies, is a theme common to a number of modernity's most acute observers, among them Anthony Giddens, Benedict Anderson, and, influencing both, Walter Benjamin. Benjamin, distinguishing the "Messianic time" of Christian cosmology, filled up in advance by comings and second-comings, prefigurations and predestinations, says that we moderns, by contrast, experience time as "homogeneous" or "empty."³² Giddens associates this "empty time" with the dissemination of the mechanical clock in the late eighteenth century;³³ Anderson stresses the rise of new literary forms at around the same time, a chief exemplar of which, he says, is the modern newspaper, where wildly disparate events are brought together solely because of their contemporaneity.³⁴

The thought here is not that modern persons understand time in some wholly new fashion. It is difficult to credit claims, for example, that the "mediaeval Christian mind had no conception" of "radical separations between past and present."³⁵ We may remain dubious of such radically different temporal schemas, as when anthropologists breathlessly tell us of Indians who do not distinguish past from future. (How happy, how hopeful they must be, unable to experience loss.) But there remains a temporality particular to modern times, and, as Anderson observes, it is inscribed in the modern *Times*. What is inscribed there? Not a new conception of the past, but a new privileging of, a fascination to the point of obsession with, the present.

Hobbes, implicitly conceded the pertinence of current consent and hence, despite themselves, adumbrated Jefferson's thesis. See, e.g., THOMAS HOBBS, *LEVIATHAN* 204 (Oxford Univ. Press 1965) (1651); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 390 (Peter Laslett ed., Cambridge Univ. Press 1965) (1690) ("'Tis true, that whatever Engagements or Promises any one has made for himself, he is under the Obligation of them, but *cannot* by any *Compact* whatsoever, bind *his Children* or *Posterity*"). Locke avoided Jefferson's result by arguing that anyone who owns property, particularly anyone who accepts a bequest, consents to the terms of the original contract. See *id.* at 358; see also SHELDON S. WOLIN, *POLITICS AND VISION* 311 (1960) (observing that Locke used "the institution of property inheritance to undercut the favorite notion of radicalism that each generation was free to reconstitute political society"). For a discussion of the latent contradiction in Locke's views in this connection, see LYND, *supra* note 11, at 69-81. For an excellent overview of the pre-eighteenth-century intellectual history, see Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195, 207-15 (Jon Elster & Rune Slagstad eds., 1988).

³² WALTER BENJAMIN, *ILLUMINATIONS* 263-65 (Hannah Arendt ed. & Harry Zohn trans., 1973).

³³ See ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 17 (1990) (internal quotation marks omitted). Giddens also emphasizes the "worldwide standardi[z]ation of calendars," so that "the approach of the 'year 2000,' for example, is a global event." *Id.* at 18.

³⁴ See BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 22-25, 32-36, 37 (rev. ed. 1991).

³⁵ *Id.* at 22-23.

Both in name and effect, the news enacts the present's devotion to itself. Mass entertainment news is the act of the present day enfolding narcissistically upon itself, utterly ahistorical even as it reports and makes history. The news marks modernity's obsession with the up-to-the-minute—with currency above all else. Indeed, currency here takes on its distinctively modern form. It becomes its own desideratum, abstracted from all particular use-values: currency as pure exchange value. Because of this pure substitutability of the current, as Anderson observes, a front-page column on the most recent massacre in Rwanda, which you swore you saw in this morning's paper, can disappear without a trace, replaced in the final edition by a story on late-breaking baseball results.³⁶ Creating a shared day-to-day experience for millions, the news bespeaks not so much a new concept of simultaneity, but a new society in which currency can, at least for a moment, for its own moment, appear as the be-all and end-all of human activity.

This demand for currency is the logical conclusion of the present-tense temporality about which Jefferson, Turgot, and Rousseau spoke. If the past is past, and if the future does not belong to us, then there is only the present for the living to seize hold of, only the moment in which we can realize our being and our freedom.

Leaping from Jefferson's thesis to the present day, behold a society that has made living in the present a cultural imperative. Behold a society consumed with consumption; a society in which the most massive technological power the world has ever known is organized around the instantaneous gratification of desire; a society that does not save; a society obsessed with currency, with being up-to-the-minute; a society whose citizens bear not arms but second hands.

Behold a culture that fears time, desperate to erase the marks of time, if only it could, from its very face. In the art forms most definitively called modern, every trace of temporality has been banished—into abstraction or the facelessness of modern architecture. In the more popular art forms, on television or the big screen, behold a culture craving the simulacrum of a fully-lived moment: hence one whose iconography is dominated by desire and sensational violence, indeed one in which violence itself is eroticized—for de Sade too, like Rousseau, sought the experience of a fully-lived present.

I will say nothing here of so-called post-modernism, except that it is only the culmination of modernity's flight from time, a determination to

live one day at a time To forbid the past to bear on the present. In short, to cut the present off at both ends, to sever the present from history. To abolish time in any other form but of a loose assembly, or an arbitrary sequence, of present moments; to flatten the flow of time into a *continuous present*.³⁷

In the ultra-modernism of post-modernism, the last vestige of modernism's historicity, the idea of progress is finally done away with, and we are left with a style that is not only without history (because it lays claim to all

³⁶ See *id.* at 33.

³⁷ ZYGMUNT BAUMAN, *POSTMODERNITY AND ITS DISCONTENTS* 89 (1997).

history) but also without futurity. The extraordinary thing is only that the aspiration to such timelessness does not recognize how old hat it is, how existentialist, how its image has been reflected for decades in the smiling message (“live one day at a time!”) of the heartbroken, dreamless consumerism that we fortunate Westerners know and love so well.

Behold a culture that is, above all, juvenescent, forever growing young. Modernity adores youth, not merely out of the fear of death, but rather because in a culture devoted to the present, the young embody that form of being which is unburdened by any life-in-progress, unensnared by the coils of time, uncommitted. Youth—in both its sexuality and its self-destructiveness, in its self-confidence and its alienation—is desired above all things, for being young signifies living in the present. As if to prove that this adulation of youth is not merely a reflection of the fear of death, the single act of commitment on the part of the young that increases in modern society, that becomes specially alluring, at once confirming and denying everything that the young are supposed to be—and the committing of this act would have to hover ambiguously between crime and inalienable right—is the one by which a young person incomprehensibly and yet so understandably escapes time altogether.³⁸

Modernity, whose imperative is to live in the present, never really had a future. Its many teleologies, despite their seeming forward-lookingness, were always either utopias, with no real connection to our actual temporal trajectory, or else apologies for the present moment. Consider how many modern teleologies have tended to terminate just about where we are now, only perhaps with a little less disorder, a little less historical debris. Modernity’s ultimate valorization of the present is to find itself continually arriving at the end of history.

The direct implication of Jefferson’s thesis is forgetfulness of the future. To modern man, the future is not his. It is only someone else’s present, as foreign to him as an independent nation. There is no fighting this truth; it is nature’s edict. “[B]y the law of nature,” said Jefferson, “one generation is to another as one independ[e]nt nation to another.”³⁹

And from this declaration of independence, it is only a stone’s throw to our own millennial predicament, our own Year 2000 coding crisis. Why on earth should our early programmers have bothered thinking ahead to the next generation? Why should they have adopted an inconvenient three- or four-digit code for identifying years, when the simpler two-digit code would handle all the requirements of their own time, their own generation? I am not implying that these early codifiers were lazy or selfish. They may have supposed that their work would be obsolete by the next generation. And might not this supposition have seemed quite reasonable? Those who wrote our codes need not have been shortsighted; they may simply have succumbed to modernity’s most distinctive and corrosive reason for forgetting the future:

³⁸ See Stephanie Stapleton, *Surgeon General Calls for Suicide Prevention*, AM. MED. NEWS, May 4, 1998, at 9, available in 1998 WL 10730982 (noting that suicide is “the third leading cause of death for young people ages 15 to 24, for whom suicide rates have tripled since the 1950s”).

³⁹ Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *supra* note 2, at 395.

belief in one's own imminent obsolescence. We are all, at every moment, passing out of date, into dust, into the ashes that will have to be stirred to nourish the living. Our very genetic composition will no doubt be laughably obsolete within a generation or two. Let us, therefore, reach for the minoxidil and live for the present, because living in the present is all we can do.

Modernity's devotion to the present explains why economics is the quintessentially modern human science. Nowhere is the reduction of human psychology to a currency of the present—to monetizable present wills called preferences, including "ideological preferences"—so complete as it is in economic thinking. Economics outdoes even utilitarianism in this regard because of the remorselessly present-tense perspective it takes, or asks us to take, on our past and future. In economic rationality, to attribute value to the seeing-through of a temporally extended project is to perpetrate a logical error, a fallacy. The past is past, its costs are sunk, and the only rational question today is what is the marginal value of the next dollar. True, economics carries within it a certain future-directedness, an investor-friendly perspective, an acknowledgment that an individual might relate to himself over time in a fashion exceeding his existence as an instantaneously gratifying consumer. But the future remains for economic man merely a succession of monetizable future presents, in principle perfectly substitutable for an equivalent amount of money here and now. The culminating triumph of economic psychology is the idea of *discounted present value*, through which all our future presents are made exchangeable for, and reducible to, a present demand for—what else?—currency. As a result, economics can provide no adequate explanation why we today, in our policy choices, should take into account the interests of future citizens—except by reference to the present preferences of those now living, as for example parents who may care about their children's welfare (but not as much, of course, as they care about their own).⁴⁰

But economics is hardly the only repository of a modern psychology of the present. Living in the present is the advice of all of those cheap psychotherapies that fill our bestseller lists and that proclaim their devotion to the now in flawless temporal tautologies. The past is past, they remind us. Or:

⁴⁰ For an extremely interesting discussion, see KENNETH J. ARROW, *Some Ordinalist-Utilitarian Notes on Rawls's Theory of Justice*, in 1 COLLECTED PAPERS OF KENNETH J. ARROW: SOCIAL CHOICE AND JUSTICE 96, 111-13 (1983). ARROW notes that utilitarianism would suggest that "the utilities of future generations enter equally with those of the present," and hence that, at the present moment, "virtually everything should be saved and very little consumed, a conclusion which seems offensive to common sense." *Id.* at 111. Economists' "most usual" solution to this problem, Arrow writes, does not deny that the welfare of future individuals must be counted by decisionmakers today, but rather "assert[s] a criterion of maximizing a sum of *discounted* utilities," a solution "more in accordance with common sense and practice, but the foundations of [which] seem arbitrary." *Id.* Arrow's own "guess" about the solution to this problem rejects the idea of directly counting the interests of future individuals when making policy today. Rather, "any justification for provision for the future" will have to rest on the preferences of present individuals to provide for the welfare of their issue, but as it is likely that "fathers think more highly of themselves than of their sons," and "more highly of their sons than of subsequent generations," this approach will produce a result "very much the same as that of discounting future utilities." *Id.* at 112. Of course it would follow that "the burden of saving should fall only on those with children and perhaps in proportion to the number of children." *Id.*

however we got to this place, here is where we are. Or: be in the moment. Or: live one day at a time.

In fact, even in far more sophisticated precincts, modern psychology begins, with Freud, with the extraordinary discovery that mental illness consists of living in the grip of the past. Behind all the endless confessionalism of modern society, the putative idea is always the Freudian one of expurgating the past by speaking of it in the here and now, thereby eliminating the grip of the past by giving it present voice. Though Freud towers above today's psychobabble, the function of the "talking cure" was and is nothing other than to allow the patient to live in the present.

III. Freedom Now

Return now to political thought, which prescribes its own talking cure. Although Rousseau's and Jefferson's views on direct or agrarian democracy have largely passed by, modern political-legal thought continues to define self-government in the same present-tense terms that they marked out—in terms, that is, of governance by the present will of the governed. Jefferson's thesis is quoted by John Hart Ely and all but quoted by Bruce Ackerman.⁴¹ Or consider Habermas's "discourse theory" of democracy, which "insists" on a process of "democratic will-formation" that "does not draw its legitimating force from . . . prior" expressions of democratic will.⁴²

This fixation on legitimate authority in the here and now respects none of the classical ideological categories, cutting across liberal, republican, and even fascist thought alike. Thus, when Carl Schmitt called for "immediate" expressions of popular voice,⁴³ this immediacy not only implied unmediated and even unreasoned expressions—anathema to a Habermas—but also suggested that the authoritative political will ought to be a will of the present. Meanwhile, at the other end of a certain ideological spectrum, today's most individualist, pluralistic understandings of democracy similarly hold that the "true consent" of the governed "would have to be continuous—of the living now subject to the laws, not the dead who enacted them."⁴⁴

American constitutional thought has elaborated itself almost entirely within this presentist conception of democratic self-government. For at least a century, constitutional thought has been organized around what Alexander Bickel eventually called the "counter-majoritarian difficulty,"⁴⁵ according to which constitutional law must answer to the charge of being "undemocratic" because it deliberately thwarts the will of representative majorities in the "here and now."⁴⁶ The counter-majoritarian difficulty begins with the prem-

41 See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 11 (1980); Bruce Ackerman, *Rooted Cosmopolitanism*, 104 *ETHICS* 516, 527-29 (1994).

42 JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 278 (William Rehg trans., 1996) (emphasis added).

43 See CARL SCHMITT, *VERFASSUNGSLEHRE* 83 (1928).

44 ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 50 (1989).

45 ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (2d ed. 1986).

46 See *id.* at 16-17 (judicial review "thwarts the will of representatives of the actual people of the here and now"; that is "the reason the charge can be made that judicial review is undemocratic").

ise that democratic self-government consists—at least presumptively—at least in ideal form, of governance by the present will or consent of the governed. Hence, the entire problem posed by this “difficulty,” together with all the would-be accommodations of it, stems from the same ground on which Jefferson set out. Whenever we read in constitutional literature of “the dead hand of the past,”⁴⁷ or the “dead letters” of the law,⁴⁸ we are on the same terrain.

Elsewhere I have referred to this present-oriented conception of self-government—in all its variations, republican, liberal, fascist, and so on—as “speech-modeled.”⁴⁹ I use this term because this conception has always articulated itself in a language of voice, talk, saying, conversation, dialogue, and other speech cognates. Thus Rousseau: “[A]ny tongue with which one cannot make oneself understood to the people assembled is a slavish tongue. It is impossible for a people to remain free and speak [such a] tongue.”⁵⁰ Thus Mill: “[I]f [popular] assemblies knew and acknowledged that talking and discussion are their proper business,” they would not “attempt to do what they cannot do well—to govern and legislate.”⁵¹ And thus Schmitt: “The natural way in which a People expresses its immediate will is through a shout of Yes or No by an assembled multitude, the Acclamation.”⁵²

These formulations are not fortuitous, nor merely metaphoric. In every case, the language of voice appears precisely when we are told what is the necessary, proper, or natural way to implement governance by popular will. In recent times, conceptualizing democracy in terms of a public discussion or conversation has become commonplace. “The will of the community, in a democracy, is always created through a running discussion between majority and minority”⁵³ Democratic politics must be grounded in a “common will, communicatively shaped and discursively clarified in the political public

47 See, e.g., Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1074 (1988).

48 See, e.g., CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW* 122 (New York, G.P. Putnam's Sons 1890).

49 See Jed Rubenfeld, *Reading the Constitution As Spoken*, 104 YALE L.J. 1119, 1123-43 (1995).

50 Jean-Jacques Rousseau, *Essay on the Origin of Languages Which Treats of Melody and Musical Imitation*, in *ON THE ORIGIN OF LANGUAGE* 3, 73 (John H. Moran & Alexander Gode trans., 1966).

51 J.S. MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (1861), reprinted in *ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 109, 173 (R.B. McCallum ed., 1946). Mill's description of representative bodies is instructive: “[T]hey are not a selection of the greatest political minds in the country,” but rather, “when properly constituted, [are] a fair sample of every grade of intellect among the people which is at all entitled to a voice in public affairs.” *Id.* at 173, 174. The members of Mill's “popular assembly” resemble the respondents in a “properly constituted” public opinion survey or focus group: Their legitimate role in government derives from their capacity to *speak* representatively. Thus it followed that the proper role of the assembly was to *talk*, not to *govern* or *legislate*.

52 SCHMITT, *supra* note 43, at 83 (“Die natürliche Form der unmittelbaren Willensäußerung eines Volkes ist der zustimmende oder ablehnende Zuruf der versammelten Menge, die Akklamation.”).

53 HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 287 (Anders Wedberg trans., 1961).

sphere.”⁵⁴ “Democracy is government by public discussion”⁵⁵ More examples can be found in the margin,⁵⁶ but this rhetoric is probably strongest in the so-called “dialogic,” “discursive,” or “deliberative” models of democracy, which now come complete with an entire code of “speech-act ethics.”⁵⁷

In all these instantiations, modern political theory, like modern psychology, prescribes a talking cure, whose function is once again to allow the patient to live in the present. The rhetoric of voice and speech indicates in political thought, as it does in psychological talk, the operation of a present-tense ideal, an ideal of governance by the living voice of the governed rather than the dead letter of the past, an ideal of liberty in which the present is or should be its own master.

Undoubtedly, there is a nostalgia in all this, a nostalgia for a democracy in which citizens might personally assemble to deliver the *vox populi*.⁵⁸ If today’s citizens no longer gather for speech-making in an *agora*, or in a town hall, then contemporary political theorists must have them gathering and deliberating in the public sphere, in cyberspace, in the original position, or at a rare but decisive “constitutional moment,” when individuals “mobilize” and at last declare the “living voice of the People.”⁵⁹ But if a dream of the *polis* lies obliquely behind these figures of speech, this nostalgia must not be permitted to obscure what was revolutionary, what was distinctively modern, when Jefferson, Webster, Paine, Rousseau, Turgot, Condorcet, and others began to insist on the thought that government belongs to the living.

54 JÜRGEN HABERMAS, *LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON* 81 (Thomas McCarthy trans., 1987).

55 Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195, 233 (Jon Elster & Rune Slagstad eds., 1988).

56 See, e.g., PAUL W. KAHN, *LEGITIMACY AND HISTORY* 8 (1992) (defining self-government as “that state of grace in which . . . the voice of authority is nothing other than the voice of the self”); CLAUDE LEFORT, *DEMOCRACY AND POLITICAL THEORY* 39 (David Macey trans., 1988) (“[M]odern democracy invites us to replace the notion . . . of a legitimate power, by the notion of a regime founded upon the legitimacy of a debate as to what is legitimate and what is illegitimate.”) (emphasis omitted); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453, 477 (1989) (“[T]he Constitution is best understood as . . . an evolving language of politics through which Americans have learned to talk to one another in the course of their centuries-long struggle over their national identity.”).

57 Although Habermas is the great figure here, see, e.g., HABERMAS, *supra* note 42, at 287-328, excellent discussions may also be found in AMY GUTTMAN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996); Seyla BenHabib, *Deliberative Rationality and Models of Democratic Legitimacy*, 1 *CONSTELLATIONS*, Apr. 1994, at 26; and David M. Estlund, *Who’s Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence*, 71 *TEX. L. REV.* 1437 (1993). For the associated speech-act ethical theory, see, e.g., WILLIAM REHG, *INSIGHT AND SOLIDARITY: A STUDY IN THE DISCOURSE ETHICS OF JÜRGEN HABERMAS* (1994).

58 See, e.g., MILL, *supra* note 51, at 170-74; JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (1762), reprinted in *THE SOCIAL CONTRACT AND DISCOURSES* 89-92 (G.D.H. Cole trans., 1950); SCHMITT, *supra* note 43, at 83. For contemporary appeals to the *polis* or equally nostalgic modern analogues, see, e.g., Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013, 1042-43 (1984); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 22 (1948) (“[T]he traditional American town meeting . . . is commonly, and rightly, regarded as a model by which free political procedures may be measured. It is self-government . . .”).

59 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 48-49, 267, 280, 286 (1991).

This thought communicated an unprecedented break not only with past authority, but with the past itself and with the future as well. It implies absolute foreignness, as a political matter, between parents and children. It implies that we should look upon the future of our own state—if the words “our own” did not already beg the decisive question—just as we would look upon “a nation in Asia.”⁶⁰

With this thought, a new political calculus arose, a calculus able to deal for the first time with accelerating rates of change, able to hold itself constant over the furious increase in the pace of social change that would come to define modernity⁶¹ and that was already being felt in the second half of the eighteenth century. Turgot was clear on this point. Yesterday’s foundations could not keep pace; “time brings about new revolutions which will sweep away” whatever utility they may once have had.⁶² In the modern political calculus, there is no coefficient for the future, no basis for writing our codes with the next generation, much less the next millennium, in mind. On the contrary, it would be presumptuous, overreaching, even illegitimate to do so. The future will take care of itself, as the present must take care of itself. For after all, if we do not take care of ourselves, who will?

Where did the present’s insistence on presence come from? Perhaps from the Enlightenment, with its relentless critique of tradition. (Newton, said Voltaire, is worth more than all antiquity.⁶³) Or perhaps it came from capitalism. Or from the breakdown of religious eschatologies. (For if there is no ultimate reward or punishment, what else is there to live for but the present?) Or from science, technology, and the collapse of sexual taboos. All these thoughts—I will not call them explanations—may help with the question of origins, or they may beg it. But however we got to this place, here is where we are.

Except that we are not here, at all.

Modernity’s present-tense temporality may infuse our lives, but can never comprehend them. It can never comprehend itself. No human being lives in the present. We conduct ourselves at almost every moment through temporally extended projects, in a fashion irreducible to the aim of being governed by present voice or of satisfying present preferences.

The example is commonplace, but even now, as you read this paper, are you in fact acting on present will? I doubt that reading this text delivers more satisfaction, or even the promise of greater future satisfactions, than anything else you might do. Can you really think of nothing you would

⁶⁰ See Webster, *supra* note 23, at 14.

⁶¹ See GIDDENS, *supra* note 33, at 6 (noting the “sheer pace of change which the era of modernity sets into motion”).

⁶² TURGOT, *supra* note 26, at 223.

⁶³ VOLTAIRE [FRANÇOIS-MARIE AROUET], VOLTAIRE’S NOTEBOOKS 409 (Theodore Besterman ed., 1952) (“*Boerhave utilior Hippocrate, Newton tota antiquitate, Tassus Homero . . .*”). But he added, “*sed gloria primis.*” *Id.* Professor Gay makes this epigram the epigraph of the first volume of his study of the Enlightenment and dates it as around 1750. See PETER GAY, THE ENLIGHTENMENT: AN INTERPRETATION—THE RISE OF MODERN PAGANISM vii, 31 (reissued ed. 1995) (translating the preceding phrase as “Boerhaave is worth more than Hippocrates, Newton more than all antiquity, Tasso more than Homer; but glory to the first.”).

sooner be doing here and now? Isn't it possible that, in permitting this text to govern some of your precious time, you are not really listening to your present voice at all, but rather seeing through a temporally extended commitment, personal or professional, apart from or even contrary to your moment-to-moment will?

As we live our lives, most of the time we neither decide at each moment what would maximize the satisfaction of present preferences nor decide at each moment what would be the best life to pursue, all things considered. We consider, rather, how best to conduct ourselves within the roles—scholar or lawyer, friend or parent—that we have given ourselves. We occupy spaces of time, conducting ourselves within commitments we have made, living neither for the moment nor for the millennium.

Perhaps there are occasions when we act solely by reference to present will, and perhaps there are other occasions when we bracket every engagement, every commitment, that we have, taking seriously the possibility of walking away from what we have been, and trying to decide what life, all things considered, would be the best life to pursue. But such occasions do not represent how we live most of the time. Nor should such occasions, if they exist, be mistaken for moments of authentic being or freedom, as if only then did we find our true selves or as if only then did we act as genuinely free agents. On the contrary, we find ourselves, and achieve our freedom, to the greatest possible extent when we live a self-authored life—which means a life that includes important temporally extended commitments of our own making.

To live in the present is inescapable—but also impossible. A person genuinely committed to living in the present, strenuously resisting every kind of temporally extended commitment, would be living a contradiction. He would be one of those people who work so hard at being spontaneous, or one of those who take so much care to look as if they do not care about how they look. When we think, for example, that we ought to spend less time at our jobs and live more in the moment—say, by spending more time with our children—we are not really confronting a choice between living in the moment and not living in the moment. “Spending time” with one’s children involves a relation that is about as temporally extended as anything could be in a person’s life. To merely “enjoy” one’s children, as modern childcare sometimes advises, would be, if one really took the advice seriously, a form of child abuse. What is really at stake when we think about how much of our lives to devote to our work, and how much to our “personal” lives, is a judgment not about future-orientation versus present-orientation, but about which temporally extended values or relations we want to live for.

At bottom, there is something fearful in the wish to live in the present, some hint of a loss of confidence or of a reluctance to look one’s past and future in the eye. On page one of a recent novel, the author of *The Book of Laughter and Forgetting*⁶⁴ captures this aspect of life in the present in the

⁶⁴ MILAN KUNDERA, *THE BOOK OF LAUGHTER AND FORGETTING* (Michael Henry Heim trans., HarperPerennial 1994) (1978).

image of a man—and this is an image of modern man himself—on a motorcycle:

What could I say? Maybe this: the man hunched over his motorcycle can focus only on the present instant of his flight; he is caught in a fragment of time cut off from both the past and the future; he is wrenched from the continuity of time; he is outside time; in other words, he is in a state of ecstasy; in that state he is unaware of his age, his wife, his children, his worries, and so he has no fear, because . . . a person freed of the future has nothing to fear.⁶⁵

Nothing to fear except, of course, the past, which is that from which this man is in “flight.” His degree of speed only testifies to the intensity of his desire to forget. “[A] person who wants to forget,” Kundera observes later, “starts unconsciously to speed up his pace . . . the degree of speed is directly proportional to the intensity of forgetting.”⁶⁶

Certainly, we can break with our past, and certainly there are times when we should, but to break with the past is not to live in the present. The revolutions of the eighteenth century, radical and discontinuous with the past though they were, are incomprehensible as programs for living in the present because their defining elements are commitments—temporally extended commitments—to principles built on the ashes of the past. There is a kind of temporal struggle or aporia within modernity, an overtimeliness within it that constantly exceeds the grasp of its present-tense imperatives. The novel itself—and I mean now not Kundera’s novel only, but the novel as such, and here we deal with what might be the definitively modern art form, though, for the very reasons I am about to mention, it is not called modern and no longer even seems modern—displays this aporia. For what was novel about the novel was its creation for its readers of an unprecedentedly full experience of the present life of its characters, and yet this simulacrum of a fully-lived present was achieved only by and through an unprecedentedly full presentation of the temporally extended life of its characters. This struggle over temporal extension is visible throughout the history of the novel, from *Tristram Shandy*⁶⁷ to the most modern of novels, which try to extinguish temporality altogether, and is the very subject matter of one of this century’s greatest novels, the cycle by Proust whose title, translated literally, would be *In Search of Lost Time*.⁶⁸

Proust’s theme: we precisely are not *here*. We are not ourselves, we are never what we are, in the present. But the idea that the earth belongs to the living would have us *here*, governing ourselves by our own present will or voice. The issue, then, is the coherence of a conception of self-government that founds or participates in—no matter what its intentions—modernity’s obsession with currency. Can we conceive of self-government as yet another thing to be had here and now?

65 MILAN KUNDERA, *SLOWNESS* 1-2 (Linder Asher trans., 1996).

66 *Id.* at 39.

67 LAURENCE STERNE, *THE LIFE AND OPINIONS OF TRISTRAM SHANDY, GENTLEMAN* (Ian Watt ed., Riverside 1965) (1759).

68 MARCEL PROUST, *REMEMBRANCE OF THINGS PAST* (C.K. Scott Moncrieff trans., 1932).

The answer is no for three reasons.

First, there can be no governance by the present will of the governed without a prior set of institutions in place, a pre-established set of constitutional rules, by which this present-tense governance is defined and put into place. We in the present cannot govern ourselves without relying on a constitution from the past to tell us, at a minimum, who we are and what the operative principles of political equality are.

Second, there can never be governance in the present without law projecting itself into the future. A law that purported to govern only for its own moment would not be a law at all, but only an act of will or force. To be sure, Jefferson's notion of *generational* self-governance is supposed to forestall this objection by allowing nineteen years for every legal pronouncement. But what, after all, is the basis for Jefferson's reliance on the concept of a "generation" after he has declared that the earth belongs to the living? If majority will should change not nineteen years after a legal enactment, but rather the very next day, why should the will of the past continue to govern? To put it another way: if the nation has no collective existence or selfhood such that its law at time 1 could continue to bind it at time 2 (more than nineteen years later), on what ground is a collective existence or selfhood imputed to a "generation," such that its law at time 1 continues to bind it at time 2 (less than nineteen years later)? In other words, if a nation must not be enslaved by the will of the past, why should a generation be?

If there is to be governance at all, there must be law, and law must always project its governance into the future. But this means that we the living can never govern ourselves in the present, in the here and now. To be self-governing, we must both permit ourselves to be governed by past law and must project present law into the future.

Third, and finally, freedom—human freedom, freedom in the human rather than the animal sense—cannot be meaningfully rendered through the ideal of living in the present. Being in the moment is a false god. The freedom to act on nothing but present will is animal freedom. It is the state of being to which stray dogs aspire, or at best the state of grace attained by the home shopper. Human freedom takes time. It takes work. It requires one to be the author of one's own purposes and commitments. It requires the exercise of the distinctly human capacity to relate to oneself as a temporally extended self, to give one's life a text, and to give it purpose and meaning over time. We cannot be free—we cannot be who we are—in the present.

It is not possible here for me to supply an argument for even one of these three large propositions, much less for all of them. Instead, I want to turn to a smaller, more manageable point, a corollary of all three of these larger ideas. This sub-point will return us—finally—to constitutional law and to the question of textualism.

IV. *Voice of the People, Text of the Law*

The question, as I have said, is whether we can live with the present-tense or speech-modeled conception of self-government announced by Jefferson and Rousseau. I have said we cannot, and I have given three reasons

why not, reasons meant to be universal in application. But there is a more specific reason too, a reason particular to our own history: the speech-modeled conception of self-government is irreconcilable with written constitutionalism. Even though this present-tense conception operates behind all of the dominant schools of contemporary constitutional interpretation, it cannot deliver a remotely satisfactory account of constitutional law.

How would a believer in the speech-modeled conception of self-government deal with constitutional law? He would have a limited repertoire of options open to him. He might decide, for example, that judges are called on to read the Constitution in light of contemporary popular consensus, on the ground that only this kind of interpretation could ensure that constitutional law continued to rest on the will of the living. Such present-popular-meaning interpretation was advocated a hundred years ago by the great legal commentator Christopher Tiedeman⁶⁹ and more recently suggested by the great former Justice William Brennan.⁷⁰ One difficulty with such a view is that it leaves the Court with virtually no ground for striking down acts of Congress or any other laws, for that matter, that can claim the support of a national majority. To interpret the Constitution in light of present popular feeling is to surrender constitutionalism itself, part of whose very point, at least as Americans understand it, is to erect guarantees that stand against current majority will.

Another, much more sophisticated interpretive strategy that one might adopt toward the Constitution, while still adhering to the Jeffersonian ideal, would be to construe the Constitution's provisions solely as safeguards for the democratic process. On the processualist view, the proper function of a written constitution is solely to erect and maintain the *process* of present-oriented, majoritarian democratic decisionmaking.⁷¹ The freedom of speech is (naturally) the exemplary case. Processualism views the freedom of speech not as honoring a substantive value, but rather as ensuring the flow of information and the robust debate necessary to self-governing citizens.⁷² A judge who interprets the freedom of speech in this way does not thwart the

⁶⁹ The "judge . . . who would interpret the law rightly . . . need not concern himself so much with the intentions of the framers of the Constitution." TIEDEMAN, *supra* note 48, at 151. On the contrary, "as soon as we recognize the *present will of the people* as the living source of law, we are obliged, in construing the law, to follow, and give effect to, the *present intentions and meaning of the people*." *Id.* at 154 (emphasis added).

⁷⁰ Justice Brennan gave an important address before he retired, entitled, with emphasis added, "The Constitution of the United States: *Contemporary Ratification*," reprinted in *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* 23 (Jack N. Rakove ed., 1990). He argued that in every "act of [constitutional] interpretation . . . it is, in a very real sense, the community's interpretation that is sought." *Id.* at 25. See also, e.g., Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 30, 35-36 (1990) (calling for constitutional interpretation responsive to the "fundamental ethos of the contemporary community" in times of "cultural consensus"); Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1193 (1977) ("[C]onstitutional law must now be understood as expressing contemporary norms."); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 311 (1973) (appealing to "commonly held attitudes").

⁷¹ See ELY, *supra* note 41, at 73-75, 92.

⁷² See, e.g., MEIKLEJOHN, *supra* note 58, at 15-16, 24-27, 39.

majoritarian process at all; he safeguards the conditions necessary to that process.

When this view is generalized from a theory of the freedom of speech to a broader theory of constitutional law, as Ely generalized it in his justly famous *Democracy and Distrust*,⁷³ it yields an ingenious solution to the antithesis between the priority of the present and the supremacy of constitutional law. From criminal procedure to voting rights to the protection of minorities, constitutional law could, Ely argued, “overwhelmingly” be viewed as safeguarding the democratic process, rather than imposing any independent “substantive values.”⁷⁴ The guiding ideal here remains government of the present by the present. Thus, the true task of judicial review, to quote Ely again, is merely to “clear[] the channels”⁷⁵ of political communication, to ensure that all citizens are “guaranteed their say,”⁷⁶ and to assure that representatives speak for the whole people.⁷⁷

Process-based constitutionalism is another version of speech-modeled or present-oriented constitutionalism. It, too, seeks to turn constitutional law into a vehicle for present popular voice, which is why it can never do justice to the Constitution. Constitutional law is suffused with substantive principles laid down in the past—principles of liberty, justice, and power. That is its point. Written constitutionalism is a means of laying down and holding the polity over time to deeply held, substantive, national commitments—like the commitment against slavery or the commitment to the equal protection of the laws. The Constitution’s commitments bind the nation whether or not present majority will supports them. No present-oriented constitutionalism can comprehend the continued governance today, irrespective of present majority will, of these historically bequeathed substantive commitments.

But how then is a believer in speech-modeled self-government—that is, government by the present will of the governed—to regard the Constitution? How can he interpret the Constitution in a way that preserves its historical content, yet respects the right of the living to govern themselves?

The answer is simple. He becomes a textualist.

By textualism here, I do not mean literalism of a mechanical or ahistorical sort. I will understand by “textualism” what Justice Scalia says he means when he advocates “textualism”:⁷⁸ a species of originalism, an inquiry into “how the text of the Constitution was originally understood.”⁷⁹ The textualist’s originalism is not Framers’-intent originalism.⁸⁰ Textualism looks, rather, for the meaning of the constitutional text that was understood or would have been understood by “the *public*” “at the time of the law’s enact-

⁷³ See ELY, *supra* note 41, at 73-104.

⁷⁴ See *id.* at 73, 74.

⁷⁵ *Id.* at 105.

⁷⁶ *Id.* at 80.

⁷⁷ See *id.* at 152-67.

⁷⁸ See 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, 23-25 (Amy Gutmann ed., 1997).

⁷⁹ *Id.* at 38.

⁸⁰ See *id.*

ment”—to quote Robert Bork, who is very close to Scalia on this point.⁸¹ Or a little more accurately: it looks for the meaning as understood by the *ratifying* public;⁸² for the idea is that the law as understood by the ratifying public is alone the law that was democratically consented to. Textualism understands its mission to be keeping the Constitution as close as possible to the law that was “democratically adopted.”⁸³

And by so understanding its mission, textualism displays its commitment to Jefferson’s ideal—the present-tense ideal—of self-government. How? Textualism is a means of treating the constitutional text as a vehicle for the voice of the people—at the time of enactment. That is why dictionaries are a textualist’s authorities, not out of respect for literal meanings, but out of respect for what the public would say about the meaning of a word. A dictionary too expresses a voice—a popular voice. A ratification-era *Webster’s* is supposed to help a court determine what the American people at the moment of ratification would have said was being ratified. A textualist may speak of what the Constitution “says,” but that is always a shorthand for the voice for which the Constitution is genuinely supposed to speak, the voice that alone gives the Constitution its legitimate authority, the voice of the people who ratified it.

Textualism, therefore, understands the Constitution just as Jefferson or Rousseau would have understood it—as a declaration of the then-present will of the then-living people, an expression of their will and nothing more. Does the textualist worry that constitutional law, so understood, imposes on present-day Americans the will of Americans long dead? Certainly he does. He believes in governance by the living will of the people. That is why he presents himself as an anti-activist, scorning and mocking those judges who use the Constitution to obstruct the right of present majorities to have their way.⁸⁴ But how then does a textualist defend the rule of the dead? His answer is that if the citizens today disagree with their Constitution, they need

⁸¹ ROBERT H. BORK, *THE TEMPTING OF AMERICA* 144 (1990) (emphasis added); see also Scalia, *supra* note 78, at 38.

⁸² See BORK, *supra* note 81, at 144. As Bork explains:

Though I have written of the understanding of the ratifiers of the Constitution, since they enacted it and made it law, that is actually a shorthand formulation, because what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean. It is important to be clear about this.

Id.

⁸³ See Scalia, *supra* note 78, at 40.

⁸⁴ See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 996 (1992) (Scalia, J., dissenting) (“The Imperial Judiciary lives. It is instructive to compare [the plurality’s] Nietzschean vision of us unelected, life-tenured judges[,] leading a Volk who will be ‘tested by following,’ . . . with the somewhat more modest role envisioned for these lawyers by the Founders.”); *id.* at 1001 (Scalia, J., dissenting) (“Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward.”); see also, e.g., BORK, *supra* note 81, at 171 (“The real objection [that judges and others have to originalism] is not to rule by dead men . . . but to rule by living majorities. Though it is disguised, the unrepresentative-dead-men argument is nothing more than an attempt to block self-government by the representatives of living men and women.”).

only amend it to enact their current will. Hence there is no problem: we “remain entirely free” to amend the Constitution whenever we like.⁸⁵

Except, of course, that we are not “entirely free” to amend whenever we like. As we all know, Article V imposes onerous obstacles to amendment, including supermajority requirements. As Jefferson himself pointed out, the possibility of amendment under these conditions cannot be sufficient if legitimate political authority genuinely resides in the majority will of the living.⁸⁶ The truth is that, notwithstanding the Constitution’s amendment procedures, or rather because of those procedures, constitutional law in our system supercedes the nation’s democratic will on any number of fundamental matters.

Robert Bork knows this: that is why, in his most recent work, he now advocates federal legislative overrides of the Supreme Court’s constitutional decisions.⁸⁷ How can this champion of original meaning, this constitutional conservative, have come to favor a proposal essentially abrogating written constitutionalism as America has known it? You may say that Bork is merely jealous (“If I don’t get to be Supreme in all the land, no one does”), but on the contrary, Bork is finally taking his original premises to their logical conclusions. Like every good originalist, Bork never had any account—no account at all—explaining why the will of the dead should govern. From textualism’s own point of view, the will of the citizens today ought to govern. A congressional constitutional override is in fact the natural, proper endpoint of textualism and all originalism.

Let me go over this point again, which may be a little surprising at first. Textualism treats the Constitution as an expression of the will of those living at the time of enactment. When textualists bother to consider the question of the legitimate authority of a Constitution interpreted through a jurisprudence of original meaning, they assume that the will of the dead is permissibly enforceable today because today’s citizens remain free to change their minds whenever they so choose. Textualism is therefore a device that tries to accommodate constitutionalism within the Jeffersonian or Rousseauian ideal of government by the present will of the governed.

But the accommodation necessarily fails. The Jeffersonian ideal and every school of interpretation built around it is, at bottom, opposed to constitutionalism. Jefferson was fairly explicit on this point, at least on occasion.⁸⁸ Webster was even more so. The entire attempt to entrench a written constitution, he warned, in a passage I have quoted already, “is the assumption of a

⁸⁵ See BORK, *supra* note 81, at 171.

⁸⁶ In the same letter discussed in detail above, Jefferson notes:

[T]he power of repeal [or amendment] is not an equivalent. It might be indeed if [the] form of government were so perfectly contrived that the will of the majority could always be obtained fairly and without impediment. But this is true of no form. The people cannot assemble themselves. Their representation is unequal and vicious. Various checks are opposed to every legislative proposition. Factions get possession of the public councils. Bribery corrupts them.

Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *supra* note 2, at 396.

⁸⁷ See ROBERT BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 117 (1996).

⁸⁸ As described above, Jefferson held that no constitution could exert legitimate authority beyond the “generation” that enacted it. See *supra* notes 14-20 and accompanying text.

right to control the opinions of future generations; and to legislate for those over whom we have as little authority as we have over a nation in Asia.”⁸⁹

Textualism’s logical conclusion is the surrender of constitutionalism itself, for it dictates either a facilitated majoritarian amendment process, as my friend and colleague Akhil Amar has shown,⁹⁰ or at the very least, as Bork has correctly concluded, a legislative override of constitutional decisions. Both these results spell the abrogation of American written constitutionalism, because both pursue the ideal of making constitutional law conform to the present voice of the people. Constitutionalism cannot survive when squeezed into a jurisprudence of a particular past moment, for it then lacks any account of its own legitimate authority, its own supremacy over the popular will of the present moment.

To restate what should go without saying: I am not arguing for Jefferson’s thesis. I am not arguing that textualism is wrong because, by refusing to defer to the will of the living, it therefore becomes anti-democratic and illegitimate. 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. Textualism, despite itself, is trapped in the Jeffersonian, speech-modeled, present-tense conception of self-government, and cannot give a coherent account of constitutional law because the speech-modeled conception of self-government is antithetical to written constitutionalism.

Written constitutionalism can only be properly understood, it can only claim legitimate authority, as an effort by a nation to achieve self-government *over time*, where self-government over time refers not to an ideal of governance at each successive moment by the will of the governed at that moment, nor to the imposition of one moment’s democratic will on the rest of the nation’s future, but rather to the nation’s struggle to lay down temporally extended commitments and to honor those commitments over time. Written constitutionalism is revolutionary. It was and is America’s most innovative, most radical, and most influential contribution to the theory and practice of self-government. It is, in fact and by design, an alternative to the speech-modeled ideal of self-government exemplified by the ancient Greek *polis* or the New England town meeting. If this revolutionary institution is to be respected for what it is, and if, moreover, its claim to legitimate democratic authority is not to be undercut, then the Constitution’s commitments must never be reduced to the will of the people at any particular moment. These commitments must not be reduced to the popular voice of the founding moment any more than to that of the present moment. A written constitution is not the expression of the voice of the people at all.

When the dimension of time is restored to self-government, all the seeming paradoxes of constitutional democracy, including the counter-

⁸⁹ Webster, *supra* note 23, at 13, 14.

⁹⁰ See Amar, *supra* note 47, at 1064-66.

majoritarian difficulty, fall away. Written constitutionalism *is* democracy; it is democracy over time. It represents a nation's struggle to live over time under legal and political commitments of its own making. There is no counter-majoritarian difficulty; this difficulty never referred to the bare fact that judges, like legislators or presidents, sometimes arrive at results contrary to majority will. The "counter-majoritarian difficulty" states the charge that judicial review is an institution whose very purpose is to thwart the outcomes of the majoritarian processes and hence is necessarily "undemocratic."⁹¹ In other words, the counter-majoritarian difficulty rests on the assumption that self-government ideally consists in governance by the present will of the governed. But self-government cannot be had in the present. It consists, instead, in living under temporally extended, self-given commitments. Democracy is not "counter" to, it is not opposed to, constitutionalism. On the contrary, democratic self-government requires an institution to preserve, to interpret, and to enforce the nation's fundamental commitments over time, apart from or even contrary to the will of the majority at any particular moment.

To be sure, this enterprise can derail. Judges can so alter a constitutional commitment over time that it is no longer the commitment that the nation put into writing. Or "the people" itself can so alter over time that it no longer recognizes the Constitution's commitments, however well or truly the judiciary has interpreted them. But one should not regard these states of affairs as crises in which the underlying antithesis between constitutionalism and democracy is finally exposed. One should regard them as the necessary vulnerabilities—the inevitable possible failures—of the struggle for political freedom, for self-government over time.

V. *Reading the Constitution As Written*

How then is the Constitution to be interpreted, if its writtenness is to be respected, if it is not to be turned into a mere vehicle for popular voice? I want to conclude by considering briefly a specific problem in contemporary constitutional doctrine in order to illustrate what constitutional interpretation would look like if the speech-modeled conception of self-government, with its relentless demand to reduce constitutional questions to a single moment of popular voice, were thoroughly overcome. Because I will just give the matter a few paragraphs, I think it best to stick to a topic of relatively small proportions—say, affirmative action.

A true textualist Justice, if there were such a person, would naturally begin by trying to determine, as specifically as he could, whether there was an original understanding about whether the Fourteenth Amendment permitted government to single out blacks for advantageous treatment in the allocation of public benefits. In fact there seems to have been such an understanding. The very Congress that promulgated the Fourteenth Amendment practiced race-based affirmative action on a number of occasions,⁹² including its enactment of a welfare statute for the District of Columbia in 1867 that granted

⁹¹ See, e.g., BICKEL, *supra* note 45, at 17.

⁹² See Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430-32 (1997).

money to “destitute colored” persons in the nation’s capital.⁹³ Obviously a textualist would not want to defer to the “subjective intentions” of the draftsmen, and obviously the Equal Protection Clause applies to state action rather than to congressional action. Nevertheless, Congress’s actions in the 1860s were such that a true believer in the original meaning of the text would be obliged to conclude that there was no understanding at the time of enactment that racial preferences for blacks were instances of the kind of abuse that the Fourteenth Amendment categorically outlawed.⁹⁴ A true textualist could not categorically condemn such preferences.

But the argument I have advanced today would not be satisfied with the original understanding. A Justice determined to read the Constitution as written, and not as a vehicle for popular voice, could not be an originalist—at least not as originalism is currently understood. He could neither defer to the sum of the Founders’ specific intentions, nor could he try, as today’s “soft” originalists do, to translate into present realities the Founders’ more general objectives and purposes, because both of these strategies are means of interpreting the Constitution in accordance with the voice of a particular historical moment.

Instead, a Justice who reads the Constitution as written would start by recognizing that a constitutional commitment, that constitution-writing itself, begins with a never-again. The enactment of a new constitutional guarantee means first and foremost that certain laws or practices, under which the nation has previously lived but which it now deems intolerable, will never again be permitted in this country. Constitution-writing is the act of memorializing into foundational law principles and propositions that commit the nation in writing never again to permit certain evils, such as slavery or black codes. The meaning of a constitutional right is forever anchored by these core or paradigm cases. By building doctrine around a provision’s paradigm cases, interpretation will preserve the core historical meaning of a constitutional commitment, without reducing constitutional meaning to the will of any particular moment, past or present.

Such paradigm cases give constitutional law its interpretive anchor and its root in the nation’s history, rather than in mere philosophy. These cases tie constitutional interpretation to the actual act of constitution-writing whose interpretation is at issue. But there can be no question of deferring to original intentions *in toto*, because doing so would, to repeat the point, reduce the constitutional text to the voice of a particular historical moment. Written constitutionalism rejects the ideal of constitutional law as the declaration by the then-living generation of its then-present will, with every successive generation expected to make its own constitution in accordance with its own then-present will. Written constitutionalism rejects this ideal not only in theory, but in its actual doctrinal existence. American constitutional law is plainly not the expression of the democratic will (nor the judicial will) of this

⁹³ S. Res. 4, 40th Cong., 15 Stat. 20 (1876); H.R. Res. 4, 40th Cong., 15 Stat. 20 (1876).

⁹⁴ For an excellent overview, but with perhaps too much emphasis on the Freedmen’s Bureau Acts, which were formally race-neutral, see Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

nation from any particular moment in our history. We live under a body of constitutional law that is utterly trans-temporal, to use Professor Tribe's term:⁹⁵ a body of law in which clause is piled on top of clause, decision on top of decision, with interpretations and principles building up, tumbling down, building up again, and interacting with one another across generations. This is all quite inexplicable from a point of view that would read the Constitution as a vehicle for popular voice, but inescapable for a Court that is trying to read the Constitution genuinely as written. The task of constitutional law is to hold the nation to its commitments over time, and the meaning of commitments (as opposed to intentions) can never be settled in advance, nor collapsed into the will of any given moment.

To illustrate the paradigm case method, and to return to the Fourteenth Amendment, consider the Supreme Court's decision a century ago ruling that the Fourteenth Amendment permitted states to bar women from the professions.⁹⁶ This result was wholly consistent with the original understanding, and we should hardly expect a court five years after a new amendment is enacted to do more than what was originally intended—although this was a Court that did far less.⁹⁷ But the Court's ultimate task under the Equal Protection Clause is to determine what that clause requires if, in its core meaning, it forbids a state to perpetrate the racial discriminations embodied in the Black Codes. In other words, the Court is obliged to elaborate and extrapolate from the paradigm cases, without reducing constitutional meaning to the putative democratic will of a particular moment. It is obliged to honor the textual commitment, as exemplified by its paradigm cases, regardless of the popular will at the "founding moment," the present moment, a predicted moment, or any other "constitutional moment." Now, if 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. Once again, if original intent were all that counted, *Bradwell v. Illinois*⁹⁸ would have been a perfectly defensible decision. But we have ruled out simple originalism as an effort to read the Constitution as the expression of a single moment's democratic will. Apart, then, from a mere declaration of the original intentions (whether of the Framers or of the ratifying public), 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? He might say something like what Justice Bradley said in *Bradwell*: that the equal protection of the laws does not confer on women a right to occupy positions for which their natural timidity "unfits" them, positions that take them outside the home where men can serve as their "protector," or positions inconsistent with the "mission" laid down for

⁹⁵ See Laurence H. Tribe, *Comment, in A MATTER OF INTERPRETATION, supra* note 78, at 65, 87.

⁹⁶ See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1873) (upholding state law denying women the right to practice law).

⁹⁷ See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 83 (1872).

⁹⁸ 83 U.S. (16 Wall.) 130 (1873).

them by the “law of the Creator.”⁹⁹ But this is precisely the point in the interpretive analysis where the paradigm cases are decisive. Those who championed slavery and the Black Codes could have made equivalent arguments equally well—indeed, such arguments were always made. To read the Fourteenth Amendment as the Court did in such cases as *Bradwell* betrays that Amendment’s paradigm cases, notwithstanding *Bradwell*’s conformity with the original understanding.

What, then, of affirmative action? The Court’s task, on the view I am laying out, is ineluctably normative, ineluctably interpretive. The Court must decide what is required in order for the nation to honor the commitments marked out by the Equal Protection Clause’s paradigm cases—among which it is today proper to include not only the Black Codes but also the apartheid laws notoriously upheld in *Plessy v. Ferguson*,¹⁰⁰ and at last struck down in such decisions as *Brown*¹⁰¹ and *Loving v. Virginia*.¹⁰² Do these paradigm cases stand for a principle of categorical color-blindness or do they stand instead for a different principle, perhaps an anti-caste principle of the kind first articulated by Justice Harlan in his *Plessy* dissent?¹⁰³

I do not want to suggest that this question is an easy one, although in my view,¹⁰⁴ the case for categorical color-blindness is ultimately undone by the very paradigm cases supposed to give it support. I mean that categorical color-blindness implies (1) that the presence or absence of an invidious purpose behind a racial classification is essentially irrelevant, and (2) that America’s separate-but-equal laws imposed no greater constitutional injury on blacks than they did on whites—which is to say that color-blindness actually recapitulates the same errors perpetrated by *Plessy* itself, the very errors

⁹⁹ *Id.* at 141 (Bradley, J., concurring). *Bradwell* was argued and decided under the Privileges and Immunities Clauses of the Constitution. *See id.* at 130-31. Hence Justice Bradley, speaking for two other Justices as well, made these arguments to support the claim that the “privileges and immunities of women” differed from those of men. *See id.* at 140 (Bradley, J., concurring). The majority in *Bradwell*, relying on the recently decided *Slaughter-House Cases*, held that the practice of law was not a privilege or immunity protected by the Fourteenth Amendment. *See id.* at 138-39. But in the *Slaughter-House Cases*, the Court also announced the reasoning on the basis of which claims like *Bradwell*’s were to fare no better under the Equal Protection Clause. *See The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 81 (“We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of [the Equal Protection Clause].”); *see also, e.g.*, *Strauder v. West Virginia*, 100 U.S. 303 (1879) (dictum) (announcing that states were free to ban women from juries because “[w]e do not believe the Fourteenth Amendment was ever intended to prohibit this. . . . Its aim was against discrimination because of race or color.”), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 n.19 (1975).

¹⁰⁰ 163 U.S. 537 (1896).

¹⁰¹ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

¹⁰² 388 U.S. 1 (1967). Precedent can supply new paradigm cases for a constitutional provision. For a fuller account, see Rubinfeld, *supra* note 49, at 1177-79.

¹⁰³ Dissenting alone, Harlan wrote:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. . . . But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here.

Plessy, 163 U.S. at 559 (Harlan, J., dissenting).

¹⁰⁴ *See* Rubinfeld, *supra* note 92.

that Justice Harlan's lone dissent, typically cited in support of color-blindness, so memorably exposed.¹⁰⁵ The point here is only this: reasoning from the paradigm cases is in fact what most of our Justices do and have always done when interpreting the Constitution, regardless of whether they call themselves textualists, originalists, or even contemporary consensualists.

There could be no clearer example of this than Justice Scalia's position on affirmative action, which has nothing to do with the plain meaning of the text, which is utterly oblivious to the original understanding of that text, but which is clearly a statement of his deepest understanding of the lessons to be drawn from America's efforts to eradicate racism.¹⁰⁶ In other words, Justice Scalia actually reads the Constitution as written, or at least tries to read the Constitution as written, in spite of his ostensible textualism.

Conclusion

A millennium is an accident—a calendrical accident. Hence a millennial event, an event genuinely tied to the coming of, say, the year 2000, could not be an accident, but would have to be the product of human design and foresight. Our Year 2000 computer fiasco is just such a product, and the degree of foresight it displays is, of course, what makes it so remarkable. We see in this millennial event the extraordinary foresightfulness of a society that lives, sensationally but a little desperately, and always very expensively, in the present. Yes, the federal budget is for the moment almost in balance, even though the media, in their zeal for the immediate, tend to neglect the little problem of the five trillion dollars that the present day has already run up on its own account, smiling genially at the imagined complaints of posterity (“there you go again”).

¹⁰⁵ The *Plessy* opinion rested on the claim that separate-but-equal inflicted no unique, constitutionally cognizable injury on blacks:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. . . . We imagine that the white race, at least, would not acquiesce in this assumption.

Plessy, 163 U.S. at 551. Justice Harlan gave the lie to this hypocrisy:

It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But . . . every one knows that [the statute] had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.

Id. at 556-57 (Harlan, J., dissenting). The true issue in *Plessy*, Harlan wrote, was the constitutionality of “state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens.” *Id.* at 560 (Harlan, J., dissenting). To say, as categorical color-blindness says, that race classifications inflict an identical constitutional injury no matter who the affected parties are or what rights are involved, is to ignore history, to ignore social fact and social meaning, and to ignore the importance of legislative purpose. It is, in short, to do just what the *Plessy* Court did.

¹⁰⁶ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (“To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to . . . preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.”).

Perhaps America is the most ahistorical of nations. We are, after all, a nation in which nostalgia itself tends to reach back no further than a decade or two (fifties-retro was old hat by around 1980; today, horrible as it may seem, the seventies are in vogue). We are also, however, at the same time, and for the same reasons, a nation spectacularly lacking in vision for our future. What plans do we have to make use of a technological power that is unthinkable, unprecedented, relative to any other period in history? What ambitions do we have for our nation over the next fifty years? The next ten? Other than enhancing the usual economic indicators, we have none. As the human genome becomes just another text, ready for coding and decoding, we had better begin to think again about what we want to make of ourselves.

The Constitution cannot be reduced to a temporality of the moment. It belongs to a very different temporal order. Jefferson lost the battle over the basic shape of American constitutionalism. Constitutional 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, to write its own codes, to lay down and to live up to its own foundational commitments over time. Self-government takes time. A nation might take a century to realize its commitment to, say, the freedom of speech or the equal protection of the laws. It might take two centuries, or even more. Let us not surrender this legacy. Let us not follow those who believe that constitutional law can be no more than the declaration of the will of the people living at a particular moment; for they would have us reduce the Constitution to a hollow shell of itself, either making it subordinate to the voice of the people at the present moment or making it a vehicle for the voice of the people at a past moment.

Constitutional self-government, like every struggle for human liberty, involves us in a project that at every second carries on the past within a vision for the future. At this moment, at this millennium, it would seem we have no future. Let us live to see that change.