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A Grand Theory of Constitutional Law

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A GRAND THEORY OF CONSTITUTIONAL LAW?

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FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT. By *Jeb Rubenfeld.* New Haven: Yale University Press. 2001. Pp. 255. $35.

Jeb Rubenfeld's book is nothing if not ambitious.[1] In just 250 pages, Rubenfeld seeks to: justify the authority of the Constitution, establish the legitimacy of judicial review, resolve the counter-majoritarian difficulty, offer a method of constitutional interpretation and judicial review, uphold the constitutionality of affirmative action, and explain the legitimacy of judicial protection of privacy, including abortion rights. Scattered throughout the book, he offers philosophical insights as to the meaning of life, discussing a central issue for all of us: dealing with time. Rubenfeld's book is elegant, relying on history,[2] continental philosophy,[3] game theory,[4] and even Supreme Court cases, to support his theory.

As a reader, I very much want for Rubenfeld to succeed. I agree with almost all of his conclusions.[5] No doubt, it would be wonderful to have a theory that resolves the counter-majoritarian difficulty, justifies nonoriginalist judicial review, and supports affirmative action and

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1. Jeb Rubenfeld is the Slaughter Professor of Law at Yale Law School.

2. *See, e.g.*, pp. 22-24.

3. *See, e.g.*, pp. 34-41, 147-48 (discussing Habermas), 9-10, 75-76 (discussing Derrida), 234-43 (discussing Foucault).

4. *See, e.g.*, pp. 27-28, 102-15 (discussing Kenneth Arrow and the application of his theorem to law).

5. I disagree with only some of his conclusions. For example, Rubenfeld says that he does not think that there should be constitutional protection for the right to marry. P. 245. As one who believes that the liberty of the due process clause safeguards fundamental rights relating to privacy and personhood, I disagree and believe that the right to marry properly has been safeguarded by the Court as a fundamental right. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1974); Loving v. Virginia, 388 U.S. 1 (1967) (constitutional protection of the right to marry). More importantly, I disagree with Rubenfeld's conception of strict scrutiny. I see strict scrutiny as a form of balancing, with the weights on the scales being set against the government's action. Rubenfeld, as part of his paradigm case method of constitutional interpretation, sees strict scrutiny as absolutely prohibiting certain government actions and justifications. Pp. 202-03. I discuss Rubenfeld's paradigm case method of interpretation in Section II.C, below.

abortion rights. If Rubenfeld succeeded, progressive law professors could forever retire from engaging in constitutional theory, except to refine, apply, and defend his approach.

And if this is not enough, Rubenfeld claims to accomplish this by rejecting all of the constitutional theories that have been previously developed. The book jacket quotes Bruce Ackerman as stating, "This brilliant book heralds a new era in constitutional thought."

Unfortunately, if Rubenfeld's claims seem too good to be true, it is because they are. On careful examination, many key steps in Rubenfeld's argument have serious problems. Some aspects of Rubenfeld's analysis are simply rephrasings of familiar arguments in constitutional theory. Others, such as his "paradigm case" theory of judicial review, are so inadequately developed as to be of little help in understanding how courts should decide cases.

Rubenfeld's book is similar to efforts by Albert Einstein and other famous physicists to develop a "unified" theory accounting for all physical forces. Even Einstein failed at this effort and most physicists seem skeptical that a "unified field" theory ever can be developed. Likewise, reading Rubenfeld's book heightens my skepticism that there ever can be a grand theory of constitutional law of the sort he seeks.

Part I of this Review summarizes Rubenfeld's thesis and his arguments. Part II considers the key steps in Rubenfeld's argument and the problems with it. Finally, Part III concludes by offering final thoughts about the role of constitutional theory.

I. RUBENFELD'S THESIS

At the risk of oversimplifying, I see six major steps in Rubenfeld's analysis.

(1) *The traditional approach to constitutional law is "speech oriented," meaning defining democracy as having government follow the voices of the current majority of society.* Rubenfeld argues that society is obsessed with living in the present. He says that "[t]he proliferation of the imperative to live in the present . . . can be seen in a wide variety of modern practices, institutions, styles, and literatures" (p. 26). He says that in the realm of government this means that democracy is understood as the imperative for government to follow the will of the current majority of society. This is what he means by "speech oriented." Rubenfeld writes that "a . . . predominant conception of self-government . . . call[ed] speech-modeled of which the organizing term is government by the present will or voice of the governed" (p. 74). He says that "[t]he idea that the earth belongs to the living would have us govern ourselves by our own present will" (p. 143). In other words, Rubenfeld finds the definition of democracy as majority rule as de-

rived from a focus on the *current* majority and the need to follow its voice.

(2) *A "speech-oriented" approach to constitutional law creates the counter-majoritarian difficulty.* Four decades ago, Alexander Bickel wrote of judicial review being a deviant institution in American society.[6] Bickel wrote of the counter-majoritarian difficulty: constitutional judicial review involves unelected judges striking down the choices by popularly elected legislatures.[7] If democracy is defined as majority rule — or as Rubenfeld puts it, if government is thought of in "speech" terms — judicial review is inherently at odds with democracy.

Countless books and articles have been written about this, including many that offer their own solutions to reconciling judicial review with democracy. Originalists, for example, argue that their theory is best because it limits the situations in which courts usurp the popular will to only those situations where the Constitution's text and intent are clear.[8] Perhaps most famously, John Hart Ely's book *Democracy and Distrust* begins on page one by defining democracy as majority rule and then purports to reconcile judicial review with it by having courts focus on perfecting the processes of government.[9]

Rubenfeld argues that every model of judicial review is fatally flawed because it is founded on a speech-oriented approach. Rubenfeld reviews major approaches — social contract analysis, originalism, proceduralism, consent theory, and liberalism — and shows how none succeeds in solving the counter-majoritarian difficulty. He says that the "antimony built into the very logic of the speech-modeled ideal of self-government makes that ideal presuppose what it cannot accept: the presence of texts, enacted in the past, governing the polity on fundamental matters of justice today and in the future" (p. 75).

(3) *The Constitution instead should be seen as a written commitment over time.* Rubenfeld sees his alternative view of the Constitution as being about enduring commitments, and he derives this from the fact that the document is written. He writes:

> Self-government cannot be an exercise merely of freedom of speech and all that *freedom of speech* entails (political dialogue, formation of the 'public will,' responsiveness of the representatives to the 'voice of the people.') Self-government requires an inscriptive politics, a politics that exercises the *freedom to write*, a politics oriented around the production

6. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962).

7. *Id.* at 16-20.

8. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977); ROBERT BORK, SLOUCHING TOWARD GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE (1996); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

9. JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

> and enforcement of a democratic text laying down principles and institutions for generations to come. (p. 86)

He says that the Constitution is a "conception of self-government as living out, over time, commitments of one's own authorship" (p. 14). Later he explains this by stating: "[T]he defining thesis of self-government on the model of writing [is] the self that governs itself over time is governed by commitments of its own making, apart from or even contrary to its will at any given moment" (p. 92).

In other words, there are three basic elements to Rubenfeld's conception of the Constitution: it is a commitment; it is expressed in writing; and it is meant to last over time. He discusses, in detail, types of commitments that people make. He explains the importance of a written, as opposed to a speech-based approach to government. Unlike a speech-founded orientation, which is committed to following the will of the present majority, a written Constitution is not so oriented. Most importantly, he says that understanding the Constitution requires that it be seen as extending over time and thus transcending the present-oriented approach to government that he earlier criticizes. Indeed, a central focus of his book concerns time and how focusing on it changes our understanding of the Constitution.

(4) *Viewing the Constitution as written warrants its existence, justifies judicial review, and solves the counter-majoritarian difficulty.* The obvious objection to Rubenfeld's argument is that those who are now alive did not ratify the Constitution. Why should they be seen as having made the commitment that he describes? This is particularly important because Rubenfeld criticizes those who have described the Constitution as an effort of society to tie its hands so that short-term impulses do not cause a compromise of long-term values.[10] Some, such as Jon Elster, have used the story of Ulysses and the Sirens, where Ulysses had his hands tied to the mast to prevent him from indulging in the desire to follow the Siren song, as a metaphor for the Constitution.[11] Rubenfeld, though, says that the problem with this view is that those now alive did not choose to tie themselves to this mast; it was a choice made by past generations and what right do they have to tie future ones? (pp. 93-94). Moreover, Rubenfeld argues that the analogy to Ulysses does not provide a normative reason why the commitment should be honored (pp. 116-17).

But why doesn't Rubenfeld's conception of commitment and a written constitution run afoul of the same problems? He says that it is because there is such a thing as the American "people" that exists over time (p. 131). Of course, the individuals change, as they die and

10. *See, e.g.*, 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 18-23 (3d ed. 2000).

11. JON ELSTER, ULYSSES AND THE SIRENS 94-96 (1984).

new persons move in and are born. But Rubenfeld says that even a single person changes; he writes that "we are composed of many different selves not at a particular moment, but over time" (p. 131). Rubenfeld says that just as an individual changes, but retains his or her status as a person, so can "people" change, but retain a common unity. He says "the way we solve the problem of unity of the subject over time, in the case of persons, is by recognizing that human subjects occupy time as well as space .... The idea of human-being as being-over-time completes the work necessary to situate commitment to human freedom" (pp. 139-40).

Therefore, since there is an American people — of which we are all a part — and it has committed itself to the Constitution, we, in the present generation, have done so too. This commitment is not just made by those in the past, but by a timeless "people" of which we are a part. In a particularly important passage, Rubenfeld writes: "Today we are all Jews and blacks; we are all minorities infesting a region that others wish they could have for themselves. We are also members of a historical people taking part in that nation's sins and glories" (p. 159).

Rubenfeld says that this justifies judicial review because it exists to uphold and enforce our own commitments. He says that "[c]onstitutional interpretation cannot be vested in organs of government beholden to or expressing popular will" (p. 173). He says that the judiciary is "the only branch positioned to exercise the interpretive power in such a way as to avoid collapsing into an exercise of present democratic will" (pp. 172-73).

Rubenfeld argues that this conception of the Constitution solves the counter-majoritarian difficulty because it is our own commitment that is the basis for invalidating laws conflicting with the Constitution. He boldly proclaims that "[c]onstitutionalism as democracy undoes *all* of the theoretical perplexities that have so confounded contemporary constitutional thought" (p. 163). He says that understanding the Constitution as our own commitment eliminates the need to see judicial review as a deviant institution in American society. He writes: "The cardinal rule of this interpretive task is that interpretation of commitments cannot be permitted to collapse into governance by the self's present will. In saying what commitments require, we are obliged not to rationalize our way, under guise of 'interpretation,' to whatever we wanted to do in the first place" (p. 173).

(5) *In interpreting the Constitution, courts should follow the "paradigm case method."* Rubenfeld says that his view of the Constitution leads to a new way of thinking of judicial review; he terms this the "paradigm case method." He explains this by stating:

> Rules and concepts can take on meaning by reference to their "paradigm case": their central or most clearly established instances .... "Paradigm cases" are so called because they do paradigmatic duty. They furnish fixed points of reference. They are the exemplars, the building blocks,

out of which doctrine is to be built. (pp. 180-81)

Rubenfeld does not claim that the paradigm case method will offer determinative answers in most constitutional cases. He says, though, that it often will "rule out" a proposed interpretation of the Constitution (p. 194). He applies his paradigm case method to justify the Supreme Court's decision in *Brown v. Board of Education*.[12] Rubenfeld says that no other theory of constitutional interpretation can justify *Brown*. He says, though, that if the Fourteenth Amendment is understood as being about eliminating the black codes in the South that followed the Civil War, then *Brown* follows from this paradigm. He writes: "The paradigm case method holds that the meaning of the Fourteenth Amendment is secured, and its proper interpretation shaped, by the paradigmatic instance of its application" (p. 182). He says that the paradigm case of the Fourteenth Amendment is an anti-caste principle and that laws mandating segregation of the races run afoul of it.

(6) *Application of the paradigm case method justifies the constitutionality of affirmative action and judicial protection of privacy, including abortion rights.* In the last two chapters of the book, Rubenfeld applies his theory to particular, controversial constitutional issues. In Chapter Eleven, he considers sex discrimination and race preferences. Initially, he explains why the equal protection clause is properly understood as prohibiting sex discrimination, even though this was not within the intent of the provision's drafters (pp. 197-99). He then tackles the harder topic: the constitutional permissibility of affirmative action.

He begins by making the powerful point that the drafters of the Fourteenth Amendment endorsed affirmative action efforts. He notes:

> The judges and scholars who most prominently oppose affirmative action, saying that 'the government may not make distinctions on the basis of race,' are the very same ones who supposedly champion the jurisprudence of original understanding. But here, without excuse, without a word of explanation, they adopt a highly unoriginalist position, and they ought at least to be candid in doing so.[13]

Rubenfeld argues that the equal protection clause, under his paradigm case method, is about stopping purposeful discrimination against minorities. Affirmative action, to benefit minorities, does not offend this conception of equal protection. Indeed, Rubenfeld writes: "Something has gone profoundly wrong in constitutional interpretation when the Fourteenth Amendment is read, as it is today, to make racial mi-

12. 347 U.S. 483 (1954).

13. P. 202. This is a point that was developed in Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477 (1998).

norities virtually the only minorities in our entire legal system that cannot be singled out for favorable treatment" (p. 218).

Finally, Chapter Twelve presents Rubenfeld's views of constitutional interpretation with regard to privacy and particularly abortion rights. Rubenfeld argues that the Constitution should be understood as containing an "anti-totalitarian right of privacy" — "a right of each person not to have a particular life imposed on him" (p. 239). Rubenfeld argues that from this perspective laws prohibiting abortion are unconstitutional because such laws have "invasive, far-reaching prescriptive, indeed conscriptive effects. It compels this woman to bear a child. It forces motherhood upon her" (p. 225). Rubenfeld maintains that statutes prohibiting abortion go further than any other law in their "conscriptive, life-occupying effects" (p. 225).

Thus, in just 250 pages Rubenfeld covers everything from the reasons for having a Constitution to how it should be interpreted to the resolution of the most controversial issues such as affirmative action and abortion. The argument is logically structured, though the book is not an easy read; the writing is dense and often abstract. I found myself having to read some passages several times to try to understand Rubenfeld's points.

II. WHAT DOES RUBENFELD ADD TO CONSTITUTIONAL THEORY?

Professor Rubenfeld's book is unquestionably impressive in his weaving together continental philosophy, economic game theory, and history to justify his conclusions. He invents a new vocabulary, such as the distinction between a "speech" orientation and a "written" orientation and his "paradigm case method of interpretation." His progressive conclusions make it appealing — at least for liberals — to say that he's got it right.

But, on reflection, the theory is not nearly as original or as effective as Professor Rubenfeld purports. First, although he is right to challenge the definition of democracy as majority rule, this is not new and it is not aided by drawing a distinction between "speech" and "written" views. Second, Rubenfeld's conception of commitment fails for the same reason he criticizes others: people today did not commit themselves to the Constitution. His artificial construct of a unified American "people" — which is the crucial step in his argument — does not work on a theoretical or practical level. Third, the paradigm case method of constitutional interpretation is just another way of phrasing "modified originalism" — constitutional interpretation should be true to the central goal for each provision, even though it need not follow the particular views of the drafters (even if they could be known). As Dworkin put it, for each constitutional principle there is a central concept that should be followed, but there is not the need

to adhere to the specific conceptions of the Framers.[14] Rubenfeld's paradigm case method seems little different than this, except that it is not as clearly explained. I will consider each of these points individually.

A. *Judicial Review and the Meaning of Democracy*

If democracy is defined as majority rule, no theory can succeed in solving the counter-majoritarian difficulty. Unelected federal judges invalidating the actions of popularly elected officials is inherently at odds with majority rule. It does not matter whether the court is following an originalist or a nonoriginalist philosophy; either way, a judiciary that is not electorally accountable is striking down the choices of elected officials. Under originalist review, this may occur less often, but when it happens, it is no less at odds with majority rule.

As I have argued at length elsewhere, the problem with the obsession with the counter-majoritarian difficulty is that it is based on a misdefinition of democracy as majority rule.[15] Neither descriptively nor normatively is majority rule a proper definition of American democracy. Descriptively, the Constitution does not reflect a commitment to majority rule. There is no provision within the Constitution for national referenda or initiatives to allow the majority to be involved in government decisionmaking. There never has been anything at the federal level like the initiative process that exists in many states to allow the majority to vote on laws.

The reason for this is simple: the Framers of the Constitution were deeply distrustful of pure majority rule. The *Federalist Papers*, for example, repeatedly emphasize the dangers of unchecked majority rule.[16] The Constitution they created, for the most part, rejects majority rule. The President is chosen by the electoral college, not the popular vote of the people. The result, of course, is that today — like a few times earlier in American history — we have a president who received fewer popular votes than his prime opponent. Senators initially were selected by state legislatures and even today the allocation of two senators per state ensures that the Senate is not representative of the majority of the population. Federal judges are chosen by the President and approved by the Senate, with no direct role for the people. It is impossible descriptively to see this structure of government as re-

14. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134-36 (1978).

15. *See* Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 74-77 (1989); Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEXAS L. REV. 1207, 1211-26 (1984). *See generally* ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION (1987).

16. *See, e.g.*, THE FEDERALIST NOS. 15-16, at 78-84 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST, *supra*, NO. 49, at 281-85 (James Madison).

flecting a commitment to democracy defined as majority rule. The very existence of the Bill of Rights was to put limits on the majority's ability to restrict individual freedom. Justice Robert Jackson put this eloquently when he wrote:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to a vote: they depend on the outcome of no election.[17]

Nor normatively is such a conception desirable. The United States should be understood as a *constitutional* democracy, a system where the choices of the majority and their elected officials are allowed only so long as they are consistent with the Constitution. The definition of American democracy thus should include both a belief in majority rule and also a commitment to protecting fundamental values — such as fundamental rights, equality, and separation of powers — from the majority.[18] Normatively, it is desirable to have a conception of democracy that focuses on both the processes of government and the substantive values that the Constitution protects.

If democracy is understood this way, then judicial review safeguarding rights or advancing equality is actually consistent with American democracy. Put another way, the Constitution itself is inconsistent with defining democracy as majority rule because the Constitution is an inherently anti-majoritarian document. No one alive today voted for it and a majority cannot change it. Judicial review enforcing an anti-majoritarian document always will be anti-majoritarian. But isn't it peculiar, inaccurate, and undesirable to define American "democracy" in a way that makes the Constitution itself seem deviant? If instead the very definition of democracy includes the Constitution, then judicial review enforcing it is consistent, and not at odds, with democracy.

Rubenfeld essentially makes this point when he argues that democracy should not be defined as the voice of current majorities. He notes that "in a society that aspires to governance by the present voice of the people, this self-addressed self-written law, the one that marks the day of every legitimate popular assembly, is foundationally problematic" (p. 77). He thus argues that the conception of democracy

17. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

18. Mark Tushnet has powerfully developed this point: "Such a view of democracy has seemed inadequate to most political theorists, who argue that democracy, properly conceived, requires the protection of some fundamental but nonpolitical rights." MARK TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 71 (1988).

cannot be based on the speech model which focuses on having the government follow the views of the majority. He argues instead that the proper understanding of the Constitution is as a written commitment.

This distinction between a "speech"-oriented view and a "written"-oriented view is at the very core of Rubenfeld's argument. But I do not see what it adds to attacking the definition of democracy as majority rule. In fact, a distinction between the spoken and written word seems inherently arbitrary. Why should so much depend on the way in which the communication occurs? Both spoken and written forms of communication can be about following the views of the current majority and either could also be about forming an enduring commitment. Binding commitments can be made orally and writings need not be binding over time. Statutes are in writing, but they can be changed by a majority of the current legislature at any point in time.

In other words, the appropriate distinction is between democracy defined as majority rule and democracy defined to include the enduring commitments contained in the Constitution. I think that the latter is preferable, both descriptively and normatively to the former, but I don't see what is added by labeling these "speech" as opposed to "writing."

B. *Is There an Enduring American "People"?*

My strongest criticism of Rubenfeld's book is his reliance on a fictional concept of an American people that transcends time to justify the Constitution and judicial review and to resolve the countermajoritarian difficulty. Rubenfeld's argument that the Constitution should be seen as a "commitment" is not new. Many have developed this argument.[19] For example, as Rubenfeld recognizes, many have analogized the Constitution to the story of Ulysses having himself bound to the mast so as to not be tempted by the Siren songs that lured sailors to their death on the rocky shoals.[20] Rubenfeld quotes Stephen Holmes's characterization of this: "A constitution is Peter sober while the electorate is Peter drunk. Citizens need a constitution, just as Ulysses needed to be bound to his mast."[21]

Rubenfeld says, though, that "the venerable Ulyssean analogy is inapt and misleading" (p. 116). But how is Rubenfeld's theory different from the Ulysses analogy? He says: "[T]he point on which I want

19. *See, e.g.*, ELSTER, *supra* note 11, at 94-96; TRIBE, *supra* note 10, at 18-24; Thomas C. Schelling, *Enforcing Rules on Oneself*, 1 J. ECON. & ORG. 357 (1985).

20. The story is from Homer, *The Odyssey*, Book XII, lines 141-200 (Harper Colophon ed. 1975). The analogy to the Constitution is most developed in ELSTER, *supra* note 11.

21. P. 116 n.26 (quoting STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 135 (1995)).

to focus is this: nowhere in this story of reason and passion does Ulysses's action of self-binding provide him with a reason to act" (pp. 116-17). Rubenfeld elaborates: "The ropes that hold Ulysses when he hears the Sirens explain why he stays on board the ship in a causal sense; they do not supply a reason in a normative sense" (p. 117).

This argument, however, is problematic because the normative reason for adhering to the commitment seems clear: it is desirable to make certain choices in advance and then adhere to them to avoid anticipated harms. For Ulysses, this was the choice to avoid death, while still being able to hear the Siren song, by having himself tied to the mast. The normative desirability of this is obvious. The Constitution allows society to protect its long-term commitments and precious values from its anticipated short-term impulses to compromise them.

Rubenfeld also says that "Ulyssean pre-commitment appeals to rationality as against the seduction of transient passion. Commitment appeals to passion as against the seduction of rationality — of everyday, cost-benefit, preference-maximizing rationality" (p. 129; emphasis omitted). But this seems an arbitrary and false distinction. In making commitments (or pre-commitments), there can be both passion and rationality. Marriage, an example frequently used by Rubenfeld to illustrate the concept of commitment, would, for most people, include both. Likewise, the commitment (or pre-commitment) found in the Constitution makes it difficult for us to later change our mind for reasons of either passion or rationality. Again, this is like being married, which may cause us to stay in a relationship even when passions or rational self-interest might point us to other choices.

Rubenfeld distinguishes his approach to commitment from the Ulysses analogy, and ultimately defends much of his theory, by contending that there is an on-going American "people" of which we are all a part. He says that "a *people* might be regarded as a collective agent, persisting over time, able to make and to live under its own commitments" (p. 93). He says that "[c]ommitmentarian democracy holds that a people, understood as an agent existing over time, across generations, is the proper subject of democratic self-government" (p. 145). He argues that just as a person changes over time, but still remains the same individual, so can a "people" change but remain a single entity. He writes: "To recognize a people as a subject persisting over time, despite the heterogeneity of its composition, is ultimately no more mystical than recognizing individuals as subjects persisting over time despite the heterogeneity of their composition" (p. 158).

This concept of an American "people" does great work in Rubenfeld's theory. It goes to his central thesis about the role of time; he sees a people that transcends time and does not simply exist at a particular moment. The notion of a "people" also provides an easy an-

swer to the counter-majoritarian difficulty: the Constitution, then, is *our* commitment, and enforcing it is not contrary to our will.

Although the notion of an enduring "people" is romantic, it doesn't work because it is purely a fictional construct. The vast majority of those present today did not have ancestors here at the founding. Professor Tribe puts this well when he writes: "For it is not *we*, but people who are long dead who tied us to this mast — not an alien species, to be sure, but not ourselves either . . . . For the truth is that we as individuals are likely to have written, and voted to ratify, not a single word of the document to which we swear allegiance as the Constitution of the United States."[22] Native Americans who were present were excluded from participation, as were women, blacks, and others. Rubenfeld must assume a degree of homogeneity, of some sort, among people engaged in the framing and people now that defies reality.

To be fair, Rubenfeld recognizes this when he states: "There is and always will be something intensely self-delusive in the suggestion that "Americans" compose a single people engaged in a protracted, centuries-long struggle for self-government. This delusion inevitably helps suppress everything we know about America's mistreatment of those excluded, now as well as then, from the Constitution's 'People.' The exclusion of a majority of persons from the constitution-making processes of the 1780s will always eat away at America's legitimacy" (p. 158).

But Rubenfeld brushes this aside by saying that over time there became an American "people." He says: "But if a nation had to be born at a single founding moment, it could never be born at all" (p. 158). He then writes, in a key passage justifying his concept of an American people: "Today we are all Jews and blacks; we are all minorities infesting a region that others wish they could have for themselves. We are all members of a historical people, taking part in that nation's sins and glory" (p. 159).

Again, it sounds romantic, but it also seems clearly wrong. We are not all Jews and we are not all black — not in a fictional sense and certainly not in a real sense. Individuals are often treated differently because of their race or ethnicity and as a result they often experience the world differently. As I drive down the streets of Los Angeles, I am not going to be stopped by its police officers solely because of my race, but those with black or brown skin very well may be stopped. Indeed, because of our different experiences, we often will view constitutional issues differently. Rubenfeld, of course, would not deny this; he would say that it does not refute that there is such a thing as the American "people."

22. TRIBE, *supra* note 10, at 24.

But this then becomes entirely an argument from definition. Rubenfeld defines an enduring "American people" and then uses that definition to great advantage in explaining why a commitment over time is desirable. The problem is that the definition seems so at odds with reality. To use the simplest example, contrary to what Rubenfeld says, we are not and never all will be Jews or blacks or minorities. In a nation as divided as America, now and historically, it is fictional to define the country as consisting of a unitary people persisting over time.

C. *A Method of Constitutional Interpretation*

Rubenfeld's book also describes his approach to interpreting the Constitution: "the paradigm case method" (p. 178). He says that for every constitutional provision there is a "paradigm case" and that courts should discern and reason from it in deciding constitutional cases. He writes: "This method takes as foundational only commitments — and more specifically, only those commitments made in the course of the historical struggles that actuated the Founder's constitution-writing" (pp. 186-87).

However, Rubenfeld's description of the paradigm case method is unfortunately very sketchy. For example, Rubenfeld never explains how a court is to determine the paradigm case for a particular constitutional provision. Equally important, Rubenfeld never explains the appropriate level of abstraction to use in stating a paradigm case. An originalist might use Framers' intent to define the paradigm case and then state it at a very narrow level of abstraction. For example, an originalist might see the paradigm case for the equal protection clause as protecting former slaves from discrimination, thus excluding the protection of other groups. Rubenfeld sees the paradigm case for the equal protection clause as eliminating the black codes (p. 182). But how is the choice to be made as to which is the better "paradigm case?" Rubenfeld never explains. Nor is there any explanation as to how courts are to use the paradigm case method, even assuming that a paradigm case can be discerned.

Rubenfeld's paradigm case method seems very similar to "abstract originalism" — the idea that courts should follow the Framer's general goal for each constitutional provision, but need not adhere to their specific views. This was captured in Dworkin's notion that there is a "concept" for every constitutional provision that should be followed, but that the specific "conceptions" of the Framers need not be controlling.[23] Paul Brest termed this approach "moderate originalism."[24] Although Rubenfeld uses different terminology, there does not seem

23. DWORKIN, *supra* note 14, at 134-36.

24. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205 (1980).

to be any meaningful difference between his approach and the earlier descriptions.[25]

Of course, every court interpreting the Constitution thinks that what it is doing is consistent with the concept behind a constitutional provision.[26] Each could articulate a "paradigm case," at some level of abstraction, to justify any conclusion.[27] Absent any description of how to derive and assess a paradigm case, Rubenfeld's approach adds little except a new phrase.

III. THE FUTURE OF CONSTITUTIONAL THEORY

I confess to being a skeptic as to whether there ever will be a unified theory of constitutional law that answers all of the questions that Professor Rubenfeld addresses. Indeed, Professor Rubenfeld's effort makes me even more doubtful.

Ultimately, the purpose of constitutional theory is to give guidance as to how courts should interpret the Constitution in specific cases. But no overarching theory can answer, or give guidance as to how to answer, the hard questions of constitutional law. Consider a few examples from recent Supreme Court decisions. Does sovereign immunity bar suits against unconsenting state governments in state courts?[28] Should the First Amendment protect the media's broadcasting of a tape of a conversation illegally intercepted and recorded if it concerns a matter of public importance?[29] Is the execution of the mentally retarded cruel and unusual punishment?[30]

I do not see how any desirable constitutional theory can answer these questions. Each inescapably involves a value choice — whether to favor immunity over accountability, whether to favor speech over

25. The same criticisms that could be advanced at all nonoriginalist (or moderate originalist) constitutional interpretation could be directed at Rubenfeld's theory: the lack of any significant constraint on the judges. I share Rubenfeld's belief in nonoriginalist judicial review so I do not mean to criticize him for this. But it is surprising that Rubenfeld makes no attempt to answer this argument, which conservative constitutional theorists undoubtedly would make in response to his theory.

26. Tribe, for example, speaks of "the inescapability of moderate originalism." TRIBE, *supra* note 10, at 51.

27. Nor does Rubenfeld address the key question in any theory of constitutional interpretation: the level of abstraction at which a principle is to be stated. *See* LAURENCE TRIBE & MICHAEL DORF, ON READING THE CONSTITUTION (1991) (discussing the importance of the choice of the level of abstraction).

28. Alden v. Maine, 527 U.S. 706 (1999) (holding that state governments cannot be sued in state court, even on federal claims, without their consent).

29. Bartnicki v. Vopper, 532 U.S. 514 (2001) (noting the First Amendment precludes the imposition of civil liability for using or disclosing the contents of illegally intercepted communications on a person who was not involved in the interception, but who knew or had reason to know that the interception was unlawful).

30. Atkins v. Virginia, 122 S. Ct. 2242 (2002).

privacy, whether to protect the individual or the state's choice of punishment. Deciding each of these questions — like almost all constitutional issues — requires making a value choice. There is no way to avoid that.

Some, such as originalists, may try to hide their choices in the cloak of a claimed neutral methodology. But as many have shown, originalists are making value choices and simply masking them in the language of Framers' intent. As Dworkin said, there is not a Framers' intent out there to be discovered; it is created and the creator does so in a way to advance his or her value choices. Think of Justice Antonin Scalia: he finds in his theory of original meaning a Constitution that forbids affirmative action, allows bans on abortion, permits school prayer and aid to parochial schools. Surely it is not coincidence that these also happen to be his, and other conservatives', political views.

Constitutional decisionmaking is all about value choices. Should equal protection be seen as prohibiting government-mandated segregation? This is not answered in the text or the Framers' intent or by paradigm cases or any other theory of constitutional interpretation. *Brown v. Board of Education* was a value choice. In allowing the Boy Scouts to exclude gays, the Supreme Court made a value choice to favor the group's right to make discriminatory choices over the right of gays to be free from discrimination. Plain and simple, that's what *Boy Scouts of America v. Dale* was about.[31] Every time the Court balances, such as in deciding what is reasonable under the Fourth Amendment or in deciding whether intermediate or strict scrutiny is met, a value choice is being made.

This is not to say that there is no role or importance for constitutional theory. Constitutional theory can explain why it is desirable to have an institution, like the judiciary, making value choices. Rubenfeld's book offers such an explanation in describing the importance of making and adhering to commitments over time. But constitutional theory cannot avoid the need for courts to make value choices in deciding cases. Nor can constitutional theory provide the content for those value choices. That should be the primary focus of constitutional scholarship: debating and illuminating the value choices that courts should make in interpreting the Constitution.

CONCLUSION

I liked Professor Rubenfeld's book more than may seem from this Review. I was dazzled by his ability to integrate continental philosophy, modern economics, and social psychology, among other disciplines, into a theory of constitutional law. I was awed by his audaciousness in claiming to reject all prior constitutional theories and

31. 530 U.S. 640 (2000).

develop his own and to try to accomplish so many tasks in such a short book. I learned a great deal from this book.

Yet, in the end, I was frustrated by the book because although I wanted him to succeed, it just isn't possible. There is not a grand theory of constitutional law that can justify the Constitution's existence, warrant the existence of judicial review, resolve the countermajoritarian difficulty, offer a method of judicial interpretation, and support affirmative action and abortion rights. Not today, not ever.