Book Reviews

BROTHER, CAN YOU PARADIGM?

REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW. By Jed Rubenfeld.[1] Cambridge, Harvard University Press. 2005. Pp. ix + 241. $39.95.

Brannon P. Denning[2]

INTRODUCTION

Jed Rubenfeld's *Revolution by Judiciary* is an ambitious search for a way out of the reductionist debate between originalism and non-originalist interpretive theories that has dominated constitutional theory since at least the mid-twentieth century. Building on "commitmentarianism," a theory of constitutionalism introduced in his previous book *Freedom and Time,*[3] Rubenfeld argues that there is a structure to American constitutional law—a structure that, once understood, reveals more harmony than cacophony in much of constitutional doctrine.

This hidden structure can be accessed through what Rubenfeld calls the "paradigm-case" method of constitutional interpretation. Rubenfeld argues that all constitutional text is derived from historic paradigm cases. The text embodies consti-

---

1. Robert R. Slaughter Professor of Law, Yale Law School.

2. Associate Professor of Law and Director of Faculty Development, Cumberland School of Law, Samford University. Thanks to Brian Bix, Tim Lytton, Mike Ramsey, Bill Ross, Howard Walthall, Norman Williams, and the students in my Spring 2006 Contemporary Constitutional Theory seminar—Maggie Harrell, Mike Higgins, Rebecca Hill, Joe Hubbard, Trevor Jones, Dustin Kittel, Miles McGrane, and Thomas Richie—for many helpful comments on and criticisms of earlier drafts.

3. JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT (2001).

tutional "commitments" made by the Framers, which bind subsequent generations. Judges then derive *Application Understandings* from those paradigm cases, which reflect the irreducible minimum substantive content of the textual commitment (pp. 12–18). In other words, if the Constitution guarantees right *R*, then the Application Understanding of *R* reflects what *R*, at a minimum, *prohibits* the government from doing. Likewise, the Application Understanding of constitutional power *P* reflects what, at a minimum, the Constitution *permits* the branch exercising that power to do.

But Rubenfeld makes clear that his paradigm-case method is not repackaged originalism. There may be other contemporaneous understandings about what the text did or didn't permit or prohibit, but, he argues, these are mere "intentions" that do not rise to the level of a commitment, which may form and be sloughed off by courts as the years go on. These intentions he terms *No-Application Understandings* (pp. 99–103).

Rubenfeld makes both normative and descriptive claims for the paradigm-case method. Normatively, Rubenfeld argues that constitutional law should respect past commitments by grounding decisions in paradigm cases and their Application Understandings. At the same time, by seeking and preserving only the *core* commitments, the paradigm-case method, he argues, avoids the stultifying effects of originalist interpretive theories in which the intentions of the framers regarding constitutional text exhaust the content of those textual provisions (pp. 109–19). The mark of a true constitutional commitment, Rubenfeld argues, is that it is made without knowing quite what the commitment will ultimately entail.[4] (pp. 79–84).

Descriptively, he argues that the Court has instinctively hewed to these core commitments throughout its history and that his theory holds the key to resolving many so-called hard cases that plague American constitutional doctrine—everything from *Brown v. Board of Education*[5] to takings clause cases (pp. 20–47). Recent cases on issues like gay rights and affirmative action would be more defensible, and less controversial, he argues, were the Court to adopt explicitly the method he finds implicit in its enduring decisions (pp. 184–201). Further, because

4. *See* pp. 79-84 (discussing JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS (2000)).

5. 347 U.S. 483 (1954).

the Court has instinctively adopted it, Rubenfeld maintains that the paradigm-case method can be applied prospectively without upsetting settled doctrine (pp. 15–18).

If it is indeed possible to identify, interpret, and apply the paradigm cases and Application Understandings, then Rubenfeld's theory would be extremely appealing. Ultimately, however, I find the paradigm-case method flawed. In too many crucial places, Rubenfeld has left too many questions about his interpretive method unanswered.

Part II will summarize Rubenfeld's paradigm-case method. Part III outlines my objections to his interpretive method: First, he furnishes no criteria for correctly identifying and interpreting historic paradigm cases; second, the process for constructing Application Understandings from these paradigm cases is obscure, neither instructing how to choose among plausible, contending Application Understandings nor explaining the rule that precedent should play in their construction or application; finally, Rubenfeld offers little sense how the paradigm-case method operates to aid in the prospective resolution of constitutional cases. A brief conclusion follows in Part IV.

This review begins, however, with the distinction between "commitments" and "intentions" developed in Rubenfeld's earlier work.[6] Part I will summarize his theory of "commitmentarianism" and tie it to the paradigm-case method described in more detail in Part II.

I. COMMITMENTS VERSUS INTENTIONS

Rubenfeld argues throughout the first part of *Revolution by Judiciary* that Application Understandings reflect specific constitutional commitments informed by paradigm historical cases and enshrined in the Constitution's text. He juxtaposes these paradigm cases and the resulting Application Understandings that arise from them against mere "intentions" reflected in No-Application Understandings, which, in contrast to the Application Understandings, judges are free to discard over time. The second third of his book, drawing on *Freedom and Time*, explains and defends this distinction, which Rubenfeld argues separates paradigm-case interpretive method from both originalism and non-originalist interpretations of the Constitution. The argument he offers is complex; what follows is, of necessity, only

6. RUBENFELD, *supra* note 3.

a brief summary of his defense, which, itself, is a summary of his earlier book. Nevertheless, I begin here, *in media res*, because understanding commitmentarianism is key to understanding the distinction between Application and No-Application Understandings.

According to "commitmentarianism," a present-day political community is bound by commitments made in the past because self-governance is a temporally-extended process of making commitments and being bound by them after the committing generation has passed (pp. 96–98). The obligation to honor those commitments separates the paradigm case method from non-originalist modes of interpretation. But Rubenfeld's method is also different from originalism because it enforces only those special obligations that rise to the level of a constitutional commitment—the intentions of the framers count for nothing because they could not have foreseen what the commitments they made might ultimately entail.

"Commitments," he writes, "create—or seem to create—obligation. Mere intentions do not" (p. 73). Thus, when one commits to another, or to oneself, that action, according to Rubenfeld, signifies a level of obligation that merely intending to do something does not. "To commit oneself is to engage in a special normative operation that goes beyond intending, through which one imposes obligations on oneself over time" (p. 99). Further, that obligation is recognized as valid and binding at some point in the future, even when the immediate preference is to do something else.[7]

Our political commitments are reflected in our written Constitution. Creating commitments and obligations over time, Rubenfeld believes, is what constitutes real political freedom—undertaking the actions of self-government that owe duties to the past even as we constantly look to the future. "We live committed lives," he writes; one facet of the committed life is self-government, which "requires a practice of making and keeping commitments" (p. 89). Constitution-making is simply this idea of self-government writ large, with entire communities making and obeying commitments, even commitments made in the past.[8] For

7. *See* p. 73 ("An agent makes a commitment precisely in order to lay an obligation on himself, and this obligation is supposed to govern his future conduct even in the face of a later contrary preference.").

8. P. 96:

> American constitutionalism is a practice through which a democratic nation seeks to govern itself by making and living up to its own enduring commitments,

Rubenfeld, this free choice to commit, and then obey those commitments over time, constitutes true autonomy.[9] As he puts it later in the work:

> Understanding American constitutionalism, both descriptively and normatively, requires us to embrace a temporally extended picture of self-government. This idea of self-government over time in turn implies a central place for commitments. Rejecting the presentist conception of self-government means that democracy does not consist ideally of governance by present democratic will, but also, in fundamental part, of adhering to the nation's fundamental, self-given commitments over time. Only this commitment-based account of constitutional democracy explains the Constitution's continuing authority today. That is why commitmentarianism is the right lens through which to read the Constitution (p. 112).[10]

The distinction between commitments and intentions operates in the realm of constitutional interpretation as well, for Rubenfeld invokes this dichotomy to justify his distinction between Application and No-Application Understandings. The latter "are never commitments" and thus may be freely ignored by judges interpreting constitutional provisions (p. 99). Application Understandings, on the other hand, represent the concrete fact situations that gave rise to the obligations reflected in the Con-

---

even in the face of contrary majority preferences at one moment or another. Our constitutionalism . . . stands for a form of democracy that rejects presentism.

9. P. 91:

> [A] person's freedom . . . is bound up with his capacity to give his life purposes of his own making and to pursue those purposes over time. This freedom is called autonomy or self-governance. A self-governing agent does not act merely on his present preferences. He will have given himself his own ends and held himself to those ends over time.

10. This notion of constitutional democracy as a temporally-extended project where the past restrains, to some extent, the wishes of present majorities, is why Rubenfeld finds the "dead hand" argument unavailing. "On the temporally extended conception of self-government," he writes in response to the argument that the Framers, being dead, cannot commit anyone to anything, "one way a nation gives itself law is by making constitutional commitments in the past and holding itself to them over time." (p. 135). Rejecting the commitments the Framers made, and to which we are presently committed, he continues, would require "replac[ing] the rejected constitutional commitments with other, enduring commitments, which would in turn exert authority over the next generation of Americans, after we had died, unless and until they rejected them." (p. 141). While an "earth belongs to the living" approach to government may be better than the commitmentarian scheme he favors, Rubenfeld suggests, by way of confession and avoidance, that "those who argue for government by present popular will have stepped outside the enterprise of self-government embraced by American constitutionalism for the last two hundred years." (p. 141).

stitution in the first place; thus, they should command the respect of judges, who should honor those commitments despite strong majoritarian sentiment to disregard them (p. 99).

To understand precisely how this works, consider Rubenfeld's example of the Fourteenth Amendment. The consensus, while by no means universal,[11] is that the Framers of the Fourteenth Amendment did not understand that Amendment to require the immediate desegregation of public schools.[12] There is, however, nothing in the Fourteenth Amendment that speaks to the question of public school segregation; rather, the language of that Amendment both guarantees "privileges or immunities" against state interference and enjoins states to extend "equal protection of the laws" to all persons within their jurisdiction.[13] For Rubenfeld, the latter guarantees are the commitment; the former understanding that segregation would not be affected—however important to the ratification of the Amendment it might have been—was a mere No-Application Understanding that the Amendment did not require desegregation of public schools and was subject to being discarded at some point in the future. It did not, he stresses, commit states or judges to the continued segregation of schools (pp. 43–46).

As he explains, a "prohibition against *x*, understood not to apply to *y*, implies no commitment to *doing y*" (p. 100). Nor does it even imply "a commitment to the permissibility of *y*" because it is not a commitment of any sort (p. 100). "No-Application Understandings, even of commitments, are not themselves commitments. They are, precisely, understandings of what the agent has *not* committed himself to, so far as *this* commitment is concerned. They reflect . . . at most, an intention not to be committed" (p. 101). Commitments to do something, or to allow something to be done—like requiring the segregation of public schools or permitting states to maintain segregated systems—could be made, but to be regarded as "commitments," they would need to be made explicit in the Constitution (p. 103).

Similarly, he holds that assurances given about the scope of a commitment's applicability—think, for example, about the assurances given that ratifying the Equal Rights Amendment

11. *See, e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

12. *See, e.g.*, Alexander M. Bickel, *The Original Understanding and the Desegregation Decisions*, 69 HARV. L. REV. 1 (1955). Note that Bickel concluded that the Framers might not have intended to entrench segregation forever either. *Id.* at 61–63.

13. U.S. CONST. amend. XIV.

would not lead ineluctably to gay marriage, unisex bathrooms, and the like—also count for naught because they are not commitments either (pp. 102, 104). The inability to limit commitments *ex ante*, he says, makes his "commitmentarian" approach different than originalism. "Originalism requires adherence, to the greatest possible extent, to all the 'founding' intentions. Commitment-based interpretation, by contrast, has no special regard for the original No-Application intentions, which were not commitments" (p. 106).

Application Understandings, on the other hand, represent commitments because "the agent centrally intends to be imposing on himself an obligation not to engage in some specific course of action by committing himself to a more general prohibition (of which the specific course of action is the definitive, paradigmatic instance)—the Application Understanding is itself a commitment" (p. 117). As it happens, there *were* specific, paradigm applications of the general prohibitions and powers detailed in the Constitution (p. 119). "Where the Constitution's commitments have core paradigm cases, they require precisely the interpretive asymmetry observed throughout constitutional doctrine. The foundational Application Understandings bind because they are themselves commitments, even while the No-Application Understandings can be cast aside" (p. 119). This holds true even if the original Application Understanding turns out to be mistaken (p. 129).

Rubenfeld's distinction between intentions and commitments is central to his theory. That distinction will not, however, be the focus of my critique.[14] I will focus instead on the problems arising from any attempt to employ Rubenfeld's paradigm-case method in constitutional interpretation. These difficulties, I argue in Part III, mean not only that Rubenfeld's theory fails to avoid the problems of either originalism or another nonoriginalist approach to interpretation, but in fact may combine the worst features of both. The next Part, however, describes the paradigm-case method in more detail.

---

14. For critical appraisals of *Freedom and Time*, where Rubenfeld discussed his distinction in more detail, see Erwin Chemerinsky, *A Grand Theory of Constitutional Law?* 100 MICH. L. REV. 1249 (2002) (book review); Michael J. Gerhardt, *The End of Theory*, 96 NW. U. L. REV. 283 (2001) (book review). A more positive review can be found in L.H. LaRue, *The Self That Governs*, 5 GREEN BAG 2d 225 (2002) (book review). The *Fordham Law Review* also sponsored a symposium on Rubenfeld's book, along with Christopher Eisgruber's book *Constitutional Self-Government*. *See* Symposium, *Theories of Constitutional Self-Government*, 71 FORDHAM L. REV. 1721 (2003).

II. UNCOVERING THE CONSTITUTION'S "KILLER APPS"

"Reasoning from paradigm cases," Rubenfeld writes, "is the primary business of constitutional interpretation" (p. 16). While paradigm shifts occur when "judges periodically tear down the interpretive paradigms they have constructed, replacing them with new ones . . . constitutional law retains its fundamental structure: it remains organized around historical Application Understandings, while No-Application Understandings are left behind" (p. 17).[15] Rubenfeld's project is to produce criteria by which constitutional paradigm shifts may be evaluated (p. 17). "Judges who engage in radical reinterpretation of the Constitution must still answer to the Constitution's foundational paradigm cases. The new doctrine labors under the continuing obligation to do justice to the paradigm cases—or, more precisely, to do justice to the text in light of its paradigm cases" (p. 17). Understanding the role that these paradigm cases play in constitutional law is the key, argues Rubenfeld, to explaining what appears at first glance to be doctrinal incoherence and to justifying some of constitutional law's hardest cases, like *Brown*.[16]

The Application Understanding of a constitutional right reflects "specific understandings of what a constitutional right prohibits" (p. 14). Conversely, a No-Application Understanding is what the constitutional provision does not (at least explicitly) prohibit (p. 14). In discussions of constitutional powers, Application Understanding refer to what the power was understood to *permit*. No-Application Understandings, on the other hand, refer to "original understandings of what a particular Article I power did *not* authorize Congress to do" (p. 49). Rubenfeld claims that "where constitutional doctrine has departed from important historical understandings, it has virtually always departed" from No-Application Understandings (p. 13).

One of the challenges of *Revolution by Judiciary* is the opaque terminology Rubenfeld employs to describe his con-

15. Later, Rubenfeld makes clear what is suggested here: Reasoning outward from paradigm cases follows the conventional common law model of legal reasoning. *See* p. 43 (noting that reasoning from paradigm cases "exerts a kind of hydraulic normative force. It pushes outward, in the familiar common-law style, available for the next set of plaintiffs as a basis for argument. Paradigm-case reasoning is common-law reasoning; it is the font of constitutional law's common-law-ishness.").

16. P. 18 ("Once we see the fundamental structure of constitutional interpretation, the revolutionary holding in a case like *Brown* will no longer seem difficult to justify as a matter of interpretation.").

cepts. Fortunately, he does provide specific case studies attempting to illustrate paradigm cases and Application Understandings of particular constitutional rights and powers. Below, I have highlighted a few of the doctrinal areas Rubenfeld uses both to illustrate the paradigm-case method and to bolster his argument that the method reflects what the Supreme Court already does, at least implicitly. Free speech, takings, and equal protection are discussed first, followed by an application of the paradigm-case method to the commerce clause and to separation of powers questions.

A. RIGHTS

1. Free Speech—Given the variety of things that it protects, from profanity and pornography to nude dancing and flag burning, "contemporary free-speech law spurns a vast range of original No-Application Understandings" (p. 21). In other words, no one would have understood the First Amendment to prohibit governmental regulation of much of what it now protects. Two Application Understandings—derived from historic events that served as paradigm cases—are, however, still a part of First Amendment doctrine: the ban on prior restraints and a ban on prosecutions for "seditious libel"—for criticizing the government or its officials (pp. 21–23). Not only have these two core applications remained, the Court has relied on both as justification for its strict scrutiny of content-based regulations of speech. Rubenfeld explains:

> The concept of prior restraint was limited to laws that restrain speech before utterance, but it had no inherent subject-matter limitation (it was not limited, for example, to political speech). The prohibition of sedition laws stretched beyond prior restraint, but it was limited by subject matter (applying only to speech criticizing government officials or policy). When, however, these two paradigm cases are put together, the First Amendment can become a bulwark against *all* state efforts to impose orthodoxies on individuals' opinions, regardless of the subject matter and regardless of whether the restrictions apply before or after the speech has been uttered (p. 27).

Thus reinterpreted, there followed "a revolutionary shift in free-speech law," opening protection of all sorts of speech not deemed protected at the time of the First Amendment's ratification (p. 28). While "modern freedom of speech cannot be reconciled with the original No-Application Understandings" it "ad-

heres to and builds on the historical Application Understandings" (p. 29).

2. Takings—Rubenfeld argues that his theory is particularly helpful when one considers an area of law, like takings, that "is often said to be so confused that [it] is almost unintelligible" (p. 35). For example, the Court's decision in *Pennsylvania Coal Co. v. Mahon*,[17] which set the Court down the path of "regulatory takings," inaugurated a particularly troublesome line of doctrine (p. 35).[18] But as Rubenfeld notes, "takings law routinely allows government to destroy the economic value of people's property without compensating them" (p. 36), while in other cases a regulation that destroys the economic value of property will be held to be a taking requiring compensation. Familiar examples from the case law in which compensation is *not* owed include prohibition laws that destroy the value of a brewery or distillery[19] and destruction of diseased trees to protect healthy trees nearby.[20] What is the difference between those uncompensated regulatory actions and the Pennsylvania law in *Mahon*, requiring coal companies to mine so as not to cause subsidence to adjacent property owners, which, the Court held, went too far?

According to Rubenfeld, sorting out Application and No-Application Understandings is key to understanding the doctrine. It was well-understood at the time of the Framing that government confiscation of one's property for use by the public (the eminent domain power) required just compensation.[21] Eminent domain, in other words, served as the paradigm case informing the takings clause. On the other hand, "land-use regulations or other governmental actions that did not involve" actual expropriation or physical possession of the land were No-Application Understandings (p. 38). While this means that modern regulatory takings law is inconsistent with a No-Application Understanding, it *is* consistent with the Application Understanding.

The takings clause requires not merely that the private property be taken, but that it be taken for public use.

---

17. 260 U.S. 393 (1922).

18. P. 35 ("*Pennsylvania Coal* was one of the first Supreme Court cases to find a 'regulatory taking'—to find, in other words, that a mere regulation of property amounted to a taking. The difficulty ever since has been to say what it means for a regulation of property to go 'too far.'").

19. Mugler v. Kansas, 123 U.S. 623 (1887)

20. Miller v. Schoene, 276 U.S. 272 (1928).

21. P. 38 ("From the beginning and still today, the one clear, unquestioned application of the takings clause is that it requires compensation when the government exercises its eminent domain power.").

> In traditional cases of eminent domain there is always both a taking and a using. The government takes over someone's land or chattel and impresses it into specific, state-directed use.... But as property regulations became more complex and pervasive, it became possible for government to accomplish an eminent domain result... under the rubric of mere regulation (p. 39).

In *Pennsylvania Coal*, there was not merely the usual prohibition of certain activities that is the hallmark of land use regulation; Pennsylvania's regulation "require[d] owners of underground real estate to leave pillars of land intact, in order to support buildings, streets, or other structures overhead" (p. 39). This distinguishes it from other regulations that "merely deprive[] people of property or property value, but do[] not impress property into a specific use" (p. 39). Cases in which compensation has been ordered by the Court, Rubenfeld argues, involve "both a taking and a using" (p. 40). Thus, "[t]he Court has identified a distinguishing feature of the takings clause's foundational applications—the element of a using, definitive of the eminent domain power—and built modern doctrine around it" (p. 40).

3. Equal Protection—By now the pattern should be clear, but let me discuss one more example. For Rubenfeld, the resort to Application and No-Application Understandings provides a useful tool for explaining why *Brown* is an easy case. The classic paradigm case that informed the framing of the Fourteenth Amendment was the proliferation of the so-called "Black Codes," which sought to keep a form of *de facto* slavery in tact in southern states following Emancipation.[22] Even a thoroughgoing originalist like Raoul Berger agreed.[23] "The struggle to abolish these black codes was famously central to, and definitive of, the act of constitution-writing that became the Fourteenth Amendment" (p. 41). The Supreme Court itself affirmed this understanding in both the *Slaughter-House Cases*[24] and in *Strauder v.*

22. P. 41 ("In 1865, the Southern states began promulgating laws singling out blacks for unequal treatment in matters of labor, land ownership, criminal penalties, and so on."). For a description and an account of the origins of the "Black Codes," see ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 198–201 & 208–09 (1st ed. 1988); 1 MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 440–41 (2d ed. 2002).

23. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 19 (1977) (arguing that the framers of the Fourteenth Amendment "meant to secure familiar, 'fundamental rights,' and only those, and to guard them as of yore against deprivation except by (1) a nondiscriminatory law, and (2) the established judicial procedure of the State.").

24. 83 U.S. 36 (1873).

West Virginia, where it struck down state attempts to keep blacks from serving on juries.[25]

But nineteenth century rights talk distinguished among civil, political, and social rights.[26] While blacks were to be afforded equal "civil" rights, few at the time thought that the Fourteenth Amendment addressed issues like equal political rights (such as voting, which wouldn't be addressed until the ratification of the Fifteenth Amendment) and social rights, which included the right to mix freely with whites. Few Framers of the Fourteenth Amendment would have regarded their support of the Amendment as incongruous with support of segregated schools, which involved social, not civil rights. *Plessy v. Ferguson*'s notorious approval of laws enforcing a "separate but equal" existence on the country's African-American citizens is a stark reminder how ingrained this distinction was.

For Rubenfeld, however, that trichotomy of rights, the approval of segregated schools, and "separate but equal" were all *No-Application* Understandings that *Brown* was free to disregard in 1954 when it announced an end to state-mandated segregation in schools (p. 46). However jarring this break with the past was to contemporary observers, Rubenfeld argues that because *Brown* kept faith with the Application Understandings of the Amendment, the rest was constitutional chaff.

The key, he argues, is *Strauder*. Not only did the Court strike down the prohibition on black jury service, but in doing so, the Court argued that their exclusion marked them with a badge of inferiority—the sort of badge affixed by the Black Codes, which the Amendment was intended to remove. "Through an interpretation of the black codes, the Court derived a principle according to which 'legal discriminations' against blacks 'assert[ing] their inferiority' or 'implying their inferiority in civil society' were unconstitutional" (p. 43).

Though modest, he argues that *Strauder* was also potentially transformative: "[T]here is no difficulty in seeing *Brown* as an elaboration on—indeed an application of—*Strauder*'s anti-inferiorization principle" (p. 43). *Brown* kept faith with the original Application Understandings, as articulated by *Strauder*; *Plessy* held with the No-Application Understandings embodied

25. 100 U.S. 303 (1880).

26. For an explanation of this division, see Plessy v. Ferguson, 163 U.S. 537, 544 (1896) (distinguishing between political and social rights); McConnell, *supra* note 11, at 1014–23.

in the tripartite classification of rights. *Brown* is now regarded as iconic, as a "super-precedent" not susceptible to overruling; *Plessy*, on the other hand, is derided (pp. 44–45).[27]

B. POWERS

1. The Commerce Clause—Originally "the commerce clause did not empower Congress to regulate most manufacturing, agriculture, or labor relations within the several states" (p. 53), but after 1937 the Court's interpretation of the clause "demolish[ed] earlier No-Application Understandings" (p. 53) until (perhaps briefly) the Court appeared to call a halt in *United States v. Lopez*[28] and *United States v. Morrison*.[29] The original Application Understandings of the clause, Rubenfeld argues were (1) to grant Congress authority "over all tariffs and commercial transactions that crossed state or national lines" and (2) "to vest Congress with the power to regulate the country's navigable waters, even when those waters were located within a state" (pp. 53–54). In particular, Congress possessed the power "to prevent obstructions to those waters," such as bridges (p. 54).

Rubenfeld argues that the power to remove obstructions from waterways actually laid the groundwork for the Court's commerce clause revolution, embodied in cases like *Wickard v. Filburn*.[30] Critics of *Wickard,* he argues, ignore

> the Application Understanding of the commerce clause just discussed: the understanding that Congress always had power to regulate bridges built over navigable waters. What brought such a bridge within Congress's commerce power was . . . the fact that it might substantially harm interstate commerce. If we ask for a general rule governing the commerce power that captures, as a central instance of that rule, a law regulating in-state bridges that might obstruct interstate commerce, the rule cannot be that Congress may regulate only acts that themselves amount to interstate commerce. . . . A rule that *would* capture the Application Understanding is the following: "The power to regulate interstate commerce embraces the power to protect that commerce from injury whatever may be the source of the dangers which threaten it, and to adopt any appropriate means to that end" (p. 55).

---

27. *Cf.* Charles L. Black, Jr., *The Lawfulness of the Desegregation Decisions*, 69 YALE L.J. 421, 424 (1960) (stating that laughter is the only appropriate response to the Court's reasoning in *Plessy*).

28. 514 U.S. 549 (1995).

29. 529 U.S. 598 (2000). *But see* Gonzales v. Raich, 125 S. Ct. 2195 (2005).

30. 317 U.S. 111 (1942).

So understood, *Wickard*, although undoubtedly an expansive construction of the commerce clause, can still trace its roots to an Application Understanding (p. 55). Though in 1789 this power may have been understood to stop when waters ceased to become navigable, and not to apply on land at all, those understandings would have been No-Application Understandings (p. 56).

2. Separation of Powers—Rubenfeld's discussion of the Application and No-Application Understandings of separation of powers questions is, by his own admission, complicated and hard to follow.[31] He contrasts his view to the "strict separationist" view under which "the Constitution's legislative powers are granted to Congress alone, the executive powers in Article II to the President alone, and the judicial power to the courts alone" (p. 56). He notes that this view casts doubt on many aspects of the modern administrative state and that the text of the Constitution itself provides little help in resolving these disputes because "virtually every one of the Constitution's power-granting provisions is grammatically ambiguous, permitting exclusive and nonexclusive readings" (p. 56).

For example, he writes, "[t]he commander-in-chief clause . . . does not say on its face that *only* the President may exercise the powers of commander in chief, but it can be read that way, and it always has been;" thus "[o]n this view, Congress could not constitutionally appoint a designated general or bureaucrat to be commander in chief" (p. 56). A nonexclusive reading of congressional powers is also possible: "[T]he commerce clause could be read as exclusive—only Congress may regulate interstate commerce—but it is not read that way today" (pp. 56–57). For example, both Congress and New York can criminalize the transportation of cocaine into New York (p. 57).

Older cases, Rubenfeld argues, embraced the strict separationist approach. Gradually, however, that view was replaced by decisions "emphasizing that the three branches can share a great deal of overlapping, concurrent power, with no 'hermetic' division between them" (p. 57).[32] This relaxed approach to separa-

31. P. 56 (prefacing the discussion with a warning that "only experts in this field may want to work their way through the complex arguments that follow").

32. *See, e.g.*, Mistretta v. United States, 488 U.S. 361 (1989) (upholding federal sentencing commission); Morrison v. Olson, 487 U.S. 654 (1988); *see also* Clinton v. City of New York, 524 U.S. 417 (1998); INS v. Chadha, 462 U.S. 919 (1983); American Trucking Ass'n v. United States, 344 U.S. 298 (1953) (refusing to tighten up the non-delegation doctrine for administrative agencies).

tion of powers questions has drawn criticism from, among others, Justice Scalia, who favors a bright-line approach.[33] Despite the criticism, Rubenfeld maintains that current doctrine follows the Application/No-Application Understandings paradigm.

Application Understandings obtain "when a power was believed to be exclusive and . . . prevent[ed] some other actor . . . from exercising the power in question" (p. 58). Courts are not free to give these provisions a nonexclusive reading at some later date. "If the Supreme Court today adopted a nonexclusive reading of the declaration-of-war clause, under which the clause no longer barred the President from declaring war, the Court would have surrendered a foundational paradigm case" (pp. 58–59). The key is "ascertaining whether any core prohibitory Application Understandings can be identified in connection with a given constitutional power" (p. 59). Such a core prohibitory Application Understanding, in contrast to Congress's power to declare war, was not present, he argues, in the commerce clause. This means that "the contemporary nonexclusive reading of the commerce clause is consistent with paradigm-case interpretation" (p. 59). "[T]here was no foundational prohibitory Application Understanding that requires an exclusive reading of that clause, and . . . the clause is not read as exclusive today" (p. 59).[34]

How does this resolve contemporary separation-of-powers controversies? The absence of prohibitory Application Understandings means that there is no bar to, for example, permitting states to exercise regulatory or taxing authority over some interstate commerce, authorizing executive officers to legislate, or allowing courts to exercise executive powers (p. 60). "While there may well have been an original understanding that executive officers or judges would have no constitutional authority to make law, there was no constitutional commitment enacted prohibiting them from doing so" (p. 60). Thus, despite criticism from Justice Scalia and some legal scholars, neither the delegation of rule-making authority to executive agencies nor the involvement of judges in the formulation of sentencing guidelines—to give two

33. *See, e.g., Mistretta*, 488 U.S. at 413 (Scalia, J., dissenting); *Morrison*, 487 U.S. at 697 (Scalia, J., dissenting); *see also* Stephen L. Carter, *Constitutional Improprieties: Reflections on* Mistretta, Morrison, *and Administrative Government*, 57 U. CHI. L. REV. 357 (1990); Ronald J. Krotoszynski, Jr., *On the Danger of Wearing Two Hats:* Mistretta *and* Morrison *Revisited*, 38 WM. & MARY L. REV. 417 (1997); Symposium, Morrison v. Olson: *Addressing the Constitutionality of the Independent Counsel Statute*, 38 AM. U. L. REV. 255 (1989).

34. For my criticism of his conclusion here, see *infra* notes 40–43, 47–48 and accompanying text.

examples—violates constitutional Application Understandings, as Rubenfeld defines them.

But what of the Constitution's vesting clauses, assigning responsibility for the exercise of legislative, executive, and judicial power with Congress, the President, and the courts, respectively? If, say, executive power vested in the President was truly exclusive, he "would be very surprised to hear it, given that state officers, who are not under the President's control" (p. 61) were expected to execute federal laws if authorized by Congress. Anticipating the argument that the Constitution recognized vertical and horizontal separation of powers,[35] Rubenfeld responds that while "this assertion may well be largely correct" it is not binding on judges because it was not an Application Understanding (p. 61).

If strict separation was an Application Understanding, Rubenfeld argues, the President could not negotiate a treaty dealing with foreign commerce since that would conflict with Article I's assignment of power to regulate foreign commerce to Congress (pp. 62–63).

> [T]he right thing to say about the treaty power is this. It is *not* in conflict with Article I. Congress's power to regulate commerce with foreign states was *not* thought to be 'horizontally' exclusive. Neither that specific grant of power to Congress nor Article I's vesting clause as such prohibits the President from making a law that regulates foreign commerce . . . (p. 63).

He concludes that once one applies paradigm case reasoning,

> there is no categorical unconstitutionality in administrative agencies passing laws or adjudicating cases. Nor is there any categorical unconstitutionality in an independent prosecutor, who exercises executive authority even though Article II vests the President with the executive power. Nor is there any fundamental problem with judges participating on commissions that promulgate sentencing guidelines. These pieces of modern separation of powers doctrine are very difficult to reconcile with originalism, but not with paradigm-case interpretation. The jettisoned historical understandings are No-Application Understandings, which are not binding (p. 66).

---

35. P. 61 ("We are asked to distinguish . . . between 'vertical' and 'horizontal' separation of powers. On the original understanding, it is said, the powers assigned to the various branches of the federal government may not have been *vertically* exclusive (prohibiting state actors from exercising the powers at issue), but they were *horizontally* exclusive (prohibiting members of other branches from exercising them).").

As for *vertical* separation of powers between the states and the federal government, the Constitution's delegations are nonexclusive as well. Where the framers wished to grant exclusive power to the federal government, the enumeration of a particular power in, say, Article I, section 8, is followed by an explicit prohibition in Article I, section 10. Had there been an Application Understanding regarding the exclusivity of congressional power, those restrictions would have been entirely superfluous (p. 59).[36]

III. PROBLEMS WITH THE PARADIGM CASE METHOD

There is no denying that Rubenfeld's theory is elegant: Take provisions of the Constitution; decide what, in fact, they were intended to do by reference to historic paradigm cases; then reason out from those paradigm cases in the familiar common law method to apply the core Application Understanding prospectively. But upon close inspection, this mode of interpretation reminds one of the joke about the shipwrecked economist, whose solution to getting at the canned food that had washed ashore begins, "First, assume the existence of a can opener."

First, identifying and interpreting paradigm cases will not always be as straightforward as Rubenfeld would have us believe. *Second*, even once paradigm cases are identified, constructing the proper Application Understandings from them will again be challenging, as the same historical event could give rise to multiple interpretations and thus multiple Application Understandings. Not only does Rubenfeld fail to provide a methodology for constructing Application Understandings, but *third*, he fails to provide, or even acknowledge the need for, guidance for choosing among rival Application Understandings. *Fourth*, there is the uncertain role that precedent plays in the paradigm case method: Do court cases become paradigm "cases"? How do these affect the construction and application of Application Understandings? Finally, there is little in the way of example showing how the paradigm case method works prospectively. At critical junctures, Rubenfeld simply goes silent, leaving us to guess at the answers to these important questions.

36. P. 59 ("Most of the powers granted to Congress in Article I were probably understood to be nonexclusive. After Article I grants Congress the power to coin money, it goes on to bar states from coining money. This would have been quite unnecessary if the granting of the power to Congress had by its own terms been understood to be exclusive.").

A. IDENTIFYING PARADIGM CASES

In his earlier work, Rubenfeld wrote that "the Constitution's provisions are to be understood in terms of the actual, historical struggles of a particular people to lay down and live out its own commitments."[37] He regarded these struggles as "foundational paradigm cases . . . [that] are nothing other than the core historical commitments memorialized by the act of constitution-writing in question."[38] Paradigm cases, therefore, precede the constitutional commitment and inform it. From those paradigm cases arise the Application Understandings that reflect the paradigm case and enshrine it in a constitutional commitment. The paradigm cases represent "a *fact*" about that provision's meaning.[39] Prevention of future trials like Zenger's represents a "fact" about the First Amendment's meaning (p. 23); the presence of post-Civil War Black Codes represents a "fact" about the Fourteenth Amendment's meaning. Both provisions, he argues, mean *at least* that seditious libel trials and discriminatory legislation depriving African-Americans of civil liberties were prohibited.

But in reading his descriptions of paradigm cases, one quickly realizes that many occurred *after* a particular constitutional provision was drafted. Rubenfeld says that the Zenger trial and the Alien and Sedition Acts are paradigm First Amendment cases. But if Zenger was the paradigm case and, as Rubenfeld argues, the Application Understanding arising therefrom was "no prosecution for seditious libel," then the fact of the Alien and Sedition Acts' passage, and subsequent prosecutions under the Acts, suggest that his account of the First Amendment's Application Understanding is mistaken. Rubenfeld responds that really the election of 1800 was what made prosecutions for seditious libel the paradigm cases (here, literally the cases brought under the Acts giving rise to the Application Understanding) (p. 24).

Or consider his description of paradigm cases under the commerce clause. Rubenfeld does not linger to consider "[t]he most obvious historical application of the commerce clause," i.e., establishing "congressional authority over all tariffs and commercial transactions that crossed state or national lines" and over "the country's navigable waters, even when those waters

37. RUBENFELD, *supra* note 3, at 183.
38. *Id.* at 184.
39. *Id.* at 183.

were located within a state" (pp. 53–54). He spends the bulk of his discussion on another alleged paradigm case: "the understanding that Congress could act to prevent obstructions to [navigable] waters" like those posed by some bridges (p. 54). The Application Understanding he derives from this paradigm case—Congress can prevent obstructions to interstate commerce—he avers, "goes a long way toward explaining and justifying," among other things, *Wickard v. Filburn*[40] (p. 54).

In both examples, Rubenfeld cites as paradigm cases events occurring not prior to, or even contemporaneous with, the constitutional commitments these events allegedly informed, but those occurring years or decades later. Whatever might be said about the election of 1800, it postdated the proposal and ratification of the First Amendment and could hardly serve as a paradigm case for that Amendment. Moreover, Rubenfeld's "preventing obstructions" Application Understanding derives not from founding-era paradigm cases, but rather from a series of Marshall- and Taney-era Court cases.[41] Most court cases in those early years interpreted the scope of the commerce clause as limiting state power, not delineating the power of Congress to act. In one case in which the Court *did* address the scope of congressional power, *Pennsylvania v. Wheeling & Belmont Bridge*, the Court upheld Congress's legislative judgment that a bridge previously held by the Court to unconstitutionally obstruct commerce was not an obstruction.[42] The *Wheeling Bridge* case, though, was decided nearly seventy years after the ratification of the Constitution; it certainly didn't inform the debates of the members in Philadelphia.

What's going on here? Rubenfeld seems to treat newly-drafted constitutional provisions like wet cement: Before the pro-

40. 317 U.S. 111 (1942) (upholding application of wheat quota to farmer growing wheat for personal use).

41. *See, e.g.*, Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1852) (ordering removal of a bridge deemed to interfere with interstate commerce); Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829) (concluding that Delaware dam was not intended to obstruct commerce, but represented valid exercise of state police power).

42. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 430 (1856) (upholding congressional declaration that bridge did *not* constitute obstruction to interstate commerce). For background on the initial determination by the Court, the congressional reaction, and the Court's reconsideration, see DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829-1861, at 192-94 (2005); CARL B. SWISHER, 5 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836-64, at 408–18 (1974); 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, 1836-1918, at 233–36 (1926).

visions' meanings "set," passersby are free to leave impressions in the cement that will become a part of them once they dry. He sees "ratification" as a temporally-extended event where a window of time exists for paradigm cases to emerge and be, in effect, backdated to inform the Application Understandings arising from the text itself. I say "seems" because Rubenfeld provides nothing to explain or defend these late-arising paradigm cases and the Application Understandings derived from them.[43]

But they need defending. Otherwise it looks as if paradigm-case reasoning begins with where the Court *is* doctrinally (no prosecutions for seditious libel) and then reasons backwards until one finds an historical event (the Jeffersonians' attacks on Alien and Sedition Act prosecutions) that is proximate enough in time to the Framing to serve as a "paradigm case" giving rise to an Application Understanding that reflects current doctrine.

B. CONSTRUCTING APPLICATION UNDERSTANDINGS FROM PARADIGM CASES

Even if there is a paradigm case—and there will often be an historical event that was on at least some framers' minds when drafting a constitutional provision—one must both interpret that case and then infer the correct Application Understanding from it or from the constitutional text spawned by the paradigm case. This is no small feat, especially since constitutional texts are often written in general terms. The Fourteenth Amendment, for example, doesn't say anything about Black Codes; it is much more general than, say, the Thirteenth Amendment, which makes it pretty clear that the eradication of slavery—by whatever name—is its *raison d'etre*.[44] I will argue here that Rubenfeld is not particularly forthcoming about either (1) how properly to

43. This feature of his method is reminiscent of Keith Whittington's theory of extrajudicial constitutional construction. KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999). Rubenfeld's colleague Bruce Ackerman explicitly adopts the notion that "the Founding" is a temporally-extended event in which subsequent occurrences affect (or ought to affect) our understanding of the Constitution. *See* BRUCE A. ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY (2005).

44. The fact that many constitutional provisions are written in such general language raises questions about Rubenfeld's entire project. Given the presence of at least some amendments—the Thirteenth and Fifteenth come immediately to mind—that *were* intended to address certain paradigm cases, slavery, and the disenfranchisement of African-Americans, and written in narrow terms targeting those cases, does it follow that *all* constitutional provisions have some historically-discernable irreducible core meaning? Or does it follow that we should privilege the cases that may have been on the minds of some framers when they crafted very general commitments?

understand and interpret paradigm cases or (2) how to divine Application Understandings from those cases.

The construction of proper Application Understandings is complicated by the inevitable presence of precedent. In few cases will an interpreter be writing on a blank slate, constructing Application Understandings from only the historical paradigm case itself. Decades—centuries even—of case law will have intervened. Yet Rubenfeld is extremely vague as to how precedent affects the construction of Application Understandings. This uncertainty may explain why it is so difficult to determine how the paradigm case method helps to decide cases prospectively, as opposed to merely providing a plausible way to harmonize seemingly disparate cases within particular doctrinal lines.

1. Interpreting the Paradigm Case and Constructing the Application Understanding—Determining what a particular paradigm case "stands for" and, thus, what its proper Application Understanding is, seems analogous to determining the holding of a case or the proper level of abstraction at which to cast the holding of a case. It may in fact be more difficult since, as Rubenfeld conceives it, the Application Understanding is a sort of least common denominator among the drafters and ratifiers (and, perhaps, early interpreters) of constitutional text. At bottom, though, it is an historical inquiry. However, Rubenfeld has nothing to say about the methods judges and others should use in conducting such an inquiry. One is struck by *Revolution by Judiciary*'s lack of interest in history. If one of the chief complaints about originalism is its tendency to produce "law office history" or "history lite,"[45] it is hard to see how the paradigm case method avoids these vices. Historical events are rarely monocausal. Even if one cause predominates, or largely causes a particular result, can judges be expected to be able to discern that cause from the background noise of other contemporary forces and settle on *the* paradigm case?[46]

Consider again Rubenfeld's discussion of the commerce clause's paradigm case and its Application Understanding mentioned earlier. He argues that perhaps *the* important paradigm case of the commerce clause authority concerned empowering

45. *See* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

46. *See, e.g.*, Cass R. Sunstein & Adrian Vermeule, *Interpretations and Institutions*, 101 MICH. L. REV. 885 (2003) (arguing that many legal theories of interpretation pay insufficient attention to interpreters' institutional competence).

Congress to remove obstructions to interstate commerce.[47] But, as I also noted, his support for this "paradigm case" came much later than the Founding Era, in connection with Supreme Court cases stating that Congress could exercise its power over interstate commerce to reverse a *judicial* declaration that a state structure obstructed commerce.[48] Rubenfeld elides these details and says that removing obstructions to commerce was a paradigm case (p. 54). The resulting Application Understanding is that the commerce clause authorizes Congress to remove any and all barriers to interstate commerce. He then argues that this Application Understanding legitimizes *Wickard v. Filburn* because Congress, by setting and enforcing quotas for the growing of wheat to prop up the market price of wheat, was simply removing an obstacle (low wheat prices) to interstate commerce, *Q.E.D.* (pp. 54–56).

There is, however, a fair distance between the Court's acquiescence in a congressional declaration that an actual physical structure did not pose an obstacle to commerce on a navigable waterway and a decision approving a fine for violation of a quota designed to prop up farm prices levied on a farmer who grew wheat locally and consumed it at home (rather than buying the wheat he needed on the market). To say that both involve Congress "removing obstructions to interstate commerce" and are thus consistent with the Application Understanding of the commerce clause casts that Understanding at a very high level of abstraction without defending the propriety of such a loose construction of that Understanding.

The commerce clause example nicely illustrates another problem with Rubenfeld's theory: How does one account for precedent in the elaboration of Application Understandings? One answer might be that you wouldn't. Rather, in all cases, you would start with the constitutional provision, look for the historical paradigm case, and construct an Application Understanding. Intervening cases inconsistent with the Application Understanding, one might reason, would represent No-Application Understandings one is free to discard, mistaken readings of paradigm cases, or failure to follow a proper Application Understanding, which ought to be overruled.

But Rubenfeld is no Clarence Thomas, willing to remake doctrine wholesale when doctrine departs from original under-

47. *See supra* notes 40–43 and accompanying text.
48. *See supra* notes 40–43 and accompanying text.

standing. Rubenfeld instead seems anxious to fit the Application Understandings to doctrine, instead of the other way around. Judges, he writes, "interpret constitutional texts in light of their paradigm cases; in so doing, they build up the interpretive paradigms through which the texts are applied. At the same time, they lay down new paradigm cases [that] can come to be regarded as landmark precedents" (p. 16).

Later in the book, Rubenfeld criticizes *Lawrence v. Texas*[49] as being "sadly lacking in terms of constitutional interpretation. The absence of paradigm-case reasoning in that opinion is an essential part of the problem" (p. 190). One might argue that paradigm-case reasoning is absent because there is no paradigm case that was available to the Court.[50] The Fourteenth Amendment said nothing about the sort of liberty interest put forward by the majority; its own cases, in fact, were quite clear that criminalizing sodomy was constitutional.[51]

But Rubenfeld is no Antonin Scalia, either. *Lawrence* was correct, argues Rubenfeld, but the decision was poorly reasoned. If the Court wished to ground *Lawrence* in some sort of "right of privacy," he writes, and "if an explanation of privacy is to have power in terms of paradigm-case reasoning, it ought both to capture *Roe v. Wade* and to draw its principles from the Fourteenth Amendment's core applications" (p. 188). At this point one might ask how *Roe* could be a "paradigm case" if Rubenfeld has already asserted that *the* paradigm case of the Fourteenth Amendment was the desire to eliminate the Black Codes and the resultant Application Understanding either an antidiscrimination or anticaste principle.[52]

As it happens, even *Roe* can be explained in terms of the elimination of the Black Codes. A "hallmark of female slavery in the American South . . . was its sexual and maternal component. Slave women were routinely forced to have sex, to bear children, and to raise children against their will" (p. 188). There is, he concludes "no difficulty seeing in *Roe v. Wade* the proposition

49. 539 U.S. 558 (2003).

50. *Id.* at 586 (Scalia, J., dissenting) (criticizing *Lawrence* as not having roots in the Court's own case law, the text of the Constitution, or history and tradition); Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555 (2004) (critiquing *Lawrence* along the same lines). For a more positive appraisal of *Lawrence* and its fidelity to what Rubenfeld would identify as paradigm cases of the Fourteenth Amendment, see Randy E. Barnett, *Justice Kennedy's Libertarian Revolution*: Lawrence v. Texas, 2002-2003 CATO SUP. CT. REV. 21.

51. Bowers v. Hardwick, 478 U.S. 186 (1986).

52. *See supra* notes 22–27 and accompanying text.

that a free woman cannot be forced into motherhood against her will" (p. 188).[53] This "anti-instrumentalization" principle is at the heart of Rubenfeld's account of privacy and one that he finds consistent with his amalgamation of the Fourteenth Amendment's paradigm cases and Application Understandings (p. 188).

At this point, however, one wonders why one using the paradigm-case method would bother with identifying an historical paradigm case at all. If the goal is, as it seems, to preserve all the major cases in a line of doctrine by identifying *some* principle that all share in common, even if it is one that is ahistorical and abstract, then there probably isn't a line of doctrine that can't be rationalized by clever lawyers. Doctrinal manipulation is something at which lawyers and judges excel. Even by the generous standards of acceptable doctrinal manipulation[54] that is the stock-in-trade of the "common law" method of constitutional interpretation, Rubenfeld's attempt to use an "anti-instrumentalization" theory to span the gap between 1868 and *Roe* is a bridge too far.[55]

One is tempted to say that Rubenfeld's anti-instrumentalization reading of *Roe* gives away the game. All the

---

53. Except that she can, if she attempts to wait until after fetal viability to have an abortion, in the absence of a threat to her life or health. *See* Planned Parenthood of Pa. v. Casey, 505 U.S. 833 (1992) (joint opinion).

54. *Compare* Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965) (striking down Connecticut ban on use of contraceptives on grounds it interferes with the privacy rights of married persons), *with* Roe v. Wade, 410 U.S. 113, 153 (1973) (citing, *inter alia*, *Griswold* and *Eisenstadt* and concluding "[t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."), *and* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."). As Charles Fried notes, individual decisions "may for a time exert their influence in a case-by-case accretion of precedents in similar circumstances," but eventually, they will "either run out, or, if potent, they invite courts to move to higher levels of abstraction, where more general propositions are announced, and it is these that begin to take over some of the work of deciding cases." CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 189 (2004). This is what happened on the way from *Griswold* to *Roe*, with *Eisenstadt* serving as the linchpin. The destination, Fried notes, "is a long way from the truly anomalous Connecticut statute in *Griswold*. Just what authority the Court was claiming for itself in *Roe v. Wade* and in the name of what doctrine is hard to tell." *Id.* at 193.

55. *Cf.* Alex Kozinski & Eugene Volokh, Commentary, *A Penumbra Too Far*, 106 HARV. L. REV. 1639 (1993) (critiquing Akhil Reed Amar, Comment, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124 (1992) (offering a reading of the First, Thirteenth and Fourteenth Amendments that would permit restriction of "hate speech")).

talk of honoring past commitments by identifying and applying specific paradigm cases looks like ornamentation designed to rationalize contemporary results appealing to many law professors. Or perhaps it highlights a flawed assumption in Rubenfeld's theory: that constitutional doctrine conforms, generally, to Application Understandings of paradigm cases.[56] Beginning with that assumption, or with the related assumption that particular cases are rightly decided, would seem to encourage hindsight bias in the selection and interpretation of paradigm cases, and in the construction and elaboration of Application Understandings. Either, it seems to me, compromises the paradigm-case method as *the* method of constitutional interpretation.

2. Choosing Among Rival Application Understandings— The difficulty of discerning through time a single cause or case that gave rise to constitutional text *and* reconstructing the minimal commitment or set of commitments framers thought they were making through that text is daunting enough. It will frequently happen that the difficulty is compounded because of the possibility of rival Application Understandings being created from the same historical materials.

Rubenfeld again has nothing to say about how one is to establish the Application Understanding of particular provisions without wading into historical controversy. His authority for the Application Understandings he cites is scant; much of it reads like the "every schoolchild knows" type of history. Rubenfeld offers those who would use his theory no help in choosing between two plausible Application Understandings, though constitutional law is replete with such contested understandings.

Take his example of the First Amendment. He argues that its Application Understandings included a prohibition on prior restraint and on prosecution for seditious libel (pp. 22–23). He alludes to Leonard Levy's argument (p. 23 & p. 208 n.14) that the First Amendment was understood by the Framers to bar only prior restraint, and not seditious libel, but then dismisses it, saying that it became an Application Understanding after the 1800 election, and writing that "Jefferson's victory is widely regarded by contemporary historians as a decisive condemnation of the Sedition Act and the prosecutions thereunder," citing

56. Rubenfeld apparently believes this to be true. He counts "only two areas of constitutional doctrine where a foundational Application Understanding could arguably be said to have been rejected. The first concerns the contracts clause, the second the declaration-of-war clause." (p. 67).

Levy again (p. 24 & p. 208 n.16). He never resolves the founding-era difference of opinion, but implicitly argues the matter was settled by Jefferson's election. He then announces that "[t]oday the unconstitutionality of 'seditious libel' laws is a piece of First Amendment bedrock, and courts will explicitly say, when they declare such laws unconstitutional, that they are honoring the First Amendment's historical meaning" (p. 24, footnote omitted).

Rubenfeld lumps together the establishment and free exercise clauses under the heading "Religious Freedom." Whatever else the Framers intended to do, he argues, they meant to bar the establishment of a national church and prohibit involuntary tax levies to support particular denominations (pp. 30–32). But again, this cursory treatment ignores historical controversies over matters such as national acknowledgement of religion and non-preferential aid to religion—two issues over which the reading of the historical record can yield contradictory answers.[57] Rubenfeld himself acknowledges that "there was no shared original understanding about the proper overarching shape of church-state relations" other than the Application Understandings he identifies above (p. 30). Given the state of flux over the proper relationship he readily concedes, can we be as confident in *any* "set of specific, original, core Application Understandings," much less the ones he offers (p. 30)?

Another example of Rubenfeld's failure to acknowledge the existence of rival Application Understandings, much less provide a means for choosing between them, occurs in his discussion of the commerce clause. So eager is Rubenfeld to provide a paradigm case and an Application Understanding that could legitimize *Wickard v. Filburn*, he largely ignores other possible understandings of both the proper paradigm case and the correct Application Understanding.

Rubenfeld acknowledges that the commerce clause gave Congress authority over tariffs and interstate commercial transactions and over navigable waterways (p. 54), but is dismissive of the notion that the clause is anything other than a power-

57. One need only look at the majority and dissenting opinions in the Supreme Court's recent decisions on religious displays and public funding of religious schools to get a sense of how very differently the Justices approach such questions. *See, e.g.*, McCreary County v. A.C.L.U., 125 S. Ct. 2722 (2005); Van Orden v. Perry, 125 S. Ct. 2854 (2005); Zelman v. Simmons-Harris, 536 U.S. 639 (2002). Scholars, too, draw radically different conclusions from the historical materials. *Compare* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002) (concluding separation was probably not intended), *with* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 79–102 (1999) (arguing for a broad conception of "establishment").

conferring measure. In his discussion of separation of powers, he writes that "there does not appear to have been any . . . understanding" that "the commerce clause would, by its own terms, bar states from imposing tariffs on imported goods" (p. 59). While "the Constitution was understood to stop states form imposing tariffs on interstate commerce . . . the source of that paradigmatic prohibition was not the commerce clause" (p. 59). Thus he purports to demonstrate the congruence of current understanding (the commerce clause is not exclusive, barring *any* state regulation of interstate commerce) with the paradigm case resulting in the commerce clause.

There are several problems here. First, Rubenfeld is on shaky ground when he concludes that the commerce clause was understood to have little to say about state taxation and regulation of interstate commerce. As Albert Abel concluded over a half-century ago, Madison was largely correct when he described the commerce clause as designed primarily to restrain states.[58] Examining the debates from Philadelphia, as well as those in state ratifying conventions and in some published commentary, Abel showed that to the extent that the commerce clause was mentioned at all, it was mentioned in connection with restraining states. When the affirmative power of Congress was discussed, most commentators mentioned little more than Congress passing navigation acts controlling the import and export of goods into the country.[59] Abel's conclusion was that, to the extent an original understanding could be discerned, the scope of affirmative federal power granted by the commerce clause—as opposed to the restraint that it imposed on the states—was small indeed.[60]

My own research[61] confirms that of Abel. The Framers were concerned about interstate commercial discrimination, whose presence they attributed in part to a lack of centralized authority over interstate commerce. They assumed, without addressing the details of operation, that the commerce clause on its own, at least in part, removed certain commercial matters from the sphere of state competence. While the commerce clause was not the only provision addressed to restricting state power over commerce, it

58. *See* Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 469 (1941).

59. *Id.* at 470–73.

60. *Id.* at 475.

61. Brannon P. Denning, *Confederation-era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37 (2005-2006).

was thought to play a role. Chief Justice Marshall famously remarked in *Gibbons v. Ogden* that he leaned toward that interpretation;[62] his colleague William Johnson embraced it.[63] As late as the mid-nineteenth century, the Court was still wrestling with the exclusivity/nonexclusivity question when rookie Justice Benjamin Curtis cut the Gordian Knot and proclaimed that the clause was exclusive with regard to "national" subjects, but not exclusive when "local" subjects were being addressed.[64]

Finally, consider the Second Amendment, an example Rubenfeld does not use, but which would seem an excellent candidate for application of his theory. Among scholars, there are few more bitterly contested questions in contemporary constitutional law than the scope of the Second Amendment.[65] If one was to use Rubenfeld's theory to interpret the Amendment in light of a hypothetical federal gun control ordinance, then the accurate description of the paradigm case and the Application Understanding is of crucial importance. Here again there are competing models. One reading of the amendment, dubbed the "Standard Model" by Glenn Reynolds,[66] posits that the Application Understanding was that the Amendment prohibited Congress from regulating privately-owned firearms to the extent they would be unavailable for individual or collective self-defense.[67] Even Standard Modelers, however, might differ on the precise point at which governmental regulation would become an infringement on the right to keep and bear arms.

Others, however, argue that that Standard Model is incorrect; they contend that the correct Application Understanding of the Second Amendment was that it prohibited Congress from disarming or abrogating state militia, which were intended to be

62. 22 U.S. (9 Wheat.) 1 (1824).

63. *Id.* at 222–39 (Johnson, J. concurring). *See generally* Norman R. Williams, Gibbons, 79 N.Y.U. L. REV. 1398 (2004).

64. Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 319 (1851).

65. U.S. CONST. amend. II ("A well regulated Militia being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.").

66. Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 464–71 (1995) (describing the "Standard Model of the Second Amendment"). The contemporary status of the debate is nicely captured in Stuart Banner, *The Second Amendment, So Far*, 117 HARV. L. REV. 898 (2003) (reviewing DAVID C. WILLIAMS, THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC (2003)).

67. *See, e.g.*, Reynolds, *supra* note 66, at 475–88 (summarizing the scope of the Standard Model); *see also* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 257–67 (1983) (sketching an individual rights model of the Second Amendment).

the cornerstone of national defense.[68] This reading would leave private ownership of firearms wide open for governmental regulation. To the extent that the militia—as originally understood by the Framers—has disappeared as an institution, the Amendment might even have long ago ceased to have any enforceable content.[69] There is little, if any, middle ground between the contending positions.[70]

The choice of contending Application Understandings is the choice between casting the Second Amendment as a potentially robust individual right or as a constitutional anachronism, devoid of any contemporary relevance much less any judicially-enforceable content. It is striking, given how much rides on the choice of Application Understandings and the prevalence of controversies over the scope of the commitments made in the Constitution, that Rubenfeld has so little to say over how to choose among competing Application Understandings when he emphasizes that "constitutional provisions have core, historical meanings, impervious or almost impervious to judicial rewriting, given by the concrete political battles fought and won . . . in the nation's revolutionary past" (p. 17). Deciding what those "core, historical meanings" are, in fact, seems to lie at the heart of his project. His failure to engage the issue represents another crucial omission in his theory.

The point is not whether Levy, Abel and I, or the Standard Modelers, on the one hand, or Rubenfeld or anti-individual rights interpreters of the Second Amendment, on the other, are correct. Rather, the point is that there are competing paradigm cases and thus, competing Application Understandings for many (perhaps most) important constitutional provisions. What is surprising is not so much that Rubenfeld has a version of constitutional history that he thinks correct, but rather that he barely acknowledges the existence of respectable differences of opinion, much less defends his version against viable competitors or offers guidelines for selecting among them.

---

68. For a collection of anti-individual rights views on the Second Amendment, see Symposium, *The Second Amendment: Fresh Looks*, 76 CHI.-KENT L. REV. 3 (2000); *see also* WILLIAMS, *supra* note 66. A critical take on the "collective rights" interpretation is found in Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995).

69. *See* WILLIAMS, *supra* note 66, at 69–96.

70. *But see* Laurence H. Tribe & Akhil Reed Amar, *Well Regulated Militias, and More*, N.Y. TIMES, Oct. 28, 1999, at A31 (arguing that Second Amendment guarantees individual right, but that right, like all rights, is subject to reasonable regulation).

It is clear that Rubenfeld is not so much concerned with American Historical Association-approved historical accuracy[71] as with what another informed commentator might term the "truthiness"[72] of his constitutional history. Rubenfeld seeks an account of history that calibrates current doctrine with Application Understandings. No matter how incomprehensible doctrine *appears*, Rubenfeld argues, it just so happens that the Supreme Court regularly keeps faith with constitutional Application Understandings. But this introduces the possibility of bias. Given the choice of plausible accounts of constitutional texts, the "right" one, from Rubenfeld's perspective, is the one that will validate the course the Court subsequently took. But in what sense can the Court (or Rubenfeld) truly be said to be honoring the Constitution's deep commitments unless one is prepared to argue that the Court, despite doctrinal twists and turns, always ends up on the side of constitutional commitment, with time winnowing out No-Application Understandings? Perhaps that could be proven empirically, but Rubenfeld's selective survey of doctrine doesn't carry the burden of persuasion.

C. PROSPECTIVE APPLICATION OF PARADIGM CASES

Earlier I discussed the difficulty of constructing an appropriate Application Understanding from individual paradigm cases. As one looks to apply the paradigm-case method prospectively, a related problem appears. How does one fashion rules from an Application Understanding or a set of related Application Understandings (or from their antecedent paradigm cases) for use in similar, but not identical, cases arising in the future? Rubenfeld explicitly disclaims any attempt "to say here how courts go about the business of extrapolating rules or principles from paradigm cases" (p. 123). The only hint comes earlier, when he writes that "[r]easoning from paradigm cases is a variegated business—incorporating considerations of text, policy, and justice; requiring ineluctably normative, even ideological judg-

71. He makes clear at several points that his methodology is concerned with something deeper than mere "original intent;" he aims to get at the core commitments of the Framers—even, apparently, if they were unaware of the depth of their commitment. *See* p. 106 (contrasting commitmentarianism with original intent).

72. **Truthiness** is the quality by which a person purports to know something emotionally or instinctively, without regard to evidence or to what the person might conclude from intellectual examination. Stephen Colbert coined this definition of the word during the first episode (October 17, 2005) of his satirical television program *The Colbert Report*, as the subject of a segment called "The Wørd."

Wikipedia, http://en.wikipedia.org/wiki/Truthiness (last visited Jun. 30, 2006).

ment—but it is the primary business of constitutional interpretation" (p. 16).

If he is not going to give us explicit direction as to how to do this, how can we ascertain whether it is being done well or poorly? Only in a final, brief chapter does he look at the Court's current jurisprudence in a few areas and assess it in light of the paradigm case method. There, he offers a peek at the paradigm-case method's operation by analyzing recent Court decisions on privacy, congressional power under the commerce clause, and affirmative action; the results serve largely to reinforce the foregoing criticisms.

1. Lawrence *and the Right of Privacy*—As noted earlier, Rubenfeld criticizes the Court's recent decision in *Lawrence* as an unsatisfying example of constitutional interpretation in general and its failure to shore up its holding "by paradigm-case reasoning" (p. 184). Rubenfeld is skeptical that, by holding Texas had no legitimate governmental interest in prohibiting homosexual sodomy based on its citizens' moral disapproval, the Court truly intended to construct a new paradigm for privacy cases around the notion that states may not legislate for moral reasons (pp. 185–86).

If it did, Rubenfeld continues, it failed to include paradigm cases to support the Court's decision. "The *Lawrence* opinion," he writes, "presents itself as an interpretation of the Fourteenth Amendment, but one searches that opinion in vain for any sign of an interpretive engagement with the text of that amendment or its paradigm cases" (p. 186). This is a curious criticism because Rubenfeld then declares that *Roe v. Wade*[73] is "one paradigm case most associated with, and most definitive of, the right of privacy" but that *Lawrence*'s putative "no-legislating-morality principle" doesn't encompass *Roe* (pp. 186–87). But *Roe*, like *Lawrence*, represented a marked departure from prior cases itself. One searches *Roe* in vain for paradigm cases. In fact, *Roe* is notorious for its studied indifference to the constitutional source—text, history, paradigm case, or what have you—of the fundamental right it declared.[74]

Rubenfeld offers one, though. *Roe*, he argues, is consistent with an "anti-instrumentalization" principle he derives from an

73. 410 U.S. 113 (1973).

74. *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973) (complaining that *Roe* "is *not* constitutional law and gives almost no sense of an obligation to try to be").

aspect of the anti-discrimination paradigm case of the Fourteenth Amendment: prohibiting the forced childbearing endured by female slaves. This paradigm case, for which he offers no historical evidence, I have already criticized.[75] I cite it again, however, to highlight the difficulty one would have in applying his method prospectively. The anti-instrumentalization principle's constitutional pedigree is no better than, and the principle itself is at least as malleable and difficult to apply as, the putative "no-legislating-morality" principle of *Lawrence*.

Rubenfeld is surely correct "that American constitutional jurisprudence has never embraced the principle that government may not 'legislate morality'" (p. 189). But, at least as Rubenfeld seems to use it—as a principle that "condemn[s] all state efforts to force particular occupations on individuals, or otherwise to instrumentalize them as masters could do to their slaves" (p. 188)—I'm doubtful our jurisprudence has ever embraced the anti-instrumentalization principle either. The draft, for example, stands as a glaring exception;[76] so, too, perhaps do laws mandating school attendance or compulsory vaccination. And let us not forget that the U.S. Supreme Court has also countenanced the forced sterilization of the "feeble-minded."[77] Perhaps I have misunderstood Rubenfeld's use of the term "instrumentalization," but he fails to provide a more detailed definition.

2. Lopez, Morrison, *and the Commerce Clause*—Rubenfeld also criticizes the Court's (perhaps shortlived[78]) attempt in *United States v. Lopez*[79] and *United States v. Morrison*[80] to impose limits on Congress's commerce power as inconsistent with the commerce clause's paradigm case (p. 191). Returning to his assertion (hedged here) that preventing obstructions to interstate commerce was a "very early and *probably foundational* application" of the commerce clause (p. 191, emphasis added), Rubenfeld dismisses *Lopez* and *Morrison*'s concern with the presence or absence of economic activity before sanctioning the regulation of intrastate activities substantially affecting interstate commerce. [81] According to Rubenfeld, "in this paradigm case

75. *See supra* notes 53–56 and accompanying text.

76. *See* The Selective Draft Law Cases, 245 U.S. 366 (1918) (upholding the constitutionality of conscription).

77. Buck v. Bell, 274 U.S. 200, 205 (1927).

78. *See* Gonzales v. Raich, 125 S. Ct. 2195 (2005).

79. 514 U.S. 549 (1995).

80. 529 U.S. 598 (2000).

81. *See id.* at 610 (calling the economic/non-economic distinction "central" to the decision in *Lopez*).

[i.e., removing obstructions to interstate commerce], Congress's power arises from the effect on interstate commerce, not from the notion that the bridge was itself 'economic in nature' (which it may or may not have been)" (p. 191). Thus, "Congress clearly acts within its commerce power when it regulates in-state activity to eliminate injuries to interstate or international commerce" (p. 193). He goes on to propose an *intent* test for the commerce clause: Congress can "indeed potentially reach virtually all activity under the commerce clause, but only so long as that activity threatens adverse effects on commerce *and* only to the extent that Congress is genuinely seeking to redress those effects" (p. 193).

The criticism of *Lopez* and *Morrison* is ironic given Rubenfeld's earlier concern with having Application Understandings incorporate and reflect subsequent precedent. Chief Justice Rehnquist's opinion in *Lopez* may be criticized on a number of grounds, but it was an impressive attempt at synthesis that incorporated existing case law without surrendering the premise that there were judicially enforceable limits on congressional power.

Rubenfeld's criticism also belies a lack of sensitivity to the test that *Lopez* and *Morrison* actually produced. The Court readily conceded that Congress has (and has had for nearly a century) power over the channels of interstate commerce, including people and things moving therein, as well as power to regulate instrumentalities of interstate commerce.[82] This power exists regardless of the *reason* for the regulation, and without regard to whether the channel or instrumentality was located in a single state. This power, moreover, results from a straightforward reading of the commerce clause and the necessary and proper clause. Thus, *Lopez* and *Morrison*'s tripartite divisions of congressional authority—two of which in no way depend on the commercial or economic nature of the regulated activity—neatly reflect what Rubenfeld regards as a paradigm case, without the problems endemic to the purpose-based inquiry he proposes.[83]

---

82. *See id.* at 608-09; *Lopez*, 514 U.S. at 558–59.

83. Rubenfeld concedes that "[n]otwithstanding the *Lopez* rule," Congress could prohibit construction of a bridge under its power to regulate the channels of interstate commerce. (p. 231 n.7). Yet he complains that "the *Lopez* rule misunderstands the circumstances in which an effect on commerce justifies an exercise of Congress' commerce clause power." *Id.* Shortly thereafter he writes that "[t]he absence of a purpose-based limitation explains what is wrong with both the *Lopez* Court's economic-activity rule and its exemption for laws regulating the 'use of the channels' of interstate commerce. . . ." (p. 231 n.10). As an example, he offers a law prohibiting persons entering

Were Rubenfeld's purpose-base test adopted, it would seem to reverse at least a century's worth of precedent. For example, it is difficult to see what harm *to* interstate commerce is produced by child labor, convict-produced goods, and the like. The ban on goods produced by children was undertaken to right what was seen as a moral wrong when it was first proposed in 1907, not to protect commerce from some harm; a version barring from interstate commerce goods produced by child labor was finally signed by President Wilson in 1916.[84] It was precisely on the grounds that Rubenfeld seems to advocate—that the regulation was not of harmful goods, but was instead a pretext—that the Supreme Court struck down the ban in *Hammer v. Dagenhart*.[85] A decade earlier, dissenters complained that the ban of lottery tickets upheld in *Champion v. Ames*[86] did not involve interstate commerce at all, but reflected an attempt by Congress to exercise a police power that the Constitution denied to it.[87] Not even Justice Thomas denies Congress's power to regulate the

---

into same-sex marriages from using waterways or airways. Such a law

> would be a regulation of the use of the channels of interstate commerce, but it would not be a valid exercise of the commerce power—precisely because its purpose was not genuinely commercial or economic in nature. Conversely, a law prohibiting the noncommercial transport of dangerous explosives on airplanes *is* a valid exercise of the commerce power—not because the activity regulated is 'economic in nature,' and not because a 'channel' of commerce is involved, but because the law is clearly aimed at preventing harm to interstate commerce. . . .

Id. Considering the "channels" and "instrumentalities" to be "exceptions" to the "*Lopez* rule" reflects a curious reading of that case. Rubenfeld does not seem to appreciate that all three categories result in large part from the combination of the commerce power and the necessary and proper clause.

84. For the background of the child labor law and the ensuing litigation, see ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., 9 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921, at 447–59 (1984).

85. 247 U.S. 251, 271–72 (1918). The Court wrote that "[t]he thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States." *Id.* Later, the Court argued that "[t]he grant of power of Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture." *Id.* at 273–74.

86. 188 U.S. 321 (1903).

87. *See id.* at 364–73 (Fuller, C.J., dissenting); ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 587–88 (3d ed. 1963) ("Chief Justice Fuller's dissent . . . centered on the intent or purpose behind the law. The real purpose of the statute, according to Fuller, was not the regulation of commerce but the suppression of lotteries. The measure therefore constituted a clear invasion of the police powers of the states under the pretense of regulating interstate commerce.").

channels of interstate commerce, including persons and things moving therein.[88]

Rubenfeld does suggest that "it may be that Congress ought to have power to redress not only potential harms *to* commerce but also potential harms caused *by* commerce," like "environmental degradation" (p. 195). Presumably this could include harms caused to children by permitting a market for goods produced by child labor to exist. But this seems not only to range far beyond the paradigm case of *obstructing commerce* but also to remove any limits that his purpose-based inquiry places on congressional power.[89]

In addition, Rubenfeld never explains how the Court is to conduct its purpose-based inquiry. How can courts accurately gauge whether a particular law is pretextual? Conflicts will inevitably arise over the "purpose" of a law. When they do, must the Court defer to Congress's statement of its purpose? Search for the "actual" purpose?[90] Chief Justice Marshall's opinion in *McCulloch* cautioned Congress that pretextual invocations of the necessary and proper clause would result in judicial invalidation.[91] Yet the Supreme Court has not made Marshall's admonition a robust restriction on congressional power.[92]

---

88. *See, e.g.*, Gonzales v. Raich, 125 S. Ct. 2195, 2229-30 (2005) (Thomas, J. dissenting).

89. For the *Hammer* Court's response to a similar argument—that the child labor law was needed to prevent unfair competition between states banning child labor and those permitting it, see *Hammer*, 247 U.S. at 273–74 (arguing that "[t]here is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may co-operate to give one state, by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions" and concluding that "[t]he grant of power of Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture").

90. *Compare* United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) (holding that rational basis review requires the Court to take as the "end" of Congress its stated purpose when assessing rationality of means), *with id.* at 187 (Brennan, J., dissenting) (arguing that Court should have ascertained Congress' "actual" purpose in order to measure the rationality of means against legislative ends). For a brief, yet insightful discussion of the problem with looking for legislative purpose, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 125–31 (1980).

91. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819) ("Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.").

92. *Compare* Sabri v. United States, 541 U.S. 600, 605 (2004) (characterizing *McCulloch* as having "establish[ed] review for means-ends rationality under the Necessary and Proper Clause"), *with id.* at 611 (Thomas, J., concurring) (criticizing the major-

When Marshall later tried to use a purpose-based test to distinguish permissible and impermissible *state* regulations of interstate commerce, it became apparent that a single law can partake of *both* categories.[93] A congressional statute could be *both* an attempt to remove a commercial obstruction *and* largely addressed to some problem ancillary to its effects on interstate commerce. Without a rule for distinguishing *pure* anti-obstruction or anti-harm legislation from pretextual ones, courts will either underenforce the clause by deferring to Congress or will risk its wrath by second-guessing congressional policy choices.

3. Grutter, Gratz, *and Affirmative Action*—Finally, the Court's recent affirmative action cases[94] receive some rough treatment from Rubenfeld. The result, of course, does not—Rubenfeld approves of the fact that the Court stepped away from *Adarand Constructors, Inc. v. Pena*'s[95] rigorous application of strict scrutiny, at least in an educational setting.[96] But it is only *in spite of* the Court's prior decisions, argues Rubenfeld, that the Court reached the correct decision in *Grutter* and *Gratz* (p. 196).

When the Court settled on strict scrutiny as the proper standard of review for classifications involving race,[97] many understood the Court to be embracing Justice Harlan's "color-blind" theory of the Fourteenth Amendment.[98] Rubenfeld concedes "it is possible in theory to derive either an anti-caste principle of the kind that tolerates affirmative action or a color-

---

ity opinion for its apparent holding "that the Necessary and Proper Clause authorizes the exercise of any power that is no more than a 'rational means' to effectuate one of Congress' enumerated powers").

93. Initially, the line Marshall drew between permissible and impermissible state regulations of interstate commerce depended on whether the state statute was intended to be an exercise of the state's police power or whether it regulated interstate commerce *qua* commerce. Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252 (1829).

94. Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

95. 515 U.S. 200 (1995).

96. P. 201 ("[T]he *Grutter* Court was right to back away from a strict implementation of the strict-scrutiny regime announced in *Adarand*.").

97. *Adarand*, 515 U.S. at 221-22; City of Richmond v. J.A. Croson, Inc., 488 U.S. 469, 493 (1989) (identifying strict scrutiny as the proper standard of review).

98. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("[I]n 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. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."). For articles identifying *Adarand* with the "color-blind" interpretation of the Fourteenth Amendment, see, for example, Koteles Alexander, Adarand: *Brute Political Force Concealed as a Constitutional Colorblind Principle*, 39 HOW. L.J. 367 (1995); Neal Devins, Adarand Constructors, Inc. v. Pena *and the Continuing Irrelevance of Supreme Court Affirmative Action Decisions*, 37 WM. & MARY L. REV. 673 (1996).

blindness principle that cuts against it" from "the Fourteenth Amendment's paradigm cases" (p. 196). But, he continues, adopting a color-blind theory produces what he perceives to be intolerably anomalous results: Many groups, under current constitutional doctrine, are both protected from discrimination *and* may be singled out for beneficial treatment.[99] Thus, "color blindness puts racial minorities in a worse position than that of other minorities under existing equal protection law" (p. 197).

Here Rubenfeld has a point worth considering. If the Fourteenth Amendment was meant to aid newly-freed slaves, it seems odd to both ban discrimination against that group *and* bar efforts to remedy the effects of their enslavement and subsequent legal subordination. It is also odd that the Court's two originalists—Justices Thomas and Scalia—do not seem the least bit interested in the attitude the Reconstruction Congress had towards what we might now call racial preferences (pp. 196–97). But the shortcomings of Rubenfeld's paradigm case method all come together in this final example.

First, Rubenfeld's own distinction between commitments and intentions might be turned against his argument. Sure, framers of the Fourteenth Amendment likely *intended* to permit beneficial legislation to aid African-Americans transition from bondage to freedom, but their intentions cannot be considered more than a No-Application Understanding, given their failure to sanctify that intention in the Fourteenth Amendment's equality commitment. Thus, *Adarand* was entirely correct to discard that No-Application Understanding in favor of the no-discrimination Application Understanding. The commitment made to color-blindness perhaps operates in a more unyielding fashion than it was originally intended, but as Rubenfeld points out earlier, we undertake commitments without being able to foresee what living up to those commitments will require of us in the future (pp. 75–76).

There are other problems, too. The inability to resolve the anti-caste/anti-discrimination interpretation suggests the importance—and the difficulty—of correctly framing the paradigm case and constructing the proper Application Understanding. It

99. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (striking down a special use permit for a home for the mentally retarded); United States Dept. Agric. v. Moreno, 413 U.S. 528 (1973) (invalidating a restriction on a food stamp program limiting the program to households composed of related persons).

highlights the failure of Rubenfeld's theory to provide a means of choosing between two plausible Understandings.

In the case of affirmative action, Rubenfeld tries to resolve the dilemma by pointing out that one theory—the anti-caste principle—produces fewer doctrinal anomalies (pp. 197–201). But to resolve disputes over paradigm cases by choosing the one that causes the least doctrinal disruption again highlights the uncertain role of precedent in his constitutional theory. Does Rubenfeld truly think that the Court rarely strays from Application Understandings and thus its doctrine, however it develops, largely reflects that fidelity? Or does he just think that, *cetus paribus*, in choosing paradigm cases and Application Understandings, one should endeavor to incorporate as much existing doctrine as possible? The former seems implausible. The latter would seem to undermine the distinction that he makes between his theory and other non-originalist theories of interpretation—that his theory honors and attempts to remain faithful to historic commitments made in the past and written into the Constitution.

IV. CONCLUSION

Rubenfeld's interest in grounding Supreme Court decisionmaking in text and history is admirable. (It also suggests the degree to which, in fact, proponents of originalism triumphed. It is hard to imagine *Revolution by Judiciary* being written thirty or forty years ago.) But Rubenfeld's professed concern that interpretive theory honor the past is undermined by his other concerns: the preservation of particular Supreme Court cases like *Roe*; lines of doctrine like the post-New Deal commerce clause decisions; and the defense of controversial new cases like *Lawrence* and *Grutter*. The result, in the paradigm-case method, seems to combine the rootlessness and mutability of non-originalist interpretive theories, like Dworkin's "law-as-integrity" theory, with a superficial historicism indistinguishable from the "law office history" that sets professional historians' teeth on edge. Like many "third-way" theories, the paradigm-case method seems to combine the worst aspects of the theories to which it presents itself as an alternative. It seeks legitimacy in history and text without being willing to subordinate particular cases—or, indeed, judicial decisionmaking generally—to the discipline of either. When the historical ornamentation is stripped

away, the paradigm-case method seems little more than a version of common law constitutional interpretation.[100]

The questions critics[101] raised about the early version of the paradigm-case method presented in *Freedom and Time* are still present at the end of *Revolution by Judiciary*. If the paradigm-case method is to win an audience, it appears that another book will have to be written.[102] In his next book, Rubenfeld should give a better account of how paradigm cases and Application Understandings are to be derived. He should provide criteria for choosing among competing Application Understandings. He should provide guidance for applying Application Understand-

---

100. *See generally* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

101. Erwin Chemerinsky, for example, called the description of the paradigm-case method "sketchy" and complained that "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." Chemerinsky, *supra* note 14, at 1261. How, he also asks, "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." *Id.* "Absent any description of how to derive and assess a paradigm case," he concluded, "Rubenfeld's approach adds little except a new phrase." *Id.* at 1262.

Mike Gerhardt's review, which also used "sketchy" to describe the paradigm-case method, Gerhardt, *supra* note 14, at 324, echoed Chemerinsky's concerns.

> Once the Court constructs the "foundational paradigm," the next few steps are unclear. Presumably, the authority of a foundational paradigm derives from its consistency or conformity with the basic purpose of a constitutional guarantee. A paradigm is binding to the extent it has accurately captured the central commitment or purpose underlying a particular constitutional guarantee.... Yet, the methodology as described does not indicate where or how anything other than the written-ness of the Constitution, such as constitutional structure or the actual inscriptions of the Constitution, matter to the explication of a constitutional guarantee or prohibition.... Nor is it clear how one should move from "the foundational paradigm" to further explication of it. Why not stop once you have identified the foundational paradigm (as would apparently be the case with originalism)? It is not clear what else compels the next move.
>
> ... [T]he challenge of the paradigm case method is to capture precisely the central commitment underlying a constitutional guarantee in conformity with the historical struggle giving rise to it and not the interpreter's subjective preferences.... However, the paradigm case method provides no guidance on how to sort out coinciding, overlapping, arguably conflicting, or multiple purposes. Moreover, the paradigm case method seems to ignore the likelihood that a given text reflects a compromise among those who drafted it; merely assigning a single paradigm to a particular text has the effect of unraveling the compromise and arbitrarily declaring one constituency victorious.
>
> A further difficulty with the paradigm case method is Rubenfeld's suggestion that in fact the Court has largely adopted the paradigm case method in almost every setting, with the sole exception of affirmative action.

Id. at 324–25.

102. *But see* DANIEL A. FARBER & SUZANNA SHERRY, DESPARATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS (2002) (criticizing top-down foundational theories of constitutional interpretation).

ings prospectively. He would do well to abandon the assumption that the Supreme Court nearly always preserves Application Understandings and discards No-Application Understandings, with the consequence that cases and lines of doctrine must be preserved. In addition, Rubenfeld should address the institutional competence of judges to perform the intellectual heavy-lifting that the paradigm-case method seems to entail if it is to be performed well.[103]

103. *See generally* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006) (faulting much contemporary constitutional theory for failing to consider the institutional competencies of interpreters).