

# Hopeful Commitment

Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government*. New Haven: Yale University Press, 2001. Pp 272. \$ 35, cloth.

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In *Freedom and Time*, Jed Rubenfeld asserts, “Time is necessary in a special way to the being of things human: of human being and hence of human freedom.”<sup>1</sup> Noting the pervasive impulse to link the idea of “living in the present” with the notion of freedom, Rubenfeld suggests that “a people can govern itself only by both *being governed by its past* and *governing its future*.”<sup>2</sup> According to Rubenfeld, most preexisting theories in constitutional law such as present-consensus constitutionalism, proceduralism, contractarianism, originalism, hypothetical-consent theory, and liberalism are based on an inadequate idea of temporality because they all rest on what he calls a “speech-modeled” conception of constitutional self-government: “If legitimate political authority derives from the will of the governed, then fundamental rights can be legitimated only by deriving them either (1) from the will of the governed at some particular moment—whether past, present, or predicted—or else (2) from truths lying outside the domain of temporal authority altogether.”<sup>3</sup> Thus, Rubenfeld contends, “Constitutional law is irreducibly temporal, and yet also irreducible to the political will of any given moment.”<sup>4</sup>

In order to restore a temporal horizon to the idea of constitutional self-government, Rubenfeld proposes a shift from speech to writing as a paradigm of self-government: “Government by present voice is incompatible with law, because law can never be merely spoken. It

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1. JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 7 (2001).

2. *Id.* at 86.

3. *Id.* at 73.

4. *Id.*

requires a writing; it requires language preserved over time.”<sup>5</sup> According to Rubinfeld, this temporal reorientation in constitutional law would solve many apparent conundrums in constitutional law, such as the so-called counter-majoritarian difficulty, as such problems arise from the speech-modeled conception of self-government.<sup>6</sup> The book is devoted to a demonstration of this possibility.

At the heart of Rubinfeld’s theory of constitutional self-government is his theory of commitment. By commitment, Rubinfeld means “an enduring normative determination made in the past to govern the future.”<sup>7</sup> Rubinfeld asserts:

democratic self-government is itself something that exists, if it exists at all, only over time. . . . [D]emocracy consists not in governance by the present will of the governed, or in governance by the a-temporal truths posited by one or another moral philosopher, but rather in a people’s living out its own self-given political and legal commitments over time—apart from or even contrary to popular will at any given moment.<sup>8</sup>

In developing his theory of commitment, Rubinfeld first seeks to differentiate his notion of commitment from the notion of precommitment often invoked in debates about rationality: “Commitments give agents reason to act, but to make this commitmentarian reason intelligible requires a break with standard modern accounts of rationality, which are oriented to an agent’s *present* aims or preferences.”<sup>9</sup> According to Rubinfeld, “Commitments . . . are precisely the kind of normative embrace of the future necessary to a self that conducts itself, much of the time, within temporally extended engagements that it has given itself.”<sup>10</sup> Like the idea of precommitment, Rubinfeld’s notion of commitment is self-binding: “It is critical that *some* basic interpretation be given a chance to establish itself, to become part of our practices. Otherwise the commitments are never made real.”<sup>11</sup> Unlike precommitment, however, commitment is ultimately open-ended: “It is part of the nature of a commitment that its full entailments can never be known until they have been lived out, and lived under, for an extended period of time. . . . Commitments have to be filled in and filled out through an ongoing task of interpretation.”<sup>12</sup>

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5. *Id.* at 86.

6. *Id.* at 10.

7. *Id.* at 92.

8. *Id.* at 11.

9. *Id.* at 93.

10. *Id.* at 128.

11. *Id.* at 189.

12. *Id.* at 188-189.

Rubinfeld's theory of constitutional self-government also entails a redefinition of the notion of a people as a form of political subjectivity: "Commitmentarian democracy holds that a people, understood as an agent existing over time, across generations, is the proper subject of democratic self-government."<sup>13</sup> According to Rubinfeld, the currently popular notion of peoples as imaginary only results from a speech-based conception of a people that is in turn based on the idea of language-based homogeneity.<sup>14</sup> This predication of political subjectivity on cultural homogeneity by nature generates a tension between collective and individual agents:

We do not owe our popularity to any shared set of cultural, psychological, or biological characteristics that might confer upon us as a unique national identity. We must give up altogether the search for this sort of homogenous national identity, in which a certain set of values or traits is imagined as defining the unique and essential national character.<sup>15</sup>

Instead, Rubinfeld proposes the notion of a people based on a shared commitment to a written constitution: "There must be room for a nation whose members struggle, despite and indeed because of their individual differences, to be the collective authors of their own foundational law."<sup>16</sup> In other words, "A people, for purposes of democratic self-government, is the set of persons co-existing under the rule of a particular political-legal order."<sup>17</sup> According to Rubinfeld,

a temporally extended people cannot speak in . . . [one] voice. It can only inscribe itself, over time, into the world. Constitutional interpretation in written self-government must itself be a written project, an enterprise in which one [text] is intermeshed with another and another over a long period of time. It cannot be reduced to an authoritative, clarifying pronouncement by the people, even a pronouncement made in unison by every living citizen at a sublime constitutional moment.<sup>18</sup>

From this standpoint, Rubinfeld declares, "democracy does not consist in effectuation of majority will, but is rather the temporally extended popular struggle for authorship of the nation's legal and political commitments."<sup>19</sup>

Rubinfeld defines his temporal reorientation as a move away from the kind of presentism that he believes defines modernity: "Modernity *created* the present moment—created it as the exclusive site of being, and hence as

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13. *Id.* at 145.

14. *Id.* at 149.

15. *Id.* at 151.

16. *Id.*

17. *Id.* at 153.

18. *Id.* at 173.

19. *Id.* at 253.

the exclusive site of will and freedom.”<sup>20</sup> He cites a wide range of thinkers from Rousseau to Jefferson and Freud as advocates of such presentist freedom. Ultimately, Rubenfeld seeks to restore the future (as well as the past) in the conception of freedom: “passionate engagement with the world and with the future is a central element of human freedom.”<sup>21</sup> In more general terms, *Freedom and Time* is a passionate call for a vision for the future in American constitutional politics:

Our politics grows ever more insipid as it grows ever more attentive to what we want, or say we want, here and now. We have today a productive capacity enabling us to realize our dreams to an extent beyond the wildest dreams of those who lived before us—if only we had dreams!

What are our ambitions, here in America, what plans do we have with respect to our unprecedented technological power? What ambitions do we have for the next fifty years? The next five? Other than enhancing the usual economic indicators, none. At this moment, at this millennium, it would seem we have no future. Let us live to see that change.<sup>22</sup>

Rubenfeld’s passionate appeal to futurity rests on his conviction that human life is resolutely temporal and that the idea of “living in the present” is nothing more than an abstraction:

To say that I am what I am only *over time* is to say something very different from the proposition that what I am is decisively shaped by what I have been, or that I will continue to be the person I am over time. If I am I only over time, then there is never a present moment at which I can say, *I am*. I do not *now* exist. At any given moment, there will have been an I only by virtue of my having led a human life.<sup>23</sup>

Furthermore, Rubenfeld points to the trivial character of the present moment:

The present is small. Living in it is the refuge of those who cannot bear the large responsibility for living over time, the responsibility for what they have been and will be. We are all familiar with this smallness. It is what we feel when, “going about our business” in the “hurry that modern working conditions demand,” we have the sense of having filled our lives pursuing the most minuscule and shallow of objects.<sup>24</sup>

The problem of the present has animated debates among generations of philosophers. This is partially because of the incongruity between the

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20. *Id.* at 7.

21. *Id.* at 92.

22. *Id.* at 16.

23. *Id.* at 10.

24. *Id.* at 16.

temporally stretched character of interpretive work and the seemingly ungraspable character of the present conceived as a fleeting point.<sup>25</sup> In more general terms, the problem of the present has served as a problem paradigmatic of the problem of self-knowledge. The two problems share a single broader epistemological difficulty arising from a lack of distance between interpretive work and its object. In this sense, as Rubenfeld rightly suggests in *Freedom and Time*, the problem of the present is central to the problem of modern knowledge that seeks to understand what has produced itself.

In light of this, however, I wish to suggest that Rubenfeld's future-oriented solution to the problem of the present is directly relevant to at least two radically different efforts to reintroduce futurity in philosophy. First, Rubenfeld's theory of the temporal character of self-formation recalls American pragmatists' rendition of the present as temporally stretched and its accompanied redefinition of the concept of self. In *The Principles of Psychology*, for example, William James famously redefines the notion of the present: "The practically cognized present is no knife-edge, but a saddle-back, with a certain breadth of its own on which we sit perched, and from which we look in two directions into time."<sup>26</sup> This redefinition of the present follows James's notion of the "stream of thought" in the consciousness of self. G.H. Mead also develops the idea of "the present as the locus of reality" and approaches self as emergent.<sup>27</sup> Rubenfeld's theory of constitutional self-government would have benefited greatly from a serious engagement with this American intellectual tradition. In particular, Rubenfeld's engagement with American pragmatists' theory of temporality would have constituted an interesting interjection to wider debates about pragmatism in constitutional law and legal theory, more generally.<sup>28</sup>

Second, and more importantly, Rubenfeld's theory of commitment resonates with some early twentieth-century German philosophers' efforts to redeploy eschatological temporality as a solution to the modern problem of the present. Rubenfeld dismisses such theological renditions of the present as reminiscent of early Christian millenarian faith and asserts, "when this Christian 'wakefulness' wakes from its dreams of a millennial future and becomes a matter of 'Dasein's being wakeful for itself,' then it assumes a modern form."<sup>29</sup> Yet, it is important to note that these modern deployments of eschatology have focused not so much on the character of the millenarian end as on the character of retrospection entailed in

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25. See HIROKAZU MIYAZAKI, *THE METHOD OF HOPE* (forthcoming 2004).

26. WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* 574 (1981).

27. See G.H. MEAD, *THE PHILOSOPHY OF THE PRESENT* (1959).

28. See PRAGMATISM IN LAW AND SOCIETY (Michael Brint & William Weaver eds., 1991).

29. RUBENFELD, *supra* note 1, at 33.

eschatological imaginations.<sup>30</sup> In his well-known *Theses on the Philosophy of History*, for example, Walter Benjamin famously notes: "Only that historian will have the gift of fanning the spark of hope in the past who is firmly convinced that *even the dead* will not be safe from the enemy if he wins."<sup>31</sup> Hope in the past points to its future moment of fulfillment (or redemption), and the historian's role is to realize this moment.<sup>32</sup> In Benjamin's hopeful reconceptualization of history as messianic retrospection, as I have argued elsewhere, hope in the past is in turn replicated in the present as the historian's own hope for salvation.<sup>33</sup> In the temporality of hope, the present becomes a point of articulation between the unfulfilled past and a horizon of expectation for future moments of fulfillment. In a similar fashion, I argue, Rubinfeld's theory of commitment stretches in two temporal directions (to the past as well as to the future) and seeks to chart a horizon of future commitments.

This somewhat idiosyncratic juxtaposition of Rubinfeld's theory of constitutional self-government with American pragmatism on the one hand, and with a tradition of German philosophy on the other, becomes acutely pertinent in light of the contemporary pragmatist philosopher Richard Rorty's recent call for "hope in place of knowledge."<sup>34</sup> In a series of essays entitled *Philosophy and Social Hope*, Rorty seeks to turn philosophy to the future and ultimately suggests, following John Dewey, that "we can, in politics, substitute *hope* for the sort of knowledge which philosophers have usually tried to attain."<sup>35</sup> Rorty anchors the notion of hope in his commitment to America and Americans' capacity to create a better future. It is important to note that Rorty tries hard to avoid elements of teleology in this temporal reorientation, however. According to Rorty, pragmatic hope is predicated on a commitment to "principled and deliberate fuzziness."<sup>36</sup> In Rorty's view, therefore, hope is not so much about its concrete object as a perspective on the future it generates: "The vista, not the endpoint, matters."<sup>37</sup> Both the pragmatist philosophers and the German philosophers discussed above share with Rorty their willingness to dwell on a delicate balance between determinacy and indeterminacy. Rubinfeld's theory of constitutional self-government is

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30. See WALTER BENJAMIN, *ILLUMINATIONS* (Hanna Arendt ed. & Harry Zohn trans., Fontana Press 1992) (1974); ERNST BLOCH, *THE PRINCIPLE OF HOPE* (1986).

31. WALTER BENJAMIN, *Theses on the Philosophy of History*, in *ILLUMINATIONS*, *supra* note 30, at 245, 247.

32. See PETER SZONDI, *ON TEXTUAL UNDERSTANDING AND OTHER ESSAYS* (Harvey Mendelsohn trans., 1986).

33. See MIYAZAKI, *supra* note 25.

34. RICHARD RORTY, *PHILOSOPHY AND SOCIAL HOPE* (1999).

35. *Id.* at 24.

36. *Id.* at 28.

37. *Id.*

precisely an expression of a similar kind of future-oriented commitment as a source of hope in the present.

