THE DEAD HAND OF CONSTITUTIONAL TRADITION

MICHAEL S. MOORE*

It was Dickens who asked us why it was, with regard to the courts of England and the common law, that dead men sat on our benches. What is the authority of those who preceded us to dictate the ideals by which our generation lives? With regard to that part of our past having to do with our constitutional structure, what is the authority of the authors' "original understanding" of the document they wrote, and what is the authority of the understanding held by that document's original audience? These strike me as quite real and quite interesting questions. Yet it has been impressed upon me, having raised these sorts of questions before, that many are loathe to answer them, on the ground that they are not questions that genuinely can be asked.

I was most struck by this tendency when I was teaching a seminar for judges in California. For several years Jeremy Waldron and I ran seminars twice a year for the California judiciary when we were both teaching at Berkeley. In one of Waldron's sessions of an hour and a half in length, Waldron raised for the judges the question of the authority of the past, and specifically the authority of our constitutional past for them as judges. One justice of the California Supreme Court drew himself up and said, "I don't believe that there is a person present in this room who would question the authority of our Constitution." Since everyone else in the room was a lower court judge who was going to defer to this particular justice, that left Waldron casting about with an hour and twenty-nine minutes to go, and nothing to talk about.

But contrary to that justice, every judge (and every theorist who would make normative recommendations to judges, an enterprise in which a lot of us are engaged) has an obligation to ask and answer the question, what are those texts (and understandings of texts) that bind judges as judges? Indeed, even nonjudges have to ask and answer a like question: what are those texts that bind any legal actor—be he a judge or a citizen or a lawyer—in his role as a legal actor?

* Leon Meltzer Professor of Law, and Professor of Philosophy, University of Pennsylvania.

To be sure, there are kinds of jurisprudential enterprise that do not require that judges answer that question. One that comes to mind is H.L.A. Hart's jurisprudence. Hart argues that judges do not have to answer the question, "What is the justice of the rule of recognition?" for there to be a legal system.[1] They have only to accept it. By acceptance, he meant that they had only to have an internal attitude towards the rule of recognition for whatever reason, including no reason at all except for dull conformity with custom. Because Hart was engaging in purely descriptive jurisprudence, which asks questions about when there is law, this answer is a possible one.[2] The last letter I received from Hart, a year before he died, maintained the position he always had held, which was that judges did not have to answer the question about the authority of the Constitution or the intellectual tradition that informed it, because (descriptively) there still would be a legal system no matter what answer they gave.[3]

Hart's jurisprudence was a descriptive enterprise external to any particular legal system. His position is plausible only within that enterprise. But if you are engaged as a judge, or as someone who recommends to judges how to decide—if you are engaged in the normative enterprise of saying, "What are the standards that can justify the use of state coercion on unwilling citizens?"—you have to ask and answer the normative question that Hart's jurisprudence refused. Even if the rule of recognition is accepted, why is such acceptance justified? What good reasons stand behind accepting such a Constitution as authoritative?

This question has also been ducked by competent constitutional theorists. There is a well-known article by Henry Monaghan in which he says that it is axiomatic within constitutional law that the document and the original understanding behind it are authoritative.[4] On his view, this authoritative status is an "incontestable first principle" that is "incapable of and not in

1. *See* H.L.A. HART, THE CONCEPT OF LAW 198-199 (1961); H.L.A. HART, ESSAYS ON BENTHAM 159 (1982). The rule of recognition is Hart's term for the secondary rule that licenses all other rules as law, which is part of what we mean by a constitution. *See* HART, THE CONCEPT OF LAW, *supra*, at 97-120.

2. Even while sharing Hart's descriptive enterprise, Joseph Raz has criticized this answer for years. *See, e.g.*, Joseph Raz, *Hart on Moral Rights and Legal Duties*, 4 OXFORD J. LEGIS. STUD. 123 (1984) (stating that no system is a system of law unless it lays a claim on judicial obligation).

3. *See* Letter from H.L.A. Hart to Michael S. Moore (Jan. 13, 1990) (on file with author).

4. *See* Henry Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 360 (1981).

need of further demonstration."[5] If that is anything other than the old advice to put your pants on one leg at a time—that is, to hold in abeyance questions of justification when struggling with particular questions of interpretation[6]—then it strikes me as an invitation to irrationalism. We need to ask ourselves the question about the past that Dickens raised with his "dead men" complaint.

So let me ask this question, directing it specifically to the authority of our constitutional past. I shall examine briefly five answers, all of which I find problematic. The first answer is this: the question of the binding authority of the constitutional text and the tradition in which it was originally understood is the sort of question that, even if it can be asked at all, has a *necessary* answer. That is, on this view it is not only desirable to look to the past, it is actually necessary because each of us stands in the tradition that comes from that past. This is an impossibility argument. The argument is that you cannot stand outside the tradition and judge it, because you have no place from which to make such external judgments.

There are two contemporary examples of this point of view, neither of which should be particularly agreeable to this audience. One comes from what a colleague of mine rather unneutrally described as "post this-and-that, critical this-and-that, pseudo-philoso-babble," namely, postmodernist hermeneutics.[7] Here it is argued that you cannot stand outside a tradition in order to judge the tradition. To do so would be to ask a meaningless external question. A second example is provided by Ronald Dworkin's "interpretive jurisprudence," which he defends on the ground that no legal theorist can stand outside the legal tradition in which he is a theorist but must instead interpret the tradition of which he is a part.[8] The concepts of our tradition are said to define, as Dworkin puts it, the plateau of agreement that makes disagreement possible.[9] Dworkin believes our tradition's concept of law requires legal theorists to look to the past, how-

5. *Id.* at 384.

6. This stance is only possible if you separate your theory of the authority of the Constitution from your theory of its interpretation. On this issue, see Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107 (1989).

7. *See generally* Michael S. Moore, *The Interpretive Turn In Modern Theory—A Turn For the Worse?*, 41 STAN. L. REV. 871 (1989).

8. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986) (observing that our present institutions descend from earlier institutions through interpretive adaptations).

9. *See id.* at 71.

ever much these theorists might have differing conceptions about what that past represents.[10]

I think both of these alleged conceptual necessities run contrary to everyone's actual experience in doing moral, political, or legal theory. None of us are hostage to traditions in the way that Dworkin and his hermeneutic friends would suggest. Each of us has not only a birthright but an obligation to make judgments about what it is that the past has bequeathed to us, to see whether it should be continued. Moreover, such judgments do not require the impossible from us. It may be impossible to stand outside *all* traditions whatsoever but this is not to say that it is impossible to stand outside of a particular tradition in the name of some other, perhaps one that you yourself are inventing. We all sense the possibility of what I would call revolutionary moral judgments.[11] Revolutionary moral judgments are those judgments of value that go against our culture's dominant values. Such judgments say that the tradition in which they are made has it radically wrong. Our sense that we all make such judgments, at least occasionally, belies the argument that it is either psychologically or epistemologically impossible to stand outside our own tradition.

Let me leave these supposed necessities that we look to the past in favor of four more genuinely normative arguments. Three of these come as interpretations of Edmund Burke, which I expect this audience may find more agreeable. The first interpretation of Burke is what I think of as the epistemic interpretation. Burke thought that there was a modesty of individual human reason in the face of the collective wisdom that is bequeathed to us by the past. This is an almost Darwinian view: we subject social ideas to the test of time in which they flourish or die, and the fittest survive. Burke supported this epistemic point of view with two subpoints, one having to do with the puniness of any individual's share of reason, and the other with the strength of the collective wisdom enshrined in tradition.

Burke thought that individual human reason about politics and good government was weak, for several reasons. First, Burke was no democrat about the intellect. The mass of humanity, in his view, was intellectually incapable of grasping truths about

10. *See id.* at 93.

11. *See* Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424, 2467 (1992) (observing that truth is not governed by conformity to social convention).

rights and good government.[12] Second, all of us—even the intellectual elite—are incapable of grasping truths about government when they are put as propositions of abstract right.[13] Burke confessed that he could not "stand forward, and give praise or blame to anything which relates to human actions, and human concerns, on a simple view of the object, as it stands stripped of every relation, in all the nakedness and solitude of metaphysical abstraction."[14] "Liberty in the abstract," for example, would seem to protect the highwayman and the murderer, but such a result would be absurd.[15] Third, what is needed for any of us to grasp political truths are the particular circumstances of the tradition in which we find ourselves: "circumstances . . . give in reality to every political principle its distinguishing colour and discriminating effect. The circumstances are what render every civil and political scheme beneficial or noxious to mankind."[16] Fourth, such local knowledge is delivered to us more from the passions and prejudices that we have inherited from our tradition than from our reason. As Burke put it, "I am bold enough to confess, that we are generally men of untaught feelings; that instead of casting away all our old prejudices, we cherish them to a very considerable degree, and, to take more shame to ourselves, we cherish them because they are prejudices; and the longer they have lasted, and the more generally they have prevailed, the more we cherish them."[17]

For Burke, these four points should make any individual hesitant to challenge the authority of the past on the basis of his own abstract reasoning about rights against the state. The second and positive part of Burke's argument here is that we should defer to the collective wisdom of our past traditions. This position reflects the (pre-Darwin) Darwinian faith that long held and widely shared beliefs have stood the test of time, for they have been sifted by generations and not found wanting. These beliefs should be respected because there is greater experience behind them than any individual could possibly bring to bear against them: "The science of government being . . . a matter which re-

12. *See* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 46-60 (Dent 1910) (1790).

13. *See id.* at 58-59.

14. *Id.* at 6.

15. *Id.*

16. *Id.*

17. BURKE, *supra* note 12, at 84.

quires experience, and even more experience than any person can gain in his whole life, however sagacious and observing he may be,"[18] we should give the past a presumption of greater wisdom.

If one puts these two points together, one gets Burke's epistemic argument for deferring to tradition. As Burke put it, we are "afraid to put men to live and trade each on his own private stock of reason; because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages."[19] I call this Burke's epistemic argument because he makes no claim that the past binds us in the way of a promise, a request, or a command. The only claim of the past as Burke here asserts it is epistemic: the past *knows* better than do we what the truths of politics are. We should listen to tradition, on this view, because it is wise, and not because it has any other form of authority over us. Looking particularly at the abstract philosophy leading to the French Revolution, Burke thought that nobody, whatever his intellect and no matter whether one of the intellectual elite or one of the common masses, could make judgments about general rights such as the rights to liberty, equality, and fraternity in the abstract. If you are trying to figure out what liberty is, he thought, you have to do it in context—that is, in the particular circumstances of the tradition which you yourself know—and you have to let that tradition speak to you through the prejudices that it has instilled in you.

There are a number of answers to Burke. One of them is that our tradition in America is much more Lockean than it is Burkean. To declare certain truths about politics to be self-evident, to include among those truths the idea that every person has certain natural rights in the abstract, is to echo Locke.[20] Locke said that we each can know the truths of morality with the certainty with which we can know truths about mathematics.[21] That is, we as individuals can know these truths, rather than having to defer to the collective wisdom of others. So if one wants to talk about the traditions needed for knowledge, one can at least say that our tradition, descended to us from Locke through Ham-

18. *Id.* at 58-59.
19. *Id.* at 84.
20. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 285-446 (Peter Laslett ed., 1967).
21. *See* JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. I, ch. II, § 1 (1690).

ilton and Madison (who both read Locke assiduously),[22] is one in which individual reason is not so puny, and abstract right not so difficult to grasp.

A second point: if we do muster up the wherewithal to judge this matter for ourselves, is not Locke better than Burke on the power of individual reason? Is it not the case that we each have a sense that sometimes at least our own judgment on matters of right and politics is to be preferred to that of our intellectual inheritance? John Hart Ely makes this point nicely when he gives as an example of tradition the distinctively American tradition (pre-1950) of riding men out of town on a rail.[23] So-called "sunset laws" were in force when I grew up in Oregon in the 1950s, under which all black people had to be out of town by sunset. Ely rightly argues that such unjust laws easily can be a part of one's tradition. Surely we should judge these to be wrong traditions; surely individual reason can and should stand against them no matter how revolutionary doing so might seem to be.

Such examples of obviously pernicious traditions also call into question the other side of Burke's comparative judgment between individual reason and collective wisdom. Burke's faith in traditions having stood the test of time, resulting in better and better judgments, calls to mind John Mansfield's famous statement about the common law "working itself pure."[24] Mansfield's statement causes most of us to smile because of the inherent naiveté in the idea that the accidents of history will lead to a better and better common law. The accidents of history might just as easily produce traditions that are pernicious. It depends on who sits on the bench or who the mainstays of the tradition are.

A fourth and final point on Burke's epistemic argument is that traditions are worthy of the respect of those who share them only because previous generations have tested them in the light of individual reason.[25] There is certainly a tension between the idea of respecting the past for its likely wisdom, and suspending one's own judgment in the face of that wisdom, inasmuch as the possession of such wisdom by any tradition depends on previous generations *not* having so suspended their own judgment.

22. On the influence of Locke on Madison and Hamilton, see MORTON WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION (1987).

23. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 60 (1980).

24. Omychund v. Barker, 26 Eng. Rep. 15, 33 (K.B. 1744).

25. *See* BURKE, *supra* note 12, at 180-81.

The third argument for the authority of the dead hand of the past springs from a second interpretation of Burke: the religious argument. Burke thought that traditions were in part sanctified by God by virtue of the His not changing them.[26] This position is reminiscent of a familiar argument about the common law, which is that if the legislature has not changed it, then presumably the legislature has sanctioned it. Burke makes the same argument for God vis-à-vis tradition.

Burke here touches on my first theory about the authority of our Constitution. In the fifth grade, my teacher told me that the drafters of the United States Constitution were divinely inspired. To a fifth grader that sounded pretty good. I am not a theist anymore, so I no longer can accept this argument. Even if you were a theist, however, you might be more like Thomas Aquinas, and think that God does not care very much about institutional detail. Aquinas's example was the law of deposits in Thirteenth Century France.[27] He believed that God simply does not speak to that issue, and that human law must work it out.[28] I would suspect Aquinas would say the same about some constitutional issues, such as whether we should have a bicameral or unicameral legislature: God probably does not care very much one way or the other.

Putting aside the possibility of divinely sanctioned tradition, the main argument in Burke is an argument of prudence, which is the fourth argument I want to talk about. The argument of prudence is that individual human reason is frail, and that if it fails to maintain order, the resulting disasters are both unpredictable and potentially quite large.[29] Of all odd bedfellows, that makes Burke sound a good deal like John Rawls when Rawls advocates the conservative maximin strategy when we enter into the "original position" to choose constitutions.[30] According to Rawls, if you cannot gauge probabilities accurately, and if you are in a sufficiently comfortable position that the upside potential is not that great but the downside risks are unacceptable if they materialize, it is rational not to gamble. This is an argument of prudence: if we have a tradition that roughly keeps the peace, do not rock the boat too much.

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26. *See id.* at 31.
27. *See* THOMAS AQUINAS, SUMMA THEOLOGICA 287-88 (Timothy McDermott ed., 1989)
28. *See id.*
29. *See* BURKE, *supra* note 12, at 243-44.
30. *See* JOHN RAWLS, A THEORY OF JUSTICE 154 (1971).

At some level of generality, this argument actually is persuasive. However, we should remember that it was only an argument of degree for Burke, as it is for us. That is, it does not justify using tradition to nullify incremental change; it is only revolutionary change that is not worth the gamble. Burke's example of an incremental change was the American revolution. Burke considered this an incremental rather than a revolutionary change because it appealed to the traditions of Englishmen.[31] It was the French Revolution (and Burke would no doubt have added the Russian Revolution as well) that was the gamble to be avoided. So even if we should pursue the rational but conservative maximin strategy in adopting our Constitution, this does not mean we should pick any particular extratextual mode of interpretation to maintain the tradition. More specifically, it does not mean we should pick the particular interpretive strategy called originalism as the sole means of interpreting the text that carries on the tradition. We doubtless can interpret the text in many different ways and still carry on our tradition. Indeed, I have argued that the best way of carrying on the constitutional tradition bequeathed to us by Locke, Hamilton, and Madison, is to view the text of our Constitution as they would view it: not as a repository of conventional values or shared beliefs—even if those conventional judgments are those of the founding generation—but as a document identifying preexisting natural rights whose nature each generation must seek to discover on its own.[32] Surely there is no convincing argument of prudence that such a traditional interpretive methodology is too fearsome in its risks to be worth the gamble.

I am often not sure that the fifth argument for the authority of the past is an argument at all. It sometimes strikes me that it is mostly just the grumpiness of people as they grow old. That grumpiness seems to drag along with it a mantra to the effect that the younger generation is corrupting society, morals are falling apart, and society is going to the dogs. To the extent that there is an argument here, this fifth argument asserts what Joel Feinberg calls the conservative principle—every majority has the right to have its own traditions not contaminated by behavior

31. *See* Letter from Edmund Burke to John Farr & John Harris, Esquires, Sheriffs of Bristol (Apr. 1777), *in* 6 THE WRITINGS AND SPEECHES OF EDMUND BURKE 149-97 (1906).

32. *See* Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985).

which flouts those traditions.[33] There is some intuitive appeal to this principle. The appeal lies in the sense that every society has the right to preserve itself against change for no better reason than that it does not want to change. It can value its past.

But there are two huge qualifiers to even the most sympathetic construction of the conservative principle. One is that, in any society that cares about liberty, you cannot go very far down the road of making everyone conform to prevalent mores simply because they are prevalent without losing far too much liberty to be tolerated. That people want others to do as they do, for no better reason than to prevent the spectacle of difference, is a formula for the most totalitarian of societies.

The second qualifier is that the conservative principle does not necessarily justify giving authority to any very remote past. Chief Justice Earl Warren could have used this principle to justify his use of the "evolving standards of decency that mark the progress of a maturing society" to interpret the constitution.[34] The conservative principle could give *each* generation the right to live by its own ideals, and not to have other ideals—whether from the future or from the past—thrust upon it. There is nothing inherently protective of past tradition (as opposed to present consensus) in the conservative argument, if the argument has any bite at all.

I conclude that there is no very good argument for the proposition that, in general, we should defer our own critical judgments to those implicit in the tradition in which we were raised. More particular arguments must thus be used by those who would convince us that the part of our tradition that was established with the founding of the republic has some special relevance to constitutional interpretation. There is, of course, no dearth of such arguments, including, prominently, social contract theories of various stripes. These too are problematic, but that is another topic.[35] My own suspicion about all such arguments is the same suspicion I have about the five general arguments that I have considered: those who pretend to be suspending their own critical judgments by deferring to the past have not, in fact, suspended their individual reason at all. Rather,

33. *See* JOEL FEINBERG, HARMLESS WRONGDOING 39-80 (1988).

34. Trop v. Dulles, 356 U.S. 86, 101 (1958) (holding that the expatriation of a person convicted by military court martial is beyond the war powers of Congress).

35. *See* Moore, *supra* note 6, at 120-21.

our critical judgments coincide with the judgments implicit in our tradition, so that when we "defer" to the past we are in reality promoting our own political conclusions. There is nothing wrong with this, so long as we are all clear that this in no sense gives any authority to the past. A past that has authority only insofar as it agrees with present judgment has no authority at all.