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OF CONSTITUTIONAL SELF-GOVERNMENT

Jed Rubenfeld*

Is constitutional law democratic?
If democracy means government by the living will of the people, the answer seemingly has to be no. Why should we cavil at this answer? Constitutional law checks the excesses of popular rule; that was and is its point. Europeans, by and large, are content to say so; the entire ideology of "universal human rights," which is orthodoxy in the "international community" today, presents these rights, enforced by constitutional tribunals throughout the world, as a supra-national, supra-political imperative to which every nation, including democratic nations, must equally bend.

But Americans have never wanted to concede that their Constitution or its rights are anti-democratic. For over a hundred years, American constitutionalists have offered ever more ingenious theories reconciling constitutional law with the principle of government by the living will of the people. This is a prestigious, central line of American constitutional thought, linking such prominent figures as Tiedeman, Thayer, Holmes, Meiklejohn, Bickel and Ely.


Let me summarize, oversimplistically, what I understand to be the bottom-line of Eisgruber’s position. Judges are to make most constitutional decisions about individual rights, and to a considerable extent about structures of governmental power, "on the basis of moral reasons."1 But not just any moral reasons. Judges are to decide moral issues "on the basis of moral reasons that enjoy popular appeal."2

What does this twofold requirement mean?
"On the basis of moral reasons" refers to a style of constitutional interpretation intended to differ from deciding cases on the basis of

* Slaughter Professor, Yale Law School. It is a pleasure to be given the opportunity to comment on Chris Eisgruber's excellent book and to suggest how his thinking overlaps with, but also diverges from, my own. For this opportunity, I want to thank Professor James Fleming, the Fordham Law Review, and all the participants in this symposium.
2. Id.
constitutional text, history, precedent, and so on. Constitutional methodologies that stress these interpretive sources smack, says Eisgruber, of a sacralizing attitude toward “legal craftsmanship” and the Constitution itself: an attitude in which “the Constitution is a sacred and obscure legal text, and lawyers are the high priests of American politics.” Not that judges must never look to text, history, stare decisis, and so on. But judges are to look to these sources only insofar as it helps them discharge their more basic task of rendering decisions “on the basis of moral reasons that enjoy popular appeal.”

The latter requirement—“that enjoy popular appeal”—is a trickier proposition. Eisgruber is concerned here to differentiate his morality-based constitutionalism from that of Ronald Dworkin. Judges are not to strive for “the best conception of justice, whatever that may mean,” nor even to express “their own best judgment about justice.” Rather, they are “to speak [about justice] on behalf of the American people.” Their job is to “represent the American people” and “the American people” here refers to Americans alive today, not those who died two hundred years ago. They are to express “the people’s judgment about justice.”

Why? In order to assure constitutional law’s democratic legitimacy. Democracy, for Eisgruber, consists of governance in accordance with the interests and opinions of the living people, and especially in accordance with the people’s own judgment about moral and political principles. For this reason, judges are not to make constitutional decisions on the basis of justice as such. In order to bring constitutional law within the fold of democracy, judges must be understood as speaking representatively, as “speaking for the people,” as expressing “the people’s judgment about justice.”

The difficulty here is, of course, that this picture of judicial review seems false to basic features of written constitutionalism. If we were really interested in effectuating “the people’s judgment about justice,” why would we want a hundred- or two-hundred-year-old text to be the supreme law of the land, and why would we want this text to be interpreted by unelected, life-tenured judges, who are thereby entrusted with a systematic authority to overrule “the people’s judgment about justice”? It would seem we would have to believe that these judges are better at speaking on behalf of the people than are the people’s own elected representatives. Indeed we would have to believe that judges are better at representing the people’s judgment about justice than are the people themselves, because popular referenda are not allowed to trump constitutional law any more than statutes are allowed to.

3. Id. at 2.
4. Id. at 126.
5. Id. at 7.
6. Id. at 52, 126.
Eisgruber is forthright in recognizing these difficulties. Indeed, his responses to them are among the most original parts of his book.

Judges are better at speaking for the people, he says, on matters of morality, than are the people's elected representatives. He asks us to consider the possibility that when it comes to "represent[ing] the American people with regard to the issues referred to in the Constitution," disinterested judges "can do the job better" than elected legislatures. More than this, judges can represent the people better even than the people can themselves, at least when the people are expressing themselves by majority vote. A majority is only a majority, after all, and voters' decisions can be "tainted" by many factors, such as self-interest or the desire to "send a message" about the "power and prestige" of a particular "cultural group." The majority's reaction may result more from self-interest than from moral judgment, and the majority is only part of the American people. Hence a majority vote does not necessarily represent the people's judgment about justice. Judges can do the job better.

Later, I will consider Eisgruber's arguments in a little more detail. But I think it worthwhile to step back a moment and to reflect on how a constitutional scholar of Eisgruber's obvious sophistication comes to argue for so remarkable a position.

We are asked to support constitutional law on the ground that the nine aging justices of the Supreme Court, whose office is specifically designed to make them independent of popular judgment, represent contemporary popular judgment. These old, unelected judges-for-life—whose worldviews were shaped thirty to fifty years ago—represent the people's present judgment about morality not only better than the people's currently elected representatives, but better than the people themselves in their capacity as voters. Purporting to interpret legal language enacted a century or two ago, our judges are actually engaged in the business of giving voice to a moral judgment that is neither their own, nor one grounded in historical commitments laid down in the Constitution, but is that of the people today.

Even if we took this position as completely prescriptive, rather than descriptive, it would remain highly counter-intuitive. Viewed purely prescriptively, Eisgruber's position seems to call on judges to engage in a form of decision-making that would strike many of us as puzzling.

Let's assume a federal statute establishes Christianity as the national religion. This statute, I take it, is unconstitutional, and it would be unconstitutional even if a large majority of Americans supported it. If the Constitution means anything, we might say, it means that this statute is unconstitutional.
But suppose that the "moral reasons" that tell against the statute no longer "enjoy popular appeal." Or suppose, at any rate, that five members of the Supreme Court genuinely believe this to be so. The Court therefore upholds the statute. In their opinion, the majority acknowledge that constitutional text, history and precedent stand firmly against the law. Moreover, the five even say—again, perhaps, sincerely—that the statute violates their own personal views about what justice requires. But while text and history are sometimes useful guides to the people's contemporary moral judgment, the Court holds, here the statute accurately reflects the moral judgment of living Americans, and therefore it is constitutional.

Wouldn't we think that a Court producing such an opinion had gone off the constitutional rails? As I say, Eisgruber has some creative arguments defending his position, which I will consider more carefully below. But we should take a moment to think about how constitutional theory ends up in a position like this.

For over a hundred years, American constitutionalists have cut their teeth trying to square constitutional law with the principle of governance by the living will of the people. The attempted reconciliations have varied considerably.

At the end of the nineteenth century, Christopher Tiedeman's *Unwritten Constitution* argued forcefully against what we today call "originalism"; in a democracy, he wrote, the Constitution has to be interpreted, sometimes aggressively, in accordance with the "present intentions and meaning of the people," the "prevalent" and "popular" "sense of right." Thayer's *American Doctrine of Constitutional Law*, highly influential in the first half of the twentieth century, argued for extreme judicial restraint in constitutional cases (at least in cases involving federal statutes); only such restraint respected the right and need of the living to govern themselves. Meiklejohn presented a theory of the First Amendment that made constitutional law an engine of democracy on the model of a New England town meeting. Bickel's interesting mixture of judicial prudence and prophecy was formulated so that "an aspect of the current ... popular will finds expression in constitutional adjudication," thus achieving "a tolerable accommodation with the theory and practice of democracy." For Ely, constitutional law remains democratic if judges do not impose

substantive values on the nation, but rather safeguard the processes through which today's citizens govern themselves.14

Every one of these great works is involved in a common project. Every one of them fights the past. The common project is to find a way for constitutional law to serve self-government in the here and now, where self-government is understood as governance by the living in accordance with their own decisions, will, or values.

Fighting the past: "the intentions of our ancestors cannot be permitted to control the present activity of the government."15 Thayer will pick up the same line of thought.16 So, too, will Bickel. Democracy, he will say, means government by representatives of "the actual people of the here and now."17 And so, too, Ely, who will quote Jefferson: "the earth belongs... to the living."18 Thus, constitutional law, if it is to be squared with democracy—and every one of these authors means to do just that—must somehow find a way to suppress its own historicity.

Constitutional law must deny that it carries forward into the future the force and weight of past judgments about justice, power and liberty. It must become, counter-intuitively, a vehicle for democratic decision-making in the here and now, even as it strikes down the products of democratic decision-making in the here and now. It must not constrain popular decision-making on the basis of substantive principles of justice or liberty laid down long ago, even though constitutional law seems to aspire to do precisely that.

Thus, Eisgruber. He begins his book by joining with those who decry governance by "the dead hand of the past."19 Like Tiedeman, Thayer, Meiklejohn, Bickel, and Ely, he struggles against constitutional law's historicity. "I deny that the Constitution's purpose is to constrain American democracy on the basis of rules or principles laid down long ago."20 The Constitution's "specific provisions should be understood to serve, rather than constrain, the freedom of later generations," and its "abstract provisions" should be

15. See Tiedeman, supra note 10, at 144.
16. See, e.g., James Bradley Thayer, John Marshall 106 (1901). As Professor Kahn has observed, Thayer's critique of judicial review as "outside" intervention, preventing "the people" from "fighting the question out... and correcting their own errors," id., was an implicit "attack... on originalism." Paul W. Kahn, Reason and Will in the Origins of American Constitutionalism, 98 Yale L.J. 449, 516-17 & nn.301 & 304 (1989).
17. Bickel, supra note 13, at 17.
19. Eisgruber, supra note 1, at 11.
20. Id. at 3.
regarded as "invitations which call upon Americans to exercise their own best judgment about moral and political principles."21

Eisgruber, therefore, embraces the project of reconciling constitutionalism with present-oriented democracy. His distinctive contribution is to open up a new way, within the terms of this project, to argue for a strongly morality-based or justice-based approach to constitutional interpretation. But how can morality-based constitutional law be seen as anything other than a constraint on popular self-government in the here and now? Surely, it would seem, if life-tenured, unelected judges are deciding fundamental questions of justice for the nation, and if these judicial decisions can be overturned only through very onerous, supermajoritarian amendment processes, we are obliged to recognize a "constraint" on Americans' ability to "exercise their own best judgment about moral and political principles."

This is the turning point in the argument where Eisgruber stakes out his own distinctive, judges-as-spokesmen-for-the-people position. He asserts, "I also deny that judicial review interferes with democratic decision-making. Instead, I maintain that the Supreme Court should be understood as a kind of representative institution well-shaped to speak on behalf of the people about questions of moral and political principle."22 Here, Eisgruber breaks, as we have seen, from Dworkin, whose morality-based constitutionalism purports to be "democratic" only in the sense that, according to Dworkin, Supreme Court judges (if they knew what was best) would adopt a liberal conception of justice based on equal concern for each individual. For Dworkin, liberalism pretty much is democracy; for Eisgruber, democracy is supposed to be something less philosophical; it is supposed to have more to do with actual people "exercising their own best judgment about moral and political principles." Eisgruber's contribution, then, is to bring justice-based constitutionalism within the fold of present-oriented democracy. This he does through the critical idea that judges should aspire not to arrive at the "the best conception of morality," but to express the living "people's judgment about morality." We can see in Constitutional Self-Government shades of Dworkin, traces of Michelman, echoes of Tiedeman, but the ultimate position is distinctive. Neither text nor history nor complex interpretive methodology is decisive for Eisgruber. Judges should make constitutional judgments primarily in the name of justice and moral principle. Judges are, however, to speak for the people when they do so. They are to give voice to a conception "plausibly attributable"23 to the living American people. If they do so, judicial review will not "constrain democratic decision-making... on the basis of...
principles laid down long ago.” Rather it will be one of many representative institutions through which America seeks to effectuate the will of the living people.

That is how Eisgruber comes to the surprising position noted above. His position is in fact predetermined by what he wants to achieve. It is the only way to make justice-based constitutionalism safe for democracy, where democracy is understood as governance by the present will or values of the people.

But constitutionalism can never be made safe for democracy, so conceived.

If Congress passed a statute establishing Christianity as the national religion, the Court would rightly rest its invalidation of the statute first and foremost on the text of the Constitution, enacted two hundred years ago. The Court would rightly cite the history that underlay that enactment. The Court would rightly say something to the effect of: this nation long ago laid down a constitutional commitment not to permit a national church, and until the Constitution is amended, this Court’s duty is to strike down such a law, no matter whether the anti-establishment principle still “enjoys popular support”—indeed no matter what the present judgment of the Congress, the President, or the people themselves may be on the question.

That just is written constitutionalism, as America understands it.

We deal here with the core function of judicial review: to enforce historical commitments—commitments of power, justice and liberty—laid down in the Constitution. It is a testimony to the independence of constitutional theory, to the force of the democracy-in-the-here-and-now paradigm, and to the ingenuity of constitutional theorists, that our scholars can work so assiduously to suppress this core element of constitutionalism. That they can find ever-more sophisticated narratives according to which judges must not do what they say they are doing—constraining democratic decisions in the present on the basis of substantive principles laid down in the past. I said earlier that my book, Freedom and Time, also belongs to this history-suppressing literature, but in a different way. While Eisgruber embraces the project of reconciling constitutionalism with governance by the living will of the governed—and makes a distinctive, original contribution to it—my effort has been to call into question the basic premises underlying this project. What is necessary, I have tried to say, is to rethink the conception of democracy that has driven so many scholars to deny constitutional law’s historicity.

A widely held view of democracy boils it down essentially to majority rule. Even though on reflection most of us probably think that democracy has to mean something more, the political scientists who have been most alive to this problem—the ones who do not evade the problem simply by defining democracy to include minority-
protecting rights—have tended to come back to a definition of democracy as simple majority rule. Thus Jon Elster: “Democracy I shall understand as simple majority rule, based on the principle, ‘One person, one vote.’”

Eisgruber, for his part, does not accept this equation of democracy with majority rule. This is a point of agreement between us. But we differ on what kind of mistake the majority-rule view of democracy makes. This is probably the single most important difference between his entire approach to constitutional self-government and mine. Spelling out this difference should help clarify our points of similarity and divergence.

Eisgruber rejects majoritarianism while staying within the present-tense framework of self-government. Majority rule is democratically lacking, according to Eisgruber, because it fails adequately to respond to “the interests and opinions of all the people.” Eisgruber takes this point to be so obvious as to be almost self-evident:

Suppose, for example, that a country is debating whether to spend tax dollars upon art museums or parks. Sixty percent of the population prefer museums, the remainder prefer parks. Would anybody think it desirable, from the standpoint of democracy, if all the money went to pay for museums, and none for parks? Would anybody think it unfortunate, from the standpoint of democracy, if the country adopted a rule designed to ensure that tax dollars were shared among majority and minority interests?

I wish Eisgruber had spent a little more time working through these questions, instead of posing them in merely rhetorical fashion (“would anybody think?”). I can think of a number of situations in which people might, from a democratic standpoint, quite plausibly consider it “desirable” if all the money in Eisgruber’s hypothetical went to pay for museums, and “unfortunate” if the country adopted a rule requiring the money to be shared. Further argument here would, I think, be very helpful to Eisgruber’s project.

For example, if the museums would be no good unless all the money went to them, and the parks no good unless all the money went to them, then certainly someone could argue, from the standpoint of democracy, that all the money should go to museums. If it has to be either museums or parks—it can’t be a little of both—and

24. Jon Elster, Introduction to Constitutionalism and Democracy 1 (Jon Elster & Rune Slagstad eds., 1993); see also, e.g., Samuel P. Huntington, The Third Wave: Democratization in the Late Twentieth Century 6-9 (1991) (“[P]opular election of top decisionmakers is the essence of democracy . . . . To some people democracy has or should have much more . . . . idealistic connotations,” but “rationalistic, utopian, idealistic definitions of democracy” cannot “make the concept a useful one.”).
25. Eisgruber, supra note 1, at 50, 54 (emphasis added).
26. Id. at 19.
if the decision between them is to be democratically made, surely one
democratic means of making the decision is by majority vote.

But assume (as I guess Eisgruber presupposes) that the tax
revenues in question could be usefully shared between museums and
parks. Now add, however, that the same 60% of the people who
prefer museums are adamantly opposed to parks; they believe that no
money whatsoever should go to parks. I don’t know why they hold
this view, and I suspect that the nature of their reasons would make a
difference on Eisgruber’s analysis. But for present purposes, assume
simply that the 60% have their reasons, whatever they may be. In this
situation, could it be “unfortunate,” from the democratic standpoint,
if “the country adopted a rule” requiring that revenues be shared?

Well, a great deal hangs on the ambiguity of the phrase “if the
country adopted a rule.”

How exactly was this rule “adopted”? If the “country adopted” the
rule through a democratic procedure—say, public debate followed by
a majority vote, in which some members of the 60% relented—then,
indeed, democrats might be entirely satisfied. But it would be
awkward for Eisgruber to invoke a majority vote as the
democratically legitimizing feature, given that his entire purpose in
this argument is to show how democracy must not be equated with
majority rule. Eisgruber seems to imply that it is the content
of the sharing rule (its responsiveness to everyone’s interests), regardless of
the process whereby it was adopted, that puts the rule beyond any
intelligible democratic objection.

I think this claim may not be as well worked through as it could
have been. The process through which the rule was adopted matters a
good deal. Suppose, for example, that the “country adopted” the rule
in the following fashion. An elite and enlightened set of nine
guardians presides over the country, and their word is law on all
questions about how tax revenues are to be spent. These guardians
were never themselves democratically elected or appointed; they were
self-appointed. Through their decision, “the country adopted” the
rule in question. A democrat might very plausibly find this
arrangement disagreeable. From “the standpoint of democracy,” one
might well consider the dictatorial imposition of this rule
“unfortunate,” even if the rule is fair, and even if it does force
government to spend revenues in a fashion responsive to everyone’s
preferences. In other words, while it might be impossible to object to
the rule from the standpoint of a liberalism that sought equally to
respect and to satisfy each individual’s interests and opinions, the rule
might yet be objectionable from the standpoint of democracy.

To repeat: what is happening here is that, in order to lay the
groundwork for a reconciliation between constitutional law with
democracy, Eisgruber is in the business of trying to detach democracy
from majority rule. I agree with this move and support it. But
Eisgruber tries to break from majority rule while remaining within a conception of democracy as governance in accordance with the present interests and opinions of the people. His argument about how a democratic society would spend tax dollars unfolds completely within the logical space of a demand for a decision that responds to the living people's present preferences. Within this logical space, movement is limited; the strategy Eisgruber is obliged to pursue is to distinguish the will of the majority from the "interests and opinions of all the people." This strategy will later be decisive for his defense of judicial review. Judges are better than electoral majorities, Eisgruber will say, at speaking for all the people on moral matters.

But we might wonder about the kind of governance that Eisgruber is prepared to deem unquestionably democratic. Specifically, we might wonder whether Eisgruber, like Dworkin, has ended up running together an appealing liberal concern for every individual with something that was supposed to be different—democratic self-government. But I will not take this thought further here. My guess is that Eisgruber has strong responses to this objection, and I would like to hear what he has to say.

So let me turn, then, to my own views about constitutionalism's relationship to democracy. What I suggest is a way of reconceiving democratic self-government that breaks not only with majoritarianism, but with the entire present-oriented understanding of democracy that underlies it.

Majority rule is one way to operationalize the democratic imperative of governance by the present will of the governed. According to some, it is the best way; according to others, it is only a fair way. But whatever is said for it, the idea behind majority rule is clearly governance by present popular will or judgment.

Why is democracy understood—so frequently that it is often stated without argument or assumed without even being stated—as governance by the present will (or preferences, consent, judgment, values, etc.) of the people? The answer is that governance by the present will of the governed is thought to be nothing other than the principle of self-government itself. What else could self-government be if not that? "Self-government is nonsense unless the 'self' which governs is able . . . to make its will effective." This was self-evident to Rousseau: "the general will that should direct the state is not that of a past time but of the present moment." And equally to Jefferson: "One generation is to another as one independent nation to

another.” As Bickel put it, if “democracy does not mean constant reconsideration of decisions once made it does mean that a representative majority has the power to accomplish a reversal.” And if there were any doubt, Bickel removes it: when he speaks of “popular will,” he does not refer to the will of the mystical people that supposedly lives on, generation after generation, but to the will of “the actual people of the here and now.”

In short, to be governed by “principles laid down long ago” is not self-government at all. It is rule by “the dead hand of the past.”

It is not, however, self-evident that self-government consists of governance by the self's present will. There is another way of thinking about self-government, which restores to self-government the dimension of time. On this view, self-government consists of living under self-given commitments laid down in the past to govern the future.

The easiest and strongest way for me to bring home this alternative picture of self-government is by invoking the case of individuals who aspire to be self-governing. This strategy of argument, as many readers have told me, runs the risk of overly anthropomorphizing the subject of democratic self-government. But it remains the clearest argument, so I will pursue it, notwithstanding the risks.

Most of us live lives deeply inscribed by commitments we have made for ourselves, large or small, professional or intimate. We do not live our lives by asking what we most want to do at each moment. Nor do we ask ourselves, at each moment, what we ought to do, all things considered. We live within the terms of our commitments—our jobs, our families, the goals we have set out to achieve—asking what we ought to do given these commitments. We reserve, to be sure, the right to repudiate some or all of these commitments. Nevertheless, in the way we actually live our lives—we who enjoy more freedom than almost any who ever lived—we exercise our capacity for self-government by living out purposes and engagements that occupy us, that govern us, for extended periods of time.

It is possible to see in this a failure of courage. To be really free, someone might say, we would cast off all commitments, if we only had the nerve. We would live in a state of pure ungovernedness. We would recognize no prior restraints. We would live “in the present.”

Living in the present: it is important to recognize that “freeing oneself from the past” in this way would also be to “free oneself”

31. Bickel, supra note 13, at 17.
32. Id.
from the future. One's "life strategy" would be not only to "forbid the past to bear on the present," but, precisely by doing so, "to cut the present off at both ends, to sever the present from history." One would "exist[] in the present, in that enormous present which is without past or future, memory or planned intention." That would be true fearlessness, would it not? For "a person freed of the future has nothing to fear."

I think we should reject this ideal of living in the present. I think its claims to fearlessness are desperate with anxiety—an irony clearly communicated by Milan Kundera in the novel just quoted. The present is very, very small. Those who desire to live in it are often looking for refuge from the larger temporal sweep of their lives—their past or future—for which they do not want to shoulder the responsibility.

More than this, the ideal of living in the present fails to do justice to our most distinctively human capacity for self-government: the capacity to give our lives purposes of our own devising. To give purpose to what we do takes time. To be self-governing takes time. Animal freedom may properly consist of the freedom to act on present will; that is the freedom, presumably, of a stray dog. An animal, then, may be free for and in a moment. Human freedom is something more. And the something more, I suggest, lies in the human capacity to give one's life direction, purpose, and commitment over time.

The self that aspires to self-government, in short, does not aspire to a state of pure ungovernedness. This self aspires to be governed as well as governing; it aspires to be governed by self-given commitments. What is a commitment? It is, essentially, an act of autonomy—of self-law-giving. The self-governing self aspires not to be free from all governance, and hence free from the past and future, but to be governed by law of its own making.

These observations apply, if anything, even more clearly to democratic self-government than to individual self-government. There is no political freedom without law. There is no possibility of a purely unconstrained society. Without law, there can be only anarchy, not democracy. To the extent that a people would be self-governing, it must make law for itself, and this law must project itself over time.

Yes, I am assuming here that a people can act collectively—that there is such a thing as rational, purposive collective decision-making. And yes, I am also assuming that a people can continue to exist over time, indeed over generations, so that the American people today are,

in an important sense, the same people that made the Constitution two hundred years ago and remade it after the Civil War. These assumptions I will not try to defend here. But if a nation does have a temporally extended existence, then its self-government must also be temporally extended. Self-government for a people, no less than a person, can be a matter of laying down and living up to self-given commitments over time.

Once self-government is so understood, the whole question of constitutionalism’s relationship to democracy changes radically. For on this view, in order to make constitutional self-government intelligible, there is no longer any need to deny constitutional law’s historicity. There is no longer any need to struggle, against all appearances, to depict constitutional law as a vehicle for present popular will. There is no longer any need to suppress the judicial tendency, when ruling a statute unconstitutional, to cite the Constitution’s text, enacted long ago, or the history that underlay that text, or the past decisions of the Court, or the fact, most fundamentally, that the Court is trying to honor a commitment the nation laid down for itself long ago.

None of this need be denied or suppressed, because it is just what judges should be doing, if they are to keep the nation to its constitutional commitments, which, in turn, is just what they should be doing in the name of constitutional self-government. For constitutional law, from this perspective, is not opposed to democracy. It is democracy—or at least it holds itself out as, it promises to be democracy—over time. Constitutionalism is an institution through which a democratic nation tries to lay down and hold itself to its own fundamental legal and political commitments. And that is self-government.

This line of argument, I suggest in *Freedom and Time*, solves the counter-majoritarian difficulty. American written constitutionalism rejects the present-oriented speech-modeled conception of self-government—a conception underlying the New England town meeting, the Rousseauian republic, and every society based on the ideal of governance responsive to the “voice of the people.” Whenever judges are said to “speak for” the people, this present-oriented, speech-modeled conception is in play.

Against and in place of this speech-modeled democracy, American constitutionalism launched the idea of self-government through foundational texts. Americans would govern themselves by laying down their own fundamental commitments in a constitution and holding themselves to these commitments over time, unless or until these commitments are repudiated, and even at times when they happen to run contrary to popular will.

Unelected judges are called on to interpret this constitutional text precisely because these judges will *not* be responsive to present
popular will or opinion. Judges are called on not to represent "the actual people of the here and now," nor to "respond to the interests and opinions of all the people." That is a job for politicians and administrators. It may be the job of the people's elected representatives. But the judicial task is to hold the nation to its self-given commitments, even at times when these commitments do not enjoy popular appeal. Or so at least Americans have always understood it, producing, I suggest, a better picture of constitutional self-government than the one made available by a good deal of highly sophisticated constitutional theory.

Let me return now to Eisgruber's most ingenious argument for his claim that judges are better at expressing the people's judgment about justice than are the people themselves. The argument is that, in a special way, moral disputes within a society are particularly poor candidates for resolution by majority vote. Eisgruber does not argue that there exist moral truths that judges are more capable of ascertaining. No: the problem goes back to the museum-parks hypothetical mentioned earlier.

There, we saw that sharing resources proportionately was, for Eisgruber, the unquestionably democratic resolution to a dispute over how to spend tax dollars. But in moral disputes, he says, "sharing will not be an acceptable solution." In at least some of these disputes—one example Eisgruber uses is the permisibility of abortion—one side or the other must win. As a result, a democratic society cannot resolve this dispute by mere majority vote, because a "democratic government should aspire to be impartial rather than merely majoritarian: it should respond to the interests and opinions of all the people, rather than merely serving the majority." How then can a democratic society proceed? This, Eisgruber says, is a "crucial juncture" in the argument. His solution rests on the idea that below popular disagreement about abortion, there may be an underlying agreement on certain more basic propositions. "[B]eneath moral controversy," he says, there may be "a shared sense (1) that morality is something different from mere preferences; (2) that moral positions should be backed up by moral reasons; and (3) that moral positions benefit from good faith discussion and argument."

According to Eisgruber, if there is consensus on these three points, then a government can best respect "the people's judgment about morality" by striving to ensure that moral disputes are decided "on the basis of moral reasons" and in particular on the basis of moral reasons that have "some popular appeal." And from this argument, judicial

36. Eisgruber, supra note 1, at 54.
37. Id.
38. Id.
39. Id. at 55.
40. Id. at 55-56.
review is supposed to follow, with judges deciding constitutional cases "on the basis of moral reasons that enjoy popular appeal."

I'm not sure what exactly to make of this argument. Assuming that its conclusions follow from its premises, the logic has to run as follows. Where there is disagreement on a moral issue, the right way for government to respond to "the opinions of all the people" is to look for a certain shared consensus below the disagreement. The desired consensus is, essentially, an agreement that moral disputes be resolved on the basis of moral reasons that, as evidenced and influenced by public discussion, have some popular appeal.

Observe that in the museum-parks hypothetical, Eisgruber did not claim to look for an underlying consensus that the revenues ought to be shared. He did not claim that below the disagreement about whether museums or parks were preferable, everyone agreed that the money ought to be shared in some way between majority and minority preferences. Rather, sharing apparently followed as a matter of logic or principle from the demand that everyone's interests and opinions be respected.

Here, however, turning to moral disputes, Eisgruber expressly rests the argument on the existence of agreement below disagreement. It is unclear to me why the argument in the two cases has a different form, but the conclusion seems clear enough. If there is an underlying consensus that moral issues ought to be decided on the basis of moral reasons and that moral reasoning profits from public debate, then democracy (we are told) is best served by taking the decision out of the hands of the people and shunting it off to unelected judges.

Let me offer two puzzles I have about this argument.

First, how many people have to agree to the underlying agreement? As far as actual American society goes, Eisgruber says: "I think that most Americans do, in fact, believe" in propositions (1)-(3) above. This "most" is, I think, a little mysterious. If "most" means a majority, then Eisgruber has based his entire edifice on a putative majority consensus, which would be most unappealing, given his express rejection of majoritarianism. It is very difficult to see why it would be a solution to the problem Eisgruber claims to identify—how a democratic society deals with a moral dispute, given that majority will does not reflect the "interests and opinions of all the people"—to locate and act on a mere majority consensus in favor of propositions (1)-(3). For propositions (1)-(3) are, I take it, moral matters, and if 40% of the people reject one of them, then basing governmental action on the 60% view would precisely seem, on Eisgruber's account, to fail to respond to the preferences and opinions "of all the people." Instead of embracing the 60% view about the nature of moral dispute,

41. Id. at 55 (emphasis added).
why not just embrace the 60% view about the disputed question itself?

If instead “most” meant all, then we might see Eisgruber as appealing to an ideal of unanimity, which, even if not empirically plausible, would at least be logically distinct from majoritarianism and would make sense of his repeated references to “the opinions of all the people.” But of course “most” does not mean all, so the unanimity ideal seems a non-starter.

Could “most” mean a very large majority—a super-majority? That would seem the only other possibility. But once again, it is hard to see why judicial deference to this super-majority would be clearly superior, on Eisgruber’s own analysis, than just taking a vote on the moral dispute itself.

If a “democratic government” must “respond to the interests and opinions of all the people, rather than merely serving the majority,” then super-majority rule might be marginally better than majority rule, but it would hardly be enough to do the trick. The trick is to jettison real popular decision-making in favor of judicial review. And invocation of super-majority agreement to propositions (1)-(3) isn’t going to do it. For after all, perhaps a super-majority of the people agrees that abortion should be prohibited. If so, why would it be less democratically desirable for government to respect the will of that super-majority agreement (expressed through a referendum) than to have unelected judges impose Roe v. Wade on the nation on the basis of a (speculative) super-majority agreement favoring the resolution of moral disputes not by vote, but “on the basis of moral reasons enjoying some popular appeal”?

Second, still more fundamentally, at the end of the day, are we still dealing here with a process that ought to be called democratic?

Suppose the members of a law review disagree about what kind of articles to accept. Two-thirds of the members want to take only articles of genuine practical relevance. One third wants to take only articles of genuine theoretical interest. If the decision is to be made democratically, how should the decision be made?

One arguably democratic procedure would be to take a majority vote on the issue. The practical-relevance camp will win. Another would be to have the law review’s officers decide. This decision procedure could be regarded as democratic if the officers were themselves democratically elected. Now we don’t know which side will win; representative democracy often produces results at variance on particular issues with majority will.

But how about this: a university-wide council of deans hears about the dispute and asserts the right to decide what kind of articles go into

42. For an account of democracy and constitutional law predicated on a unanimity ideal, see Robert A. Burt, The Constitution in Conflict (1992).
the journal "on the basis of moral reasons enjoying some popular support." Because there is "some" support on both sides of the issue, the requirement that the moral reasons "enjoy some popular support" is of course no constraint. So the council of deans makes its own moral decision and chooses in favor of the theoretical-interest camp. Is this procedure democratic?

The deans say yes. They say that their intervention is in fact more democratic than would be a vote by the students themselves. If the dispute had been decided by a student vote, the law review would have served only the majority of those students, rather than responding to the opinions of all the students. Moreover, the students' votes may be "tainted" by self-interest. The council of deans, by contrast, has no self-interest at stake. They are concerned solely with making the right choice as a matter of moral and political principle. And "most" of the students agree that the dispute should be resolved on the basis of moral and political principles, not on the basis of self-interest. Hence the only really democratic thing to do is to take the decision out of the students' hands and entrust it to a body institutionally well-suited to render a decision on the basis of moral reasons enjoying some popular support. Only thus could the students be best assured that the eventual decision reflected their own judgment about what was right.

I suspect we would not take this argument very seriously. If the deans wanted to offer an argument we might listen to, I think they would have to tell us why the students should not be making this decision—why, in other words, student democracy was not a good thing here. If, instead, they told us that they had seized authority in the name of democracy for the student-members of the law review—in the name of expressing the students' own judgment about what was right—we would presumably conclude that they were abusing the concept of democracy, distorting it to rationalize their assertion of undemocratic authority.

I confess to having a similar reaction when I read Eisgruber on judicial review. If constitutional law is democratic, it is not because taking moral disputes out of the hands of the people and entrusting them to unelected judges is the only way to assure decisions genuinely representing the people's own present moral judgment. If constitutional law is democratic, it is because holding the nation to constitutional commitments it has laid down in the past, even when those commitments run contrary to present popular opinion, is part of what it means for a democratic nation to govern itself.
Notes & Observations