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THE BETTER ANGELS OF SELF-GOVERNMENT

*Martin S. Flaherty**

Constitutional interpretation typically travels along one of two paths. For many, perhaps most, commentators, the Constitution is about democratic self-government. Thinkers as diverse as Bruce Ackerman¹ and Robert Bork,² Cass Sunstein³ and Antonin Scalia⁴ at some deep level believe that the Constitution counts as higher law because it both reflects and enables the considered decisions of the American people. Others emphasize that the Constitution, at the end of the day, promotes justice. Here, such commentators as Ronald Dworkin⁵ and Lawrence Sager⁶—yet also Richard Epstein⁷ and John Finnis⁸—contend that the Constitution embraces a certain substantive commitment to the good, whether moral theory, Thomistic philosophy, or economic liberty. Frequently, these democratic and justice-seeking⁹ visions complement one another. But as Abner Greene has suggested, they will conflict.¹⁰ We the People of the United States once chose to protect slavery, an institution that no sound moral theory could uphold. In such situations, citizens, lawyers, and the Supreme Court must ultimately decide whether the

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1. See, e.g., 1 Bruce Ackerman, *We the People: Foundations* (1991); 2 Bruce Ackerman, *We The People: Transformations* (1998).

2. See, e.g., Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1990).

3. See, e.g., Cass R. Sunstein, *The Partial Constitution* (1993).

4. See, e.g., Antonin Scalia, *A Matter of Interpretation* (1997).

5. See, e.g., Ronald Dworkin, *Law's Empire* (1986).

6. See, e.g., Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978).

7. See, e.g., Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).

8. See, e.g., John Finnis, *Natural Law and Natural Rights* (1980).

9. Some might object, and I take it Professor Eisgruber may be among them, to the term “justice-seeking” on the ground that democracy itself may be a form of justice. I nonetheless consider the term useful as a way of distinguishing theories that advocate a substantive version of justice regardless of its democratic foundations from those that do not.

10. Abner S. Greene, *The Irreducible Constitution*, 7 J. Contemp. Legal Issues 293 (1996).

Constitution rests on the will of the people or the fundamental demands of justice.

History tags along down each path, though often in different ways. The past tends to count much more heavily in democratic-based theories, most famously as evidence for what those who ordained the Constitution originally meant, intended, or understood. The current vogue of "originalism" originally sprang from the political right, with which it remains most commonly associated.¹¹ Yet arguably the best historical work along originalist lines has issued from elsewhere along the political spectrum, even if its practitioners reject the label.¹² So pervasive has this perspective become that Randy Barnett can plausibly proclaim that "[o]riginalism has not only survived the debate of the eighties, but it has virtually triumphed over its rivals. Originalism is now the prevailing approach to constitutional interpretation. Even more remarkably, it has prevailed without anyone writing a definitive formulation of originalism or a definitive refutation of its critics."¹³

Justice-seekers may beg to differ about originalism's victory, but their work also draws upon the past. When deployed in justice-seeking theories, history has most powerfully appeared as custom or tradition that reveal how governmental institutions have worked out or that define and develop the Constitution's fundamental principles of right. This approach has been comparatively more apparent on the Supreme Court, particularly in the jurisprudence of Justices Frankfurter,¹⁴ and the second Harlan.¹⁵ It remains alive, if not always

11. Highlights from a prodigious literature include: Bork, *supra* note 2; Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995); Edwin Meese III, Address before the American Bar Association (July 9, 1985), in *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. Tex. L. Rev. 455 (1986); Antonin Scalia, Address at the University of Cincinnati as the William Howard Taft Constitutional Law Lecture (Sept. 16, 1988), in *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989).

12. By now, the literature here is even more prodigious: 1 Ackerman, *supra* note 1; 2 Ackerman *supra* note 1; Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 Colum. L. Rev. 523 (1995) [hereinafter Flaherty, *History Lite*]; Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 Colum. L. Rev. 2095 (1999); Lawrence Lessig, *Fidelity and Constraint*, 65 Fordham L. Rev. 1365 (1997); William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 Cornell L. Rev. 695 (1997) [hereinafter Treanor, *Power to Declare War*]; William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (1995).

13. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 Loy. L. Rev. 611, 613 (1999). For superb overviews, see Laura Kalman, *The Strange Career of Legal Liberalism* (1996); Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 Fordham L. Rev. 87 (1997). For a strong normative dissent, see Michael J. Klarman, *Antifidelity*, 70 S. Cal. L. Rev. 381 (1997).

14. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the

well, in substantive Due Process jurisprudence.¹⁶ It has also found powerful new advocates among academics.¹⁷

Christopher Eisgruber's innovative *Constitutional Self-Government*¹⁸ does not deconstruct these polarities so much as reconfigure them, often brilliantly. As the title suggests, Eisgruber ultimately comes down on the side of democracy. He declares at the outset that he "interpret[s] the Constitution as a practical device that launches and maintains a sophisticated set of institutions which, in combination, are well-suited to implement self-government." (p. 3). Yet for Eisgruber it does not follow that the Court should simply defer to electoral majorities or the desires of framers and ratifiers. To the contrary, "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." (p. 3). Eisgruber's distinct contribution is to adopt a democratic theory but, in that context, assign a distinctly justice-minded role to the institution that most concerns constitutional theorists.

I. DEMOCRATIC JUSTICE

This project requires a thicker, more nuanced conception of democracy than constitutional theory ordinarily offers. *Constitutional Self-Government* delivers just this. Typically, the Constitution is viewed as a device to limit ordinary democratic process, which itself is assumed to be ruled by electoral majorities. As such, constitutional limitations inevitably appear suspect, especially when enforced by unelected judges. This suspicion has a long, uneven history,¹⁹ which spikes at points such as James Bradley Thayer's pioneering work,²⁰ and Alexander Bickel's "countermajoritarian difficulty."²¹ Fanning

gloss which life has written upon them.").

15. See, e.g., *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting) (describing the "rational continuum" for interpreting the Due Process Clause).

16. See *Planned Parenthood v. Casey*, 505 U.S. 833, 846-49 (1992); *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986).

17. See, e.g., Larry Kramer, *Fidelity to History—And Through It*, 65 *Fordham L. Rev.* 1627 (1997); Larry Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 *Harv. L. Rev.* 4 (2001) [hereinafter Kramer, *We the Court*].

18. Christopher L. Eisgruber, *Constitutional Self-Government* (2001).

19. This history is being comprehensively written by Barry Friedman: *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 *N.Y.U. L. Rev.* 333 (1998); *The History of the Countermajoritarian Difficulty, Part Two: Reconstruction's Political Court*, 91 *Geo. L.J.* 1 (2002); *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 *N.Y.U. L. Rev.* 1383 (2001); *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 *U. Pa. L. Rev.* 971 (2000); *The History of the Countermajoritarian Difficulty, Part Five: The Birth of an Academic Obsession*, 112 *Yale L.J.* 153 (2002).

20. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *Harv. L. Rev.* 129 (1893).

21. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).

the suspicion of constraining ordinary majority rule is what I have called the “asymmetry” of constitutional discourse. Law professors are past masters at demolishing one another’s theories justifying constitutional constraint. They are somewhat less rigorous, both by training and inclination, to challenge comfortable assumptions about how democratic our representative institutions really are.²²

Eisgruber maintains that the conventional emphasis is wrong on all counts. For starters, “we should regard inflexible written constitutions, including the American one, as practical, procedural devices for implementing relatively ordinary, albeit non-majoritarian, conceptions of democracy.” (p. 11). On this view, the Constitution’s many “supermajority” requirements for entrenching higher law are simply a different way to capture democratic sentiment in areas in which stability, deliberation, and concern about overreaching by mere majorities may be especially valued. Simple majoritarianism fails, moreover, because a government cannot speak on behalf of the people unless it takes into account “the interests and opinions of all the people.” (p. 50). Likewise, automatic deference to electoral majorities fails the test of democracy because anonymous voters, who neither have to give reasons for their actions nor expect their actions to materially influence outcomes, have little reason to take their responsibilities seriously. As a democrat, Eisgruber is hardly arguing that we do away with Congress or local legislatures. But, he does insist that they have predictable flaws, which is why “national governments routinely supplement them with other institutions, such as, for example, independent agencies [and] central banks.” (p. 52).

And constitutional courts. Having given a richer account of democracy, *Constitutional Self-Government* considers the democratic role for the Supreme Court and judicial review. One test for this role is its legitimacy. Here Eisgruber answers that judicial review is not “an external constraint upon the democratic process,” but instead “an ingredient in the process.” (p. 77). At least the Federal courts have an often unappreciated democratic pedigree through appointment by the President with the advice and consent of the Senate. Life tenure, moreover, produces a certain disinterestedness and sense of moral responsibility that makes judges comparatively well-suited to deal with the moral principles that the Constitution’s abstract provisions implicate, whether “freedom of speech,” “free exercise of religion,” or “equal protection of the laws.” On these points, Eisgruber echoes some of the judiciary’s more longstanding defenses. Hamilton, for example, long ago famously wrote that life tenure in a republic is “an excellent barrier to the encroachments and oppressions of the representative body,” adding that “it is the best expedient which can

22. See Martin S. Flaherty, *Constitutional Asymmetry*, 69 *Fordham L. Rev.* 2073 (2001).

be devised in any government to secure steady, upright, and impartial administration of the laws."²³ It is among his contributions to bring into the open the democratic implications that such statements leave buried just below the surface.

A legitimate practice may nonetheless not be a desirable one. *Constitutional Self-Government* therefore subjects judicial review to a second test—the charge that it stifles popular activity, demotes citizens to spectators, and undermines democratic flourishing. To refine this test, Eisgruber posits several goals for a well-functioning democracy, including impartiality as to the interests of all the people, the possibility for effective choice, a certain degree of participation, and public deliberation. In an especially subtle treatment in a subtle work, *Constitutional Self-Government* asserts that there is little evidence that judicial review undermines any of these objectives. By taming local majoritarian tyranny, the courts may not only protect democratic process in the fashion most famously developed by John Hart Ely,²⁴ but it may also forestall more aggressive intervention by other bodies such as Congress.

Likewise, the debates generated by cases as various as *Roe v. Wade*²⁵ and *Dred Scott*²⁶ suggest that the Court's decisions can generate as much public deliberation as they purportedly quell. A mirror image of this challenge runs that the Court cripples what might otherwise be productive legislative compromise through infecting all politics with polarizing abstractions. Eisgruber contends that this argument is so much lawyerly hubris masquerading as humility. Just as lawyers fancy themselves as instant experts in almost any field,²⁷ so too they tend to believe that issues such as birth, death, freedom, equality, and religion could not possibly generate significant political debate unless courts have weighed in. Of course, these arguments themselves are counterfactual. We cannot run an experiment to test the level of democratic flourishing without judicial review. Yet these arguments do provide sophisticated counters to oft-repeated assertions that such an experiment would come out against the courts.

II. JUDICIAL SELF-GOVERNMENT

Having addressed whether judges in constitutional cases should make independent judgments about justice, Eisgruber devotes the second half of *Constitutional Self-Government* to how they should do so. He turns first to judicial method. Here the basic prescription stresses principle over text, judgment over aesthetics. As Eisgruber

23. The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

24. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

25. 410 U.S. 113 (1973).

26. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

27. See Ely, *supra* note 24, at 56.

nicely puts it, “[l]awyers, scholars, and judges frequently demand from the constitutional text more than it can deliver,” (p. 111) as if vague phrases such as “equal protection” or “due process” obviously compelled specific results. In a salient insight, Eisgruber rightly notes that these inflated claims for text often rest on the premise that “constitutional text possesses hidden harmonies that will reveal themselves to assiduous students and so diminish the need to make their own judgments about political morality.” (p. 113).

These assumptions all but define modern constitutional discourse. They are certainly pervasive on the Supreme Court, where claims for the Constitution’s capacities can be especially overdone. To take one example, Justice Thurgood Marshall could declare in *Stanley v. Georgia*²⁸ that the First Amendment’s Free Speech Clause would be meaningless unless—as Eisgruber paraphrases it—“that the state cannot prevent men from titillating themselves at home with filthy movies.” (p. 113). This is not to say that this result is incorrect. But if it is correct, it surely is not as a function of some holistic theory about self-expression embedded in the words of the First Amendment. Rather, Eisgruber insists, *Stanley* ultimately stands or falls as a consideration of the American people’s best judgment about the state’s power to invade the home to regulate their sexual morality.

More generally, the Due Process Clause has long been notable, some have said notorious, for effectively specifying an array of unspecified rights. Again, this result is by no means unjustified. Glib critics of substantive Due Process jurisprudence, for example, commonly ignore the possibility that the text, structure, and history of the Privileges or Immunities Clause could comfortably provide a safe haven for the unenumerated rights that they decry.²⁹

Professors’ assertions are less artless, yet oddly unreal. Eisgruber convincingly argues that academics are especially susceptible to what he nicely dubs the “aesthetic fallacy.” (p. 113). This form of misplaced faith in constitutional certainty rests on the premise that the document has an overarching, elegant coherence all but beyond the reach of mere mortals.³⁰ Few commentators illustrate the lure of this vision better than Akhil Amar. Amar has written extensively from

28. 394 U.S. 557 (1969).

29. See Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977). But see Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453, 522-24 & n.139 (1989); John J. Gibbons, *Government by Judiciary: The Transformation of the Fourteenth Amendment*, 31 Rutgers L. Rev. 839 (1978) (reviewing Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977)); Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. Rev. 651 (1979).

30. This is a different sort of perfection than that famously ridiculed by Henry Monaghan. See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353 (1981). Whereas Monaghan challenged the idea that the Constitution always produces politically desirable results, Eisgruber rejects the notion that the Constitution always reflects intellectually pleasing integrity.

the premise that nearly every word, indeed nearly every punctuation mark, in Constitutional text coherently relates to every another in a mutually illuminating fashion.³¹ The trick is being clever enough, as Eisgruber aptly puts it, to “decode” these “hidden textual meanings.” (p. 113). The Ninth and Tenth Amendments, for example, when read together, reveal that the term “the people” refers neither to the rights of individuals in the Ninth, nor the rights of the states or collective peoples of the states in the Tenth, but rather to the people of the nation in their sovereign capacity to constitute governments.³²

One does not have to be an originalist to suspect not. Interpretations such as these underestimate the fallibility of human beings attempting to draft often novel text amidst conflicts, bickering, haste, and otherwise challenging circumstances.³³ They ignore that punctuation, at least in eighteenth-century text, is as likely to reflect an expectation of how they were to be read aloud as to indicate considered changes in meaning.³⁴ And in this case they overlook the fact that these two particular texts wound up together not to explicate a reinforcing doctrine but by sheer accident.³⁵ In his attraction to the “aesthetic fallacy,” Amar is not so much distinctive as simply more original.³⁶ Commentators who share little else share the conviction that the Constitution can unlock almost any specific matter, if only one has the right key. It is to Eisgruber’s credit that he admits his own momentary surrender to aesthetics before moving forward. (pp. 113-14).

One further way *Constitutional Self-Government* considers how judges should declare—or not declare—what the law is turns upon institutional competence. For Eisgruber, what marks the borders of

31. His most notable articulation appears in Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 748 (1999).

32. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998).

33. Cf. Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 57-93 (1996) [hereinafter Rakove, *Original Meanings*].

34. See Jay Fliegelman, *Declaring Independence: Jefferson, Natural Language & the Culture of Performance* (1993). I am indebted to R.B. Bernstein for this reference.

35. See William Michael Treanor, *The Bill of Rights Revisited* (manuscript on file with the Fordham Law Review).

36. One hoary example now often associated with the right is the argument that because the Article II Executive Vesting Clause lacks the “herein granted” limiting language of the Article I Legislative Vesting Clause, it follows that Article II grants the President plenary and originally well-understood and agreed upon executive authority. See *Morrison v. Olson*, 487 U.S. 654 (1988); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 Yale L.J. 541, 562-63 (1994). For a corrective, see Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725 (1996). This same debate has lately reemerged with regard to foreign affairs power. Compare Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. 231 (2001), with Curtis Bradley & Martin S. Flaherty, *Text, History, and Executive Power in Foreign Affairs* (forthcoming).

judicial competence is the ability of courts to reduce grand principles to practical legal rules, mechanisms, institutions, or tests. Borrowing from Lawrence Sager,³⁷ Eisgruber describes this task as a “strategic” decisionmaking, because judges will often have significant discretion in fashioning particular means for realizing constitutionally mandated principles. (pp. 136-37). Often courts will be fairly good at this sort of thing. Judges seem most obviously adept at handling matters relating to litigation, criminal, and civil procedure, and the functioning of the legal system more generally. In somewhat bolder fashion, Eisgruber suggests that courts are also adept in handling “discrete” moral principles that establish constraints on government, such as “persons should not be penalized for engaging in vigorous criticism of popular public officials.” (p. 170). As an example of both ideas at work, consider *New York Times Co. v. Sullivan*,³⁸ in which the Court strategically converted just the foregoing, discrete, moral principle into the “actual malice” doctrine, a mechanism that itself closely pertains to the litigation process.

Often, however, courts are not especially good at strategic decisionmaking. This is especially true, Eisgruber suggests, where the Constitution’s moral principles are “comprehensive” in demanding “that some system, considered as a whole, should treat people fairly.” (p. 170). Such areas include economic justice, voting rights, federalism, and separation of powers. Put another way, courts are rarely well situated to make even educated guesses about how best to structure political, economic, and social systems in ways most likely to produce just results.

Consider federalism. In several especially penetrating sections, Eisgruber skewers the bases the Court has invoked in its recent “states’ rights” jurisprudence. It is hardly clear that, considered as a whole, states in the federal system are more democratically responsive than the Federal government.³⁹ Or that the structural fact that the Constitution recognizes two levels of government suggests specific limitations on national authority.⁴⁰ Or, still less, that the Founders, who were to a significant extent motivated by the failures of the state governments,⁴¹ sought to create significant, judicially-enforceable,

37. Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 *Tex. L. Rev.* 959 (1985).

38. 376 U.S. 254, 279-80 (1964).

39. Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In *Defense of United States v. Lopez*, 94 *Mich. L. Rev.* 752, 768-69 (1995). *But see* Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 *Colum. L. Rev.* 346, 414 (1990).

40. *Printz v. United States*, 521 U.S. 898, 918-19 (1997). *But see id.* at 976-77 (Breyer, J., dissenting); *see also* Martin S. Flaherty, *Are We to Be a Nation? Federal Power v. “States’ Rights” in Foreign Affairs*, 70 *U. Colo. L. Rev.* 1277, 1288 (1999) [hereinafter Flaherty, *Are We to Be a Nation?*].

41. For this proposition, see the bulk of the last several decades’ work on the origins of the Constitution. More specifically, sample Rakove, *Original Meanings*,

protection of state governments against Federal intrusion.⁴² For all these reasons, *Constitutional Self-Government* convincingly asserts that there are simply too many contested “ways to make federalism work, and the choice among these ways will turn upon all sorts of highly contingent factual judgments and preferences” (p. 198) that judges are not especially well-positioned to determine—especially in comparison to the legislature and executive.

III. THE DEATH OF DEAD HAND CONTROL

Professor Eisgruber has earned a reputation as one theorist who has a healthy appreciation for constitutional history⁴³ and therefore avoids the pitfalls of what I have elsewhere dubbed “history ‘lite.’”⁴⁴ *Constitutional Self-Government* thus promises an insightful consideration of the role that the past should play in the Court’s deliberations, and it does not disappoint. As with his theory in general, he seeks to navigate between the twin excesses of justice-seeking and democratic approaches. Eisgruber rejects the notion that “the dead hand of the past” should trump the contemporary moral judgments of the living. At the same time, he embraces the idea that the nation’s constitutional history—both noble and tragic—can often serve as a critical foundation for a judge or justice seeking to fulfill his or her democratic task of deriving and applying the Constitution’s moral commitments.

For these reasons, Eisgruber has little truck with originalism. Seeking a broad yet workable definition, he counts as originalist any theory that in ambiguous cases “dictates that we must comply with a certain moral view because it was held in the past (when the Constitution or a relevant amendment was ratified), even though we now think the view erroneous.” (p. 27). Originalism of this sort fails for at least two sets of reasons. One: as Ronald Dworkin has argued, even conceding that we should follow the Founders’ intent, the only uncontested evidence of their views is the Constitution’s text itself, and texts such as “free exercise of religion,” “executive power,” not to mention, “the enumeration of certain rights in this constitution should not be construed to deny other rights retained by the people,” are

supra note 33; Gordon S. Wood, *Creation of the American Republic 1776-1787* (1969). For a historiographical overview, see Flaherty, *History Lite*, *supra* note 12, at 535-49.

42. *Alden v. Maine*, 527 U.S. 706 (1999).

43. A very incomplete list includes: Christopher L. Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 *Const. Comment.* 37 (1993); Christopher L. Eisgruber, *Early Interpretations and Original Sins*, 95 *Mich. L. Rev.* 2005 (1997); Christopher L. Eisgruber, *John Marshall's Judicial Rhetoric*, 1996 *Sup. Ct. Rev.* 439 (1996); Christopher L. Eisgruber, *The Fourteenth Amendment's Constitution*, 69 *S. Cal. L. Rev.* 47 (1995); Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 *Fordham L. Rev.* 1611 (1997).

44. Flaherty, *History Lite*, *supra* note 12, at 523.

famously abstract.⁴⁵ Two: constitutional history honestly pursued is almost always sufficiently messy that it rarely “compels” results in the way judges sometimes assert. (p. 127).

Yet *Constitutional Self-Government* does not throw out this historical baby with the originalist bathwater. A classic example in this regard is Justice Brandeis’s concurrence in *Whitney v. California*.⁴⁶ The opinion’s reference to the framers selectively mined the Founding for an account of free speech that was attractive in contemporary terms rather than faithful to history’s complexity. To this many other examples might be added. In *Everson v. Board of Education*,⁴⁷ Justice Black famously popularized Jefferson’s metaphor of a “wall of separation between church and State,”⁴⁸ even though the phrase came over a generation after 1791 from a Founder who was a notoriously quirky representative of his generation, and who was neither present nor participated at the Constitutional Convention, the state ratifying conventions, nor the First Congress that drafted the Bill of Rights.⁴⁹ More recently, Justice Marshall eloquently invoked the fall of Richmond during the Civil War to argue that one of the city’s modern affirmative action programs comported with the Equal Protection Clause, not on narrow originalist grounds but in light of the moral revolution that the Union’s victory helped bring about.⁵⁰ What Eisgruber says about *Whitney* applies to each of these invocations. However selective these appeals to the past may be, they remain legitimate since history should contribute to constitutional jurisprudence “as servant, not rival, to justice.” (p. 127).

In similar fashion, history as tradition can and has played an even greater role. Despite cases such as *Bowers v. Hardwick*,⁵¹ the “deeply rooted American tradition” has often served as a basis for the Court’s recognition of numerous Federal rights, whether through substantive Due Process or incorporation. In *Griswold*,⁵² *Roe*,⁵³ and *Casey*,⁵⁴ even in *Cruzan*⁵⁵ and *Glucksberg*,⁵⁶ the sort of reliance on tradition

45. Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *Fordham L. Rev.* 1249 (1997).

46. 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

47. *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1 (1947).

48. *Id.* at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

49. This is not to argue Jefferson’s irrelevance by any means. The point is, however, that statements by Jefferson are to be treated with more care than arguments put forth by less idiosyncratic advocates such as Madison and Wilson, especially when the source comes so far after the Constitutional text it is supposed to illuminate. For a comment on Jefferson’s reliability, see Flaherty, *Are We to Be a Nation?*, *supra* note 40, at 1309-10 n.157.

50. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 528-29 (1989) (Marshall, J., dissenting).

51. 478 U.S. 186 (1986).

52. *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring).

53. *Roe v. Wade*, 410 U.S. 113 (1973).

54. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

55. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990).

commonly associated with Justice Harlan (*grand fils*) serves as a central basis for considering the rights at issue. That said, most fair-minded readers would have to conclude that the rights shape the traditions—or at least the selective accounts of the traditions—as much as the traditions ordain the rights.

Eisgruber rightly notes that in part tradition in these instances serves roughly the same function that the Founding served in *Whitney*: persuasive but not binding evidence that a judge's determination is not idiosyncratic but instead has a plausible basis in the considered views of the American people. But, Eisgruber argues, tradition also has an additional role to play in the strategic cashing out of constitutional principle. To take just one example, a judge seeking to apply the principle that parents should be able to direct the upbringing of their children except when contrary to the child's best interest will usually find it useful to consider how society has customarily struck the balance, as well as how that balance has evolved. Yet many traditions—racism, gender subordination—do not merit contemporary moral recognition no matter how deep their roots or enduring their existence. "Tradition," like "history," may provide important data, but such data requires self-conscious interpretation and evaluation, not blind obedience.

IV. (SOME) PAIN FOR THE CLAIM

Any theory that is substantial and original suggests challenges, and *Constitutional Self-Government* is no exception. To start with the past, Eisgruber's case against originalism is curiously modest. Not for him are the usual moves that fixing "collective" intent is impossible,⁵⁷ still less that a given conception of justice should trump a well-considered democratic outcome, including presumably, an outcome ordained by "We the People."⁵⁸ Rather, his indictment has a distinctly empirical cast despite protestations to the contrary. Originalism fails as a theory of what words mean because most of the words that matter are general and appear to invite a turnover of more specific meanings over time. (pp. 28-35). Originalism fails as a theory about constitutions limiting future generations to the specific conceptions its ratifiers desired again, because the words they left behind are sweeping and it is doubtful that historical inquiry could ever "provide

56. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

57. Compare Max Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863, 870 (1930) (arguing that collective legislative intent is absurd), with James M. Landis, *A Note on "Statutory Interpretation,"* 43 Harv. L. Rev. 886 (1930) (defending the concept). For a more recent discussion, see William N. Eskridge Jr., *Legislative History Values*, 66 Chi.-Kent L. Rev. 365 (1990).

58. See Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 69 Fordham L. Rev. 2087 (2001); cf. Larry G. Sagar, *Justice in Plainclothes: A Theory of American Constitutional Law* (forthcoming 2003).

any solid ground for rejecting the hypothesis that the framers intended to constitutionalize the best understanding of whatever moral ideals or political concepts they mentioned.” (p. 33). Originalism, finally, fails on the view that the Constitution’s central purpose is to prevent change on the ground that American society has, on balance, historically progressed rather than declined over the past two hundred years. (pp. 36-38).

Each of the counts in this indictment are powerful. Yet they are all in a sense contingent. Most, though not necessarily all, constitutional terms that today generate controversy seem general. Yet generality may be in the eye of the modern beholder. Perhaps phrases that appear to lack specificity to us look that way only because we have lost a sense in which people from earlier periods thought such phrases fixed far more limited meanings, as opposed to believing the words to be general against an array of more specific potential conceptions. The generality of the text seems to invite continual reassessment. But what if (however implausibly) no one at the time thought this? Or, worse, what if everyone comprising We the People affirmatively rejected the idea of evolving interpretation, thus foreclosing the option of we the living opting for a more attractive reading on the ground that the document’s abstract phrases might allow such an interpretation? Twenty-first-century America indeed appears far more attractive than its eighteenth-century predecessor, at least to me. But in the end, that is my opinion. That opinion, moreover, might easily change if, say, the war on terrorism results in an authoritarian state ten years down the line. In fact, Eisgruber’s indictment is, as a general matter, surely correct on all counts. That said, one could run thought experiments supposing different historical baselines that would make this conclusion less certain. In fact, “fact” appears to matter.

In consequence, history may at times actually have more bite than Eisgruber acknowledges, even on his own terms. How deep the bite will be, like history itself, is contingent. With regard to originalism, constitutional text may usually be the best evidence of what framers and ratifiers sought, but not always. More likely is that sources will produce a range of answers: often very general, sometimes more constraining, and once in a while quite specific. As historian Jack Rakove notes, the history of the Founding will more often than not reveal no more than the sketches of answers to discrete constitutional questions, because the Founders in fact papered over important disagreements in majestic generalities.⁵⁹ Even Rakove, however, may overstate the impossibility of ever fixing specifics.

Suppose, for example, that the sources overwhelmingly showed that the “Declare War” Clause was understood to mean that Congress

59. Rakove, *Original Meanings*, *supra* note 33, at 337-65.

authorizes military engagement subject only to a presidential power to “repel sudden attacks.”⁶⁰ Suppose as well that the phrase “declare war”—then or now—could as a matter of language also mean simply announcing that hostilities now exist in international law.⁶¹ Likewise, the balance of historical scholarship argues that the Eleventh Amendment was never meant to embody some vague concept of “sovereign immunity,” but instead was aimed at limiting Federal court jurisdiction and, more narrowly still, probably at doing so only in diversity cases rather than Federal question suits.⁶² It is far from clear why adopting either linguistic possibility fairly clearly rejected by We the People should be permissible any more than it would be appropriate to construe the admonition to “eat healthy” as advice to dine on what is “cool” if healthy came to have that possible meaning—a position Eisgruber humorously rejects. (pp. 29-32).

Likewise tradition. Suppose here that the evidence, again overwhelmingly, shows that American tradition even very broadly defined has and continues to reject the claim that the state must allow parents to deny their children life-saving medicine on religious grounds. Now suppose that the Supreme Court declares such parental authority to be a constitutional right based in part on the dissenting practices of a few minority sects whose presence would be inevitable in the history of a nation as large and diverse as the United States. Or, in a similar vein, consider the Grimké sisters. As David Richards has shown, these exceptional women of the antebellum Southern aristocracy powerfully argued against a broad conception of “moral slavery” that the Fourteenth Amendment should be seen as encompassing, an interpretation that in turn should clear the way for recognizing gay rights.⁶³ This is an extremely innovative and attractive formulation. One trouble, at least in terms of method, is that the Grimkés in their day were exceptional to the point of being outcasts. Eisgruber might respond that adopting the Grimkés, or the parentalist

60. See John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath* 3-10, 139-52 (1993); Louis Fisher, *Presidential War Power* (1995); Harold Hongju Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* 74-77 (1990); Treanor, *Power to Declare War*, *supra* note 12.

61. See Henry P. Monaghan, *Presidential War-Making*, 50 B.U. L. Rev. 19 (1970); Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 Tex. L. Rev. 833 (1972); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal. L. Rev. 170 (1996).

62. See John V. Orth, *The Judicial Power of the United States: The Eleventh Amendment in American History* (1993); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033 (1983); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. Chi. L. Rev. 1261 (1989); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889 (1983).

63. David A. J. Richards, *Women, Gays, and the Constitution: The Grounds for Feminism and Gay Rights in Culture and Law* (1998).

minority sects, may nonetheless be legitimate on the grounds of contemporary moral reasoning. It is, however, hard to see how such à la carte selection of traditions that in context border on outlandish enhances, rather than undermines, the democratic claim that the Court is speaking on behalf of the American people.

As for theory, Eisgruber excels at fairly presenting potential objections, then patiently countering them. There is, however, at least one substantial problem that he does not fully identify. Confining membership in an institution designed to speak the sense of the American people on complex moral issues to a single elite seems a grand lost opportunity. Surely such a body could only benefit from the contributions of accomplished doctors, philosophers, artists and activists on the model of the British House of Lords or better, the more democratically accountable Irish Senead.

Confining membership to a *legal* elite, moreover, seems an especially risky choice. Expertise in the law, to be sure, enhances the ability of the Court to take the “strategic” steps that translate principles into rules. But with that comes a host of disadvantages. For one, a focus on rules can often lead to a certain moral obtuseness. Eisgruber is right to note that the Court has not done a bad job in the last fifty years; it is less clear that this assessment applies more generally. This thought might inspire more confidence if the prior 100 years had not produced so many abominations, from *Dred Scott* through *Korematsu*.⁶⁴ Nor is it as easy as it once was to consign the Court’s morally obtuse performance to the dark past. Any number of recent cases violate the very prescriptions that Eisgruber advances. *Bowers*,⁶⁵ *Lopez*,⁶⁶ *Printz*,⁶⁷ *Adarand*,⁶⁸ *Bush v. Gore*,⁶⁹ and the related cases in between lend renewed support to the idea that it was the New Deal, Warren, and Burger Courts that were aberrational, not the other way around.⁷⁰

For another problem, the American legal elite—at least as reflected in the Supreme Court—remains horribly unrepresentative in terms of race, class, gender, ethnicity, religion, sexual orientation, and even geography. Only one is a person “of color”; only two are non-Christian; and only two are women, the last reflecting a still fairly recent and substantial change. However much their influence may be

64. Even a short list is truly sobering: *Dred Scott*, 60 U.S. (19 How.) 393 (1856); *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1872); *Civil Rights Cases*, 109 U.S. 3 (1883); *The Chinese Exclusion Case*, 130 U.S. 581 (1889); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Lochner v. New York*, 198 U.S. 45 (1905); and *Korematsu v. United States*, 319 U.S. 432 (1943).

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

66. *United States v. Lopez*, 514 U.S. 549 (1995).

67. *Printz v. United States*, 521 U.S. 898 (1997).

68. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

69. 531 U.S. 98 (2000).

70. See Kramer, *We the Court*, *supra* note 17.

exaggerated, law clerks might theoretically provide the justices with a window on a more diverse sampling of the American public. Yet it would be surprising if the older, more insular group did much beyond replicating itself, and there have been few surprises. As periodic press “exposés” suggest, the law clerk population itself remains severely unrepresentative of the citizenry on almost any criterion.⁷¹

Even if things may be improving on some of these fronts, in matters such as diverse life experience the Court appears to be marching in exactly the wrong direction. Not that long ago justices, regardless of politics and ideology, brought to the Court careers of genuine accomplishment in widely disparate fields, both in the law and outside it as well. Among other things, Earl Warren had served as governor of California; Hugo Black, a United States Senator; William O. Douglas, first chair of the Securities and Exchange Commission; Felix Frankfurter, a leading academic; Byron White, Rhodes Scholar, a professional sports star, and war hero; Thurgood Marshall, the definitive civil rights lawyer. Backgrounds such as these gave the Court at least a remembered access to many different and at times clashing aspects of American life. Whether sufficient, judicial appointments along these lines made the claim that the Justices could speak on behalf of the American people—even in the considered, principled, moral sense that Eisgruber seeks—plausible and plausibly attractive.

Today, the typical justice sees all the variety that a law school, a prestigious law firm, an appointive government position, or a lower appellate judgeship have to offer. Eisgruber legitimately counters that his theory is not meant to define the best institutional structure, but merely to justify what we have. Even on those terms, the specter of lawyers such as this offering the moral sense of the nation gives one pause.

CONCLUSION

These critiques are nonetheless a measure of the book's great success. *Constitutional Self-Government* opens disavowing any aspirations “to the model of John Hart Ely's great work, *Democracy and Distrust*.” (p. 5). What Eisgruber means is that he has no aim “to supply an easily grasped theory that tells judges how to decide every issue that comes before them.” (p. 6). Nor does he, given his theory that the Constitution is an open-textured structure for ongoing democratic argument, the Supreme Court included. The work

71. According to a recent report in USA Today: of 394 law clerks hired by the current court, just seven were African-American, or 1.8%. Five were Hispanic (1%), and eighteen were Asian (4.5%). One-fourth were women. As recently as 1999, moreover, four Justices had not hired an African-American. Tony Mauro, *The hidden power behind the Supreme Court Justices give pivotal role to novice lawyers*, USA Today, March 13, 1998, at A1.

nonetheless resembles Ely's in several other senses. It is lucid, concise, and tautly reasoned. It is also exceptionally rich, original, and wide ranging. Among many insights made in passing, the work as a whole offers one of the most powerful arguments available for a vigorous, principled judiciary. And far more than Ely's work, *Constitutional Self-Government* offers a distinctively measured and thoughtful consideration of the role that history could and should play in the process. For lawyers and historians alike, it is a slim volume that should generate substantial discussion.