H-Net Reviews
in the Humanities & Social Sciences

Christopher L. Eisgruber. *Constitutional Self-Government.* Cambridge, Mass.: Harvard University Press, 2001. ix + 260 pp. $46.00 (cloth), ISBN 978-0-674-00608-9.

Reviewed by Martin S. Flaherty (Fordham Law School)
Published on H-Law (April, 2002)

Judging the "Better Angels of Our Nature"

Juding the Better Angels of Our Nature

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 Ackerman and Robert Bork, Cass Sunstein and Antonin Scalia believe at some deep level 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 Dworkin, Lawrence Sager – yet also Richard Epstein and John Finnis – 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-seeking visions complement one another. But as Abner Greene has suggested, they will conflict.[1] 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 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. When deployed in justice-seeking theories, history has most powerfully appeared as custom or tradition revealing how governmental institutions have worked out or defining and developing the Constitution's fundamental principles of right.

Christopher L. Eisgruber's innovative *Constitutional Self-Government* does not deconstruct these polarities so much as reconfigure them, often brilliantly. As the title suggests, Eisgruber (Director of the Program in Law and Public Affairs and Laurance S. Rockefeller Professor of Public Affairs in the Woodrow Wilson School and the University Center for Human Values at Princeton University) comes down on the side of democracy. He declares at the outset that he interprets "the Constitution as 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.

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 rule by electoral majorities. Eisgruber maintains that this 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, since 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 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 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 Constitution's abstract provisions implicate, whether "freedom of speech," "free exercise of religion," or "equal protection of the laws."

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, 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*[2] and *Dred Scott v. Sandford*[3] suggest that the Court's decisions can generate as much public deliberation as they purportedly quell. A mirror image of this challenge asserts that the Court cripples what might otherwise be productive legislative compromise by infecting all politics with polarizing abstractions. Eisgruber contends that this argument is so much lawyerly hubris masquerading as humility, assuming that issues such as birth, death, freedom, equality, and religion are probably sufficient to polarize political debate on their own. Of course, these arguments themselves are counterfactual. We cannot run an experiment to test the level of democratic flourishing without judicial review. Yet they do provide sophisticated counters to oft-repeated assertions that such an experiment would come out against the courts.

Having addressed whether judges in constitutional cases should make independent judgements about justice, Eisgruber devotes the second half of *Constitutional Self-Government* to how they should do so. He turns first to judicial method. Here his basic prescription stress principle over text, judgement over aesthetics. As Eisgruber 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 the inflated claims for text that result 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). In just this fashion, for example, Justice Thurgood Marshall could declare in *Stanley v. Georgia*[4] that the First Amendment's Free Speech Clause would be meaningless unless – as Eisgruber paraphrases it – "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-statement 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.

One further way that *Constitutional Self-Government* considers how judges should declare – or not declare – what the law is involves institutional competence. For Eisgruber, what marks the borders of judicial competence is the ability of courts to reduce grand principles to practical legal rules, mechanisms, institutions, or tests. Borrowing from Lawrence Sager,[5] he describes this task as a "strategic" decisionmaking, for judges often will have significant discretion in fashioning particular means for realizing constitutionally mandated principles (p. 137). 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 also suggests that courts are also adept at 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 v. Sullivan*[6], 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 very 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, among others. Consider federalism. In several penetrating sections of a penetrating work, 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. Or that the structural fact that the Constitution recognizes two levels of government suggests specific limitations on national authority. Or, still less, that the Founders, who were to a significant extent motivated by the failures of the state governments, sought to create significant, judicially-enforceable, protection of state governments against Federal intrusion. For all these reasons, *Constitutional Self-Government* convincingly asserts that there are simply too many contested "ways to make federalism work, and that the choice among these ways will turn upon all sorts of highly contingent, factual judgments and preference" (p. 198) that judges are not especially well-positioned to determine – especially in comparison to the legislature and executive.

Professor Eisgruber has earned a reputation as one theorist who has a healthy appreciation for constitutional history and therefore avoids the pitfalls of what I have elsewhere dubbed "history 'lite."'[7] *Constitutional Self-Government* thus promises an insightful consideration of the role that past should play in the Court's deliberations, and it does not disappoint. As with his theory in general, Eisgruber seeks to navigate between the twin excesses of justice-seeking and democratic approaches. He 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 – often can 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 much 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 Founders' intent, the only uncontestable evidence of their views is the Constitution's text itself, and that texts such a "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 famously abstract. Two: constitutional history honestly pursued is almost always sufficiently messy that it rarely "compels" results in the way judges sometime 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*.[8] 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. But, Eisgruber argues, this is as it should be since history should contribute to constitutional jurisprudence "as servant, not rival, to justice" (p. 127).[9]

In similar fashion, history as tradition can and has played an even greater role. Despite cases such as *Bowers v. Hardwick*,[10] 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. 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 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 interests 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 persistence. "Tradition," like "history," may provide important data, but such data requires self-

conscious interpretation and evaluation, not blind obedience.

Any substantial, original theory suggests challenges, and *Constitutional Self-Government* is no exception. To start with the past, history may at times have more bite than Eisgruber acknowledges, even on his own terms. With regard to originalism, constitutional text may usually be the best evidence of what framers and ratifiers sought, but not necessarily always. Suppose, for example, that the sources overwhelmingly showed that the "Declare War" Clause was understood to mean that Congress authorizes military engagement subject to a presidential power to "repel sudden attacks." [11] 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. It is far from clear why adopting this linguistic possibility, if rejected by We the People, is permissible any more than it would be appropriate to construe the admonition to "eat healthy" as advice to dine on what's "cool" if healthy came to have that possible meaning – a position that Eisgruber humorously rejects (pp. 29-31).

Likewise tradition. Suppose here that the evidence showed, again overwhelmingly, that American tradition, even very broadly defined, has rejected 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 that would be inevitable in the history of a nation as large and diverse as the United States. Eisgruber might respond that such a decision may nonetheless be legitimate on the grounds of contemporary moral reasoning. It is, however, hard to see how reliance on tradition that provides such thin support enhances, rather than undermines, the democratic claim that the Court is speaking on behalf of the American people.

As for theory, Eisgruber excels at presenting potential objections fairly, then countering them patiently. There is 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 any 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. To be sure, expertise in the law enhances the Court's ability 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. 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, even geography. And even if things may be improving on many of these fronts, in matters such as diverse life experience, the Court would seem to be marching the exact wrong way. Not that long ago, justices as varied as Earl Warren, Hugo L. Black, William O. Douglass, Felix Frankfurter, Byron R. White, and Thurgood Marshall offered the Court accomplished careers in disparate areas of the law and beyond. Today, the typical justice sees all the variety that a law school faculty, a prestigious law firm, a high government position, or an 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, however, the specter of elite lawyers exclusively offering the moral sense of the nation gives one pause.

Nonetheless, these criticisms are a measure of this book's great success. *Constitutional Self-Government* opens by disavowing any aspirations "to the model of John Hart Ely's great work, *Democracy and Distrust*" (p. 5).[12] 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, given his theory that the Constitution is an open-textured structure for ongoing democratic argument, the Supreme Court included, does he. The work 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 should and should play in the process. For lawyers and historians alike, it is a slim volume that should generate great discussion.

NOTES

[1.] Abner S. Greene, "The Irreducible Constitution,"

Journal of Contemporary Legal Issues 7 (1996): 293) (1996 JCLI Religion Symposium).

[2.] *Roe v. Wade*, 410 U.S. 113 (1973).

[3.] *Dred Scott v. Sandford*, 60 U.S. (19 Howard) 393 (1857).

[4.] *Stanley v. Georgia*, 394 U.S. 557 (1969).

[5.] Lawrence G. Sager, "Foreword: State Courts and the Strategic Space Between the Norms and the Rules of Constitutional Law," *Texas Law Review* 63 (1985): 959.

[6.] New York Times v. Sullivan, 376 U.S. 254 (1964).

[7.] Martin S. Flaherty, "History 'Lite' and Modern American Constitutionalism," *Columbia Law Review* 95 (1995): 523.

[8.] *Whitney v. California*, 274 U.S. 357 (1927), esp. 372ff. (Brandeis, J., concurring).

[9.] In this connection, Prof. John Phillip Reid of New York University School of Law has elucidated the concept of "forensic history," by which he means the use of historical evidence to support presentist legal or constitutional arguments. *See, e.g.*, John Phillip Reid, "Law and History," *Loyola of Los Angeles Law Review* 27 (Nov. 1993): 193-223. *See generally* Hendrik Hartog and William E. Nelson, eds., *Law as Culture and Culture as Law: Essays in Honor of John Phillip Reid (Madison, Wis.: Madison House, 2000), esp. R. B. Bernstein, "Legal History's Pathfinder: The Quest of John Phillip Reid," in* id._, 1-36.

[10.] *Bowers v. Hardwick*, 478 U.S. 186 (1996).

[11.] William Michael Treanor, "Fame, the Founding, and the Power to Declare War," *Cornell Law Review* 82 (May 1997): 695-722.

[12.] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980).

Copyright (c) 2002 by H-Net, all rights reserved. H-Net permits the redistribution and reprinting of this work for nonprofit, educational purposes, with full and accurate attribution to the author, web location, date of publication, originating list, and H-Net: Humanities & Social Sciences Online. For other uses contact the Reviews editorial staff: hbooks@mail.h-net.msu.edu

If there is additional discussion of this review, you may access it through the list discussion logs at:
http://h-net.msu.edu/cgi-bin/logbrowse.pl.

Citation: Martin S. Flaherty. Review of Eisgruber, Christopher L., *Constitutional Self-Government*. H-Law, H-Net Reviews. April, 2002.
URL: http://www.h-net.org/reviews/showrev.php?id=6193

Copyright © 2002 by H-Net, all rights reserved. H-Net permits the redistribution and reprinting of this work for nonprofit, educational purposes, with full and accurate attribution to the author, web location, date of publication, originating list, and H-Net: Humanities & Social Sciences Online. For any other proposed use, contact the Reviews editorial staff at hbooks@mail.h-net.msu.edu.