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# THE MISSING SELVES IN CONSTITUTIONAL SELF-GOVERNMENT

James E. Fleming\*

## INTRODUCTION

Both Christopher Eisgruber and Jed Rubenfeld have written important books developing sophisticated theories of constitutional self-government. Eisgruber's *Constitutional Self-Government*<sup>1</sup> and Rubenfeld's *Freedom and Time: A Theory of Constitutional Self-Government*<sup>2</sup> join issue in significant ways, and therefore a dialogue concerning them should prove illuminating. Rubenfeld says his book and Eisgruber's book are somewhat similar, but very different.<sup>3</sup> Eisgruber says his book and Rubenfeld's book are fairly similar, yet also somewhat different—and where they differ, they sometimes complement one another, or perhaps supply the deficiencies in the other.<sup>4</sup> I say the books are very similar—more similar than either recognizes or concedes—and that the problems with the books are likewise similar!

First, I want to point out some salient similarities between the two books. Both propound theories of constitutional self-government (witness their titles). Both are deeply critical of majoritarian conceptions of democracy, and each argues forcefully that such wrong-headed conceptions lie at the root of constitutional theorists' anxiety about judicial review posing a "counter-majoritarian difficulty." Both advance conceptions of "constitutional self-government" or constitutional democracy and claim that their conceptions and related arguments for judicial review solve or avoid the "counter-majoritarian difficulty." Both say, in effect, that indeed constitutional self-government and judicial review enforcing it are

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\* Professor of Law, Fordham University School of Law. I prepared this essay for the Symposium on Theories of Constitutional Self-Government, Fordham University School of Law, November 15, 2002. Thanks to Sotirios Barber, Abner Greene, and Linda McClain for helpful comments.

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

2. Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (2001).

3. See Jed Rubenfeld, *Of Constitutional Self-Government*, 71 Fordham L. Rev. 1749, 1749 (2003).

4. See Christopher L. Eisgruber, *Dimensions of Democracy*, 71 Fordham L. Rev. 1723, 1731-32, 1731 n.35 (2003).

counter-majoritarian, but that they are not for that reason undemocratic; to the contrary, they are democratic rightly understood.<sup>5</sup>

In both of their theories, the people have two selves: (1) the selves who pursue present wants and interests through ordinary politics and (2) the selves who are concerned to live under their commitments (Rubinfeld) or to honor their moral principles (Eisgruber).<sup>6</sup> Let's call these two selves the people's *ordinary selves* and their *constitutional selves* (I deliberately echo Bruce Ackerman's formulations here<sup>7</sup>). Thus, both propound conceptions of self-government that are "dualist" in a generic sense (not Ackerman's specific sense): both emphasize the constitutional selves with their deeper commitments or moral principles over and against the ordinary selves with their present wants and interests.

Both are profoundly critical of originalist conceptions of constitutional interpretation and judicial review. Originalists characteristically claim that their theory is the only one consistent with our Constitution and our scheme of democracy.<sup>8</sup> Yet, both Eisgruber and Rubinfeld reject originalist conceptions of constitutional interpretation and view originalism as thwarting constitutional self-government rightly understood.<sup>9</sup> Furthermore, both are admirably post-originalist (to use a term that both Martin Flaherty and I have used in recent work<sup>10</sup>): they give due regard to original understanding and history without being originalist.<sup>11</sup>

Both differ from familiar theories of constitutional democracy (like those associated with Ronald Dworkin) that justify the right of privacy in the name of personal autonomy or personal self-government.<sup>12</sup> At the same time, both argue that *Roe* was rightly decided and that *Bowers* was wrongly decided.<sup>13</sup> Both attempt in

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5. Eisgruber, *supra* note 1, at 18-20; Rubinfeld, *supra* note 2, at 10-15; Eisgruber, *supra* note 4, at 1723-24.

6. Rubinfeld, *supra* note 2, at 45-56, 168-74; Eisgruber, *supra* note 1, at 49-64.

7. 1 Bruce Ackerman, *We the People: Foundations* 6-7 (1991).

8. See, e.g., Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 143 (1990); Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 44-47 (1997).

9. Eisgruber, *supra* note 1, at 25-44; Rubinfeld, *supra* note 2, at 62-65, 178-85.

10. Martin S. Flaherty, *Post-Originalism*, 68 U. Chi. L. Rev. 1089 (2001); James E. Fleming, *Original Meaning Without Originalism*, 85 Geo. L.J. 1849, 1850 (1997); James E. Fleming, *Are We All Originalists Now? I Hope Not!*, Alpheus T. Mason Lecture in Constitutional Law and Political Thought, Princeton University (Sept. 19, 2002), available at <http://www.princeton.edu/sites/jmadison/>.

11. Eisgruber, *supra* note 1, at 109-35; Rubinfeld, *supra* note 2, at 184-88.

12. Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 101-04 (1996); Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* 53-54, 148, 157-60 (1993) [hereinafter Dworkin, *Life's Dominion*].

13. Eisgruber, *supra* note 1, at 148-61 (discussing *Roe v. Wade*, 410 U.S. 113 (1973), *Bowers v. Hardwick*, 478 U.S. 186 (1986), and related cases); Rubinfeld, *supra*

sophisticated ways to ground the relevant rights in a conception of democracy, not personal autonomy or personal self-government.<sup>14</sup>

Finally, both are remarkably court-centered in their thinking about enforcement of the Constitution, and both have notably high regard for courts and low regard for legislatures and executives in the project of constitutional self-government. I use the words “remarkable” and “notable” because we live in a time when many proponents of conceptions of constitutional self-government that bear affinities to their conceptions have begun to reconsider their court-centered and court-loving propensities, as well as their legislature-disparaging propensities. Many theorists have also come to view their focus on courts as “the forum of principle” as historically myopic.<sup>15</sup> I suspect that Rubenfeld and Eisgruber have boxed themselves in through their dualism about the people’s two selves, and their corresponding dualism about the institutional roles of courts and legislatures—with legislatures representing the present wants and interests of the people’s ordinary selves, and courts honoring the commitments or moral principles of the people’s constitutional selves. (I, too, once was a court-lover, but I am no longer.<sup>16</sup>)

Second, here are some salient differences between the two theories. Their criticisms of majoritarian conceptions of democracy, while evidently similar, prove to be quite different: Eisgruber focuses on the majority of the people versus all of the people problem.<sup>17</sup> Rubenfeld stresses the presentism versus commitmentarianism problem.<sup>18</sup>

The dualisms in their conceptions of constitutional self-government, though apparently similar, also turn out to be quite different. Rubenfeld focuses on the dualism between the present wants of the ordinary selves and the deeper commitments to be lived under by the constitutional selves; thus, for him, judicial review should *elaborate* those commitments over time.<sup>19</sup> Eisgruber focuses on the dualism between the present wants of the ordinary selves and the deeper moral principles of those same selves; thus, for him, judicial review should *represent* the people’s judgments about moral principles.<sup>20</sup>

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note 2, at 221-27, 235-40, 248-53 (discussing *Roe* and *Bowers*).

14. Eisgruber, *supra* note 1, at 151-53, 160-61; Rubenfeld, *supra* note 2, at 226, 235-42.

15. The formulation of courts as “the forum of principle” is from Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. Rev. 469 (1981), reprinted in Ronald Dworkin, *A Matter of Principle* 33, 69-71 (1985). For a criticism of this conception as historically myopic, see Cass R. Sunstein, *Legal Reasoning and Political Conflict* 59-61 (1996).

16. See James E. Fleming, *The Constitution Outside the Courts*, 86 Cornell L. Rev. 215 (2000) (reviewing Mark Tushnet, *Taking the Constitution Away from the Courts* (1999)).

17. Eisgruber, *supra* note 1, at 18-19.

18. Rubenfeld, *supra* note 2, at 45-73.

19. *Id.* at 178-95.

20. Eisgruber, *supra* note 1, at 5, 48, 52.

Hence Rubinfeld's charge that Eisgruber is a presentist,<sup>21</sup> and hence Eisgruber's clarification that Rubinfeld's multi-dimensionality (roughly what I am calling his dualism) is temporal, while Eisgruber's own is spatial.<sup>22</sup>

Though both Eisgruber and Rubinfeld are commendably post-originalist, their criticisms of originalism seem to be exactly the opposite of one another. Eisgruber criticizes originalism for its authoritarianism: for its imposition of the "dead hand of the past" upon the present will.<sup>23</sup> Rubinfeld criticizes originalism for its presentism: for its concern to free up the present will (from what Rubinfeld views as the constraints of commitments of the Constitution on a model of writing).<sup>24</sup>

Their approaches to the writtenness of the Constitution also are practically the opposite of one another. Rubinfeld emphasizes the writtenness of the Constitution, propounding a model of the Constitution as written (as distinguished from models of the Constitution as spoken).<sup>25</sup> Eisgruber criticizes what he sees as the fetishism of written texts, or the pathology of trying to pass off every interpretation of the Constitution as derived or derivable from the text.<sup>26</sup>

In this essay, I shall focus on the missing selves in Eisgruber's and Rubinfeld's theories of constitutional self-government. First, the missing personal selves: neither develops an adequate theory of personal self-government as an aspect of constitutional self-government. Second, the missing constitutional selves: neither develops a vigorous conception of the people taking the Constitution seriously outside the courts. But I want to begin by making a point about the architecture of theories, in particular, theories of constitutional self-government. I believe that the architectures or molds of their theories are inadequate to our irreducible, incorrigible, dualist Constitution. Accordingly, both of them end up reducing our dualist scheme of constitutionalism and democracy into the mold of democracy.

#### I. CONSTITUTIONALISM, DEMOCRACY, AND OUR IRREDUCIBLE, DUALIST CONSTITUTION

Abner Greene has put forward the idea of our "irreducible Constitution,"<sup>27</sup> and I have embraced such an idea.<sup>28</sup> For present

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21. Rubinfeld, *supra* note 3, at 1751-55.

22. Eisgruber, *supra* note 4, at 1724-25.

23. Eisgruber, *supra* note 1, at 36-39.

24. Rubinfeld, *supra* note 2, at 61-65.

25. *Id.* at 163-95.

26. Eisgruber, *supra* note 1, at 111-15.

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

purposes, the idea, roughly, is this. Our constitutional scheme of government combines elements of democracy and constitutionalism, or democracy and fundamental rights. Some constitutional theorists reduce our constitutional scheme to a democracy, to the neglect of fundamental rights that constrain democracy. Others overemphasize fundamental rights constraining democracy, to the neglect of democracy.

Greene argues that our “irreducible Constitution” resists being reduced to either democracy or fundamental rights (and that this is a good thing, too). I would add that we should learn to live with the tension between constitutionalism and democracy, rather than reducing constitutionalism and fundamental rights into democracy. Although Greene has lumped me in with the camp that overemphasizes fundamental rights to the neglect of democracy,<sup>29</sup> I have tried to agree with him concerning the importance of not reducing our Constitution into either democracy or fundamental rights.<sup>30</sup> Indeed, in several articles, I have made “irreducible Constitution” arguments against Ely, Sunstein, and Ackerman.<sup>31</sup> I have argued that each of them has sought, in analogous ways, to reduce or level our irreducible, incorrigible,<sup>32</sup> dualist Constitution into a scheme of democracy or popular sovereignty to the neglect of constitutionalism and fundamental rights.

I have put forward a Constitution-perfecting theory with an architecture that honors the imperative of not reducing our constitutional scheme into democracy or fundamental rights, and of not reducing constitutionalism into democracy. This is a theory of securing constitutional democracy that has two fundamental themes of deliberative self-government.<sup>33</sup> The first theme is concerned to secure the basic liberties that are preconditions for *deliberative democracy*, to enable citizens to apply their capacity for a conception of justice to deliberating about the justice of basic institutions and social policies. The second theme is concerned to secure the basic liberties that are preconditions for *deliberative autonomy*, to enable citizens to apply their capacity for a conception of the good to deliberating about and deciding how to live their own lives.

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28. James E. Fleming, *We the Unconventional American People*, 65 U. Chi. L. Rev. 1513, 1516 (1998).

29. Greene, *supra* note 27, at 296.

30. Fleming, *supra* note 28, at 1516; James E. Fleming, *Securing Deliberative Autonomy*, 48 Stan. L. Rev. 1, 24-29 (1995).

31. See, e.g., James E. Fleming, *Constructing the Substantive Constitution*, 72 Tex. L. Rev. 211 (1993) (critiquing John Hart Ely, *Democracy and Distrust* (1980) and Cass R. Sunstein, *The Partial Constitution* (1993)); Fleming, *supra* note 28 (critiquing 1 Bruce Ackerman, *We the People: Transformations* (1998)).

32. See Lawrence G. Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. Rev. 893 (1990) (arguing that our “incorrigible” justice-seeking Constitution resists being reduced to an expression of popular sovereignty).

33. See, e.g., Fleming, *supra* note 30, at 2-3; Fleming, *supra* note 31, at 218.

I have argued that there are good reasons—architectural reasons, or reasons concerned with the construction of theories—for conceiving our basic liberties in terms of securing the preconditions not only for deliberative democracy but also for deliberative autonomy, instead of framing them as, or reducing them into, preconditions for democracy.<sup>34</sup> The first reason is prophylactic: articulating a constitutional theory with these two themes protects us against taking flights from substance to process by recasting substantive liberties as procedural liberties or neglecting them. The second, related reason is architectonic: presenting our basic liberties in these terms illustrates that the two fundamental themes of deliberative democracy and deliberative autonomy are co-original and of equal weight. The third, more general reason is heuristic: articulating our basic liberties through these two themes keeps in view that our constitutional scheme is a dualist constitutional democracy, not a monist or majoritarian representative democracy. A final reason is elegance: the importance of being elegant (though not too reductive) in constructing a constitutional theory. The dualist Constitution-perfecting theory that I have proposed would not reduce our Constitution into democracy or fundamental rights, but would conceive both as co-equal and would cast both in the architecture of the theory of constitutional democracy.

The question that I want to pose here is, do Eisgruber and Rubinfeld reduce or level constitutionalism into democracy? On the face of it, it might seem that they do not. After all, both of them emphasize that their theories of democracy are decidedly non-majoritarian, and are instead theories of constitutional self-government (a formulation that appears to preserve the tension between and the hybrid of constitutionalism and democracy). And both of them advance conceptions of democracy that are pointedly dualist (in the way I have sketched) or multi-dimensional (in the way Eisgruber has observed). So it would seem that they *do not* reduce or level constitutional self-government into democracy.

At the same time, it seems that they *do* reduce or level constitutionalism into democracy. For one thing, each repeatedly says that his conception of constitutional self-government *is* democracy, is pro-democratic, or the like. For example, Rubinfeld goes so far as to say that his theory is a conception of constitutionalism *as* democracy, or that constitutionalism is required by democracy.<sup>35</sup> And Eisgruber criticizes the idea that “constitutionalism is usefully characterized as ‘limited government.’”<sup>36</sup> For another, both Rubinfeld and Eisgruber reject familiar constitutionalist and liberal understandings of rights of

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34. Fleming, *supra* note 30, at 27-29; James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 Fordham L. Rev. 1335, 1342-43 (1997).

35. Rubinfeld, *supra* note 2, at 163, 172-74.

36. Eisgruber, *supra* note 1, at 44.

privacy or autonomy as fundamental rights of personal self-government, instead recasting these rights into the mold of their conceptions of democracy.<sup>37</sup>

These moves sound alarms for me as a proponent of the irreducible Constitution thesis. We should not labor under the compulsion always to say that a theory of constitutionalism is a theory of democracy, or that fundamental rights are elements of democracy. These moves suggest that the constitutionalism or fundamental rights elements of our irreducible Constitution are being reduced or leveled into democracy. Again, in other work, I have argued that the best architecture for resisting such reductions or leveling is a substantive dualism with two themes corresponding to democracy and constitutionalism: a Constitution-perfecting theory of securing constitutional democracy through securing not only the procedural liberties associated with deliberative democracy, but also the substantive liberties related to deliberative autonomy.

## II. THE MISSING PERSONAL SELVES IN CONSTITUTIONAL SELF-GOVERNMENT: PERSONAL SELF-GOVERNMENT

Strikingly, neither Rubenfeld nor Eisgruber puts forward a theory of *self-government*. Say what? Do not both of them have “constitutional self-government” in the titles of their books? And indeed, are not both books true to their titles in that they advance theories of constitutional self-government? My argument will be that neither develops a theory of personal self-government in our constitutional scheme. To the contrary, both criticize any such idea. Thus, persons are missing selves in their theories of constitutional self-government.

The dualist conception of constitutional democracy that I have been developing is a theory of deliberative self-government in two senses: (1) deliberative democracy—or political self-government, and (2) deliberative autonomy—or personal self-government. I also have engaged with the literature on reviving civil society that argues that persons have to learn *self-government*—how to govern themselves as persons—before they can become good citizens and thus participate in political self-government.<sup>38</sup> I have criticized this literature for failing to articulate how the former leads to the latter. But here I want to note that it has the virtue of highlighting two senses of self-government: personal self-government and political self-government.

Rubenfeld rejects any notion of individual autonomy or personal self-government. To him, the self that governs in self-government is

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37. See *supra* text accompanying note 14.

38. Linda C. McClain & James E. Fleming, *Some Questions for Civil Society-Revivalists*, 75 Chi.-Kent L. Rev. 301 (2000).

*the* people or *a* people.<sup>39</sup> (To the extent that his theory recognizes a personal self, it is the commitmentarian self as opposed to the (unencumbered) liberal autonomous self or the (encumbered) communitarian self.<sup>40</sup>) For him, our Constitution includes an anti-totalitarian principle of privacy, to protect us from being conscripted.<sup>41</sup> But it decidedly does not include a liberal principle of personal self-government—what I have called deliberative autonomy—to enable persons to govern themselves.<sup>42</sup> And so, his antitotalitarian principle of privacy does not entail a notion of deliberative autonomy (or deliberative personal self-government). Instead, he wants to derive privacy from democracy or from constitutionalism as democracy.<sup>43</sup>

Now, it is striking that Rubinfeld of all people does not advance a conception of personal self-government. (Here, I will focus on Rubinfeld's argument rather than Eisgruber's.<sup>44</sup>) For, in trying to make the notion of a people having commitments over time seem intelligible rather than mysterious, Rubinfeld draws an analogy between persons and a people.<sup>45</sup> He notes that there is nothing mysterious about the notion of a person giving herself a commitment, living under it, and revising it; so, too, he says, with a people. And he develops a notion of autonomy as political autonomy—a people living under laws and commitments that it gives to itself.<sup>46</sup> But he does not carry the analogy back to persons and develop a notion of personal autonomy as a person living under laws or commitments that she gives to herself. Instead, he rejects the idea of a constitutional right to personal self-government.

In my own work, I have drawn analogies between persons and a people, even echoing the Platonic notion that the soul of the individual is writ large in the Constitution.<sup>47</sup> More particularly, I put forward a Rawlsian conception of the person as having two moral powers: the capacity for a sense of justice and the capacity for a conception of the good. I suggested that that conception of the person, with those two moral powers, is writ large in our constitutional scheme. I developed two themes, deliberative democracy and deliberative autonomy, which correspond to the two moral powers. I observed that both themes, and both moral powers, are about deliberative self-government—personal self-government and political

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39. Rubinfeld, *supra* note 1, at 145-59.

40. *Id.* at 97-101.

41. *Id.* at 226, 242.

42. *Id.* at 235-37.

43. *Id.* at 242-43.

44. Eisgruber provides an illuminating analysis of Rubinfeld's analogy between the idea of a person and the idea of a people. Eisgruber, *supra* note 4, at 1727-30.

45. Rubinfeld, *supra* note 2, at 93, 145-59.

46. *Id.* at 240-42.

47. Fleming, *supra* note 30, at 23.

self-government.<sup>48</sup> I even referred to deliberative autonomy as an anti-totalitarian principle of liberty, citing Rubenfeld's article on the right to privacy.<sup>49</sup> In short, I drew an analogy between persons and a people in developing a theory of deliberative self-government in two senses—personal self-government and political self-government—connecting the two moral powers of persons with the two fundamental themes of our Constitution and constitutional democracy.

Why would Rubenfeld reject the idea of a right to personal self-government or personal autonomy? I shall hypothesize several possible reasons. The first reason is rooted in his Sandelianism. Like Sandel, Rubenfeld criticizes liberal conceptions of the self for exalting free choice and for being "unencumbered."<sup>50</sup> He stops short of embracing a full-blown communitarian encumbered self.<sup>51</sup> But one can clearly see his notion of the committed self as being somewhat Sandelian, and as lying midway between the foregoing (too unencumbered) liberal and (too encumbered) communitarian notions of the self.

The second reason stems from Rubenfeld's hostility to Mill, and to liberal theories inspired by Mill. Here, I commend Rubenfeld for retrieving from Mill's writing his anti-orientalism, and his reductive, stereotyped views concerning oriental conformity.<sup>52</sup> But we should distinguish between Mill himself and liberal conceptions inspired by Mill. Whatever the shortcomings of Mill's own view, they are not plausibly attributable to liberal theories that are inspired by Mill or that have affinities to his view.

A third reason grows out of Rubenfeld's aversion to the 1960's style rhetoric of some of the early constitutional law cases celebrating privacy and some of the early liberal arguments for the right of privacy as the right to be different, the right to make lifestyle choices, or the like.<sup>53</sup> These materials are shot through with notions of the freely choosing self and of freedom as entailing that one is free to revise one's choices and commitments at any moment. Rubenfeld makes a powerful critique of post-modern conceptions of freedom as permitting the present will to reign rather than as living under commitments over time.<sup>54</sup> All of this stinks in the nostrils of Rubenfeld (as well as in mine), who is rightly critical of such conceptions of freedom. The quarrel between Rubenfeld and liberals like Dworkin, Mill, and me is more of a family quarrel than Rubenfeld

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48. *Id.* at 18-23.

49. *Id.* at 12 (citing Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737, 784 (1989)).

50. Rubenfeld, *supra* note 2, at 97-101.

51. *Id.* at 98.

52. *Id.* at 227-34.

53. *Id.* at 221-55.

54. *See id.* at 17-88.

seems to recognize or concede. But it is worth asking why he believes it is a quarrel worth engaging in.

### III. THE LEFT OUT PEOPLE IN CONSTITUTIONAL SELF-GOVERNMENT: THE MAJORITY OF THE PEOPLE VERSUS ALL OF THE PEOPLE

As stated above, both Eisgruber and Rubinfeld are deeply critical of majoritarian conceptions of democracy (and of our constitutional scheme); and both offer instead conceptions of constitutional self-government that are dualist: they posit two selves in self-government, or two dimensions in democracy, and the like. Eisgruber takes up the problem of whether our scheme of government represents simply the majority of the people or all of the people. Majoritarian conceptions of democracy argue for or assume the former. Eisgruber argues for the latter. He calls this a conception of impartial democracy as opposed to majoritarian democracy.<sup>55</sup>

All of this is well and good. In recent years, many constitutional theorists—especially, but not exclusively, civic republicans and liberal republicans—have sought to develop conceptions of democracy as impartial democracy, government of the whole people, or the like. Indeed, even Ely (who is sometimes mistaken for being more of a majoritarian than he is) criticized interest group pluralist and majoritarian conceptions of democracy, arguing that our Constitution establishes a scheme of representative government in the interest of the whole people.<sup>56</sup>

What is notable, though, about Eisgruber's argument is that he evidently believes that this critique of majoritarianism and argument for impartial democracy somehow supports judicial review to represent the moral principles of the people. I say this is notable because in recent years, most of the constitutional theorists who have developed civic republican or liberal republican or even generically "government of the whole people" views of democracy have taken a decidedly different route. Consider Ely and Sunstein. In general, they believe that pointing out shortcomings in representative or deliberative institutions supports judicial review to make those institutions more representative or more deliberative. And so, from the deficiencies of democracy, they argue for judicial review reinforcing representative democracy (Ely)<sup>57</sup> or securing deliberative democracy (Sunstein).<sup>58</sup> In short, they think that the deficiencies of democracy, or situations of distrust in a democracy, warrant judges to perfect democracy by making representative or deliberative

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55. Eisgruber, *supra* note 1, at 18-20; *see also id.* at 52-56.

56. Ely, *supra* note 31, at 79-80.

57. *See id.* at 73-104.

58. Sunstein, *supra* note 31, at 133-45.

institutions more representative or more deliberative. They pointedly reject the idea that this warrants having judges themselves do the representing or deliberating—and the idea that this warrants having judges represent the people's judgments about moral principles or having judges do the deliberating about such matters.<sup>59</sup>

Yet, Eisgruber seems to say that this deficiency argues for courts representing the people's judgments regarding moral principles.<sup>60</sup> Moreover, in places, he seems even to suggest that courts are more democratic in some important senses than legislatures and executives are.<sup>61</sup> And it has been a while since I have read so disparaging an account of legislatures as not being representative.<sup>62</sup> Eisgruber is right to point out ways in which courts systemically are more democratic than common accounts—and familiar hand wringing about “government by judiciary”—acknowledge. He also is right to point out ways in which legislatures systematically are less democratic than common accounts suppose.

But I fear that he carries his valuable corrective too far. That courts are more democratic—and that legislatures are less democratic—than commonly supposed does not necessarily support an argument that courts should represent the moral principles of the people. Instead, it would support an argument for making legislatures more democratic.<sup>63</sup> And it would support an argument that legislatures have an obligation not only to represent the immediate wants and interests of the ordinary selves but also to represent and honor the long term commitments and moral principles of the constitutional selves.<sup>64</sup> It is also worth noting that Eisgruber rejects some proposals that would make courts more democratic. One such proposal, which I enthusiastically support, is for a fixed, limited term for Supreme Court justices, say, fifteen years.<sup>65</sup>

Now, let us distinguish between two defects in majoritarian conceptions of democracy. One is the majority versus all defect that I have been discussing. The other is the interests versus principles defect to which I have just alluded: that majoritarianism represents

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59. See Ely, *supra* note 31, at 43-72; Sunstein, *supra* note 15, at 35-61.

60. Eisgruber, *supra* note 1, at 5, 48, 52.

61. *Id.* at 46-78.

62. *Id.* at 46-52; see also *id.* at 168-204.

63. See Ely, *supra* note 31, at 67.

64. See Fleming, *supra* note 31, at 291-92 (suggesting that legislatures and executives along with courts should be forums of principle); Fleming, *supra* note 16, at 218 (arguing that taking the Constitution seriously outside the courts requires—not simply taking it away from courts—taking it to legislatures, executives, and citizens generally).

65. See, e.g., Sanford Levinson, *Contempt of Court: The Most Important “Contemporary Challenge to Judging”*, 49 Wash. & Lee L. Rev. 339, 341-42 (1992) (suggesting idea of limiting tenure of Supreme Court justices to single, non-renewable terms of eighteen years). Eisgruber clearly is not moved to propose such ideas. Eisgruber, *supra* note 1, at 66-68.

the immediate wants and interests of the ordinary selves, but does not represent or otherwise honor the deeper commitments, principles, and aspirations of the constitutional selves. It is important to recognize that the majority versus all defect is not the same as, and is not coterminous with, the interests versus principles defect. Therefore, it is not at all clear that saying that judges should represent the people who are left out of the majoritarian processes entails that judges should represent the people's judgments regarding moral principles. (After all, the left-out ordinary selves are not the same as our better constitutional selves, nor do their interests or commitments necessarily map onto those of our better constitutional selves.)

The majority versus all defect seems more directly to entail that judges should seek to facilitate the representation of the people left out, to bring them into the political process, at least to the extent of making representatives represent them, take their interests into account, not discriminate against them, enact only legislation that can be supported by public regarding reasons, and the like. Again, let's return to Ely. Ely argues from the majority versus all defect that courts should facilitate the representation of the whole people, such as minorities, or open up the political process to their participation, or seek to assure that representatives actually or virtually represent them, or flush out prejudice against them, and the like.<sup>66</sup> And let's recall Sunstein. He argues from the majority versus all defect that courts should secure deliberative democracy. One significant way they should do this is through slightly toughening up rational basis scrutiny: perhaps to a general rational basis with bite scrutiny searching for impartial, public-regarding reasons (a scrutiny that has some bite with respect to both ends and fit between ends and means).<sup>67</sup> In short, the majority versus all defect of representative or deliberative institutions entails judicial review (1) reinforcing or securing democracy and (2) applying rational basis scrutiny with bite to screen for reasons that are not impartial and public-regarding. What it does not entail is aggressive judicial review to represent the people's judgments about moral principles. All of this, I assume, Rubenfeld would agree with, for he expresses puzzlement at why Eisgruber thinks the majority versus all defect supports courts representing the people's judgments about moral principles.<sup>68</sup>

#### IV. FREEDOM, TIME, AND THE CHARACTER OF OUR CONSTITUTION'S COMMITMENTS

Because Eisgruber says that courts should represent the people's current moral judgments, it is understandable that Rubenfeld

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66. See Ely, *supra* note 31, at 73-179.

67. Sunstein, *supra* note 31, at 158-59.

68. Rubenfeld, *supra* note 3, at 1749-55.

criticizes him for being a presentist.<sup>69</sup> Rubenfeld's critique is all the more understandable when you consider that Eisgruber complains about the "dead hand of the past"<sup>70</sup>—this in part may lead Rubenfeld to lump him in with present-will democrats. Understandable, but mistaken.

For one thing, Eisgruber wants to throw off the dead hand of the originalist past, understood as a form of authoritarianism. But so does Rubenfeld.<sup>71</sup> So does Dworkin.<sup>72</sup> So do I.<sup>73</sup> So should we all. An authoritarian originalism is inconsistent with constitutional self-government, and constitutional democracy, as each of these theorists conceives it. That does not make Eisgruber a present-will democrat, just as it does not make Rubenfeld one. For one can reject the authoritarianism of dead hand originalism while still proposing living under commitments that we give ourselves over time. It is important to note that all of the foregoing theorists have in common a view that the commitments we give to ourselves in the Constitution are more abstract than the specific historical norms (mainly rules) that the originalists claim exhaust their authoritarian Constitution. All of those theorists view the Constitution's commitments as moral principles, as Dworkin and Eisgruber would say, or commitments, as Rubenfeld says. They are commitments, not commands; principles, not rules. They are to be lived under, not to be viewed as authoritatively decreed for us.

For another, Rubenfeld overlooks or underestimates the extent to which Eisgruber takes the historicity of past commitments seriously.<sup>74</sup> Eisgruber is not a forward-looking, justice-seeking theorist pure and simple.<sup>75</sup> The important point is that there is a middle ground between the anti-authoritarianism that I have mentioned and the presentism that Rubenfeld charges. This middle ground encompasses living under a Constitution that is properly conceived to embody the commitments, principles, and aspirations of the people's constitutional selves. Rubenfeld says this is constitutional self-government. So too in his own way does Eisgruber. So indeed, for that matter, does Dworkin. So do I.

This middle ground consists of constitutional self-government without presentism, under a Constitution that is not authoritarian.

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69. *Id.* at 1750-55.

70. Eisgruber, *supra* note 1, at 36-39.

71. Rubenfeld, *supra* note 2, at 184-88.

72. Dworkin, *Life's Dominion*, *supra* note 12, at 118-47.

73. Fleming, *supra* note 34, at 1355 n.89.

74. Hence Martin Flaherty's praise for Eisgruber's understanding of the uses of history in constitutional interpretation. See Martin S. Flaherty, *The Better Angels of Our Past*, 71 Fordham L. Rev. 1773, 1781-83 (2003).

75. I am supported in this view by Abner Greene's analysis of Eisgruber's theory. Abner S. Greene, *Constitutional (Ir)Responsibility*, 71 Fordham L. Rev. 1807, 1812 (2003).

This is constitutional self-government under a Constitution that embodies commitments, principles, and aspirations that are plausibly attributable to the people themselves.<sup>76</sup> All of these theories come within what Dworkin generically calls a moral reading of the Constitution.<sup>77</sup> Whatever one might say about Dworkin's own particular version of a moral reading, a moral reading need not—and should not—deny the historicity of the moral commitments embodied in the Constitution.<sup>78</sup> In short, Eisgruber is not the presentist that Rubinfeld understandably, but mistakenly, takes him to be.

I also want to raise a larger point about Rubinfeld's argument about time. Let's observe that Rubinfeld argues that originalists are presentists.<sup>79</sup> He also argues that Ely is a presentist.<sup>80</sup> He also argues that Ackerman is a presentist.<sup>81</sup> He also argues that Eisgruber is a presentist.<sup>82</sup> He even argues that Dworkin and Rawls are presentists.<sup>83</sup> All of this should give us pause. Can it be that all of these theories suffer from the same basic flaw? It is certainly possible. And Rubinfeld gives a clever, tidy, and ironic analysis of why this is so. Now I am all for cleverness, tidiness, and irony. But his analysis may be too clever, tidy, and ironic. Perhaps he is sweeping too many theories together.

Take originalism. Originalists are always telling us that they alone take the Constitution, understood as historical commitments, seriously.<sup>84</sup> Now, Rubinfeld comes along and says that originalists are majoritarians who do not understand what it means to live under a Constitution's commitments over time, and that they are presentists who want to free up present will. Or take Dworkin. Dworkin is always telling us that the only way to take the Constitution—understood as moral commitments—seriously is to recognize that we have to elaborate its commitments over time and bring fresh moral and political theory to bear in coming to the best understanding of them.<sup>85</sup> Then, Rubinfeld comes along and says that Dworkin does not understand what it means to live under a Constitution's commitments over time, and that he, too, is a presentist.

How might the originalists and the Dworkinians respond? (Here, I will take up the originalists' case in response to Rubinfeld, just so once in my life I can say that I have defended originalism against a criticism.) Originalists might say that Rubinfeld has it all wrong.

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76. Eisgruber, *supra* note 1, at 126.

77. Dworkin, *Freedom's Law*, *supra* note 12, at 1-38.

78. See Fleming, *supra* note 34, at 1349-50.

79. Rubinfeld, *supra* note 2, at 63-65.

80. See *id.* at 60.

81. *Id.* at 175.

82. Rubinfeld, *supra* note 3, at 1749-55.

83. Rubinfeld, *supra* note 2, at 67, 71.

84. See, e.g., Bork, *supra* note 8, at 139-60; Scalia, *supra* note 8, at 37-47.

85. See, e.g., Dworkin, *Life's Dominion*, *supra* note 12, at 118-47.

They might say that they and they alone take seriously the Constitution's commitments. They and they alone understand what it means to live under such commitments over time. They and they alone understand that honoring such commitments entails that we not collapse them into present will. After all, you will recall all of their railing against a living Constitution, and against understandings of constitutional interpretation that they view as being tantamount to a continuously sitting constitutional convention, and the like. And don't forget all of their talk about the importance of fidelity to the original understanding, narrowly conceived, and all the rest of it.

The originalists might add, in response to Rubinfeld's charge that they come on like majoritarians, that they are not majoritarians as such. Keith Whittington has clearly distinguished originalism from majoritarianism.<sup>86</sup> (To see the difference between deference to democratic majorities and originalism, consider, for example, the deep differences between the anti-textualist inquiries into reasonableness proposed by Thayer and Frankfurter, on the one hand, and the textualist rebuffings of inquiries into reasonableness propounded by Black and Scalia, on the other.)<sup>87</sup> Originalists would say, no, we believe in fidelity to the commitments of the Constitution in the first instance; only if the Constitution "says nothing about" a subject matter does it leave majorities free to govern. If it turns out that such a belief entails that under their theory majorities often are left free to govern, it is not because originalists are majoritarians. Rather, it is because they believe that the Constitution's commitments are specific and narrow, rather than abstract and broad, and therefore they believe that the Constitution's commitments leave things open to majority rule.

The originalists might also say, we and we alone understand what it means to live under a Constitution over time; we and we alone take seriously the historicity of the Constitution's commitments. They would say that living under a Constitution means living under specific historical rules. It means understanding that those rules don't change unless we have a constitutional amendment. It also means understanding that interpretation of the Constitution is a matter of discovering and following historical understandings, not a matter of elaborating abstract principles and commitments. And so, if originalists look like presentists and majoritarians, it is because their

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86. Keith Whittington, *Constitutional Interpretation* 153, 168 (1999); Keith Whittington, *The New Originalism*, available at [http://www.princeton.edu/~kewhitt/new\\_originalism.pdf](http://www.princeton.edu/~kewhitt/new_originalism.pdf) (last visited Mar. 18, 2003).

87. For Thayer, see James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893). For Frankfurter, see, for example, *Dennis v. United States*, 341 U.S. 494, 521-28 (1951) (Frankfurter, J., concurring). For Black, see, for example, *id.* at 580 (Black, J., dissenting). For Scalia, see, for example, *Morrison v. Olson*, 487 U.S. 654, 703-15 (1988) (Scalia, J., dissenting).

positivism drives them to see constitutional commitments as specific rules, which entails that the Constitution does not "say anything about" most matters that arise today and therefore that, for the most part, majorities are free to govern; on their view, there is very little in the Constitution's specific commitments to constrain the present will of majorities.

The point of all this is this: The central question is not what is originalists' conception of time, but what is their conception of the character of the commitments of the Constitution?<sup>88</sup> If the originalists appear to be presentists, it is not because of any notion of time they hold, but because of their conception of what the Constitution is. This is not fundamentally an issue of time, only an issue of time insofar as that relates to the character of the commitments in the Constitution.

Well, then, if we are not all presentists, who are the real presentists who do not understand what it means to live under commitments over time? First and foremost, the majoritarians, Anglophiles, monists, and levellers.<sup>89</sup> Second, the post-modernists who actually believe (or claim to believe) the sophomoric things about freedom that Rubinfeld quotes.<sup>90</sup> Third, probably many of the people who complain about the inflexibility of Article V.<sup>91</sup> Fourth, probably many of the people who yearn for a "living Constitution" (if there are any such people still living). Fifth, perhaps many of the people who say that they believe in commitments, but who are anxious to contend that those commitments enjoy contemporary support. These folks probably are presentists who are looking for a footing in the past, rather than commitmentarians who are looking for a footing in the present. Some of these folks probably lack the courage of their commitments.

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88. For an analysis of constitutional interpretation that emphasizes the fundamental interrogative, "What is the Constitution?", see Walter F. Murphy, James E. Fleming & Sotirios A. Barber, *American Constitutional Interpretation* (2d ed. 1995).

89. I am using Bruce Ackerman's formulations here. See, e.g., Ackerman, *supra* note 7, at 7-10, 35; Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 Yale L.J. 1013, 1035-38, 1047-48 (1984).

90. Rubinfeld, *supra* note 2, at 3-16.

91. Aside on Article V: Both Rubinfeld and Eisgruber applaud Article V's inflexibility and obduracy to constitutional amendment (Rubinfeld, *supra* note 2, at 174-76; Eisgruber, *supra* note 1, at 16-18, 20-25)—notwithstanding the vogue among self-styled democrats to criticize Article V (see, e.g., Ackerman, *supra* note 7; Ackerman, *supra* note 31; Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457 (1994); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043 (1988)). They do so precisely because such obduracy is appropriate under democracy as they conceive it, namely, constitutional self-government. That is, both applaud Article V in the name of democracy itself. It's nice to learn that at least one person at Yale thinks this. See Fleming, *supra* note 28, at 1515, 1539-42 (developing the theme of "The Constitution Goes to Yale").

#### V. THE MISSING CONSTITUTIONAL SELVES IN CONSTITUTIONAL SELF-GOVERNMENT: THE CONSTITUTION OUTSIDE THE COURTS

One might expect or hope that a hearty conception of constitutional self-government would entail a hearty notion that not only courts, but also legislatures, executives, and citizens generally have both the obligation and the capacity to take the Constitution seriously. That is, one might expect or hope that Eisgruber's and Rubenfeld's theories would entail strong notions of constitutional self-government as requiring taking the Constitution seriously outside the courts.

In recent years, many liberal and progressive constitutional theorists have become dubious about courts as the primary, much less the exclusive, interpreter and enforcer of the Constitution. They have finally figured out that, as many have put it, "Earl Warren Is Dead." Some of them have also re-read Thayer and have come to fear that loving courts and disparaging legislatures not only will not save a people from ruin, but also may undercut the civic virtue, political skills, and vigilance of the citizenry. Many of these constitutional theorists have begun talking about taking the Constitution seriously outside the courts.

Eisgruber and Rubenfeld remain notably confident about courts as opposed to legislatures and executives enforcing the Constitution. They rank up there with Dworkin in court-centeredness and in evidently conceiving courts not just as *a* forum of principle but perhaps as *the* forum of principle (or commitments). Many scholars have argued (to my mind with considerable persuasiveness) that this view is myopic, and that legislatures' and executives' capacities and incentives for enforcing the Constitution have been neglected or underappreciated (in the aftermath of the Warren Court). For example, Sunstein argues that legislatures, and executives too, can be fora of principle, and indeed, that over the course of our history those institutions have been superior to courts as fora of principle.<sup>92</sup> Tushnet offers the fullest analysis yet of the capacities and incentives of legislatures, executives, and the citizenry generally to enforce the Constitution.<sup>93</sup> And Sager has offered a rich account of the thinness of constitutional law and the judicially enforceable Constitution as compared with our thicker notions of constitutional justice and political justice.<sup>94</sup> On his view, there is a moral shortfall or gap between constitutional law and the Constitution. Our Constitution is judicially underenforced. The Constitution's commitments depend for their fuller enforcement on legislatures, executives, and the

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92. Sunstein, *supra* note 15, at 59-61.

93. Mark Tushnet, *Taking the Constitution Away from the Courts* (1999).

94. See, e.g., Lawrence G. Sager, *Justice in Plain Clothes* (forthcoming 2003); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. Rev. 410 (1993).

citizenry. Eisgruber makes some gestures toward Sager's idea of judicial underenforcement, for example, in the area of the "strategic space,"<sup>95</sup> but he does not have as full a conception on this score as I would expect from a co-author with Sager.

Neither Rubenfeld nor Eisgruber seems particularly moved by or engaged with arguments along these lines. Indeed, there seems to be an *a priori* dualism in Eisgruber's and Rubenfeld's books regarding courts and legislatures—wants and interests are for legislatures, and commitments and principles are for courts. I suspect that their dualism about the people's two selves, and their corresponding dualism about the institutional roles of courts and legislatures, has boxed them in here. In any case, both books are notably court-centered.

Rubenfeld criticizes Eisgruber for being a court-lover rather than a democrat (for his view that the courts should represent the people's judgments about moral principles).<sup>96</sup> At the same time, Eisgruber criticizes Rubenfeld for being a court-lover rather than a democrat (for his conceptual, rather than merely pragmatic, link between written constitutions, constitutionalism, and judicial review).<sup>97</sup> I am a bit bemused by this spectacle. For both Rubenfeld and Eisgruber are remarkably strong in their court-loving, and each understates the extent to which he himself is a court-lover.

Both seem unmoved by, or at least unresponsive to, the call for taking the Constitution seriously outside the courts. Now, one might think this would be understandable from, say, majoritarians (who neglect the fundamental rights aspect of our Constitution) or libertarians (who neglect the democratic aspect of our Constitution). But one might expect theorists of vigorous conceptions of constitutional self-government to have greater hopes for and confidence in the capacities and incentives of the people, legislatures, and executives to respect and enforce the Constitution. Such constitutional selves are missing in Eisgruber's and Rubenfeld's conceptions of constitutional self-government.

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95. Eisgruber, *supra* note 1, at 136.

96. Rubenfeld, *supra* note 3, at 1761-62.

97. Eisgruber, *supra* note 4, at 1737-38. Note Eisgruber's footnote about judicial underenforcement and the Constitution outside the courts, where he suggests that there may be no room in Rubenfeld's theory for this (whereas he claims that there is room in his theory for this—at least in the "strategic space"). *Id.* at 1738 n.57.