

## Symposium

# How Democratic Is the United States Supreme Court?

By JOSHUA P. DAVIS\*

THE MOST COMPELLING writing is often remarkable not so much for its apparent complexity or intricacy, but for its deceptive simplicity. The author puts forward an idea that may seem obvious, or perhaps obviously right, except that no one else has said it before, or has said it in quite the same way. The arguments defending the idea are clear and plainly stated. Only after revisiting the text, with objections in mind, does one discover how carefully the author has chosen his or her words, anticipating counterarguments and avoiding pitfalls, yet without distracting the reader's attention.

Professor Christopher Eisgruber's book, *Constitutional Self-Government*,<sup>1</sup> is an example of just this sort of compelling writing, as is demonstrated by the arguments contained in this issue of the *University of San Francisco Law Review*. The essays that follow—by Professors Rebecca Brown, John Denvir, Rick Hills, Mark Tushnet, and Jeremy Waldron—are themselves clear and perceptive, and provide powerful challenges to the argument in *Constitutional Self-Government*. And Professor Eisgruber's reply reveals not only the significance and the strength of his position, but also the degree to which his analysis addresses the concerns of the careful reader. For this reason, as well as because of its profound insights, I believe his book will prove to be of enduring importance and worthy of repeated review.

My goal in this introduction is to offer a brief sketch of some of Professor Eisgruber's main conclusions, and a few of the key proposi-

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\* Professor, University of San Francisco School of Law. The author would like to thank John Adler, Rhonda Andrews, Jeff Brand, Eric Cramer, Chris Eisgruber, David Franklyn, Susan Freiwald, Alice Kaswan, and Josh Rosenberg for the insights and ideas they provided for this introduction and the University of San Francisco Constitutional Law Symposium.

1. CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* (2001).

tions on which they depend. It provides some context for the various responses to Professor Eisgruber's book and his reply.

At its most ambitious, *Constitutional Self-Government*, as the title suggests, offers a general theory of how a democracy can and should work in a government framed by a constitution. Professor Eisgruber explores not only the ways in which a constitution can provide a foundation for democracy, but also the realistic limitations a constitution will place on later political choices.

Perhaps the single most intriguing insight that runs through the book is that the ways in which a constitution at first appears to constrain democracy may, in fact, turn out to facilitate democracy. The most important implication of this insight is also the focus of this issue of the *University of San Francisco Law Review*: Professor Eisgruber's argument that a robust form of judicial review *promotes* democracy.<sup>2</sup>

Professor Eisgruber's argument in favor of a form of robust judicial review is too careful and involved for me to do it justice in this short introduction. And, indeed, I need not undertake that effort. The book itself does that clearly and concisely. Moreover, two authors in this volume have provided a valuable synopsis of many of Professor Eisgruber's main contentions. First, Professor Rebecca Brown provides a wonderful account of its general contours, its significance, and its persuasiveness.<sup>3</sup> Further, Professor Eisgruber himself summarizes the general framework for his argument at the outset of his reply.<sup>4</sup> Nevertheless, a few words may help to orient the reader.

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2. The insight has other implications as well. It provides an important response, for example, to Professor Robert Dahl's recent book, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (2001). Professor Dahl appears to assume that the difficulty of amending the United States Constitution is an impediment to democracy. *See id.* at 154–55. As Professor Eisgruber explains, the opposite may be true. In reality, inertia itself makes changes to the Constitution rare. The most important effect of the substantial effort necessary for amendments may not be added stability, but rather it may make more obvious to those who draft the Constitution, and to those who alter it, what would be true in any case: they had better act with care because the effects of any actions are likely to endure. To put the same point in a different way, if the formal process for amending the Constitution were less burdensome, its original drafters and those who later revise it might be lulled into a false sense that it is safe to do so in an effort to win a political battle of only fleeting importance. A crucial point that ties together this argument and Professor Eisgruber's defense of judicial review is that majoritarianism is not the same as democracy, and restraints on majoritarianism may promote democratic self-governance.

3. *See generally* Rebecca L. Brown, *A Government For the People*, 37 U.S.F. L. REV. 5 (2002).

4. *See generally* Christopher L. Eisgruber, *Constitutional Self-Government and Judicial Review: A Reply to Five Critics*, 37 U.S.F. L. REV. 115 (2002).

The main goal of Professor Eisgruber's argument about judicial review is to facilitate understanding of the practice as promoting democracy. To do this, he must respond to the so-called "counter-majoritarian difficulty."<sup>5</sup> Most critics of American judicial review argue that it is at odds with democratic self-government. Supreme Court Justices, after all, are not elected, and yet they make value judgments in deciding highly contested political issues. This, the critics say, is undemocratic.

Two arguments traditionally have been put forward in favor of judicial review.<sup>6</sup> The first posits that judicial review is proper only insofar as it reinforces democracy.<sup>7</sup> Under this view, the Supreme Court should protect precisely those rights necessary for our democracy to function effectively. The perceived flaw in this argument is that it cannot justify many of the rights that the Supreme Court currently protects, and that many people believe the Court should protect. The second argument is that judicial review is necessary to safeguard certain fundamental rights.<sup>8</sup> These rights are so important that they should be preserved, even if by undemocratic decision-making.<sup>9</sup> The most obvious vulnerability of this position is that it is, by its own admission, undemocratic. Neither view is able to reconcile democracy with important aspects of current Supreme Court practice.

Professor Eisgruber offers, if you will, a third way. He claims that scholars have tended to overlook the conjunction of two points: the extent to which the Justices of the Supreme Court are selected through democratic politics, and the ways in which the Supreme Court may be particularly well-suited for certain kinds of democratic decision-making.<sup>10</sup> To oversimplify his position, it rests on at least two essential arguments: (1) that majoritarianism, as implemented through voting and legislative action, is not necessarily the same as democratic decision-making; and (2) that on some issues, promoting democracy may be less dependent on decision-maker's connection to majoritarianism, and may be more dependent on providing a principled analysis that has popular appeal. His conclusion is that the Supreme Court can be understood as a defensible democratic

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5. See, e.g., ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962). Professor Eisgruber also discusses the point. See EISGRUBER, *supra* note 1, at 46-49.

6. See EISGRUBER, *supra* note 1, at 46.

7. See *id.*

8. See *id.* at 46-47.

9. See *id.*

10. See *id.* at 48-49.

institution, with its members appropriately chosen through a political process and with its design appropriate to render judgments about some of the issues that the people in a democracy would want decided on a principled basis.

Various features of the United States Supreme Court enable the Justices to act on principle. Unlike elected officials, they need not worry about their job security in making a difficult decision, for they are appointed, in essence, for life. Unlike voters, they have reason to act responsibly because their vote may well decide any given case and because others will know how they vote and hold them personally accountable. And unlike both elected officials and voters, they must defend their decisions with a reasoned analysis. Notably, Professor Eisgruber does *not* include in this list that Justices have especially sound judgment on moral issues. He disavows the elitist view that lawyers or judges have a particularly refined moral sensibility. Rather, it is the means through which Justices are selected and the characteristics of the Supreme Court as an institution that situate them well to make principled decisions on behalf of the people.<sup>11</sup>

This sketch of Professor Eisgruber's argument suggests some basic questions: What is the distinction between democracy and majoritarianism? What characterizes the issues that will be resolved most democratically if they are decided on a principled basis? When is the Supreme Court the institution best suited to perform this function? These are some of the issues that this volume addresses. It offers provocative and engaging reading, particularly for those interested in the intersection of political theory, constitutional law, and judicial review.

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11. Indeed, the first two points about the Supreme Court support one of the least elitist features of our judicial system—the role of the jury. Jurors, too, need not worry about the effect of their decisions on their livelihoods, and their votes are likely to have a large impact on the outcome of cases.