Are Judges Really More Principled than Voters?

By Roderick M. Hills, Jr.*

Chris Eisgruber's Constitutional Self-Government articulately lays out a familiar, respectable, and (I argue) misguided argument for giving federal judges broad discretion to read what they take to be our moral convictions into the United States Constitution. The argument relies heavily on Ronald Dworkin's famous case for a "moral" reading of the United States Constitution. However, Dworkin's argument is the lineal descendant of a much older and more explicitly anti-democratic theory that was less concerned with judicial review and more concerned with social classes. According to this older theory, only a landed aristocracy could truly represent the permanent interests of the nation, because only this social class was sufficiently independent of economic need to be impartial about moral principles. Persons without land would be driven by their immediate appetites to sell their allegiance to the highest bidder without regard to the long-term interest of the nation. Therefore, it was in the interest of the nation, including commoners, to give the landed gentry special power to govern the nation, usually by special representation in a legislative assembly.

Eisgruber and Dworkin have substituted the life tenure and unchanging salary of Article III judges for the real property of the landed gentry, but, mutatis mutandis, the logic of their argument is the same as the old Tory case for the House of Lords. Article III courts are "forums of principle," because the Constitution guarantees that they enjoy "social prestige and a comfortable salary" regardless of their decisions. Thus, judges, like the landed gentry, do not stand to gain or lose any material benefit from their exercise of power. They can deliberate freely about the meaning of moral principle "on the basis of the

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3. Eisgruber, supra note 1, at 61-62.
right kind of reasons." Voters, by contrast, can reap economic benefits from their political power; they can be expected, therefore, to ignore arguments rooted in principle in favor of self-serving arguments that favor their short-term material self-interest. In their more clear-sighted moments, voters can see their own shortcomings as deliberative political actors, so they approve constitutions turning over responsibility for serious moral deliberation to life-tenured judges, leaving the political hustings for grubby pork barrel spending and eat and swill campaigning. The judges represent the long-term interests of the voters because they act from principle rather than from interest, which is what the voters themselves want (at least during those rare constitutional moments when they can muster up enough virtue to think about moral principles). The resemblance of this argument to the Tory argument for privileging the gentry is fairly straightforward: It is not for nothing that English judges are still known as "barons" and "law lords" and wear ermine, for these sumptuary indicia are fit trappings of independence that Eisgruber and Dworkin favor—more so, perhaps, than the priestly cassocks favored by their American brethren.

I draw the analogy between the Dworkinian argument set forth by Eisgruber and the older Tory argument not to mock the former but to link the case against Eisgruber and Dworkin to an older political theory about the nature of impartial self-government. As I hope my discussion will indicate, Eisgruber’s and Dworkin’s argument rests on two misunderstandings—one about the nature of “impartiality” and the other about the nature of “self-government.”

Briefly, Eisgruber assumes that the primary threat to impartiality is material self-interest, to which mass publics are distinctively prone to succumb. But this understanding of impartiality is too crude: partial attachment can arise from the presence or absence of passion or ideology just as easily as the presence of material self-interest, and judges as a class are as prone to these partialities as voters. Second, Eisgruber assumes that “self-government” occurs whenever officials act on the beliefs and values of the people they govern. But self-government requires more than this: it requires that the People be active agents in causing their officials to respect their beliefs and values. Eisgruber’s judges do not respect the People’s agency and, therefore, cannot respect their right of self-government, even if they were faithful repre-

4. *Id.* at 55.
sentatives of the People’s values—which, because of their class-based partialities, they are not likely to be.

I. What Does It Mean to Be “Impartial?”

Are life-tenured judges more impartial than voters and their elected representatives? Eisgruber says that they are, for two distinct reasons. First, Eisgruber notes that judges’ life tenure gives them the assurance of “social prestige and a comfortable salary” regardless of how anyone is affected by their decisions. Freed from constituent pressure to deliver the bacon, this ensures that judges will likely decide on the basis of a principled judgment—a judgment, in other words, about what is good from a moral perspective, rather than a judgment about what is good for their careers or their pocketbooks. Voters, by contrast, can improve their financial position through their votes and therefore cannot be trusted to deliberate impartially about moral principles. Second, Eisgruber notes that “judges must account for their votes and their reasons,” giving them “greater incentive to reflect on the distinction between moral principle and self-interest.” According to Eisgruber, “[w]hat life tenure makes possible, public scrutiny makes obligatory. Through law journals, newspapers, political committees, and professional associations, Americans watch judges carefully to make sure that their decisions are untainted by personal interest.” By contrast, voters vote secretly, do not give reasons for their votes, and know that their own individual vote is unlikely to influence the outcome of an election—all of which combine to make it unlikely that “voters will take responsibility for their choices.”

A. Some Problems with Eisgruber’s Account of “Impartiality”

This short summary immediately indicates some trouble in Eisgruber’s account of impartial deliberation. First, there is confusion about whether impartiality is endangered or protected by external pressure. On one hand, pressure from outside sources compromises impartial deliberation: The judge must have the protections of a tenured professor to engage in truly impartial analysis of principle. On the other hand, outside pressure from bar associations and journalists

5. Id. at 61.
6. Id. at 59.
7. See id. at 60.
8. Id. at 62.
9. Id. at 59.
10. Id. at 60.
ensures judicial impartiality, by purging the judge's decisions of "personal interest." Why the difference? Eisgruber does not say, an omission that gives his account of impartiality an *ipse dixit* quality. There is also some tension in the reasons Eisgruber offers for distrusting the impartiality of voters. On one hand, Eisgruber faults voters because they are too attentive to the consequences of their votes: They vote as rational self-maximizers, cannily trying to win financial benefits at the ballot box. On the other hand, Eisgruber faults voters because they are too careless about their votes: Each voter knows that "his or her individual ballot is unlikely to affect the outcome of the election," so that they vote carelessly, without attention to the moral consequences of their decision. But, of course, both of these claims cannot be true. Knowing that their ballot could not affect the outcome, self-interested voters would be rationally ignorant about politics and not vote at all. That voters actually do vote in large numbers, despite the incentives for rational ignorance of politics, suggests that something beyond self-interest motivates their decision to do so. Maybe they vote as frivolously as Eisgruber suggests, but this frivolity has nothing to do with seeking "what is good for their careers or their pocketbooks."

Both of these difficulties boil down to a single problem: Eisgruber over-simplifies impartiality by reducing it to freedom from the incentive of material self-interest. Eisgruber's own account, however, suggests that mere freedom from such material temptations cannot guarantee impartiality: One is impartial only when one is both free from the wrong sort of pressure and subject to the right sort of pressure. But what counts as proper and improper pressure? Eisgruber does not say.

**B. What Does It Mean To Be "Impartial"—Of Interest, Passion, and Principle?**

Eighteenth century social theory had a richer vocabulary with which to describe political motivation. Consider the tripartite division of interest, passion, and principle. Persons are motivated by "interest" when their goal is improvement of their own material well-being. For instance, the White businessman who urges racist laws to exclude Black competition is motivated by interest in this sense. Persons are motivated by "passion" (or "affection") when they have an emotional desire for a particular outcome. For example, the White racist

11. See id. at 61–62.
12. Id.
13. Id. at 59.
homebuyer who feels an emotional revulsion at living near a Black neighbor is acting from a passion that may cause the racist to suffer an economic loss (as his market choices will be constrained by his racist emotions). Finally, persons act on “principle” when they support a position because it follows from some more general system of beliefs and values compliance with which is regarded as intrinsically choice-worthy even if it is emotionally unappealing and materially unremunerative. The pacifist who refuses to use violence even in favor of causes or persons whom he loves, undergoing emotional agony as a result, acts from principle in this sense.

Note that the same decision could simultaneously be the product of interest, principle, or passion. David Hume, for instance, notes that the laity and the clergy were motivated by principle and interest respectively in maintaining the prerogatives of the priesthood. Likewise, Don Herzog notes how a member of the Ku Klux Klan might have a self-interest in preventing economic competition from Black labor, a passionate attachment to parading around in funny white robes, and a principled attachment to the theory of racism. It is also never self-evident whether a motive proceeds ultimately from one or another motive, because one’s self-interest might turn out to be a consequence of principle or passion. Consider, for instance, the farmer who supports farm subsidies—but who remains a farmer eligible for such subsidies rather than selling his land to a developer for a tidy profit only because he adheres to a back-to-the-earth ideology or has a passionate commitment to maintaining a family farm. Note also that the tripartite division does not purport to be exhaustive. Even David Hume’s essay on parties, the canonical citation for the tripartite division of motives, classifies only “real” parties into those rooted in principle, passion, or interest: In addition to these, there are purely “personal” factions rooted in differences the only purpose of which is to serve as markers for conflict.

The critical point, for the purposes of this essay, is that none of these motives can be regarded as inherently “impartial.” Each might

17. See Hume, supra note 14, at 57–58. Hume cites the strife between proponents of two different teams of charioteers, the “Blue” and “Green” teams, in the Byzantine Empire, as such a division. Interestingly, he regarded racial strife as a product of such “personal” division. See id. at 59.
compromise objectivity by distorting decision-making away from the socially appropriate end. The SS officer who stays at his post in a concentration camp out of a sense of disinterested loyalty to the cause of antisemitism even though the work is emotionally traumatic for him is a principled actor—and none the less "partial" for his ideological motivation.\textsuperscript{18} Likewise, passionless decision-making is not thereby rendered objective, if passion is necessary or helpful to focus the decision on the appropriate criteria.\textsuperscript{19} Consider, for instance, Burke's attack on the "French System," which charges the Jacobins with inappropriately fanatical reliance on ideology to the neglect of passion.

Thus, detecting a conflict of interest is not simply a matter of determining whether or not a decisionmaker will materially benefit from a decision. To the contrary, in certain contexts, precisely such a personal incentive might be essential to insure that the decisionmaker can be trusted.\textsuperscript{20} Reliance on principle (or ideology), likewise, does not guarantee disinterestedness, if the principle is the wrong principle or if it is pursued with the wrong intensity. (Would a member of Greenpeace make a disinterested decision on whaling simply because he lacked any financial stake in the outcome?) As Andrew Stark has argued, whether a conflict of interest results from ideology is a tricky matter of interpreting a social practice: Ideology may or may not compromise objectivity, depending on the context and actor.\textsuperscript{21}

C. Judges and Voters Compared

With this complexity in mind, has Eisgruber made a persuasive case that judges are more impartial than voters or their elected representatives? I think not. Considering interest, passion, and principle in turn, voters are at least as impartial as federal judges.

\textsuperscript{18} Heinrich Himmler famously praised such officers' sense of duty when touring the camps.

\textsuperscript{19} See Elizabeth Theiss-Morse et al., Passion and Reason in Political Life: The Organization of Affect and Cognition and Political Tolerance, in Reconsidering the Democratic Public 249–50 (stating that "citizenship requires combined reliance on passion and reason"); Herzog, supra note 15, at 150 (stating that "appeals to the sympathies and compassion of one's audience" fuel the pursuit of justice).

\textsuperscript{20} Thus, members of many corporations' board of directors are expected to buy stock in the company on the board of which they sit. Consider, also, the familiar argument that public school teachers ought to be eligible for merit pay in order to give them the right incentive to pursue their students' best interest aggressively.

\textsuperscript{21} See Andrew Stark, Conflict of Interest in American Public Life 119–24 (2000).
1. Material Self-Interest: The Sociotropic Voter and the Power-Hungry Judge

Concerning interest, one can agree with Eisgruber that decisions about moral principles should be rooted in reasons different than decisions about how best to maximize the wealth or welfare of the community or individual. Eisgruber, however, has made no persuasive case that voters are more likely than judges to be motivated by material self-interest. As noted above, each voter has such a small likelihood of affecting the outcome of an election that it would be irrational for any to use their vote for personal gain. Therefore, it is not surprising that the great weight of the research shows that voters do not vote on the basis of personal self-interest. Instead, they seem to engage in “sociotropic” voting—voting on the basis of their assessment of the public good. Of course, some interest groups focus on the narrow self-interest of their members despite collective action problems that make such a focus difficult. But, as Mark Tushnet points out in his contribution to this symposium, constitutional doctrine rarely deals with matters of interest to these groups. On those issues implicated by constitutional doctrine—gay and lesbian rights, sex equality, abortion, gun control, racial equality, criminal procedure, capital punishment, free speech, etc.—the relevant groups (NARAL, ACLU, the Christian Coalition, the NRA, the NAACP, etc.) and voters seem focused on sociotropic ideologies of one sort or another, not on padding their pocketbooks.

What about judges? As Eisgruber notes, judges lack any financial stake in the outcome of their decisions. However, unlike voters, judges have a direct and personal stake in the system of government that they help shape: they are, after all, government officials whose power will grow or shrink based on their own decisions enlarging or contracting judicial review. Moreover, unlike an individual voter, an individual judge or small number of judges can affect policy outcomes

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24. The National Abortion and Reproductive Rights Action League (NARAL); American Civil Liberties Union (ACLU); National Rifle Association (NRA); National Association for the Advancement of Colored People (NAACP).

25. See Eisgruber, supra note 1, at 60.
in ways that increase or decrease their own power. Of course, such decisions will not affect the Article III judges' income. But monetary wealth is hardly the only measure of material self-interest: power and social prestige which rests on power are equally important, especially for ambitious lawyers who often take a pay cut in order to exercise Article III prerogatives.

It is plausible to believe that the prestige of federal judges rests in no small part on the perception that they exercise broad powers of judicial review and can "strike down" state and even federal laws that violate some vaguely defined standard of justice. Judges who spend their days parsing obscure clauses of the bankruptcy code or resolving tedious discovery disputes will likely lack the charisma, social standing, and fame of a judge who makes front page news by striking down legislation. Should it be at all surprising that federal judges might find the exercise of powers proffered by Eisgruber personally attractive? Freed from financial pressure by Article III, section 1, will the judge be all the more able to pursue other personal goals—say, winning the approval of his social or ideological group through decisions that win favorable notice in journals and newspapers read by his or her friends? No voter has the power to win such fame and approval through his or her vote, even if he or she could credibly identify what that vote was, despite the secret ballot.

Thus, one could plausibly argue that federal judges are more self-interested in their decisions than voters. The question, of course, is an empirical one. Sadly, there is far less empirical research on the motivations of federal judges than there is on the motivations of voters. As Fred Schauer has noted, this may be because so many scholars share Eisgruber's assumption that the insulation provided by Article III suffices to make federal judges disinterested.26 However, comparing the well-documented sociotropic motives of voters with plausible assumptions about judges, the truth of the matter seems exactly the opposite of Eisgruber's account: Voters are less likely to be driven by material self-interest than judges.

Why is Eisgruber so convinced that judges are disinterested despite judges' obvious self-interest in their own power? Consider the analogy between Eisgruber's case for judges' power and the old Tory case for a powerful landed gentry. The landed gentry seems impartial just so long as one excludes from consideration their own self-interest

in controlling land: Take the basis for their social prestige and power off the agenda of ordinary politics, and they indeed have nothing to gain or lose from ordinary politics. Likewise, judges will seem disinterested just so long as one ignores their self-interest in broad judicial review. But this approach begs the question that needs to be decided: should the issue of judicial review be taken off the agenda of elected politicians?

2. Principle: Can Judges Be Trusted to Speak for the People’s Values?

Lack of material self-interest in the outcome of a decision is not, however, the only relevant measure of impartiality. There also is the question of whether the presence of inappropriate principles is more likely to distort voters’ or judges’ decisions. As Eisgruber notes, the relevant principle that ought to guide constitutional decision makers are the deeply held moral values of the People. One can concede for the sake of argument that the People do not consist only of a majority of the voters or even the majority of the entire population: The People’s values might rather be those values necessary to define the citizenry as a “moral community,” in Ronald Dworkin’s sense of the term. However, Eisgruber is insistent that the moral values enforced by judges must be the values of the People, not the values of the judges themselves: “Constructing the American people’s conception of justice is not the same thing as expressing one’s own conception of justice or as expressing the best conception of justice, whatever that might mean.” Therefore, judges or voters would be acting improperly if they followed principles because they or their friends or their social class adhered to those values rather than because those values were genuinely shared throughout the nation.

The question, therefore, is whether the voters or the judges are most likely to adhere to popular values. Conventional wisdom would suggest an obvious answer: The People know their own values as well as or better than the lawyers who staff Article III courts. The reason is not difficult to discern: It is a familiar point since Tocqueville published *Democracy in America* that lawyers as a class tend to have values and beliefs that differ significantly from those of the public generally. As Tocqueville noted, lawyers as a class attain their affluence through

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27. DWORKIN, supra note 2, at 23-26.
28. EISGRUBER, supra note 1, at 126.
their educational attainments, which gives them a "notion of their superiority" over lay people, "repugnance for the actions of the multitude," and "secret contempt of government of the people." These characteristics led Tocqueville to regard lawyers as the closest thing to an aristocracy that America has—a social class that continually places a brake on democratic opinion under the guise of helping to execute popular wishes. If the point of constitutional decision-making is to enforce widespread popular values, lawyers would hardly be the natural class from which to draw constitutional decision-makers.

Eisgruber is aware of the possibility that "drawing every member of an important political institution from a single profession would produce an undemocratic bias." His six pages of discussion, however, are an inadequate response to this worry. Eisgruber notes only that judges are confirmed by the United States Senate and, therefore are likely to have values that roughly track popular consensus. This is true as far as it goes, but it simply ignores the sociological basis for believing that lawyers, as a class, subtly support elitist over popular values in the way that Tocqueville and other sociologists have described. Even if one concedes that judges' views will likely track the views of the public in some rough sense, why would one choose judges over elected politicians whose views are much more likely to have a populist tone?

Eisgruber's answer to this question is that judges, for all their undemocratic tendencies, are more likely to make principled decisions because they give published justifications for their decisions and their power is so great that they must take personal responsibility for their votes. Voters, by contrast, might cast their ballot in a frivolous or thoughtless way in the secrecy of the voting booth. Publicity and responsibility, in short, helps insure that judges will make serious-

30. Id. at 283–84.
31. Eisgruber, supra note 1, at 67.
32. See id. at 68, 71.
33. See Michael Klarman, What's So Great About Constitutionalism?, 93 Nw. U. L. Rev. 145, 189 (1998) (noting that "Justices of the United States Supreme Court, indeed of any state or federal appellate court, are overwhelmingly upper-middle or upper-class and extremely well educated, usually at the nation's more elite universities" and share a "a culturally elite bias" which "has roughly correlated with a politically liberal one").
34. Eisgruber, supra note 1, at 71.
35. Eisgruber takes issue with this characterization of his argument, but his own "Reply to Five Critics" confirms my interpretation. He argues that voters lack incentives "to engage in extensive reflection and research." Christopher Eisgruber, Constitutional Self-Government and Judicial Review: A Reply to Five Critics, 37 U.S.F. L. Rev. 115, 138 (2002). This is a polite way of saying that voters are careless—precisely my interpretation of Eisgruber’s views.
minded decisions about principle. It is important to see that this argument is distinct from the theory that voters are more self-interested than judges. As I noted above, that self-interest theory simply contradicts the available evidence. By contrast, Eisgruber’s argument based on public reason-giving does reflect the undisputed facts that judges publish opinions, while voters cast secret ballots. But is this factual distinction sufficient grounds for arguing that judges are likely to act in a more appropriately principled way than voters? Like his argument about the self-interestedness of voters, his argument about the benefits of publicity and small numbers rests too much on a priori reasoning, ignoring the relevant empirical literature. There is considerable evidence that secrecy and collective responsibility by large numbers of people can produce principled decision-making.

Take, first, the question of whether secrecy or publicity most effectively produces principled decision-making. There is a familiar argument, ignored by Eisgruber, that secrecy protects principle by preventing public pressure from causing individuals to conceal their sincere beliefs in favor of ones popular with onlookers.36 The law follows this conventional account frequently enough. The United States Supreme Court refuses to permit oral arguments to be televised and bars all disclosure of what was said by justices in conference. Jury deliberations are typically secret. The secret ballot is rooted in similar fears of improper pressure: Progressive reformers convinced the nation in the late nineteenth century that the partisan ballot (i.e., ballots printed by the parties and easily identifiable as a particular party’s ballot by their color or shape) subjected voters to undue influence to political parties. The Australian ballot that they introduced lessened this source of pressure. Such a system of secrecy had its costs: it weakened parties, lowered voter turnout, and perhaps helped to disenfranchise illiterate voters.37 Nevertheless, the Australian ballot is rooted in precisely the same reasons that cause courts to observe principles of confidentiality in their deliberations—the principle that public scrutiny of some aspects of decision making would deter rather than inspire principled decision making. Eisgruber assumes that secret ballots are unprincipled ballots, but one might just as soundly assert that federal judges vote dishonestly because they do not observe.

government in the sunshine by making the public privy to their internal deliberations, bench memos, etc.\(^{38}\) (Was Judge Harold Baer's famous switch in time on the exclusion of evidence improved by the public scrutiny to which his decision was subjected?)

Consider also Eisgruber's assumption that individual judges' enormous power to alter policy outcomes will insure that they take their duty to follow popular principles seriously. Eisgruber suggests that individual voters might not take the time to deliberate carefully about their vote because they know that their vote will not affect the outcome. But Eisgruber ignores literature suggesting that there is safety rather than frivolity in numbers: Because so many votes are cast in the typical election, the odds are that frivolous voters will be swamped by the far larger numbers of principled voters.\(^{39}\) By contrast, only the luck of the draw and the uncertain recourse of certiorari review prevents a renegade judge or panel from imposing anti-populist or idiosyncratic values on a considerable part of the nation.

It also does not follow that voters pay no attention to relevant information just because they cast secret ballots. As Benjamin Page and Robert Shapiro have shown with substantial evidence, "political information and interpretations are produced and disseminated through a complex social system which involves organizations, division of labor, and transmission through social networks."\(^{40}\) This is a fancy way of saying that voters hear public discussions of issues on the radio, TV, town meetings, dinner tables, interest group sessions, etc., before they vote, even if they need not reveal their own individual positions after they vote. Finally, there is more to voter participation than voting: The lay public participates in public decision making in ways that do not involve secret ballots—by contacting representatives through letters and phone calls, showing up at mass demonstrations, canvassing neighborhoods on behalf of candidates, speaking at public hearings,

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38. How do we know, after all, that those published decisions are anything more than phony post hoc rationalizations, a smokescreen to distract the public from the real horse-trading that occurred in conference? The Legal Realists, after all, offered something like this hypothesis.


40. See Page & Shapiro, supra note 39, at 362–66.
and participating on citizen juries and panels.\textsuperscript{41} To measure the worth of political decision-making by the secret ballot alone is just as silly as to measure the value of judicial decision-making by the secret horse-trading that occurs in conference.

In sum, there is very little reason to believe that voters cast frivolous ballots simply because they cast secret ballots in large numbers. By contrast, there is substantial reason to believe that Article III judges might reach decisions that are hostile to popular values. Both decision-makers may be principled decision-makers, but voters and their elected representatives are more likely to follow the right—meaning \textit{popular}—principles.

3. Passion: The Importance of Being Earnest

Eisgruber focuses entirely on the voters' alleged tendencies towards self-interest and lack of principle as the best grounds for preferring judges to elected politicians as expositors of the people's values. Oddly, he ignores the traditional argument that voters might be excessively passionate in their attachments, ignoring their permanent values not because they are greedy are frivolous but because they are impulsive and emotional. This third sense of being "partial," however, might be the strongest basis for his faith in judges. There is little evidence that voters are more self-interested or less principled than judges. But there are plausible grounds for believing that judges act more slowly and less emotionally than popular decision-makers. This tendency is a function not only of glacial legal procedures but also a professional culture that values precedent and discourages innovation. Judges might protect deeply held popular values simply by slowing the people down.\textsuperscript{42}

While this is the most empirically well-supported basis for judicial review, it is also the most ambiguous. The reason is that it takes passion to deliberate about foundational moral issues. Precisely because they are foundational, they are implicit and, therefore, difficult to articulate. They also tend to be rancorously divisive. It is natural to be diffident about such matters and to avoid direct confrontation with them, whether one is a judge or voter. Lack of self-interest will not


\textsuperscript{42} Note an ambiguity in this argument: Judges might slow the people down either by enforcing long-standing traditional values or by enforcing elite legal values. Michael Klarman doubts whether judges are well-suited for the former function. See Klarman, \textit{supra} note 33, at 164 (arguing instead that judges simply enforce the biases of the legal elite).
insure that one confronts matters so thorny: One needs some positive incentive to do so. Politicians and activists who have some passionate commitment to changing social norms are far more likely to have such an incentive than judges. But such persons are unlikely to be attracted to the bench precisely because judges have so few opportunities to engage in passionate activity. For this reason, most passionate constitutional controversies have been inspired and led not by judges but by politicians and journalists like Thomas Jefferson (concerning free speech and the Alien and Sedition Acts), Andrew Jackson (on the legitimacy of public improvements), Daniel Webster (on the legitimacy of state nullification), Frederick Douglas (on the legitimacy of slavery), Elizabeth Cady Stanton (on female equality), Eugene Debs (on the constitutionality of strikes), and Martin Luther King (on racial equality).

Eisgruber asserts that many great moral controversies of high quality and passion have involved public discussion of judicial decisions. However, Eisgruber may be confusing constitutional decision-making with judicial decision-making. Constitutional decisions are often the inspiration of great moral debates, but judicial decisions rarely are. This is an error made as well by Ronald Dworkin, whose influence is so evident in Eisgruber’s book. Ronald Dworkin has observed that “[w]hen an issue is seen as constitutional . . . and as one that will ultimately be resolved by the courts applying general constitutional principles, the quality of public argument is improved, because the argument concentrates from the start on questions of political morality.” This is half right: the constitutionalization of an issue signals that the issue involves a matter of high moral principle. But neither Eisgruber nor Dworkin provide much evidence for the italicized suggestion that such constitutionalization requires judicial leadership. To the contrary, constitutional issues may be best pursued in non-judicial forums, precisely because such “legal” disputes do not involve ordinary legal controversies but rather passionate fights that mix rhetoric about custom and history with raw emotion and big principles. The great antebellum constitutional struggles—the Alien and Sedition Acts, the postal service’s refusal to circulate abolitionist literature in the South during the 1830s, John Quincy Adams’ fight in Congress against the “gag rule,” Jackson’s Maysville Road Veto Message, South

43. See Eisgruber, supra note 1, at 96–97 (citing Dred Scott as an example).
44. Dworkin, supra note 2, at 345 (emphasis added).
Carolina's threat to nullify the 1832 "tariff of abominations," Bleeding Kansas, etc.—owed nothing to any judicial involvement. *Dred Scott* came at the end, not the beginning of the slavery debate, and it hardly elevated the substance of the debate beyond, say, the Senate's debates over the 1850 compromise.

Indeed, the legalisms to which the judiciary is prone arguably degrades rather than elevates constitutional politics. Judicial rhetoric has a tinny, legalistic quality. Big moral questions of life, liberty, equality, are reduced to n-part tests, trimester frameworks, criteria for being a "suspect classification," epicycles on epicycles of doctrine which then infects the political process with its hair-splitting and Alexandrian convolutions. Eisgruber's book, like Dworkin's *Freedom's Law*, can be read as an effort to cure judicial rhetoric of this tendency toward technicality, so that judges might more directly confront moral questions free from the shackles of legal technique. But neither Eisgruber nor Dworkin consider the possibility that such rhetoric is the occupational habit of being a judge, part of the elitist professional culture that judges consciously and unconsciously adopt to solidify their priestly claims to authority. It is a striking characteristic of Eisgruber's book that, despite his praise for judicial decision-making in abstract, he rarely discusses in any detail the language or reasoning of any actual judicial decisions. Perhaps none meet his ideal standards for uplifting moral rhetoric. But then the possibility arises that this absence of inspiring examples is no accident that can be cured by mere academic exhortation. Judges may turn out to be inveterately passionless quibblers who suppress dissent from their rulings by falling back on the rhetoric of professional expertise. When they attempt riffs of high-flown rhetoric, the result is usually a pale imitation of what great constitutional politicians (Jefferson, Lincoln, Webster, King, etc) produce: In Kurt Vonnegut's phrase, judicial moralizing sounds like the 1812 Overture played on kazoo.

In sum, judges' interest, principles, and passions do not seem to make them the ideal expositors of popular ideals. They are at least as self-interested as voters; they are unlikely to be devoted to popular principles; and they lack the passion necessary persuasively to resolve public moral controversies. Could the People or their elected representatives really do any worse?

II. What Is "Popular Self-Government"?

Assume for the moment that the answer to that question ending the preceding paragraph is "yes": Popular politics over constitutional
issues is less principled and more self-interested than judicial politics. Assume also that the confirmation process before the United States Senate insures that judges' beliefs and values, in a general way, track popular beliefs and values. Would it follow that judicial review necessarily protects Americans' power of self-government over matters of principle?

On one view of democracy, no. Judicial representation of the people cannot be democratic self-government because the people are not the effective cause of judicial decisions' alleged consistency with popular values. On this view of democracy, true democratic self-government means that the people get what they demand because they demand it. Popular participation must be the cause of governmental responsiveness to popular values. One might roughly identify this view with what Quentin Skinner has called the "neo-Roman" theory of liberty. According to Skinner, the neo-Roman theory flourished in the sixteenth and seventeenth centuries, expressed especially in the writings of Commonwealth theorists like John Milton and James Harrington.46 The essential premise of neo-Roman theories was that no person could be free unless they lived in a "free state." A free state, in turn, was a state controlled by the governed. Thus, even if a king acted as a benevolent despot whose decisions faithfully reflected popular values, the king would not guarantee freedom of the people, because the people would still be subject to power that they did not control.47 Such people were "obnoxii," dependents who lacked the dignity of free citizens and whose character would be degraded by being subject to arbitrary power (meaning power uncontrolled by the people), even if such power was never actually exercised.48

Judicial power can never be popular self-government in this sense. Even if judges' decisions reflect popular moral values, they do not do so as a result of popular participation. The People themselves do not cause judges to reflect popular values because there is no mechanism for the people to force the Court to listen and respond to popular views. They can send letters to the Court denouncing or applauding the Court's decisions, but the Court's culture (not to mention its rules of procedure) forbids its members from taking such communications seriously. They can wait with picket signs on the marble steps of the United States Supreme Court Building for the proverbial puff of smoke announcing the decision—but it is the pride of the

47. See id. at 68–70.
48. See id. at 36–44.
Court that such popular displays can have no influence on the what
the college of legal cardinals decides. At most, popular pressure can
influence which judges are confirmed. Both Dworkin and Eisgruber
celebrate these brief moments of popular participation, but it is hard
to take this sort of attenuated participation seriously as anything like a
robust democratic process: only a handful of the most determined inter-
est groups and high-profile academics can have anything to say at
such hearings. Moreover, even these political elites cannot say any-
thing very substantial about any nominee without a substantial paper
trail. Presidents have an incentive to nominate persons like David Sou-
ter or Anthony Kennedy who have no paper trail to discuss. Thus, the
confirmation process has become an intellectually barren game of cat-
and-mouse, where the nominee blandly refuses to say anything that
could spark the sort of popular discussion that Eisgruber celebrates,
and the hostile senators try to trap the nominee into saying something
substantial and therefore controversial.

Eisgruber has two responses to this attack on judicial power as
unaccountable power. First, he simply derides the democratic ac-
countability provided by popular elections. Second, he launches a
frontal assault on the idea that popular participation must be linked
to governmental outputs— that the people must actually control or
determine the governmental expression of values in their name. Both
of these arguments fail, the first for lack of evidence and the second
for lack of theoretical plausibility. More fundamentally, both argu-
ments reflect an unconscious, anti-democratic bias that is, perhaps,
endemic in the legal academy.

Take, first, Eisgruber’s charge that ordinary voters will not partici-
pate in democratic processes because their own vote will rarely effect
the outcome of the election. He makes the familiar charge that “large-
scale elections can render individual political action meaningless.”49
According to Eisgruber, there is no “good reason to suppose that elec-
tions will provide opportunities or incentives for vigorous citizen activ-
ity in political communities with more than a few hundred thousand
citizens.”50 Eisgruber does not support these claims with any serious
research, and it turns out that they deserve more skepticism than he
gives them. There is an enormous literature on the issue of voters’
“rational ignorance,” not much of which is discussed or even cited by

49. Eisgruber, supra note 1, at 88.
50. Id. at 80.
Eisgruber.\textsuperscript{51} The upshot of this literature, however, is that the theory is \textit{not} predictive of voter behavior: voters \textit{do} vote, in large numbers, despite the economic prediction that they will stay home. One might infer, therefore, that ordinary people, as opposed to academics, \textit{do} feel that elections allow them to participate in a meaningful way in self-government. Moreover, they seem to vote intelligently, using interest group endorsements, political parties, and other signals as proxies for information that they personally lack.\textsuperscript{52} Although Eisgruber scoffs at the idea that individual voters can make a difference "in political communities with more than a few hundred thousand citizens,"\textsuperscript{53} he forgets that those large communities are divided into much smaller electoral districts which are the relevant unit for most sorts of political activity.\textsuperscript{54} Although the average state has around two million residents, the average state legislative electoral district contains only fifty thousand voters.\textsuperscript{55} It should not be surprising that the cost of campaigning in state districts is not overwhelmingly high: even in large states like New York, incumbents spent an average of only $35,000.\textsuperscript{56} At this price, even a person of moderate means and good reputation with the community can afford to run for office, let alone vote for it—and many do. Aside from state legislative elections, there are literally hundreds of thousands of local elective or volunteer offices with correspondingly small electoral districts: roughly three percent of the population serves in such an office.\textsuperscript{57}

There is, of course, a long-standing debate in political science between those who discount popular control of government through


\textsuperscript{53} Eisgruber, \textit{supra} note 1, at 80.


\textsuperscript{57} See Verba, \textit{supra} note 41, at 51.
elections as a sham and those who regard such control as flawed but effective. The most famous proponent of the first view is Walter Lippman; his modern intellectual heirs include Philip Converse, John Zaller, and other social scientists who regard popular opinion as fickle, uninformed, and easily manipulable by elites. The more confident view about democratic participation is most famously represented by John Dewey’s writings and the research of some modern believers in democratic effectiveness, such as Samuel Popkin and Benjamin Page. Eisgruber uncritically adopts the first view of democratic processes without considering the evidence that elections are far more effective at conveying public values than he asserts. His skepticism about the democratic importance of elections, therefore, must itself be treated with skepticism; it provides little support for his argument.

Eisgruber’s second argument is more powerful: It challenges the need for the people to be the effective cause of government’s expression of values. Eisgruber argues that government must impartially represent interests and must effectively choose policies desired by citizens, but neither of these requirements is connected to citizen self-government. In theory, “wise and beneficent rulers” might provide such benefits without any citizen input. Eisgruber, therefore, throws in participation and deliberation as additional prerequisites for regimes to qualify as “democratic.” But the participation in question need bear only the most attenuated relationship to what government actually does: he specifies only that “any citizen willing to commit time and effort should be able to make a meaningful difference in politics and feel that politics is a rewarding part of her own life.” Participation, therefore, need not be the cause of governments’ effectively choosing one policy over another: In Eisgruber’s scheme, participation is more like therapy than a decision-making procedure.

Of course, Eisgruber does concede that the citizen’s participation must make a meaningful difference in politics, but he never specifies that meaningful difference means influence proportionate to ability to persuade her fellow citizens. Nor could he, because any such requirement would compromise the goal of impartiality. If participation was the engine that controlled government’s representation of interests and values, then the civic activists’ interests and values would crowd out the values and desires of civic slobs who did not vote or read a

58. See Eisgruber, supra note 1, at 84–85.
59. Id. at 85.
60. Id. at 85–86.
61. Id. at 85.
newspaper. For lovers of democratic participation, this is not a problem: power should be proportionate to participation: Voters and speakers get influence, and soap-opera watchers don’t, and the latter’s lack of power is the penalty for abdicating their duty to be a good citizen. For Eisgruber, however, participation cannot have such influence. Therefore, he assigns it to a therapeutic rather than political position: Participation is like those toy steering wheels that parents install in cars to give children the sensation of control without the reality.62

The essentially therapeutic nature of public inputs is even more obvious from Eisgruber’s discussion of “deliberation.” Eisgruber stipulates that “[d]emocracies should encourage citizens to think and converse about basic questions of justice” but “[p]ublic discussion of this kind can take place even if most citizens lack the power to influence the outcome of the debate.”63 Of course, citizens cannot really influence the Court’s decisions with their deliberation but Eisgruber insists that this powerlessness does not distinguish the Court from Congress: “Most Americans have little power to sway” Congress in Eisgruber’s view.64 Therefore, their discussions of either federal congressional issues or cases before the Court are, in either case, mere discussions, designed to promote their own education rather than change the decisions of their government.

In short, Eisgruber believes that public deliberation can be disconnected from public power. He analogizes arguments before the United States Supreme Court as a spectator sport in which the audience gets involved in the discussion on the sidelines, “think[ing] it through, and discussing the argument with other spectators.”65 For the purposes of encouraging deliberation, debate sparked by controversial Supreme Court decisions is sufficient even though the debaters have no power to change the outcome. Dworkin shares this assumption. Consider, for instance, the following passage:

62. In response to my argument, Eisgruber argues that citizens’ “persuasive power” is “exceedingly inegalitarian” because such power depends on characteristics like “her education, her looks, her talents, her wealth, her fame, or her family name... not her level of participation.” Eisgruber, supra note 35, at 172. But all of these characteristics can generate “persuasive power” only if other citizens are persuaded by them. Thus, there is nothing “inegalitarian” about a Kennedy having more influence than a Hills with voters because of her name: It is voters themselves who confer influence on the name, using it as a proxy for other characteristics like ideology or character.

63. See EISGRUBER, supra note 1, at 86.

64. Id.

65. Id. at 98.
[T]here is no necessary connection between a citizen's political impact or influence and the ethical benefit he secures through participating in public discussion or deliberation. The quality of the discussion might be better, and his own contribution more genuinely deliberative and public-spirited in a general public debate preceding or following a judicial decision than in a political battle culminating in a legislative vote or even a referendum.66

Thus, Dworkin applauds the public discussion of decisions like *Roe v. Wade* "in newspapers and other media, in law schools and classrooms, in public meetings and around dinner tables."67

Eisgruber's and Dworkin's belief in the sufficiency of impotent talk rests, I think, on two distinct errors. Both of these errors are rooted in a deeper indifference to, or even disdain for, lay participation in politics and true political equality.

First, Eisgruber ignores the relationship between power and deliberation: He assumes that public discussion of public affairs can be treated like a college seminar, divorced from practical effects on political outcomes. But Jon Elster has suggested why power and deliberation must be connected to each other. According to Elster, civic deliberation is a state that is essentially a by-product of true decision making: Unless there is some practical decision that will be determined by deliberation, people will not discuss a public issue with the seriousness of purpose that is required to promote civic virtue.68 Thus, the jury system would not produce serious deliberation unless jurors really believed that they decided issues of money, imprisonment, life, or death.69 Likewise, one cannot expect the public to discuss the details of *Casey* or *Roe* with any care or intelligence unless they believe that they will have some share in deciding whether to sustain these decisions. Indeed, there is little evidence that the lay public has any awareness of the doctrinal debates on the United States Supreme Court. Of course, the bar and law professors debate doctrine fiercely—but these constituencies believe that they have some influence on the Court's decisions. The lay public knows better, and their discussions of the Court's doctrinal debates is correspondingly muted.

67. Id. at 34–35.
69. See Jon Elster, *The Market and the Forum: Three Varieties of Political Theory, in Foundations of Social Choice Theory* 103, 120–27 (Jon Elster & Aanund Hylland eds., 1986) (noting that "the satisfaction one derives from political discussion is parasitic on decision making" such that political debate cannot produce beneficial side effects such as self-respect, civic energy, etc., unless these benefits are perceived by the actors as side effects of the pursuit of political decisions).
Second, Eisgruber ignores the elitist symbolism of judicial processes and the egalitarian nature of electoral processes. As Robert Wiebe has noted, elections in America have served a leveling function, because their implicit message is that the governed are the social and cultural equals of the governors. Every election is a saturnalia in which the officials abase themselves before the voters, seeking their support and acknowledging their legitimacy as final arbiters of moral and policy questions. Whether or not voters have the influence that politicians attribute to them, Wiebe argues persuasively that the ritual of elections instills voters with a sense of civic competence and authority necessary to sustain a democratic sensibility. By contrast, every aspect of judicial ritual, procedure, and rhetoric is designed to suppress any sense that the laity are the social or intellectual equals of the officials ruling in their name. The robes; the curtains from behind which the justices emerge before argument; the “oyez! oyez!” of the clerk; the special seats reserved for the members of the bar; the omnipotence of the judge in setting the agenda and terms of debate; the reliance on precedent and technical language that no layperson can hope to master; the status of those who appear as “petitioners” rather than as voters; the curt power to cut off debate or back talk with threats of contempt—all are in stark contrast to any election or even congressional hearing. By placing moral issues in such a forum, Eisgruber insures that they will be monopolized by a narrow social elite—lawyers and law professors from a tiny number of law schools and the journalists who hang out with them.

In sum, Eisgruber’s separation of public deliberation from public power fatally undermines the quality and equality of the former. I believe that this willingness to sever power and participation rests ultimately on a deeper, albeit implicit, anti-democratic assumption—the assumption that there cannot be a connection between quality of argument and numbers of persons who are persuaded by an argument. This assumption underlies both Eisgruber’s and Ronald Dworkin’s derisive characterization of electoral politics as just a matter of “counting heads” or “the weight of numbers.” Judicial decisions, by contrast, rest on the “quality of reasons” or “fundamental principle.” This contrast between the weight of numbers and the quality of reasons,

71. Eisgruber, supra note 1, at 98.
72. Dworkin, supra note 2, at 344.
73. Eisgruber, supra note 1, at 98.
74. Dworkin, supra note 2, at 344.
however, is confused: the assumption of any regime of political equality is that the arguments that persuade the largest number of adherents are the best arguments. Where political equality reigns, the weight of numbers is regarded as the best available proxy for the quality of argument. Thus, on that ultimate forum of principle, the United States Supreme Court, five votes decides a case and sets precedent. Why? Because the Justices are political equals: we assess the quality of argument by counting noses. Likewise, in every philosophy department, hiring decisions which rest largely on the "quality of reasons" in the published work of a candidate are determined by a majority or super-majority vote of the faculty (or their elected representatives on an executive committee). Why? Again, because the community is a community of equals, "counting heads" is regarded as the only acceptable way to determine quality of argument.

Why do Dworkin and Eisgruber overlook this connection between the quality of an argument and the public support that the argument enjoys? I think that this strange disconnect can be explained only by their assumption that voters are not the political equals of the sorts of people who make and decide arguments in the United States Supreme Court—lawyers and legal academics and judges and justices. Their implicit assumption is that voters make their decisions based on self-interest even in constitutional contexts where principle ought to reign. As noted above in Part I, there is not a shred of evidence to support this assumption: Voters are perfectly capable of distinguishing the politics of pork from the politics of constitutional principle, and they debate the latter in a sociotropic—that is, principled—way. Whether debating physician-assisted suicide in Oregon or monitoring the Senate to insure that President Clinton was impeached only for high crimes and misdemeanors, the evidence suggests that the voters put self-interest aside and vote conscientiously as principled decision makers when an issue is marked as one of constitutional significance. Eisgruber’s contrary assumption is an expression of profound elitism.

Is such elitism justified? One of the more frustrating aspects of Eisgruber’s book is his repeated invocation of the need for unelected bureaucrats to deliberate about "moral analysis" or "moral principles" without any serious exposition of what such moral analysis might involve. He frequently calls upon judges to use the people’s convictions about justice to resolve disputes, as if these convictions could be easily obtained through a little quiet reflection—derived, perhaps, from some deductive methodology (Rawls'? Nozick’s? Eisgruber’s?). But Eisgruber gives very few specific examples of the sorts of moral reason-
ing that he has in mind. He offers an argument that constitutional protection of sexual conduct is (or should be) rooted in a prohibition against the public enforcement of certain sorts of hostile external preferences. 75 Eisgruber does not, however, offer any philosophically compelling argument that such preferences should be generally proscribed. If the Court adopted such a view, the majority could cite J.S. Mill’s *On Liberty* while the dissenters could cite James Fitzjames Stephens, and it would be impossible to determine from Eisgruber’s argument which side ought to win. Eisgruber’s confidence in the moral reasoning of judges is not, in short, matched by any examples of such reasoning that would inspire such confidence.

Given the contested nature of moral convictions, it is not surprising that Eisgruber occasionally falls back on the methodology that he elsewhere attacks as insufficiently “principled”: he counts heads. In defending the idea that parental authority over children deserves some constitutional protection, for instance, he observes that “most of us will endorse some principles that guarantee us the freedom to be parents.” 76 However, if what “most of us” believes is the basis for constitutional morality, then why not just rely on the elected branches to resolve such issues? Presumably, they know as much about what the majority (“most of us”) believe as nine elderly lawyers that received the President’s nomination and the Senate’s approval.

In short, there is no particular reason to believe that the Court will be adept at making arguments about morality that will be persuasive either to professional philosophers or to the people. The Court itself knows this and, therefore, has not assumed the moral creativity that Eisgruber would assign to it. Instead, the Court more modestly uses history, custom, widespread legislative practice, and other indicia of popular consensus to infer what most of us believe and thereby fill the gaps in the constitutional text. Eisgruber finds such reliance on history and custom “mystical”77 because “[t]raditions may reflect moral errors” or “unjust power relationships.” 78 But surely the same could be said for creative judicial inferences about moral principles. At least inferences about tradition and custom are a direct effort to get at what “most of us” have believed most of the time. And at least the people have some agency in creating the history, customs, and legislative practices upon which the Court relies.

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76. *Id.* at 150.
77. *Id.* at 142.
78. *Id.* at 144.
Conclusion

Eisgruber's argument for creative judicial review rests on two ideas: first, We the People would want the most principled branch to make moral decisions for us and, second, the United States Supreme Court is the most principled branch. Both of these ideas are mistaken. There is very little evidence that the Court's interests, passions, and principles make them more likely to adhere to popular values than the people's own elected representatives. Even if there were evidence for such a position, the very idea of popular agency—self-government—requires that popular participation be the effective cause of government's expression of popular values. Popular inputs lack such influence on the Court.

This criticism leaves open the question of what exactly the Court's role ought to be in interpreting the vaguer parts of the United States Constitution. I will not attempt to answer that question here. My more modest goal is that Eisgruber's answer—to make the Court into the conscience of the nation—will not do. Popular convictions about justice cannot be so easily inferred by judges, for those convictions hardly exist absent concrete disputes that are subject to popular decision making. They must be created by the people themselves. Eisgruber seems to argue that the business of inferring popular moral principles can be delegated to a corps of experts who will be insulated from popular pressure while the people gather obediently around them to provide color commentary on the experts' various "principled" arguments. But why should the people listen to those who refuse to listen to them?

79. See, e.g., Hochschild, supra note 22 (citing case studies in the conflict and hesitancy expressed by various interviewees concerning distributive justice).