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CONSTITUTIONAL (IR)RESPONSIBILITY

Abner S. Greene*

How should we locate the higher law principles of our Constitution? Both Jed Rubenfeld and Chris Eisgruber have produced recent books on constitutional self-government, and both books address this central issue of constitutional theory.¹ For both scholars, although the Supreme Court serves as the principal interpreter of constitutional principle,² the Court must locate such principles in what is sometimes called an “interpretivist” fashion. In other words, although applied moral and political theory plays a role in constitutional interpretation, it is a decidedly subordinate role. Such theorizing is constrained, for Rubenfeld and Eisgruber and all interpretivists, by materials internal to the American constitutional order, such as text, precedent, history, or tradition. Rubenfeld’s claims are quite demanding in this regard. His is a theory that I will call “diachronic commitmentarianism,” i.e., his theory explains that the American people develop constitutional principles over time, that we become committed to such principles, and that it is the Court’s duty to locate and follow them. Eisgruber is more solicitous of noninterpretivism, that is, of moral and political theory detached from these internal sources of constitutional meaning. And Eisgruber takes to task methods of interpretation that are irresponsible, i.e., that unjustifiably displace interpretive authority from the Court to other sources. (For example, Eisgruber offers lovely critiques of the worst forms of textualism and originalism, precisely on the ground that these interpretive methods do nothing but obscure the judge’s responsibility for decision.) But Eisgruber, too, ultimately demands that the Court locate the people’s principles in an interpretive fashion, and history and tradition play an important role in this quest.

* Professor, Fordham University School of Law. Thanks to Jed Rubenfeld and Chris Eisgruber for writing such terrific books, to Jim Fleming for organizing the day at Fordham to discuss the books, and to John Nagle for his usual hard-to-answer comments on my essay.


² Neither book is primarily about allocation of interpretive authority. Both books discuss the United States Supreme Court as the principal interpreter of constitutional principle. Although I have a few words to say about this below, this essay takes the books as they are on this point, and also discusses the Court as principal interpreter.

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In this essay, I challenge these interpretivist claims on strictly normative grounds. That is, I do not claim that the Court does not write in interpretivist terms; it most often does. Rather, I argue that although reference to materials internal to our constitutional order should play an important role in judicial thinking about concepts such as “equal protection of the laws” or “freedom of speech,” such materials should play a background rather than foreground role in a court’s ultimate decisionmaking. Such decisionmaking should rest instead on moral and political reasoning for which the judge can hold herself fully responsible. First, I lay out Rubenfeld’s theory of diachronic commitmentarianism and Eisgruber’s theory of the Court as locater of the people’s principles. Next, I address a key ground of Rubenfeld’s argument, namely, that constitutionalism is the antithesis of presentism, or modernism, or an allegiance to what currently seems right. I contend that Rubenfeld’s theory of the person, which undergirds his theory of the nation (our nation, the constitutional People of the United States), improperly privileges what I call the “classical” part of what it means to be a human being over what I call the “modern” aspect. When we return the understanding of what it means to be a human being to its proper balance, we see that the ground for a diachronic commitmentarian theory of constitutional interpretation cannot stand, or at least must take its place as merely one source of constitutional meaning.

Next, I argue that Rubenfeld improperly equates constitutionalism with diachronic commitmentarianism. Constitutionalism is indeed about commitment, but its commitment is to principle over whim, and this can come in synchronic as well as diachronic form. (That is, the principle can be stated in the here and now rather than over time.) In this section, I sketch a theory I call “the currentness of normativity,” which is the strong version of the claim that to avoid irresponsibility, decisionmakers must always acknowledge in the foreground their own moral and political reasoning. I also offer a critique of diachronic constitutionalism as grounded in a false conception of democratic legitimacy.

We the People may be legitimately bound only by constitutional principle that we have had a role in creating. I do not mean to suggest that judges should defer to the people to determine constitutional principle. I do mean that the bindingness of judicial orders and precedent is legitimate only if those affected by such rulings have reason to believe that they have participated in the process leading up to the rulings, or have had the opportunity to do so. Thus, in contradiction to Rubenfeld, I offer praise for Jefferson’s support for generational re-creation of the Constitution. This is not meant to exclude such important second-order values as stability and predictability; it does insist, though, that such values be considered by decisionmakers, but not be given pride of place in the decisionmaking.
Both Rubenfeld (strongly, it is the main theme of his book) and Eisgruber (clearly, but less insistently) demand stronger interpretive continuity than my theory of legitimacy based in generational participation, and of interpretation foregrounding the currentness of normativity, will bear. Both books track a more familiar interpretivist line, in which our constitutional history is a through-line, a narrative of continuity, of commitment, of constructing a People. In my view, it is time to see such interpretivist theories as relying heavily on (unconscious) misreadings, misreadings that render the discontinuous continuous. Where Harold Bloom’s theory of “misprision” explains how poets misread to break from the past, my theory of constitutional misreading explains how constitutional interpreters misread to create a continuity with the past that otherwise would not exist.

I. RUBENFELD’S AND EISGRUBER’S INTERPRETIVIST THEORIES

Rubenfeld’s book is about both the self and the nation. The self and the nation are both free only as they live up to self-chosen commitments over time. “[T]ime is necessary,” proclaims Rubenfeld, “in a special way to the being of things human: of human being and hence of human freedom. Every page of this book is an elaboration of this proposition.” Rubenfeld offers a critique of presentism—what I will call (and Rubenfeld sometimes calls) “modernism.” He follows that critique with an affirmative case for freedom through commitment—what I will call “classicism.”

Modernism claims that our freedom consists in escaping form, escaping given methods; rather we must recognize our contingency and the possibility of radical current choice at any moment. Rubenfeld analogizes this conception of freedom to the freedom to speak (rather than to write). And he devotes many pages to railing against it. He critiques law and economics, modern art and architecture, existentialism, Zen Buddhism, and especially dialogic theories of democracy. For Rubenfeld, speech is the enemy because it revels in the present, in living human beings’ desire and capacity to govern themselves through current workings-out, rather than through apprehension of prior writing, that is, through living up to commitment. “Every self that seeks its freedom—individually or politically,” Rubenfeld writes, “by living in the present fools itself, either denying or flying from its real, inevitable engagements with past and future.”

4. Rubenfeld, supra note 1, at 7.
5. Id. at 38.
In place of presentism, Rubenfeld offers a theory of commitment over time. 

"[P]ersonhood," he writes, "just is being-over-time."6 "[H]ow long does it take to be a person? ... a lifetime."7 For Rubenfeld, human identity and human freedom are diachronic: "If I am I only over time, then there is never a present moment at which I can say, I am. I do not now exist. At any given moment, there will have been an I only by virtue of my having led a human life."8 The individual person

tries to understand what he ought to do given certain important lines—relations, attachments, purposes, and so on—with which he has already inscribed his life. He does not in his deliberation try to bracket or to step outside his ongoing attachments, either in the name of present desire or in the name of a present demand to consider all the reasons that apply to him. He is, rather, entrained in the task of working out the implications and possibilities of certain engagements he already has with the world.9

Just as it is wrong to think of the self as free at the current moment, and just as a proper theory of the self entails diachronic commitments, so for Rubenfeld is it wrong to think of democracy as the will of the current people, and so for Rubenfeld is it proper to think of constitutional self-government as a nation’s living up to commitments over time. A nation is not a person, of course, so there is a problem at the outset of who the subject of constitutional self-government is. (That is, “self” here is a metaphor.) Rubenfeld deals with this problem with a kind of definition:

[1]f a sufficient number of individuals in a given people share the same general principles over a sufficient period of time, and if they are prepared to create and live under institutions that preserve these principles, then it becomes possible . . . to speak of popular, national commitments to these principles.10

Rubenfeld offers a critique of political self-government on the model of speech, and then advances his affirmative theory of diachronic commitmentarianism. His critique flows from his critique of modernism, and of a presentist view of the self. Each of four versions of “constitutional self-government on the model of speech”11 fails to capture the fact that freedom comes only through diachronic commitment. Thus, he critiques judicial review that would be merely responsive to current popular will, or that would be merely proceduralist, interested only in clearing a path for current popular will. He critiques a form of narrow originalism, which would simply

6. Id. at 137.
7. Id.
8. Id. at 10.
9. Id. at 95.
10. Id. at 156.
11. Id. at 45.
channel the will of a past people. He critiques judicial review that would hypothesize a possible will of the people. Finally, he critiques judicial review based in a liberal conception of rights, based in liberal political theory. All of these speech-modeled theories of self-government miss this:

Constitutional law is a set of substantive, foundational commitments—commitments to principles of justice and liberty and power—laid down by the nation to govern itself. These temporally extended commitments cannot be captured in proceduralist terms, nor indeed in any speech-modeled logic.\(^\text{12}\)

And this:

Government by present voice is incompatible with law, because law can never be merely spoken. It requires a writing; it requires language preserved over time. Law is always written. (Even in a society whose law is preserved solely by oral tradition.) And government requires law. Which is to say: a people can govern itself only by both being governed by its past and governing its future.\(^\text{13}\)

Rubenfeld then translates these insights into a theory of constitutional self-government. Constitutionalism requires interpretation, and the "cardinal rule of this interpretive task is that interpretation of commitments cannot be permitted to collapse into governance by the self's present will."\(^\text{14}\) Instead, "[c]onstitutional interpretation in written self-government must itself be a written project, an enterprise in which one text is intermeshed with another and another over a long period of time."\(^\text{15}\) In sum:

A written constitution's normative force depends ultimately on whether it works to recall a people to itself over time: a means by which a people re-collects itself and its fundamental commitments.\(^\text{16}\)

Rubenfeld also offers a more specific method for cashing out his theory of diachronic commitmentarianism. He calls his method "paradigm case interpretation."\(^\text{17}\) This method requires the Court to look to the foundational paradigm case of a constitutional prohibition, and to reason from that foundational case to the case at bar. Or it requires the Court to look to the foundational paradigm case of a constitutional permission, or a constitutional requirement, and reason similarly from paradigm case to the case at bar. But a constitutional prohibition tells us only about what the framers of that text meant to prohibit, not about what they meant to permit. This is true also for permissions and requirements. For example, the framers of the Equal
Protection Clause meant to wipe out the Reconstruction black codes, which singled out blacks for various legal disabilities. Those same framers, it seems, were entirely unconcerned about governmental segregation of public schools. That permission—allowing governmentally segregated public schools—is not what matters for constitutional interpretation, says Rubenfeld. Rather, we must reason from the core prohibition—which he reads as an anti-caste principle—to the case at bar, and conclude that governmentally segregated public schools in 1954 violate such a principle.¹⁸

In sum, for Rubenfeld, individual self-government and national constitutional self-government make no sense through a prism of the here and now. A person only becomes a person and a nation only becomes a nation over time, by making commitments and then by living up to them. Although the commitments may change, they are the foundational pieces of freedom, both for the self and for the nation. In this way, Rubenfeld’s theory of constitutional interpretation is deeply interpretivist, that is, it is deeply committed to knitting together materials from our constitutional text and history, to recapturing the principles to which the framers of constitutional text were committed, and then to analyzing how those principles must be understood over time.

Eisgruber’s book nods far more in the direction of noninterpretivism, but at the crucial point adopts a backward-looking interpretivism not wholly unlike Rubenfeld’s. At the core of Eisgruber’s book is a concern with ensuring impartiality in governance, and with judicial responsibility in so doing. Eisgruber advances this theory of democracy:

To qualify as democratic, a government must respond to the interests and opinions of all the people, rather than merely serving the majority, or some other fraction of the people. I will refer to this goal as impartiality.¹⁹

Eisgruber elaborates the theme of impartiality. Even though we may disagree about important matters, often of moral controversy, for democracy to work we must see morality as distinct from mere preference, that moral positions must be backed by moral reasons, and that such positions benefit from discussion and argument.²⁰ Moreover, when a debate is finished and a vote is taken, the losers must be able to see their loss as temporary.²¹ “In sum, if people have faith that institutionally structured political discussion is likely (over the long term) to produce moral progress, then their faith can enable

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¹⁹ Eisgruber, supra note 1, at 19.
²⁰ See id. at 55.
²¹ Id. at 56.
them to regard choices among contested values as impartial, and hence democratic."\(^{22}\)

Federal judges are ideally situated to ensure such impartiality. They are life-tenured, and thus relatively insulated from political pressure;\(^ {23}\) they must take moral responsibility for their decisions, both because they act in small groups and because they must give a public account of their decisionmaking (through judicial opinions).\(^ {24}\) Eisgruber frequently adverts to the importance of judicial responsibility. He criticizes judges who: "invoke history in order to deflect attention from justice" for "shirking the responsibility the Constitution assigns to them";\(^ {25}\) "attempt to justify controversial rulings by citing ambiguous precedents";\(^ {26}\) "veil their true reasons behind unilluminating formulae and quotations borrowed from previous cases";\(^ {27}\) are obsessed "with textual specificity," thus "obscuring the judgments [the Court] makes and so insulating them from effective public criticism";\(^ {28}\) "pretend they are not making political judgments themselves, and that their decisions were forced upon them by textual details or historical facts."\(^ {29}\) Again and again, Eisgruber accuses courts of obscuring questions of principle, of hiding behind, for example, invocations of tradition.\(^ {30}\)

But how should the Court reason about questions of principle? How should the Court interpret the "ambiguous moral and political language"\(^ {31}\) that Eisgruber correctly notes is at the heart of many hard constitutional cases? Here Eisgruber turns away from a noninterpretivist idea of the Court as disinterested forum for the development of constitutional principle, and toward the interpretivist idea of the Court as conduit of the people's principles. Here is what he writes:

The job of judges is to speak on behalf of the American people on (certain) matters of justice . . . .

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 may mean. In a democratic political system, judges engaged in judicial review cannot simply act on the basis of their own best judgments about justice; they must instead act on the basis of a conception of justice

\(^{22}\) Id.

\(^{23}\) Id. at 57-59.

\(^{24}\) Id. at 59-62.

\(^{25}\) Id. at 8.

\(^{26}\) Id. at 70.

\(^{27}\) Id.

\(^{28}\) Id. at 119.

\(^{29}\) Id. at 135.

\(^{30}\) See id. at 149, 153, 161.

\(^{31}\) Id. at 34; see also id. at 35, 39, 205, 207.
with which Americans in general could plausibly identify themselves.\textsuperscript{32}

Although Eisgruber sometimes invokes this hypothetical conception of the principles of the people ("plausibly" identify themselves rather than "actually" identify themselves),\textsuperscript{33} he does not mean the judicial task to be a kind of Rawlsian hypotheticalism. Rather, by "plausibly," Eisgruber means that the interpretation in any particular case must plausibly replicate the people's own judgments of principle. Indeed, if a judge feels her sense of justice out of sync with that of the people, "democratic principles require that she act on the basis of what she considers to be the people's best judgment about justice, rather than her own."\textsuperscript{34} Eisgruber occasionally uses language that suggests a less deferential and more judicially unconstrained posture when he writes of the Court's "constructing" the people's sense of justice.\textsuperscript{35} But more often, and more centrally, his formulation is of the Court seeking to ascertain, rather than to construct, "the American people's view of justice."\textsuperscript{36}

Although Eisgruber critiques judicial reference to history and tradition when such reference does nothing but obscure the difficult arguments of principle with which the Court must grapple, he has much kinder words for judicial use of history and tradition as evidence of the people's principles:

[H]istory matters specially to constitutional adjudication not because... judges have an obligation to preserve the past, but because historical argument can sometimes help them to represent the people's convictions about justice. More specifically, a sensitive examination of the historical record may help judges to test the connection between their own intuitions about justice and those held by the American people more generally.\textsuperscript{37}

He adds that when law departs from tradition in ways that plausibly raise liberty concerns, such departure should receive special judicial scrutiny.\textsuperscript{38}

\textsuperscript{32} Id. at 126.
\textsuperscript{33} See id. at 129.
\textsuperscript{34} Id. at 130.
\textsuperscript{35} See id. at 8, 121, 123.
\textsuperscript{36} Id. at 120. Sometimes Eisgruber's formulation is that the Court must speak about justice "on behalf of" the American people. See id. at 7, 57, 126. This formulation is ambiguous as to whether the Court must look to the people for an elaboration of principle or whether the Court constructs principle with which it believes the people would concur. The bulk of the book, though, especially in the discussion of history and tradition, is about capturing the people's principles rather than developing them for the people.
\textsuperscript{37} Id. at 110-11.
\textsuperscript{38} See id. at 147, 163. For a more instrumental use of tradition, see id. at 143 ("[T]radition may in some cases be a useful guide to the best means by which the judiciary can pursue constitutionally desirable ends.").
II. RUBENFELD'S IMPROPER PRIVILEGING OF THE CLASSICAL OVER THE MODERN

Throughout his book, Rubenfeld critiques conceptions of the human self that foreground present desire and awareness. He privileges conceptions that foreground how we come to know ourselves over time. The former, he says, make us unfree. The latter make us free. For example:

In personal life, [the conjunction of liberty with present will] puts freedom at war with character and with all the commitments, professional or intimate, in which we find ourselves engaged. It leaves us mystified, in other words, by the people we are, the monuments we have built, and the aspirations we pursue. 39

Quite to the contrary, I want to suggest, a conception of the human self rooted in diachronic commitments entails its own brand of mystification. The proper conception of what it means to be a human being involves a delicate balance between commitments and present desire. As T.S. Eliot wrote in “Ash Wednesday”: “Teach us to care and not to care/ Teach us to sit still.” 40 Using “caring” as a place-holder for commitment, and using “not caring” as a place-holder for action free from commitment, I want to suggest that “sitting still” is an apt metaphor for the balance that properly describes the human condition. Rubenfeld’s book is all about one side of this balance, and as this conception of the human self undergirds Rubenfeld’s argument for diachronic commitmentarianism in constitutional theory, it is worth spending some time to expose the conception as false.

We are both human and being. As human, our minds expose us to the pleasures and pains of history, of time. We anticipate with glee, we look back on fondly, we plan with enormous expectation. But we also regret, we mourn, we desire with unmet voraciousness. This being-for-itself allows us, perhaps paradoxically, to imagine what it would be like to escape time, to be the divine. Language is a good example of how this paradox works. Language allows us to name, to point toward, to overcome gaps between our situatedness and the world. It allows us, in other words, to point toward a condition in which we would not need language, in which all would be immediately known and apprehended. It allows us to represent the condition of the divine. But at the same time, language reminds us of our humanness, of the fact that we are not divine, of the fact that we need language to overcome, to mediate, to represent. Being-for-itself is teleological: it points toward (backwards or forwards). It is, in this way, “classical.” By which I mean: Think about Platonism, or Christianity, or Hegel. All involve conceptions that point human

beings toward a nonhuman end—Platonic forms; Christian salvation; Hegelian pure Spirit. These conceptions, and many others, are ways for we human corporeal beings to imagine ways out of our condition, to yearn toward the infinite.

We are also beings. As beings we are mortal, we are animals, we are born and die, our existence is contingent, it is being-in-itself. The modernists grasped this, and in various ways tried to explain how our classical self-consciousness grapples with the brute fact of our animalness. (Interestingly, some of these so-called modernists themselves have foundational conceptions of the human condition. Witness Marx’s theory of the inevitability of the collapse of capitalism and the ascension of the proletariat; witness Freud’s theory of the dominant force of the unconscious and of primary psychosexual positioning.)

Both classicism and modernism have fetishistic, mystifying extensions. For classicism, it is taking our humanness out of time. For modernism, it is reducing our humanness to our material existence. We are both material (and thus in time) and human (and thus, through our mind’s ability to imagine the divine, out-of-time). Reducing us to one or the other is a mistake, and it is a mistake I fear Rubenfeld makes in his book. As the various quotations above make clear, Rubenfeld privileges diachronic commitment over present desire. In the next section I critique Rubenfeld’s conception of freedom, which tracks this privileging. Here it is sufficient for me to have made a case for humans as both human and being. Neither can be given privilege of place. Such privileging constitutes mystification, or bad faith. Sartre refers to “the double property of the human being, which is at once a facticity [being in-itself, our corporeal being] and a transcendence [being for-itself, our human self-consciousness].” He adds, “These two aspects of human reality are and ought to be capable of a valid coordination. But bad faith does not wish either to coordinate them or to surmount them in a synthesis.”

The mystification of being-for-itself, to use Sartre’s terminology, is the extension of our human-ness (as opposed to our being-ness) over time, at the expense of our being in time—say, at the moment one is reading this sentence, or writing it.

Marx writes of the mystification that ensues when human beings forget that they are the origin of the value of commodities, and instead posit a “value” of the commodity coming from the commodity itself. Does not Rubenfeld engage in

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42. See Rubenfeld, supra note 1, at 95 (“Is there really nothing else that you, the reader, at this moment, the moment you are reading this sentence, would prefer to be doing?”).
just such mystification when he writes—"Many animals speak; man alone writes"? Does this not neglect the other half of the equation—that man is also an animal? Similarly, Rubenfeld writes,

There is no such thing as a "present person." In this sense, we can never properly say of ourselves, "I am." ... A person is, but always and only in the sense of being in being: in progress ...

Some things, like a circle or a rock or a stereo, may be what they are all at once, in the present. But not so persons.

But a person exists, not "always and only" as a being "in progress," but also as an animal being, as extant in the moment, as not self-conscious, as subject to forces both external (the elements) and internal (autonomic systems). We are both human and being, and it is a dangerous mystification to privilege either the classical yearning for the infinite or the modern apprehension of contingency.

III. CONSTITUTIONALISM AS COMMITMENT, BUT NOT NECESSARILY DIACHRONIC

Even if one agrees with my ontological claims in the prior section, critiquing Rubenfeld for privileging the classical over the modern in describing what it means to be a human being, one might still argue that constitutionalism requires commitment-over-time. Constitutionalism is about constraining the will of current majorities, one might argue, and these constraints are located diachronically, in commitments the American people make and hold themselves to over time. This is the view of many constitutional scholars, and it is Rubenfeld's and Eisgruber's view as well. As I set forth above, both authors make history and tradition a central reference point for constitutional interpretation. I believe this notion—that constitutionalism requires fidelity to prior law—is incorrect; rather, constitutionalism requires fidelity to higher law. To get to this conclusion, first let me say a word about freedom.

I have not said much about the title of Rubenfeld's book—Freedom and Time. Rubenfeld consistently advances the idea that human freedom is found only over time, through developing a self based in diachronic commitments. (He then extends this conception to the nation.) For example: "[F]reedom is always a struggle over the authorship of our commitments. Man must commit himself to be free." We can walk away from commitments, he says, but "we do

44. Rubenfeld, supra note 1, at 141.
45. Id. at 140.
46. And they vary in political disposition. See, e.g., 1 Bruce Ackerman, We the People: Foundations (1991); 2 Bruce Ackerman, We the People: Transformations (1998); Robert H. Bork, The Tempting of America: The Political Seduction of the Law (1990).
47. Rubenfeld, supra note 1, at 97.
not attain a true or pure freedom at such moments of rupture. On the contrary, we will be obliged to start again, to find other temporally extended engagements within which to live. Rubenfeld does not clearly work out this theory of freedom. He works out why he believes diachronic commitments are necessary for becoming a person, and necessary to constitutional self-government. But his additional claim that freedom is found only through diachronic commitments is less well-supported in the book. Perhaps Rubenfeld's is the Kantian notion that freedom is meaningless in the abstract, that freedom makes sense, conceptually, only when we speak of becoming free from something, from some constraints. And one is not free if the constraints are imposed from without. So by giving ourselves constraints (sometimes referred to as "law") we become free. But just as we cannot be truly free under another's boot, neither can we be free in an anarchic condition, because the oppression of disorder would take over. My objection is not to this well-accepted and defensible conception of freedom. It is to the privileging of diachronic commitments in locating freedom. Even if we accept the Kantian idea of autonomy (living under law one gives to oneself, either as an individual or as a nation), it still could be synchronic rather than diachronic.

The problem with diachronic theories of freedom, and with diachronic theories of constitutionalism, is that they obscure the responsibility of the interpreter, who is living and breathing and reading and writing and interpreting now, not in the past. Interpretation is necessarily a normative task, and it involves the acquisition of knowledge. There is no mechanical interpretation, because texts are codes of meaning and because human beings are not gods. Even the apparently simplest interpretation—a so-called "easy case"—relies on prior knowledge held by the interpreter that submerges the contested beneath the uncontested, that foregrounds the known and backgrounds the unknown. But the failure to foreground at all times the work we have done to acquire understandings of texts to make those texts appear easy is a failure worthy of the appellation "mystification" or "fetishism" or "bad faith." This is not to say that interpreters must reinvent the wheel. There are many reasons to establish rules of interpretation; like rules of the road, they coordinate behavior and save time in decisionmaking. But unlike rules of the road, rules of interpretation should always be transparent in their purpose. Interpreters—especially interpreters of legal texts that govern the real lives of real people—should take second-order values such as stability, predictability, and the like into account when interpreting, and thus should use rules of the interpretive road. But these rules should

48. Id. at 128.
always remain unmasked as rules, always open to revision and
overriding at any moment, always transparent in the substantive good
they serve so they can be exposed as disserving those or other values
as the case may be.49

In this way, any decision made today by a Supreme Court Justice to
"defer" to a decision made in a prior day must itself be normatively
justified now. I want to make two claims about why deference to
framers’ understanding, or history, or tradition, while helpful in
interpreting vague texts such as “equal protection of the laws” or
“freedom of speech,” can never be the appropriate touchstone of
constitutional interpretation. First: Why is reference to the past so
appealing in constitutional interpretation? Why do so many judges
and scholars see it not just as helpful, but as necessary? I believe
these arguments are based in a false theory of democratic legitimacy.
The argument begins (in liberal democracies, with elected, limited
government, rights, judicial review, etc.) from a premise of individual
self-government, a version of autonomy. But that more literal form of
self-government yields to “self-government” as metaphor: We elect
representatives to govern; they are our delegates; this is a republican
form of government; we must always remember that we are the
principals, they the agents. Our charters of government—be they the
higher law charter of the Constitution or the lower law charters of
laws, regulations, etc.—are reflections of our will as filtered through
our representatives. Text is not self-standing; plain meaning is in many

49. To some extent, my disagreement with Rubenfeld is about foreground and
background. I agree with Rubenfeld that history matters in constitutional
Rev. 1749, 1763-64 (2003). Rubenfeld agrees with me that current judicial
interpreters of the Constitution must exercise current normative judgment. Here is
his clearest statement on this:

Constitutional interpretation is irreducibly normative. The foundational
paradigm cases give a decisive structure to constitutional law, but this
structure must still be elaborated, and in this elaboration there is no escaping
the exercise of normative judgment. Nor is there a reason to want to escape
from such judgment, which is a necessary part of giving any commitment
meaning.

Rubenfeld, supra note 1, at 200. The difference between Rubenfeld’s theory and
mine is that Rubenfeld insists on history giving a “decisive structure” to constitutional
law, and he insists on this based on the principal argument he makes throughout the
book, that constitutionalism is about a nation’s developing and living up to its
commitments-over-time. Rubenfeld foregrounds the ways in which constitutional
interpreters are bound, and backgrounds the current normative judgments. He says
that a commitment provides “a reason to act,” id. at 117, that such a reason is
“weighty,” id. at 102, that commitments indeed exert “strong normative force . . . over
time.” Id. at 125. In so arguing, Rubenfeld aligns himself with legal theorists such as
Fred Schauer, who has written elegantly on the rule-ness of law, on how a rule (and
law) displaces current all-things-considered normative judgment by providing so-
called content-independent reasons to act. See Frederick Schauer, Playing by the
Rules (1991). My argument that Rubenfeld improperly foregrounds the diachronic is
directly parallel to my critique of Schauer’s work in Abner S. Greene, The Work of
interesting ways the true opposite of originalism; rather, text is a window into what our representatives did, what policies/principles they wished to advance; and what they did is what we did, we the principals/authors, we the legitimate source of power, we the sovereign people. Thus, originalism (as thought of intelligently) is a legitimating device: It acknowledges that texts must be interpreted (i.e., there is no “plain meaning”), but that the authorized interpreters should view their role as recapturing what the principals (us via our representatives) wanted. That makes sense for wills, for contracts, and many times for statutes. So why not for constitutions? Or for our Constitution?

One response is that even on originalist terms, the framers didn’t want future interpreters to be originalists, and that is why they wrote so many abstract moral rights at various times into the Constitution’s text. But the response on which I want to focus is different. Originalism, I believe, is based on a false view of democratic legitimacy. For a current generation of Americans to defer to a prior one is to assume that we are bound to obey their understandings. But we never consented to such obedience. To alienate my sovereignty to a prior generation assumes a strong version of duty to obey based in the “born here, reside here, accept benefits, therefore are bound” argument of political obligation. That argument is not quite as slippery as the “consent” argument (which is notoriously impossible to prove), but it is close to being as bad. As I show in the next section, there is a different view of constitutional interpretation that better legitimates our duty as citizens to obey the law, and it is based in a generational-participation model of citizenship.

Second: A somewhat different take on the democratic legitimacy argument might accept what I have just written, but nonetheless argue that for unelected life-tenured federal judges legitimately to assert

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52. See Kent Greenawalt, Promise, Benefit, and Need: Ties That Bind Us to the Law, 18 Ga. L. Rev. 727, 754-64 (1984); Joseph Raz, The Obligation to Obey: Revision and Tradition, in The Duty to Obey the Law, supra note 51, at 159, 172; Sartorius, supra note 51, at 144, 155; A. John Simmons, The Principle of Fair Play, in The Duty to Obey the Law, supra note 51, at 107; M.B.E. Smith, Is There a Prima Facie Obligation to Obev the Law?, in The Duty to Obey the Law, supra note 51, at 75, 81-83, 85; Richard A. Wasserstrom, The Obligation to Obey the Law, in The Duty to Obey the Law, supra note 51, at 17, 37.
interpretive authority, they must view themselves as bound by constraints outside their own moral or political reasoning, and what better place to locate such constraints than in the understandings of those who drafted (or ratified) the constitutional text. This argument is wrong for two separate reasons.

First, federal judges are not philosophers who alighted on our nation’s soil and assumed interpretive authority. They are placed on the bench via a transparently political process involving the President and the Senate. Their jurisdiction is controlled by federal law. And Congress has the power to impeach them. So although they are not subject to case-by-case check (at least the Supreme Court is not) and although they do not have to stand for election or reelection, federal judges are still politically checked in three important ways, which should be sufficient to buttress their democratic legitimacy. Moreover, as Eisgruber makes clear, the disinterestedness of federal judges fits well with most understandings (originalist and otherwise) of our constitutional structure. The checking value of disinterested federal judges on political institutions is a further argument helping legitimate the federal courts, wholly apart from whether they look to history when interpreting constitutional text.

Second, insisting that judges interpreting today defer to understandings of prior generations on abstract terms such as “equal protection of the laws” or “freedom of speech” obscures the current normative assessment that today’s judges must necessarily make. There are no mechanical ways of recapturing framers’ intent, or history, or tradition. Judges may try to make history seem like math, but it’s not, especially in the context of interpreting abstract texts.

Nonetheless, understanding historical sources can be helpful to a judge’s current normative interpretive task, even if it is not required by democratic legitimacy. There is no such thing as interpretation in a vacuum. A judge living today cannot decide whether (say) affirmative action programs in public higher education do or do not violate the Equal Protection Clause by gazing into the sky or down to the ground. He or she will have been raised in a certain place, at a certain time, with certain cultural referents. Reading and understanding how such cultural referents came into being cannot but help inform the judge’s necessarily normative judgment.53

53. Rubenfeld maintains that just as a nation lives according to rules of the road set down earlier—for example, rules regarding how we select our federal officials, how they make laws, etc.—so does a nation live according to principles of justice, instantiated in the Constitution, set down over time. See Rubenfeld, supra note 1, at 75-83. To some extent Rubenfeld and I agree: We agree that judges interpreting today cannot help but understand abstract terms such as “equal protection of the laws” or “freedom of speech” in the context of their world, which includes their understanding of the culture in which they live, which includes an understanding of history. But Rubenfeld is not simply making this descriptive point about interpretation. He is making a normative argument about what constitutionalism (at
Both Rubenfeld and Eisgruber attack originalism. But both ask federal judges to look to history and tradition in interpreting the Constitution. As discussed above, for Rubenfeld this is central to his diachronic commitmentarian theory of the Constitution, and he applies it via his paradigm-case theory. For Eisgruber, the look to history and tradition is necessary for judges to speak on behalf of the people’s principles. Thus, although both have no use for the less intelligent forms of originalism, both are still wed to constitutionalism as prior law rather than constitutionalism as higher law, and that is the claim I have challenged in this section.

IV. A GENERATIONAL-PARTICIPATION THEORY OF CONSTITUTIONAL BINDINGNESS

Constitutional theories based in diachronic commitmentarianism are one example of a kind of rule-based thinking that pervades many areas of legal scholarship. Law—whether it is the law of a statute, the framers of a constitutional provision, the historical understanding of such a provision, or the Court’s precedent—commands respect and obedience because it constrains current behavior in a way that is legitimate and that advances second-order values such as stability and predictability. But if one can show that law, in all these forms, lacks a foundation in democratic legitimacy, then law’s claims would have to be reconsidered.

I believe that such a case against law’s prima facie legitimacy can be made. Here I can only sketch the case. Law claims a fullness, a bindingness on present actors in the name of external constraints. Those constraints are of various sorts; all are justified, though, through related theories of democratic legitimacy: We the people are sovereign, but we the people have authorized various other persons—Constitution-writers and ratifiers, courts, and legislatures—to make law on our behalf, and such law is presumptively legitimate, it presumptively binds. But what if this presumption proves false? What if law’s fullness proves to be pock-marked, to be a show of fullness behind which are tenuous claims of bindingness? What if throughout our legal system one could show that at virtually every turn, legitimacy must be found in law’s exceptions, in its limitations, in its leavings-alone? What if in addition to such legitimation through negation, law were legitimated only through a more hands-on, presentist notion of consent through participation?

The argument for this can be summarized as follows: Autonomy of the self is the baseline proposition. One cedes autonomy for various reasons, but unless one has ceded autonomy knowingly and (least ours) should be, and on that point, I have tried to show throughout this essay why I believe the claim improperly privileges the classical, the teleological, the diachronic.
voluntarily, claims by others over the self are illegitimate. Sometimes such consent exists—say in a private organization, or maybe a small town in which the founders are all alive. But most often legitimation-through-consent is merely fictional, and thus cannot undergird political obligation. The next most-offered theory for such obligation is based in residence and receipt of benefits. Reciprocity is the idea: If you live in a place, and remain voluntarily, and receive benefits, you have tacitly consented to law’s authority, or even if tacit consent is discarded as a useless concept, it is just to bind you to law’s authority under such circumstances. This is a complex issue. The principal point against reciprocity as sufficient to undergird political obligation is that whatever claims of consent or justice one can make from residency and benefits, they are too weak to support law’s plenary claim for obedience. A more promising line of justifying law’s obligation is through second-order claims; namely, without law, we would lose the stability, order, and predictability that we all desire. We are no more likely to retain autonomy in a law-less state, for there we fall subject to the ravages of disorder. Such second-order claims, however, do not provide a theory of legitimacy; rather they avoid the question. Moreover, one can account for second-order concerns in an all-things-considered view of obligation. That is, if one takes the view that law does not legitimately obligate, one can still argue that it is most often correct to obey law. Here one would have to consider many factors, such as the justness of the system, both procedurally and substantively, the risk of error from disobedience, the likelihood of others following suit, etc. It is correct to ask whether such all-things-considered judgments are more or less likely to lead to overall societal well-being than following the presumption that law obligates. I believe that question can be answered in favor of scrapping a plenary theory of law’s obligation and adopting instead a reticulated view of case-by-case judgment. But I will say no more about that in this essay.

The case against law’s prima facie legitimacy (in all the forms discussed here, most centrally including the grip of the past) extends both to citizens’ obligation and to interpretive theory. Just as I am not morally bound to obey law (not statutes, not the Constitution or its framers or interpreters), so institutional constitutional interpreters should view their interpretive role as plastic, plural, and normative. Plastic: Institutional constitutional interpreters are not bound by any particular source of constitutional meaning, for no source has the stamp of legitimacy. Plural: Institutional constitutional interpreters are many. The Supreme Court is just one among many. For various second-order reasons, it is often correct for other institutional constitutional interpreters to follow or “obey” the Court. But it is not

54. See supra note 51 and accompanying text.
55. See supra note 52 and accompanying text.
required by political morality, nor by institutional role. Normative: As I have argued throughout this essay, interpretation is irreducibly normative, and normativity is irreducibly current. One must look to external sources to interpret texts (this is a conceptual point; there is no such thing as interpretation otherwise), but one is not bound by any proper theory of democratic legitimacy to do so in any particular way.

Having said all this, I want to add a few words about a way in which legitimacy can come to the American constitutional system. Consider a spectrum with one’s own autonomous decisions at one end, and displacement of authority to long-dead people at the other. A generational theory of constitutional interpretation can bridge this gap. I might not myself participate in any court case or any legislative debate that results in an act of constitutional interpretation. But if I am alive, and am able to vote, speak, write, and petition for redress of grievances, I have the capacity to participate, along with others of my generation, in constitutional creation and interpretation. I cannot reasonably complain when law is created or interpreted that binds me. Although this theory of generational participation needs much working-out, and although it cannot provide the pure legitimacy that consent demands, I believe it is the strongest available legitimating tool to undergird political obligation in our system and to provide a solution to the plurality problem of constitutional interpretation. On this view, a political actor (say, a Governor) should give far more weight to a Supreme Court precedent that she had an opportunity to influence than to a precedent from a prior generation. This means that constitutional issues will have to be revisited, rethought, reaffirmed or edited or scrapped. Diachronic commitments may play a role in such rethinking, but always the voice and authority of those alive (those under threat of being bound by law) will be in the foreground.”

56. For Rubenfeld’s critique of Jefferson’s argument for generational constitutional re-creation, see Rubenfeld, supra note 1, at 18-26. To the extent that Rubenfeld’s anti-Jeffersonian argument is based in a critique of presentism in favor of diachronic commitmentarianism, I have already responded at length in the text. Rubenfeld also claims that Jefferson’s idea has a reductio ad absurdum problem, namely, that the logic of Jefferson’s position dictates that even a generation is too long, i.e., that only the will of the people at the present moment can legitimately bind. This critique fails to see generational reinterpretation (or re-creation, I am not bound to one formulation over the other) as a way of bridging the gap between two situations, each of which would lead to a loss of autonomy: pure anarchy, in which law binds only if it is the subject of unanimous ongoing consent, which it never is; and diachronic commitmentarianism, in which we are constantly ceding our autonomy to long-dead authorities. A generational-participation theory of constitutional interpretation provides a middle ground. If it too does not fully legitimate authority, (a) it comes closer to legitimating authority while retaining autonomy than does pure presentism or diachronic commitmentarianism, and (b) it recognizes more openly the failure of law’s claims to fullness and the need to view law as open to exceptions and change, continuously, for law ever to have a chance legitimately to bind.
V. THE ANXIETY OF INFLUENCE: MISREADING TO CREATE A FALSE CONTINUITY

In his seminal work *The Anxiety of Influence*, Harold Bloom uses the term “misprision” to refer to a poet’s misreadings of influential texts, misreadings in the service of freeing the poet from the grip of the past.\(^57\) I believe that much of American constitutional law, as set down in Supreme Court opinions, as well as American constitutional theory, such as Rubenfeld’s and Eisgruber’s books, engage in a different sort of misreading. Rather than misreading to break from the past, American constitutional authors misread to create a false illusion of continuity, to free themselves from the grip of the present. It is hard to argue for the constitutionality of (say) racial affirmative action programs by pointing to justice-based distinctions between invidious and benign racial classifications. By “hard” I do not mean it is hard analytically; actually the justice-based case for racial affirmative action is fairly easy to make. Instead, by “hard” I mean hard for interpreters of the American Constitution to free themselves from the grip of the past, from the notion that they are unauthorized to engage in current normative argumentation, from the (false) idea that their interpretive acts are legitimate only insofar as they are bound to prior authors, to framers, to prior Courts, to the people more generally.

Our constitutional text may be fairly continuous, but our constitutional law is not. It is marked by dramatic shifts, by (mostly) real advances in the name of justice. These advances have not been made by dead people, nor by living people in the name of the dead. They have been made by each generation, as the people, the political actors, and the Court have grappled with moral concepts such as “equal protection of the laws” and “freedom of speech.” The responsibility for interpreting such concepts has rested in each interpreter, despite the many ways in which interpreters have sought to deflect responsibility, often in the name of an erroneous conception of constitutionalism as prior law.

\(^{57}\) See *supra* note 3 and accompanying text.
Notes & Observations