

2001

Professor Eisgruber, the Constitution, and the Good Society

Sotirios A. Barber

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Sotirios A. Barber, *Professor Eisgruber, the Constitution, and the Good Society*, 69 Fordham L. Rev. 2151 (2001).

Available at: <https://ir.lawnet.fordham.edu/flr/vol69/iss5/25>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

PROFESSOR EISGRUBER, THE CONSTITUTION, AND THE GOOD SOCIETY

*Sotirios A. Barber**

One can argue on several grounds that the Constitution is an instrument for pursuing an American approximation of the good society, and that the Constitution should be interpreted accordingly.¹ Publius understood the Constitution in this way; so did John Marshall and Abraham Lincoln.² Though conceptions of liberty and justice, and therewith constitutional rights, are integral to any view of constitutional ends, the ends of government implicate the power of government. So the constitutionalism of Publius, Marshall, and Lincoln is concerned more with ends and power than with exemptions from power in the form of rights against government. I call this view of the Constitution a benefits view, or a positive view, or a welfarist view of the Constitution, as opposed to either a negative or a proceduralist view of the Constitution. Because I'm convinced that purely proceduralist and purely negative constitutionalism fail on both textual and historical grounds, and that neither makes sense philosophically,³ I think a welfarist view, acknowledged or not, is everyone's view of the Constitution.

Still, many profess a constitutionalism concerned most with restrictions on power, like checks and balances and negative constitutional liberties. Opposite the benefits model is a constitution that promises nothing beyond a representative democracy constrained only by rights, as originally conceived, and by the structural principles of representation and deliberation. Between this last view and a constitutionalism of ends is the view that promises benefits, but only as derivative of constitutional structures and negative liberties, not as constitutionally fundamental. This third view might hold that because democracy (the presumed fundamental good) cannot work where most people are too dependent on corporate power to have a will of

* Professor of Government, University of Notre Dame.

1. See Sotirios A. Barber, *On What the Constitution Means* ch. 3 (1984).

2. *Id.* at 40, 72-75, 212; see also Sotirios A. Barber, *Judicial Review and The Federalist*, 55 U. Chi. L. Rev. 836, 839-44 (1988).

3. See Sotirios A. Barber, *Welfare and the Instrumental Constitution*, 42 Am. J. Juris. 159, 160-73 (1997).

their own, the Constitution implicitly mandates the right to a job, a minimum wage, protections for unions, and like benefits.

I am not sure how to classify Professor Eisgruber's view of the Constitution; his article for this symposium sends a mixed message. He begins by criticizing people like Michael Sandel, Mary Ann Glendon, and Ronald Dworkin for urging levels of civic virtue and engagement beyond reasonable expectations and constitutional possibilities.⁴ In the course of this criticism, he invokes the values of liberty and pluralism largely to depreciate the whole idea of a constitutional duty to pursue the good society. He contends that the Constitution does and must guarantee the freedom to live bad lives. He claims that it actually undermines civic virtue by establishing a large republic that cannot help but reduce citizenship to paying taxes and casting inconsequential ballots. This part of his message aligns him with those who contend that the Constitution enables popular majorities to do what they want, good or bad, from virtue or vice, so long as they do not offend constitutional restrictions on their power.

But there is another message in Professor Eisgruber's paper. He cites with approval the positive constitutionalism of Martin Diamond and the perfectionist liberalism of Joseph Raz. He also offers his own suggestions regarding virtue and the good society and the obligation of constitutional government to foster one and pursue the other. In the same paragraph where he says that there are "many ways to live a good life" and it is "important that individuals should be free to live whichever . . . way of life most appeals to them," he also says that "government can, and should, take stands . . . against intolerance, laziness, materialism, and selfishness, to say nothing of violence and criminality."⁵ Next comes a bolder assertion. He says, quite matter-of-factly, that a good life is possible without any particular religious convictions. And from this presumably moral and/or scientific fact about an element of the good life, he infers, in welfarist fashion, that "[a] good constitution must therefore include very broad principles of religious freedom."⁶ By his account, these principles are broad enough to protect both religion and atheism, though not so broad as to shelter religious-based violence and unspecified forms of intolerance. Later, he involves government in the promotion of an associated virtue; he says, correctly I think, "laws and institutions that

4. Christopher L. Eisgruber, *Civic Virtue and the Limits of Constitutionalism*, 69 *Fordham L. Rev.* 2131, 2131-37 (2001). I will not comment here on the specifics of Professor Eisgruber's comments on these other writers. What concerns me is where he places his emphasis on the larger question of the Constitution as an instrument of the good society. This last question is the prior question. Conceptions of the good society become important to constitutional theory once it is recognized that the Constitution is not at all indifferent to the good—that it is straightforwardly instrumental to a particular theory of the good.

5. *Id.* at 2133-34.

6. *Id.* at 2135.

uphold religious freedom will encourage citizens to be tolerant of other religious faiths.”⁷ These statements draw a rough constitutional line between religions, contrary to his statement at one point that there is no way to draw such a line.⁸

Which is it, then? Does the Constitution foster some virtues or doesn't it? Does it envision some good states of affairs or doesn't it? Professor Eisgruber is aware of the tensions in his position, and he tries to deal with them. He submits that while the Constitution does foster virtues like toleration and law-abidingness, the burdens and expectations of this vision are *modest*, modest when compared to the civic virtues called for by Sandel, Glendon, and others.⁹ Professor Eisgruber thus reveals his debt to Martin Diamond. Diamond discussed how the American Constitution follows early-modern liberal philosophers who rejected a nobler civic republicanism for the bourgeois goals of civil peace and commodious living.¹⁰ But, in the article that Eisgruber approvingly cites, Diamond contended that, while rejecting the means of ancient constitutionalism and despite the modesty of its ends, American constitutionalism is no less connected to a theory of virtue and the good life than the constitutionalism of Aristotle.¹¹ Diamond believed, moreover, that understanding the American Constitution—and defending it—requires the questions and categories of Aristotle's constitutional analysis—questions that center on the relationship of politics and ethics and include what we would call government's role in promoting attainable conceptions of virtue and the good life.

Diamond defended the nation's bourgeois constitutionalism from its critics. In doing so, he assumed an obligation that is a continuing one for supporters of the Constitution, for its expectations are not all that modest or are not seen as modest by everyone. Observers on the religious right can claim that decisions like *Roe v. Wade*¹² and *Romer v. Evans*¹³ consign believers to second class citizenship.¹⁴ Not only are they taxed by a regime that protects what they see as abominable practices, the regime is constitutionally disabled from representing

7. *Id.* at 2137.

8. *Id.* at 2135.

9. *Id.* at 2137-38.

10. Martin Diamond, *Ethics and Politics: The American Way*, in *The Moral Foundations of the American Republic* 75, 81-85, 89-90 (Robert H. Horwitz ed., 3d ed. 1986).

11. *Id.* at 98-108.

12. 410 U.S. 113 (1973) (holding that abortion is protected as a privacy right under the Constitution).

13. 517 U.S. 620 (1996) (stating that religious objections are not a sufficient purpose for denying rights to homosexuals).

14. For a representative statement of this position, see Russell Hittinger, *A Crisis of Legitimacy*, in *The End of Democracy? The Celebrated First Things Debate with Arguments Pro and Con and "The Anatomy of a Controversy" by Richard John Neuhaus* 18-29 (Mitchell S. Muncy ed., 1997).

their faith-based morality as such—the regime therefore cannot represent *them* to the extent that their religion constitutes their identity. Believers may be right to feel this way, though I would blame not the Court but the Constitution. Believers would surely find no modest affront in Professor Eisgruber's statement that an atheist can live as well as a person of faith and that the Constitution must therefore protect both atheism and religion. A constitutionalism that protects religion and atheism on *that* basis is a constitutionalism that offends a believer's deepest convictions. Professor Eisgruber's problem is how to justify his assumptions about virtue and the good life, ideally to antiliberals, but at least to himself and other self-critical liberals.

How then can one defend a constitutionalism that, by Professor Eisgruber's account, depreciates religion as foundational to a good life and, by Diamond's account, substitutes bourgeois acquisitiveness, commerce, and attendant virtues and goods like honesty, industriousness, equal opportunity, and the commodious life of the body? There is an answer to this question in Diamond's work and in the Straussian tradition it represents. And the answer is worth debating. But this debate cannot proceed among constitutional theorists who deny its relevance for them. If Professor Eisgruber appreciates the need for this debate, others will not if they are persuaded that the Constitution is connected either to no view of virtue and the good or only to a relatively unimposing view of virtue and the good. I limit my remaining comments to what Professor Eisgruber says to encourage this view.

Professor Eisgruber offers three arguments in support of his contention that "constitutional norms and institutions cannot themselves induce a community to live well."¹⁵ The first argument starts with two moral propositions: "that there are many ways to live a good life" and that "individuals should be free to live whichever such way of life most appeals to them."¹⁶ He then adds (on the welfarist assumption that constitutional government should protect the good) that "we will be able to protect the pursuit of those [diverse] ways [of living a good life] only by establishing rights so broad that they will also protect some unethical behavior."¹⁷ Professor Eisgruber credits this argument to Joseph Raz,¹⁸ but Raz, as we shall see, has a different emphasis.

In Razzian manner, Professor Eisgruber distinguishes the (true) value of moral pluralism from the (illusory and false) value of moral neutrality; he denies in particular that American law is neutral toward

15. Eisgruber, *supra* note 4, at 2133.

16. *Id.* at 2134.

17. *Id.*

18. *Id.* (citing Joseph Raz, *The Morality of Freedom* 418-19 (1986)).

racism as a way of life.¹⁹ The point he seems to miss is that by discouraging racism, even outlawing many long-standing racist institutions, American law simply does not leave individuals free to live “whichever . . . way of life most appeals to them.”²⁰ Pluralism in America (the “many ways” of living a good life) is a limited pluralism. And the limiting principle, for Raz the substantive good of “personal autonomy,” can and does justify government’s discouraging immoral and wasteful lives and promoting both the capacity and the environment for personal autonomy as an essential element of personal well-being. As Raz conceives “personal autonomy,” it does place some limits on the state’s use of coercion to achieve the good, but it does not preclude other means, and, more to the point, it (affirmatively) *obligates* the state to promote the well-being of people.²¹ Raz would thus rescue “paternalism” from its bad name among some liberals. The Razzian state is obligated to pursue the material and social-psychological “conditions of autonomy.”²² These conditions include “a public culture” that cultivates private “tastes” and “pursuits” conducive to autonomy itself.²³ Raz exposes the teeth of his position when commenting on the state’s posture toward communities whose ethnic or sectarian cultures clash with his autonomy-promoting “public culture.” “[I]n the eyes of liberals like myself,” he says, some of these antiliberal communities harm their children by “denying them the education and the opportunities to thrive outside the community.”²⁴ “In such cases,” says Raz, the state can justly act “to assimilate the minority group,” gradually if possible but “by force of law” if need be.²⁵

With all this, Professor Eisgruber’s reliance on Raz seems misplaced. It is hard to see how Raz’s thought supports Professor Eisgruber’s view that there is no way to formulate, and no institution to enforce, a line between good and bad religions.²⁶ Unlike Raz, Professor Eisgruber gives insufficient emphasis to the *-ism* in pluralism. As an *-ism*, pluralism is often opposed by racists and religious fundamentalists. It is an *-ism* that is imposed on them by a regime that coercively taxes and conscripts them partly to protect practices and persons they abhor, a regime that is constitutionally estopped from giving legal expression to values by which they define

19. *Id.*

20. *Id.*

21. Raz, *supra* note 18, at 414-15.

22. *Id.* at 415.

23. *Id.* at 421-22.

24. *Id.* at 423-24.

25. *Id.* at 415-17, 424. On Eisgruber’s point about the couch potato, government does not have to prohibit such a life in order to actively promote richer lives through means that range from systems of tax-funded schools to subsidies for the arts and sciences and even the licensing of broadcasters. Eisgruber, *supra* note 4, at 2135-36.

26. Eisgruber, *supra* note 4, at 2135.

themselves. Liberals should find it increasingly harder to deny the fact of these impositions. The question becomes, as I have said, whether liberals can justify their impositions on antiliberals—whether they can show, at least to themselves, that liberal autonomy is a real value, morally superior to antiliberal values like racial purity and pious submission to (what some version of some holy scripture asserts to be) the will of God.

A second reason for Professor Eisgruber's reservations about constitutional government's promotion of the good has to do with alleged constitutional disincentives to the good. Professor Eisgruber begins this part of his paper by echoing Antifederalist thought: "[L]arge democracies," he says, "will inevitably have an aristocratic or oligarchic element" that leaves few citizens "able to serve as public officials" and reduces most citizens to voters and taxpayers—offices whose incentives "lead [citizens] to be selfish and lazy rather than public-spirited and active."²⁷ He describes voting in large districts as a "waste of time" for the individual voter and, because balloting is secret, an incentive to self-interested, socially unaccountable behavior, as is attested by the tendency of voters to "vote their pocketbooks."²⁸ He describes paying taxes as a burden that "inspires resentment."²⁹ But this part of his story also has another side. Whatever his personal perception of voting and paying taxes, he admits that they can be construed differently: when "ordinary citizens" do "speak out in public fora," he says, "they often brandish these roles [voter and taxpayer] to certify their political authority."³⁰ And in the end he seems to accept "policy-making . . . by [professional] elites"³¹ and the disincentives to active and public-spirited citizenship as a price that is both unavoidable and worth paying for government on a national scale, government of the kind he apparently thinks the nation needs.³² However one construes Professor Eisgruber on the disincentives to good citizenship, he hardly shows with this argument that constitution-making and maintenance can be separated from the concern for virtue and the good society. At most, he questions the bourgeois conceptions of citizenship and well-being (manifested as voting one's pocketbook) that Diamond showed the Constitution connected to.

Professor Eisgruber suggests a third argument for depreciating constitutional government as instrumental to the good. His thematic reliance on this third argument is less than one finds among negative

27. *Id.* at 2137.

28. *Id.* at 2138.

29. *Id.* at 2139.

30. *Id.* at 2137.

31. *Id.* at 2140.

32. *Id.* at 2143-44.

constitutionalists generally. But it is an element of his thought,³³ and the weight accorded it by others warrants further comment on it here. The argument I refer to concerns the *reasonableness* of different lives. I will use Professor Eisgruber's words to describe this argument: he proposes that because "people quite reasonably disagree about what counts as virtue," constitutional government should leave people "free to live whichever such way of life most appeals to them."³⁴ I have already shown that Professor Eisgruber is not serious about the second part of this proposal; it contradicts what he says about violent religiosity and racism. I want now to comment on the part of this argument that deals with the reasonableness of disagreement. How are we to understand the reasonableness of disagreement? What follows from it about the role of constitutional government?

I note first that in the end, Professor Eisgruber obligates constitutional government to support not (1) "whichever . . . way of life most appeals to [people,]"³⁵ but only (2) "lives that a . . . people might reasonably desire to lead."³⁶ The difference between (1) and (2) is, of course, no small one. A constitutionalism that supports only reasonable lives supports little more than lives that are reasonable to each other—hence Lincoln's famous statement of pride in a government that clears "the paths of laudable pursuit for all."³⁷ Diverse pursuits, yes; but all laudable (or at least either useful or harmless) from one holistic perspective. Diversity, yes; but within a larger constitutional unity. Professor Eisgruber himself reiterates his long-standing advocacy of this constitutional unity toward the end of his paper when approving the decision in *Board of Education of Kiryas Joel Village School District v. Grumet*.³⁸ He states that "government ought to treat Americans as capable of flourishing together as a unified political community, rather than as a conglomeration of separate and perhaps antagonistic sub-groups."³⁹ From this it would appear that reasonable disagreement about how to live is easily compatible with government's promoting certain goods and virtues, like political integration and its social preconditions, like religious moderation (or indifference?).

A closer look at reasonable disagreement reveals quite a bit of unity among persons who reasonably disagree. Let me develop this thought

33. *Id.* at 2133-34.

34. *Id.* at 2134.

35. *Id.*

36. *Id.* at 2135.

37. Abraham Lincoln, From the Message to Congress in Special Session (July 4, 1861), in *The Life and Writings of Abraham Lincoln* 665, 674 (Philip Van Doren Stern ed., 1940).

38. 512 U.S. 687 (1994); Eisgruber, *supra* note 4, at 2145 (citing Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 *UCLA L. Rev.* 1297 (1994)).

39. Eisgruber, *supra* note 4, at 2145.

in terms of our question. We are asking whether constitutional language, tradition, and other considerations justify talk of substantive constitutional ends as elements of the good society, like tolerant citizens and the general welfare. Some say no, claiming that reasonable people can disagree about what the general welfare means and even whether tolerance is a good. But if reasonable disagreement is disagreement among people willing to exchange reasons for and against some proposition, like whether the bourgeois life is best for most people today, reasonable disagreement cannot be a reason for abandoning the pursuit of truth. Rather, reasonable disagreement is the instrument for conducting that pursuit. Moreover, as Michael Moore has proved, reasonable parties presuppose demonstrable right answers.⁴⁰ Reasonable parties thus assume their fallibility about, and therefore the nonsubjective existence of, things like justice and the general welfare. The apparent willingness of reasonable parties to give evidence for, and consider evidence against, their initial position is evidence that their aim is, or at least could be, truth, not self-assertion. Each acts, in other words, as if the truth that they jointly pursue is worth more than its hegemony over the other party. They also act as if good-faith give-and-take toward reflective equilibrium is the method for pursuing the truth. That is quite a lot of agreement, along lines of both substance and method, too much agreement to call off the debate as either fruitless or meaningless.

I do not deny that there are disagreements and parties other than the reasonable kind. Nor do I deny that prudence or even brotherhood counsel patience with those who walk away or threaten violence. But I see no compelling reason of principle to call these people reasonable. And if the partisans of reason have obligations to the parties that walk away or threaten violence, the obligation is a limited one. Lincoln had his limits, Raz has his, and so does Professor Eisgruber, albeit sometimes despite himself.

In any case, Diamond had an answer for reasonable people who cannot accept the Constitution's bourgeois reasonableness. That reasonableness is politically foundational in America, or so Diamond insisted. But he was also convinced that the foundation supports, and in turn is supported by, higher human goods. Among these higher goods he listed those associated with religion—*moderate, privatized* (or, if you insist, *Americanized*) religion. He also included virtues and goods more important to him—those associated with science and philosophy.⁴¹ Sandel, Glendon, and others reject Diamond's answer. Professor Eisgruber seems attracted to it. The debate is worth pursuing, and by constitutional theorists, for its constitutional relevance is, in the end, undeniable. I hope the party that wins is the

40. Michael S. Moore, *Metaphysics, Epistemology and Legal Theory*, 60 S. Cal. L. Rev. 453, 481-83 (1987).

41. See Diamond, *supra* note 10, at 103-04, 107.

party with the best argument, though I concede that the issue at bottom is what "best argument" means.

