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# Constitutional Self-Government: A Reply to Rubenfeld

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# CONSTITUTIONAL SELF-GOVERNMENT: A REPLY TO RUBENFELD

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Professors Flaherty, Fleming, Greene, and Rubenfeld have offered insightful comments and criticisms regarding my book, *Constitutional Self-Government*.[1] I am grateful to them for their essays and to the *Fordham Law Review* for putting together this symposium.

In this brief reply, I take up to two arguments that, if not addressed, might leave readers with a mistaken impression of my views. It is tempting, of course, to answer other points made by my critics, but I have already had my say at some length—not only in *Constitutional Self-Government*, but in my essay here[2] and in a lengthy "Reply to Critics" published in the *University of San Francisco Law Review*.[3] My efforts to improve upon those arguments will have to await another day, when I might at least muster fresh formulations, if not better ideas.

## I. A MEANINGLESS ESTABLISHMENT CLAUSE?

Early in his essay, Jed Rubenfeld contends that my theory allows judges—and Americans more generally—to ignore constitutional commitments with which they disagree. By way of example, he imagines a "federal statute that establishes Christianity as the national religion."[4] He supposes that, if "the statute accurately reflects the moral judgment of living Americans,"[5] then my theory would direct the Supreme Court to uphold it, regardless of its apparent inconsistency with the plain text of the Establishment Clause.

This argument misrepresents my position. My theory does not license judges or other Americans to ignore constitutional provisions with which they disagree. Instead, my theory maintains that "the Constitution calls upon Americans to exercise their own best judgment about the principles it incorporates."[6] Hence, Americans

1. Christopher L. Eisgruber, Constitutional Self-Government (2001).
2. Christopher L. Eisgruber, *Dimensions of Democracy*, 71 Fordham L. Rev. 1723 (2003).
3. Christopher L. Eisgruber, *Constitutional Self-Government and Judicial Review: A Reply to Five Critics*, 37 U.S.F. L. Rev. 115 (2002).
4. Jed Rubenfeld, *Of Constitutional Self-Government*, 71 Fordham L. Rev. 1749, 1751-52 (2003).
5. *Id.* at 1752.
6. Eisgruber, *supra* note 1, at 42.

must make their own judgments about what counts as an "establishment of religion." They need not (and, indeed, ought not) defer to the framers' opinions about what counted as an "establishment." But though their interpretations will be sensitive to their (changing) convictions about justice, Americans must nevertheless offer interpretations of the concept of "establishment." They cannot ignore that concept in favor of some more abstract concept, such as "justice," even if, per Rubenfeld's hypothesis, they now believe that established religion is a good thing.[7]

In this regard, Americans are in the same position as Sonny, the promisor whom I describe at length in *Constitutional Self-Government* and "Dimensions of Democracy."[8] Sonny promises Gramps that he will eat only healthy foods. What should Sonny do if he later comes to believe that Gramps was mistaken about which foods are healthy? In my view, it is possible for Sonny to honor his promise by using his own judgment about which foods are in fact healthy. Sonny may, in other words, reject Gramps's mistaken *applications* of the concept of "healthy." But Sonny is nevertheless bound to produce judgments of what foods are "healthy," not what foods are "delicious" or "desirable." He is bound, in other words, to respect the *meaning* of the concept "healthy."[9] He cannot substitute a different concept simply because he now desires to eat unhealthy foods or because there is durable debate about which foods are healthy.

Of course, it is possible that Sonny will endorse foolish theories about what is "healthy." He might sincerely believe, for example, that all brown mushrooms are healthy. If so, he might eat poisonous ones and get dreadfully ill. Likewise, it is imaginable that, in the distant future, Americans might develop strange beliefs about what counts as an "establishment." Those beliefs might lead them to conclude that Congress could create a national church without thereby making a "law respecting an Establishment of religion." This turn of events would be highly peculiar, and, admittedly, my theory would put no obstacles in its path. But the peculiarities here are not a consequence of my theory. They are instead a consequence of the wild views that we have attributed to future generations. It is possible to produce equally zany results under other theories by attributing comparably zany opinions to future Americans. For example, under Rubenfeld's

7. I have stressed that Americans must honor constitutional rules "even if they think [them] inconsistent with basic principles of justice." Eisgruber, *supra* note 1, at 10. If, however, Americans regard a provision as unjust, they should give it "the narrowest construction consistent with [its] plain language." *Id.* at 125.

8. *Id.*, at 29-32; Eisgruber, *supra* note 2, at 1746-47.

9. The distinction between "application" and "meaning" is from Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 Geo. L.J. 569, 586-91 (1998).

theory, one can produce funny results by endowing hypothetical Americans with frivolous beliefs about "paradigm cases."[10]

There is a more general point at stake here. Rubenfeld rightly believes that my theory is more "present-oriented"[11] than his own, but he mistakes the nature of the difference. He supposes that my theory is present-oriented because it denies that the Constitution imposes any binding commitments upon us. That is not so. My theory recognizes that the Constitution imposes binding commitments that may be inconsistent with our current judgments about justice. My view is nevertheless present-oriented because it justifies those commitments on the basis of their capacity to enable Americans to govern themselves on the basis of their own (current) judgments about justice. Thus I emphasize that the Constitution's specific rules not only constrain Americans but also create structures that facilitate democratic political action.[12] I also argue that we should welcome the abstract, open-textured character of many constitutional clauses, including the Establishment Clause, that make the Constitution permeable to changing moral and political judgments.[13]

This account of constitutionalism is pragmatic and partly empirical. In practice, the Constitution might impair rather than enhance self-government. For example, if, as Rubenfeld asks us to assume, Americans believed that an established church were consistent with the demands of justice, then the Establishment Clause would stand in the way of democracy. This observation strikes me as uncontroversial, but, oddly enough, Rubenfeld seems to hold almost exactly the opposite view. His theory invites, if it does not compel, the conclusion that the Constitution is most democratic when it collides with present judgments about justice, because, according to Rubenfeld, the point of the Constitution is to ensure that Americans honor their temporally extended identities rather than their present-day judgments about justice.[14] This strikes me as an implausible view of democracy, and that is the heart of my disagreement with Rubenfeld: we disagree, in other words, about *how*—and under what circumstances—a binding Establishment Clause promotes democracy, not about *whether* the Establishment Clause is binding.

## II. DELEGATION TO THE PHILOSOPHER DEANS?

At the conclusion of his essay, Rubenfeld asks us to imagine a law review staff that disagrees about what sorts of articles to publish. A council of deans seizes control of the process. The deans assert,

10. For discussion of Rubenfeld's theory of paradigm cases, see Eisgruber, *supra* note 2, at 1744-46.

11. Rubenfeld, *supra* note 4, at 1754.

12. Eisgruber, *supra* note 1, at 12-18.

13. *Id.* at 25, 39.

14. For discussion of this point, see Eisgruber, *supra* note 2, at 1745-46.

among other things, that the question about what articles to publish is a moral question; that the students' judgments are likely to be tainted by self-interest; and that the deans themselves are more disinterested. Rubenfeld suggests that, on my theory, the deans are no different from Supreme Court Justices and hence their control of the law review should count as democratic. This result, says Rubenfeld, is absurd, and hence my theory must be wrong.[15]

The result would indeed be absurd but my theory does not produce it. Viewed through the prism of my theory, Rubenfeld's deans are nothing like Supreme Court justices. My case for judicial review depends upon institutional features of large-scale electoral processes and American courts. I argue that voters in large-scale elections have little incentive to deliberate about or take full moral responsibility for their choices, and that they are free to vote upon the basis of their self-interest. I then argue that American-style judicial review might help to for the non-deliberative characteristics of large-scale elections. Judges combine a democratic pedigree with disinterestedness. By virtue of their disinterestedness, they are likely to decide moral issues on the basis of the right kind of reasons (moral reasons). By virtue of their democratic pedigree, their moral reasons are likely to have popular appeal, in the sense of being embedded within the people's ongoing discussion about justice. As such, judges may help to represent the people with regard to moral issues.

None of these institutional features appear in Rubenfeld's hypothetical. The staff of Rubenfeld's hypothetical law review is small enough to practice face-to-face democracy; hence the incentives of large-scale elections do not apply. Rubenfeld's hypothetical thus omits the problem to which judicial review is a solution. It also omits *both* of the features that make judicial review a plausible corrective to that problem. First, the deans lack a democratic pedigree: they are not appointed by the students on the review. Second, although Rubenfeld stipulates that the students' judgments may be tainted by self-interest, this stipulation makes little sense. It seems more likely that the deans' judgment will be tainted by self-interest, because the law review's policy may affect their ability (and the ability of their friends) to publish in it. In any event, there is no good reason to suppose that the deans' judgment will be *less* self-interested than the students.

More generally, Rubenfeld's argument neglects the institutional character of my case in favor of judicial review. In particular, Rubenfeld seems to assume that my theory derives judicial review directly from its critique of majoritarianism. That is not so. I do regard majoritarian accounts of democracy as defective, and I believe that those defects are crucial to understanding the pro-democratic

15. Rubenfeld, *supra* note 4, at 1764-65.

functions of super-majoritarian amendment rules. However, my defense of judicial review depends principally on claims about the institutional characteristics of courts, legislatures, and large-scale elections.[16] Nowhere do I claim that my critique of majoritarianism is sufficient to establish the desirability of judicial review. On the contrary, I acknowledge that it is an empirical question whether other institutions could implement my preferred, non-majoritarian conception of democracy as well as, or better than, judicial review does. Nor, for that matter, is my critique of majoritarianism *necessary* to my case for judicial review.[17] As I point out in *Constitutional Self-Government*, a majoritarian democrat who accepts my analysis of electoral and judicial institutions might endorse judicial review as the best means to implement a majoritarian form of democracy.[18]

Rubenfeld's interpretation of my argument replicates a problematic feature of his own theory. As I point out in "Dimensions of Democracy," Rubenfeld attempts to justify constitutionalism and judicial review directly from moral principles about the meaning of democracy, without making any pragmatic, empirical claims about institutional competence. He argues, in particular, that constitutions and judicial review are the only ways in which a people may give itself principles over time.[19] He seems to attribute to me an argument of roughly the same form—namely, that a polity can satisfy the requirements of non-majoritarian democracy if and only if it favors some form of judicial review over legislative supremacy. As I indicated in "Dimensions of Democracy," I am skeptical about whether an argument of this form can succeed. It is certainly not the kind of argument I made in *Constitutional Self-Government*, where my emphasis (rightly or wrongly) is on the incentives that attach to particular institutions, all of which are imperfect devices for implementing democracy.

16. In fact, when I summarize my argument regarding judicial review in *Constitutional Self-Government*, the summary is all about institutional incentives, and makes no mention of majority rule or its deficiencies. Eisgruber, *supra* note 1, at 71, 77-78.

17. My critique of majoritarianism is much more important to my defense of super-majoritarian amendment rules than to my account of judicial review. *Id.* at 18-20, 44.

18. *Id.* at 72.

19. Eisgruber, *supra* note 2, at 1737-38.