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Originalism, Stare Decisis, and Constitutional Authority

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Chapter 9

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Abstract This chapter examines the relationship among three normative questions about American constitutional law: How should the Constitution be interpreted? When may (or should) the Supreme Court overrule its own constitutional precedents? And why is the Constitution binding at all? The author begins by deconstructing the "special difficulty" with stare decisis that proponents of originalist interpretation often perceive. That difficulty, the author contends, can be explained only by reference to some underlying normative theory of constitutional authority—of why the Constitution binds us in the first place. The author then assesses four extant accounts of constitutional authority to determine whether any of them implies both originalism and a distrust of stare decisis. While three such accounts (Values Imposition, Consent, and Moral Guidance) may support originalism and reject stare decisis, none of these accounts is plausible. A fourth account (Dispute Resolution) is more plausible but implies neither strong originalism nor a rejection of stare decisis. Neither originalism nor distrust of precedent, therefore, appears to be supported by a plausible account of constitutional authority.

1 Originalism and Stare Decisis: An Introductory Puzzle

"[O]riginalism … seem[s] to have a special difficulty with precedent" (Barnett 2006, 257). This is the diagnosis offered by Randy Barnett, an influential theorist of American constitutional law and a self-professed originalist. It is a diagnosis that is hard to dispute. Over the past quarter century or so, as Barnett proudly (and I think accurately) reports, originalism "has thrived like no other approach to interpretation" in American constitutional theory and practice (2006, 257). But with its rise has come a vigorous debate within its ranks over the propriety of constitutional stare decisis—the Supreme Court's presumptive deference to its prior constitutional decisions. Some originalists reject stare decisis in all or nearly all cases;[1] others accept it halfheartedly and regretfully;[2] a few attempt explanations, often lengthy and angst-ridden, of why originalism allows for some allegiance to precedent after all.[3] When originalist theorists and judges get together to talk about their ideas, constitutional stare decisis is among their most popular topics.[4]

This is a chapter in a book about constitutional stare decisis, not about originalism or any other type of constitutional interpretation. But I hope to lend support to the insight offered by Randy Kozel in Chapter 8 of this volume that the relationship between the two methodological issues is close and unavoidable. Originalism is a type of answer to a persistent question in American constitutional law and theory: the question of *interpretive methodology*, of how courts (or other interpreters) ought to go about the task of determining constitutional meaning in particular cases. Originalism holds that constitutional meaning should be determined primarily or exclusively by reference to some meaning ("original intent" or "original public meaning") that existed at the time of the Constitution's Framing. For its part, stare decisis requires its own type of methodology: In the form that concerns us here, it insists that the Supreme Court should decide constitutional cases in ways consistent with its prior decisions, even if a current majority of the Court now believes those decisions to be wrong.[5] Originalism's "difficulty with precedent" arises from the fact that the two methodologies sometimes seem to conflict. Deciding a case according to the original intent or original public meaning may

[1] For example, Gary Lawson (1994; 2007) and Michael Stokes Paulsen (2003; 2005).

[2] Such as Justice Antonin Scalia (1997b, 138-40).

[3] Including John McGinnis and Michael Rappaport (2009b), Kurt Lash (2007), Lee Strang (2006), and Randy Barnett (2006).

[4] Two prominent examples are a symposium published in 2005 in volume 22 of the journal *Constitutional Commentary* and a panel discussion (later published in a book) commemorating the twenty-fifth anniversary of the Federalist Society in 2007 (see Calabresi 2007a, 199-252).

[5] This question is of course distinct from other issues relating to stare decisis in constitutional cases that will not be my focus here. These distinct issues include whether state courts and lower federal courts within the U.S. system must adhere to the Supreme Court's constitutional decisions—the answer is a fairly noncontroversial "yes"—and the extent to which nonjudicial actors (such as state or federal legislators or executive-branch officials) must adhere to the Court's constitutional decisions, to which the plausible answers are more varied and controversial.

require a different result than deciding it consistently with the (nonoriginalist or otherwise incorrect) decision in a prior case.

I will take issue with many originalists, however, to argue that this apparent clash of methodological commands alone cannot explain originalism's "special" difficulty with precedent. It is a clash, after all, that arises under almost any methodology of constitutional interpretation, originalist or not. In order to locate the "special difficulty with precedent" that worries contemporary originalists like Barnett, we have to dig beneath the surface of both originalism and stare decisis to uncover what Kozel calls the "normative premises" underlying each practice.[6] Specifically, we have to look to theories of *constitutional authority*: answers to the questions of whether, and on what grounds, those supposedly subject to constitutional law have an obligation to obey it. Only by uncovering the accounts of constitutional authority that might motivate originalism can we understand why, or whether, originalism and stare decisis really do not mix.

I have three primary aims for this chapter. First, I want to bolster the case made by Kozel that constitutional stare decisis cannot be understood or evaluated in a vacuum; its propriety and its implementation can only be assessed alongside the question of how the Constitution ought to be interpreted. Second, picking up the hints dropped by Kozel, I want to demonstrate that answers to questions of constitutional methodology—including how the Constitution should be interpreted and whether erroneous interpretations should be obeyed—ultimately depend on how we answer the foundational question of whether the Constitution has any authority over us at all. And third, I want to suggest, at least as a prima facie matter, that the various accounts of constitutional authority offered or assumed by contemporary originalists cannot in fact explain originalism's "special difficulty" with stare decisis.

I begin in the next Part by exploring this supposed "special difficulty" in more depth. I suggest that the difficulty is not so "special"—not unless there are hidden normative motivations underlying originalism that are not apparent on its surface. In Part 3, using Randy Barnett's provocative defense of originalism as a template, I argue that the normative underpinnings of originalism, or of any interpretative methodology, ultimately must take the form of some account of why the Constitution is authoritative in the first place. Then, in Parts 4 through 7, I assess the three basic accounts of constitutional authority most often relied upon (often implicitly) by contemporary originalists. Each of these accounts, I contend, turns out to be implausible as a justification of the Constitution's authority, though for reasons that vary widely with each account. In Part 8, I describe an alternative type of account that might avoid the problems of these others but that is unlikely either to support strong originalism or to condemn stare decisis. Part 9 is a brief conclusion.

[6] See Kozel's discussion in Chapter 8, Part 4.2.

2 Originalism's "Special Difficulty with Precedent"

Originalism, in its currently fashionable version, holds that constitutional meaning should be determined primarily or exclusively by reference to how the text of the Constitution was understood by the public at the time of its Framing.[7] Barnett (2006, 258-59) offers a syllogism to explain why those who endorse an originalist answer to the question of interpretive methodology also ought to give a skeptical answer to the question of constitutional stare decisis:[8]

> (1) Originalism amounts to the claim that the meaning of the Constitution should remain the same until it is properly changed.
> (2) None of the three branches of government on whom the written Constitution imposes limits should be able to alter these limitations, either alone or in combination, without properly amending the Constitution in writing.
> (3) For this reason, the Supreme Court cannot change the Constitution which it is sworn to uphold and enforce.
> (4) Were the Court mistakenly to decide a case that adopts an interpretation that contradicts the original meaning of the text, and this mistake was entrenched by the doctrine of precedent, then the Supreme Court's interpretation of the text would trump its original meaning.
> (5) In this manner, the doctrine of precedent is inconsistent with originalism.

Barnett's syllogism, however, turns out to be subtly misleading. Barnett presents the syllogism as a demonstration of the uniqueness of originalism—of why originalism has "a *special* difficulty with precedent" that rival methodologies don't share. But in fact the syllogism points toward something like the opposite conclusion.

Consider Barnett's premise (1): "Originalism amounts to the claim that the meaning of the Constitution should remain the same until it is properly changed." The difficulty with this premise is that almost all extant interpretive methodologies, including nonoriginalist ones, agree that "the meaning of the Constitution should remain the same until it is properly changed."[9] What the various methodol-

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[7] Prominent originalists who have endorsed this "original meaning" or "original understanding" approach include Robert Bork (1990), Gary Lawson (1994; 2007), Antonin Scalia (1997a), Michael Stokes Paulsen (2003; 2005), Randy Barnett (2004; 2006), Kurt Lash (2007), John McGinnis and Michael Rappaport (2007; 2009a; 2009b; 2010), and Larry Solum (2008). There are many variations within the general original-meaning approach, most of which are not relevant for present purposes. Over the past generation or so, the search for "original meaning" has supplanted the search for the "original intent" of the Framers as the dominant variant of originalism.

[8] Similar reasoning appears in Lawson (1994, 26-28) and Paulsen (2005, 291).

[9] The possible exceptions are anything-goes pragmatism or straightforward natural-law approaches, which are not properly methods of *interpretation* at all. By pragmatism, I mean the decision of a constitutional case in a way designed to produce the best results, all things considered. Richard Posner endorses something like this approach (Posner 2003). By a natural-law approach, I mean the decision of a constitutional case in a way that accords with certain prepolitical moral values. Arguably neither approach involves *interpretation* of the Constitution, because neither has the goal of identifying the meaning of the Constitution itself (as opposed to the best result or

ogies disagree about is what constitutes "the meaning of the Constitution," and thus what amounts to a "proper change" in that meaning. "Original meaning" originalists define "the meaning of the Constitution" as what the public at the time of the Framing understood its text to mean; "original intent" originalists define constitutional meaning as what (some group of) constitutional Framers intended it to mean; purposivists define constitutional meaning as what best serves the goals that can fairly be attributed to the provision in question; and so on. The operative disagreement is about how to define constitutional meaning, not about whether that meaning should be followed (virtually everyone agrees that it should) or whether "improper" changes in that meaning should be allowed (virtually everyone agrees that they shouldn't).

Barnett obscures this fact when he *equates* originalism with an insistence on adherence to constitutional meaning. Originalism does not "amount to" such an insistence; it shares that insistence with almost every other interpretive methodology. What originalism "amounts to" is a particular type of understanding about what constitutional meaning *is*.

Once we recognize that most interpretive methodologies share with originalism a commitment to identifying and upholding the meaning of the Constitution, we can see that the problem of precedent is not the exclusive province of originalists. If the Supreme Court gets the meaning of the Constitution wrong—as determined by whatever method we adopt for identifying that meaning—then in some sense the Court has "improperly changed" the meaning of the Constitution. Following this incorrect interpretation in subsequent cases would only propagate the improper change, making matters worse. In this respect, as Barnett's fellow originalist Michael Stokes Paulsen (2005, 289-91) suggests, virtually every interpretive methodology has a difficulty with precedent.[10] Originalism is hardly unique in this regard.

And yet it is originalists who do the most hand-wringing about constitutional stare decisis. Why might that be? As Randy Kozel points out in this volume, any

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the requirements of natural law). These approaches would be "noninterpretive" in the sense famously described by Thomas Grey (1975, 706-10).

[10] Paulsen (2005, 291) identifies the following exception: "a theory of constitutional interpretation that purports to regard judicial precedents as themselves constitutive of constitutional meaning." Most such theories, however, recognize some determinants of constitutional meaning besides judicial decisionmaking alone. The theory of "common-law constitutionalism" propounded by David Strauss (2010), for example, holds that judicial decisions should be justifiable as interpretations of the constitutional text. In a somewhat different vein, Bruce Ackerman (1991) argues that the "codification" of a legitimate constitutional amendment can be accomplished by "landmark" judicial opinions rather than formal written amendments pursuant to Article V, 289-90; but he insists that these codifying opinions must follow a lengthy process of higher lawmaking that is politics-driven and that resembles the Article V process in all but name, 266-90. Both of these influential views see (some) judicial precedents as "constitutive of constitutional meaning"; but both of them also allow for the possibility of constitutionally erroneous judicial precedent (for Strauss, precedent that is not a justifiable interpretation of the text; for Ackerman, precedent that attempts to amend the Constitution without the discipline of the higher lawmaking process).

theory of constitutional stare decisis must take account of both its benefits and its costs.[11] Do originalists have special reason to fear the costs of stare decisis, or to deny or discount its benefits?

2.1 Originalism and the benefits of stare decisis

Let's begin on the benefits side. There is a fairly well-established catalog of "rule of law" advantages that might flow from adherence to precedent—predictability, consistency, judicial economy, and protection of justified reliance chief among them—the desirability of which, as Kozel notes,[12] seems unlikely to vary according to one's theory of interpretation. How important one thinks it is to maintain consistency with a wrongly decided precedent, say, or to protect justified reliance on that precedent does not appear to depend on *why* one thinks the precedent was wrongly decided.

We might think interpretive methodology is relevant, however, in determining whether these rule-of-law values come into play at all. Consider the question whether a person's reliance on a given (wrongly decided) precedent should be thought "justified." Suppose we can identify an interpretive methodology that is both easy to apply and always productive of determinate answers. Anyone with half a brain—or at least a half-decent lawyer—could employ this (mythical) methodology to generate a clear, noncontroversial answer to what the Constitution means in any given case. If such a methodology existed, justifiable reliance on erroneous constitutional decisions would become a thing of the past. It would be easy to identify a constitutional decision as erroneous, and thus any reliance on that decision would be unreasonable. Stare decisis, then, would be unnecessary as a means of protecting justifiable reliance. It also would become unnecessary as a means of promoting predictability, consistency, and judicial economy: All of these benefits could be achieved by simply applying the perfect interpretive method to generate correct constitutional results. Subsequent courts and litigants would not need to rely on stare decisis to control or predict the outcomes of their cases; they could employ the perfect methodology to rely directly on the Constitution itself.

Of course there is no perfectly transparent, perfectly determinate method for interpreting the Constitution. But perhaps originalism comes closer to this unattainable ideal than any of its rivals. If so, then a world in which originalism is the exclusive methodology would be a world in which stare decisis is, if not superfluous, then at least substantially less beneficial than it is in our actual world. We would not need to lean (nearly as much) on precedent to protect reliance, promote predictability, and so forth; originalism would (mostly) do these things for us.

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[11] See Chapter 8, Part 3.

[12] See Chapter 8, Part 3.1.

Could this be the basis for originalism's "special difficulty with precedent"? Perhaps originalists distrust precedent because their methodology makes it largely unnecessary. And indeed originalists sometimes claim that their methodology is more determinate than the alternatives. Among the earliest proffered grounds for originalism in its modern era was the constraint of judges (see Scalia 1989; Bork 1990);[13] this rationale implies that originalism is especially capable of imposing constraint, by generating answers that are clear and noncontroversial enough to embarrass any judge who fails to reach them.

The difficulty with this hypothesis—that the determinacy of originalism renders stare decisis largely superfluous—is that it finds little support in the realities of constitutional practice. In our actual world, originalist methodology is neither especially transparent nor especially determinate. David Strauss (2007, 218-19) helpfully classifies the troubles here into three categories: "the problem of ascertainability, which is simply the difficulty of doing the historical research needed to figure out what the original understandings were"; "the problem of indeterminacy," that is, the risk that members of the Framing generation had "different understandings about what the words have committed the document to"; and "the problem of translation," or the difficulty of applying the particular understandings of the Framing generation to modern circumstances they could not have foreseen. An originalist interpreter must, first, locate relevant historical evidence regarding what the appropriate collection of people alive at the time of the Framing thought or intended the Constitution's words to mean (and in so doing must decide what evidence is relevant, which collection of people is appropriate, and what understandings or beliefs or other mental states of those people matter). She must then determine whether some of the relevant mental states of some of the people in question are in conflict and, if so, what to do about it. And she must, finally, figure out how to apply those mental states—which were formed with reference to facts as they existed in the late 18th or mid-19th centuries—to the very different and unforeseen facts as they exist today.

It is implausible to think that this process will very often be easy, or that it will very often generate anything like a clear and noncontroversial result. We might be forgiven, in fact, for accusing Justice Scalia of understatement when he admits that originalist methodology "is always difficult and sometimes inconclusive"

[13] The "judicial constraint" rationale is of course not original with modern originalists. Chief Justice Taney famously deployed it in his infamous opinion in *Dred Scott v. Sandford*, 60 U.S. 393, 4050, the 1857 decision holding that African slaves, former slaves, and their descendents could never be citizens of the United States and that Congress lacked power to prohibit slavery in the territories:

> It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

(Scalia 1989, 84). And we are unlikely to take any comfort in the track record of originalism as actually employed by judges or other interpreters. Consider, for example, the Court's recent Second Amendment case *District of Columbia v. Heller*, in which Justice Scalia writing for the Court used originalist methodology to discover an individual right to bear arms, while Justices Stevens and Breyer in dissent each employed originalist interpretation to reject such a right.[14]

Or consider the controversy over whether *Brown v. Board of Education*, an explicitly nonoriginalist decision,[15] can be defended on originalist grounds. Although a number of prominent originalists believe that it can (see McGinnis and Rappaport 2009b, 842; Barnett 2006, 260), all of them rely primarily on a single article by law professor (and one-time federal judge) Michael McConnell (1995) that makes this case.[16] That article swims upstream against a strong consensus of historical and legal scholarly opinion (see Klarman 1995; Berger 1977; Avins 1967; Bickel 1955) and, revealingly, it appears to employ the now out-of-vogue "original intent" approach rather than the "original meaning" methodology favored by the current originalists who cite it. In any event, as David Strauss (2005, 304-05) notes, whether McConnell is right or wrong is beside the point: The very existence of the controversy affirms the *Brown* Court's conclusion that the originalist evidence is "inconclusive" and thus undermines any claim that originalism is an especially determinate methodology.

2.2 Originalism and the costs of stare decisis

On the benefits side, then, it is quite unlikely that originalism renders stare decisis superfluous. But what about its costs? Perhaps the costs of obedience to erroneous precedent are, from an originalist perspective, exceptionally high.

As with benefits, any supposed correspondence between the methodology that tells us a precedent is erroneous and the costs of obeying that precedent appears

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[14] See District of Columbia v. Heller, 554 U.S. 570, 572-636 (2008) (Scalia, J., for the Court); 554 U.S. at 636-80 (Stevens, J., dissenting); 554 U.S. at 681-723 (Breyer, J., dissenting).

[15] After an initial argument in *Brown*, 341 U.S. 141 (1953), the Court requested rebriefing and reargument regarding "the understanding of the framers of [the Fourteenth] Amendment" on the question of school segregation. See Urofsky & Finkelman (2011b), 859-60. In its unanimous decision, however, the Court declared that the evidence of original intent was "inconclusive," Brown v. Board of Education, 347 U.S. 483, 489 (1954), and elected to resolve the question "in light of [the] full development [of public education] and its present place in American life" rather than by "turn[ing] the clock back to 1868 when the Amendment was adopted," 347 U.S. at 492-93.

[16] McConnell also wrote several shorter articles echoing the same arguments, which originalists often cite in addition to the principal article. Some pro-*Brown* originalists also cite as support an article by Akhil Amar (2000), but as David Strauss (2005, 304 note 10) notes, Amar relies primarily "on the text of the Constitution, rather than the original understandings."

tenuous at best. (On this point I disagree somewhat with Kozel.[17]) If an originalist uses her approach to determine that, say, *Plessy v. Ferguson*[18] was wrongly decided, and a nonoriginalist uses his approach to reach the same conclusion, both interpreters will have identified an incorrectly decided constitutional precedent, with whatever attendant harms (substantive injustice, political illegitimacy, distortion of constitutional doctrine) follow from continued obedience to that incorrect decision. The nature and degree of these harms does not seem contingent on *why* the precedent was incorrect. If originalism were an especially determinate methodology, we might worry about a special cost to judicial integrity from obedience to incorrect precedent: A Court seen as following a clearly erroneous precedent might, for that reason, lose the respect of the public and the other branches of government. But originalism, as I've argued, cannot make things nearly this clear.

Of course, different interpretive methodologies often will produce different conclusions about whether a given precedent is erroneous. Originalists almost universally disagree with the Court's recognition of an abortion right in *Roe v. Wade*,[19] for example, while many nonoriginalists think *Roe* was correctly decided. This raises the possibility that originalism will identify *more* erroneous precedents than nonoriginalism will. And indeed originalists sometimes allude to the fact that their approach, if followed, "would seemingly lead to the rejection of many of the landmark cases most treasured by constitutional law professors, and even by the general public" (Barnett 2006, 259-60). Many of these cases, after all, were decided on nonoriginalist grounds, *Brown* and *Roe* being leading examples. If these decisions can't be justified by originalist methods, then originalists will see them as incorrect constitutional interpretations with all their associated harms, even if nonoriginalists would not.

The potential for originalism to upset much settled precedent may well explain both the typical originalist distrust of stare decisis and the angst that distrust sometimes causes among originalists. Contemporary originalism gained steam in the late 1970s and 1980s as a politically conservative device to critique progressive Warren Court and early Burger Court decisions[20] like *Roe*, *Griswold v. Connecticut*,[21] and *Miranda v. Arizona*.[22] As conservatives have gained power on the Court

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[17] See his discussion in Chapter 8, Part 4; see also my treatment of that discussion in the Introduction to this volume.

[18] 163 U.S. 537 (1896). The Court in *Plessy* held that the Fourteenth Amendment did not prohibit legally enforced segregation according to race. *Plessy* was overruled *de facto* by *Brown* and its progeny.

[19] 410 U.S. 113 (1973).

[20] Classic uses of originalism in this critical vein include Bork (1990), Meese (1985), and Berger (1977).

[21] 381 U.S. 479 (1965). In *Griswold*, the Court held that married couples have a constitutional right to use contraceptives, thus setting the stage for later "right of privacy" decisions including *Roe*.

over the past thirty years—first under William Rehnquist (appointed Chief Justice by Ronald Reagan, a Republican, along with three new Associate Justices), then under Rehnquist's former clerk John Roberts (appointed Chief by the Republican George W. Bush)—originalism has ascended along with them. And stare decisis has begun to look inconvenient—an obstacle to overruling the nonoriginalist, progressive decisions of an earlier era.

But not all nonoriginalist precedents are anathema to originalists. *Brown v. Board of Education* is Exhibit A for this phenomenon; as Barnett (2006, 260) puts it, "if one had to choose between original meaning and *Brown*, most"—including most originalists—"would choose *Brown*." As I've mentioned, some originalists try (unpersuasively) to avoid this particular conflict by concluding that *Brown* actually can be defended on originalist grounds. But *Brown* is only the most salient manifestation of the difficulty. I doubt many originalists would be comfortable with an Equal Protection Clause that did not protect gender equality, for example, or with a Free Speech Clause that did not protect commercial speech, or with an Establishment Clause that forbade only official state churches supported with tax dollars; yet even the most creative originalists would be hard-pressed to anchor these interpretations in the original understandings. So originalists typically cannot be content simply to reject stare decisis out of hand; they must at least grapple with the question whether erroneous constitutional decisions might nonetheless bind subsequent Courts.[23]

Perhaps, then, originalism has a "special difficulty" with precedent because originalism is driven by a desire for politically conservative results. Many progressive constitutional decisions were decided on nonoriginalist grounds; this explains the (politically conservative) move toward originalism. Overruling those decisions requires evading or rejecting stare decisis; this explains the originalist skepticism of precedent. The originalist problem with stare decisis is, on this view, a product of its politically conservative underpinnings.

Of course, the notion that a theory of interpretive methodology, or a theory of stare decisis, can be justified only by the pursuit of particular substantive results is likely to seem intuitively problematic. In the next two Parts, I will articulate a normative foundation for this intuition. For present purposes, the important point is that there is nothing in the methodology of originalism *itself* that creates a unique or exceptional conflict with stare decisis. As Randy Kozel argues in Chapter 8, a satisfactory account of the relationship between an interpretive methodology (like originalism) and the question of constitutional stare decisis requires looking beneath the methodology to its normative groundings. An interpretive methodology can tell us whether a constitutional precedent was wrongly decided,

[22] 384 U.S. 436 (1966). The Court in *Miranda* applied the Fifth Amendment to hold that confessions by criminal defendants can be admitted as evidence only if certain warnings were administered prior to interrogation.

[23] It is revealing, I think, that most attempts by originalist theorists to accommodate stare decisis would have the effect of upholding *Brown* (even assuming *Brown* was wrongly decided) while overturning *Roe*. E.g., McGinnis and Rappaport (2009b); Lash (2007); Strang (2006).

but it cannot, without more, tell us whether we nonetheless should obey that decision.

In what follows, I want to suggest that an understanding of constitutional stare decisis—of whether, and why, the Court should obey prior constitutional decisions it believes to be wrong—requires an understanding of whether, and why, the Constitution deserves obedience in the first place. It requires, that is, an answer to the question of constitutional authority. Answering that question, I will contend, can generate (or at least support) answers to the questions of interpretive methodology and stare decisis as well.

3 Interpretive Methodology and Constitutional Authority

In the previous Part, I raised the possibility that originalism's "special difficulty" with constitutional stare decisis is a function of its conservative political underpinnings. Suppose this is true. Would there be anything wrong with it?

It is worth noting that originalists rarely defend their methodology, or their distrust of stare decisis, as means of imposing certain substantive political or moral values. Instead, originalists typically advert to more abstract, relatively value-neutral goals—judicial constraint (see Scalia 1997a; Bork 1990; Scalia 1989), promotion of the "public interest" (McGinnis and Rappaport 2007; 2010) or of the "common good" (Strang 2006), preservation of "popular sovereignty" (Lash 2007;Whittington 1999). This apparent taboo hints at a recognition that tying originalism to particular substantive values is somehow illegitimate. I will argue in the next Part that such a recognition is supported by a sound understanding of constitutional authority. First, however, it may be useful to examine a prominent exception to the rule of value-neutral arguments for originalism. That exception is the originalist theory of Randy Barnett.

Barnett (2004, 9) defends originalism as an implication of his account of constitutional authority. "The Constitution … is a piece of parchment under glass in Washington, D.C.," he notes. "Why should we pay any attention to it"? Barnett agrees that, as I will argue in Part 4, this question cannot satisfactorily be answered with the notion that we have *consented* to be bound by the Constitution. Instead, he contends, legitimate constitutional authority ultimately depends on whether the system of laws established by the constitution is substantively *just*, or at least "not unjust." And he asserts that substantive justice consists of certain "natural rights" that promote liberty (4, 52-86). "[I]f a constitution contains adequate procedures to protect these natural rights, it can be legitimate," he says (4). As it happens, Barnett argues, the Framers also believed in these libertarian natural rights and "incorporated effective procedural protections of these rights into the Constitution" (53). The Constitution as created by the Framers, then, is legitimately authoritative, according to Barnett. And so to determine the meaning of that Constitution, we ought to be bound by what it was that the Framers actually

created. This requires interpreting the Constitution, in the first instance, by looking for "the meaning [its words] had at the time they were enacted" (90).[24]

Barnett's approach thus justifies originalism as a means of promoting particular substantive values, in the form of libertarian "natural rights." I will have more to say in the next Part about this feature of his theory. For the moment, however, I am interested in the fact that Barnett defends an originalist methodology as an implication of his justification of constitutional authority. Is this connection inevitable? That is, must the normative underpinnings of originalism, or of any interpretive methodology, ultimately reside in some account of why the Constitution is authoritative in the first place?

As a conceptual matter, I think the answer is no; but as a practical matter the answer is yes. One way in which the normative grounding of an interpretive methodology might be disconnected from the normative grounding of the law being interpreted is if that law *has* no normative grounding—if it lacks legitimate authority altogether. Imagine, for example, a theory of the least-offensive way to interpret the illegitimate diktats of an all-powerful despot. Where the law is illegitimate but also unchangeable and unavoidable, the best we can do might be to come up with the least-harmful way to interpret and apply that illegitimate law. We might then say that the interpretive methodology is normatively legitimate even though the law being interpreted is not.

But it seems unlikely that the interpretation of the American Constitution fits this model. This is not (merely) because the Constitution seems more legitimate than the commands of a despot. It is due, rather, to the fact that we could, if we (as a society) chose, replace the Constitution through means that are peaceful and democratic, even if they happen to be technically illegal (though they need not be). The Framers, after all, substituted the Constitution for the Articles of Confed-

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[24] "In the first instance," because Barnett recognizes that there will be no identifiable, determinate original meaning with respect to many constitutional questions (2004, 118-21). Where a determinate original meaning cannot be identified, Barnett supports constitutional "construction": the judicial creation of a constitutional meaning "that is consistent with its original meaning but not deducible from it" (121).

I should note here that Barnett's leap from the premise that the Constitution is legitimate because it protects natural rights to the conclusion that the Constitution must be interpreted according to its original meaning is too hasty, for at least two reasons. First, the (legitimate) Constitution created by the Framers might contemplate nonoriginalist interpretation. The use of vague terms like "freedom of speech" and "due process of law," for example, might be delegations to subsequent interpreters to define constitutional meaning by evolving standards rather than according to original meaning. Second, if it is the protection of natural rights that gives the Constitution its legitimacy, then the best method of interpretation is the one that best protects natural rights—even if doing so requires departing from original meaning in some instances (where, for example, the Framers' understanding of natural rights was defective).

We can put these objections to one side for present purposes, however. The important points here are, first, that Barnett's defense of originalism derives from his account of constitutional authority, and second, that Barnett's account of constitutional authority hinges on certain substantive outcomes or values ("natural rights").

eration in this way.[25] Even if the Constitution is not legitimate, its illegitimacy therefore is avoidable. And it would be difficult to justify pursuing the least-harmful method for interpreting the Constitution if we thought the Constitution itself was illegitimate and thus not worth interpreting. If we thought the Constitution was illegitimate, the normatively justifiable thing to do would be to replace it altogether, not to attempt triage by devising a relatively inoffensive way to interpret it.

Thus it would make little sense to attempt a legitimate theory of interpreting an illegitimate Constitution. As a practical matter, we must believe the Constitution itself is legitimately authoritative before considering how best to interpret it. But is it possible that our reasons for thinking the Constitution is legitimate can be entirely independent of our reasons for preferring one or the other method of interpreting it?

I very much doubt it. Suppose we believe, as Barnett does, that the Constitution is legitimately authoritative because obeying it tends to protect certain libertarian natural rights. It would then make little sense to discern the meaning of the Constitution in a way that is not designed to further this purpose. The likely result of doing so would be to apply the Constitution in many situations in which its authority is not justified.

For example, suppose we adopt Barnett's natural-rights grounding of constitutional authority; but suppose we then choose a method of interpreting the Constitution that has a different grounding altogether (say, that it is the best way to constrain judges). It will only be happenstance that these diverse rationales—protecting natural rights and constraining judges—converge to produce the same result in any particular case. In some cases, perhaps in many, the goal of constraining judges will conflict with the goal of protecting natural rights. A constrained judge, for instance, might fail to strike down a piece of legislation that impairs a natural right the Constitution was designed to protect. It would make much better sense to tailor our interpretive methodology to our reason for having and obeying the Constitution in the first place.

Here is a somewhat more theoretical way to make the point, with a debt to the work of Ronald Dworkin. Constitutional law is a conscious human practice with moral implications. We as a society have (and to some extent each of us as indi-

[25] The possibilities of replacing the Constitution through peaceful democratic means are not limited to those delineated by Article V of the Constitution itself, which provides for amendments according to certain procedures. We might, using non-Article V democratic procedures, decide to discard the Constitution and (using non-Article V democratic procedures) draft and ratify an entirely new one. This is precisely what the Framers did with respect to the Articles of Confederation. Article XIII of the Articles required the approval of Congress and the unanimous approval of each of the state legislatures for amendments. The procedure specified in Article VII of the new Constitution proposed by the Convention of 1787, however, contemplated ratification by special conventions (not the legislatures) in nine of the thirteen existing states (not unanimously), and it did not require the approval of Congress. This is in fact the procedure that was followed, albeit with the eventual endorsement of the Confederation Congress (see Urofsky & Finkelman 2011a, 12).

viduals has) a choice whether to engage in it or not, and our choice to engage in it implies a determination that the practice is morally worthwhile on the whole. In determining how the practice operates—how best to interpret the Constitution's commands, for instance—we ought to consider the practice in its morally best light and perform it in a way that is consistent with this moral vision.[26] Constitutional law purports to bind us in important ways, and if it is a morally justifiable practice, that binding authority has a justifiable moral grounding. The way we perform a core aspect of the practice—interpreting the Constitution, that is, determining how it binds us in particular instances—therefore must reflect, indeed promote, that moral grounding. Constitutional interpretation must further constitutional authority.[27]

It would be difficult to justify an interpretive approach designed to identify the meaning of an unjustifiable Constitution, or to identify its meaning without reference to the reason the Constitution is justifiable. To put the matter concisely: A persuasive answer to the question of interpretive methodology must follow from a persuasive answer to the question of constitutional authority.

4 Constitutional Authority and Values Imposition

Which brings us to the issue of whether Barnett's account of constitutional authority is in fact persuasive. The answer, I'm afraid, is no. The problem is that Barnett's account is not really an account of constitutional *authority* at all.

[26] This is essentially Dworkin's understanding of the project of "interpretation" writ large. See his lengthy discussion in Dworkin (1986), 45-86.

[27] This is not to say that every feature of a practice like constitutional law must be justifiable by reference to the moral grounding of the practice as a whole. Some features of a practice might serve to effect side constraints rather than to promote the underlying purpose of the practice. Consider the rule in ice hockey requiring players to wear helmets. Wearing helmets probably cannot be justified by reference to the overall purposes of the practice of ice hockey (athletic competition, entertainment, physical exercise). Some even think wearing helmets impedes some of these purposes. The helmet rule, rather, is justified by the side constraint of preventing serious injury while playing hockey.

There may be aspects of the American practice of constitutional law that resemble the helmet rule in ice hockey in this respect, though I am at a loss to identify one. In any event, interpretive methodology almost certainly does not qualify. How we interpret the Constitution is far too central to our practice of constitutional law itself to be justifiable solely or primarily by reference to a side constraint. Constitutional interpretation is our means of determining how constitutional law binds us, and binding us is simply what constitutional law does. It seems impossible to understand how the Constitution binds without also understanding why it does so.

4.1 The concept of legal authority

The concept of authority is among the most elusive in legal philosophy.[28] For present purposes, we can think of authority as the capacity to impose a moral obligation of obedience. If constitutional law possesses authority, then those subject to it (legislators, executive-branch officials, judges, citizens) have a moral obligation to obey it. If it lacks authority, those subject to it may have *reason* to obey it—the fear of punishment for disobedience, for example—but they lack a moral *obligation* of obedience.

There are three key operative distinctions underlying the concept of authority. The first is between authority and mere coercion. If we attribute real authority to law, we recognize an obligation to obey it even absent a meaningful threat of sanctions for disobedience. As H.L.A. Hart (1994, 82-91) observed, our attitude toward valid legal commands differs from our attitude toward the orders of an armed gunman. We view the former as authoritative, as legitimately binding, and thus as imposing an obligation to obey even without the teeth of sanctions. We view the latter as illegitimate and thus as merely coercive, not authoritative.

The second key distinction is between the kind of obligation imposed by authoritative law on the one hand, and a garden-variety *reason* to act on the other. If we recognize a law as valid, we treat it as more than just another factor relevant to our process of deciding how to act. The facts that it is dark and rainy outside are *reasons* to drive slowly; the fact that the law sets a speed limit imposes an *obligation* to drive slowly. While it is implausible that this obligation is absolute and indefeasible,[29] it must at least have greater normative force than most other relevant reasons for action.

A closely related third distinction, and the one most relevant for present purposes, is between a reason or obligation to act that is content-*dependent* and one that is content-*independent*.[30] A content-dependent reason is a reason to attribute a certain moral status to an action—to conclude, for example, that the action is morally obligatory on the one hand or morally prohibited on the other. The facts that it is dark and rainy outside are content-dependent reasons to drive slowly; they are reasons to attribute a certain moral status (moral desirability, perhaps even moral necessity) to the act of driving slowly. A content-independent reason, in contrast, is a reason to take or refrain from a certain action regardless of one's beliefs about the moral status of that action. The fact that the law imposes a speed limit is a content-independent reason to drive slowly; it is a reason to take that action without regard to whether we believe the action is morally desirable or morally necessary.

As this example suggests, legal authority requires content-independence. The obligation to act that the law imposes on us must be independent of the moral sta-

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[28] For a thorough exploration of its problematics, see Shapiro (2002).

[29] On this point, see Peters (2011), 33-36, 44-47.

[30] For a clear explanation of content-independence, see Shapiro (2002), 389.

tus we attribute to that action; it must be capable of obligating us to take actions we (otherwise would) think morally incorrect or suboptimal or wrong, that is, actions we otherwise would conclude we should not take. If we have an obligation to obey the law only when it tells us to do the morally right thing, then the supposed authority of the law is illusory: Our obligation is to obey the requirements of morality, not those of the law. Only if we have an obligation to obey the law *even when it is wrong*—even when it requires us to do something other than what morality dictates—does the law really possess authority over us.

This requirement of content-independence may seem rather abstract, but it has real-world significance for the effectiveness of law. To see how, imagine that the Constitution tells us to do something other than what we think morality requires. Perhaps, for example, it commands us to afford due process to a terrorism suspect, even though we think national security creates a moral imperative to imprison the suspect without trial. If our obligation to obey the Constitution depends entirely on the moral status of its content—of what it is telling us to do—then we will recognize no obligation of obedience in this case, or in any case in which we disagree with its requirements. We will simply do what we think morally best in such cases—and the Constitution will fail to function as law.

A Constitution that fails to motivate obedience in cases of disagreement with its commands would be a disaster. This is particularly true because constitutional law is less susceptible than ordinary law to obedience through coercion. Legal subjects might often obey *sub*-constitutional norms simply to avoid the consequences of being caught disobeying them. (I need not recognize the legitimate authority of the tax code in order to fear criminal prosecution for tax avoidance.) In the constitutional context, however, it is very often unrealistic to think that disobedient subjects will be punished for their disobedience. The contested nature of many constitutional norms frequently makes it difficult to say with any confidence whether someone has obeyed them or not. Enforcement mechanisms, moreover, are clumsy: In the United States, constitutional disobedience by government officials typically can be "punished" only by the blunt instrument of voting them out at the next election or by the extreme and rare measure of impeachment and removal from office. And the entity that is the ultimate subject of the Constitution's constraints—the democratic majority itself—is immune even to these sanctions.

Effective constitutional law therefore depends largely on people's willingness to obey it in circumstances in which they disagree with its commands but face no meaningful threat of sanctions for disobedience. Indeed, we can think of a constitution as an attempt to coordinate behavior in the face of disagreement. The people subject to constitutional law will of course disagree on matters of substance—on whether terrorism suspects deserve due process, whether reproductive freedom deserves protection, whether Congress may require the purchase of health insurance, and so on. The purpose of constitutional law is to resolve, or at least to manage, these substantive disagreements so that we can function with reasonable coordination as a society. Constitutional law can succeed in this function only if those subject to it will accept and obey its results—even when they disagree with them in

substance. Constitutional law, then, must provide reasons to obey its results that are not dependent on their substance. As Jeremy Waldron (2006, 1371) puts it, "the point is as old as Hobbes":

> We must set up a decision-procedure whose operation will settle, not reignite, the controversies whose existence called for a decision-procedure in the first place. This means that even though the members of … society … disagree about [matters of substance], they need to share a theory of legitimacy for the decision-procedure that is to settle their disagreements. So, in thinking about the reasons for setting up such a procedure, we should think about reasons that can be subscribed to by people on both sides of any one of these disagreements.

4.2 The content-dependence of values imposition

We can now begin to see why Barnett's theory fails as an account of the authority of the Constitution. Barnett grounds constitutional authority—our obligation to obey the Constitution's commands—in the desirability of certain substantive results or values (his list of libertarian "natural rights"). On the relatively abstract level of morality, such a theory cannot support the obligation of obedience it promises. One's obligation, on Barnett's theory, is to obey natural rights, not the Constitution itself. One then should do as the Constitution commands only insofar as this will foster the protection of these natural rights. If obeying the Constitution fails to protect natural rights, one has no obligation (on Barnett's account) to obey it.

On a more practical, sociological level, Barnett's theory cannot motivate obedience to constitutional law. If one agrees with Barnett's list of natural rights, then one has a reason to do as the Constitution commands whenever doing so would promote those rights. But if one disagrees with the rights on Barnett's list, or with the entire concept of natural rights; or if one agrees with Barnett's list of rights but disagrees, in any given case, that obeying the Constitution would promote them; then one will perceive no obligation to obey the Constitution. Barnett's approach provides no reasons for obedience that, in Waldron's words, "can be subscribed to by people on both sides" of a disagreement about natural rights. And thus it fails to justify constitutional law as "a decision-procedure whose operation will settle, not reignite, the controversies whose existence called for a decision-procedure in the first place."

Barnett's theory is an example—rare in its honesty—of what I will call a *Values Imposition* account of constitutional authority. Such an account attempts to ground the authority of the Constitution in its supposed capacity to promote particular substantive values or results. As I've argued, the attempt inevitably fails, because it is content-dependent, not content-independent. Values Imposition accounts attribute authority, not to the Constitution itself, but to the desired values or

results. In so doing, such accounts fail to motivate obedience by those who disagree with these values or results.

Values Imposition accounts are rare; while Barnett's is not the only example, it is probably the least apologetic.[31] And with all respect to Barnett himself, who is one of our most resourceful constitutional theorists, the analysis in this Part suggests the reason for their scarcity. Values Imposition accounts cannot plausibly support constitutional authority. And thus they cannot plausibly entail particular methodologies of interpreting a (nonauthoritative) Constitution, or particular reasons to obey or not to obey erroneous judicial interpretations of the (nonauthoritative) Constitution.

5 Consent

Originalists sometimes point to the normative force of *consent* as a grounding for their approach. And at first glance, justifying constitutional authority based on consent seems more promising than a Values Imposition account. Consent might be capable of providing a content-independent reason, perhaps even an obligation, to act. Our consent is an exercise of our autonomy; by consenting to something, we are asserting our capacity to plan our own lives. The power of consent to impose moral obligations can apply even when what we are consenting to is the subjugation of our own judgment or wishes to those of others. If I agree to allow my spouse to choose the paint color in our kitchen, for example, I am consenting to be bound by her decision, even if I dislike its substance. Less trivially, perhaps, by purchasing a home subject to a covenant that allows a homeowner's association to make rules governing various issues, from the color of our siding to the content of our garden to the amount of the maintenance fees we must pay, my spouse and I are consenting to be bound by those rules, even if we think them burdensome or unwise. There are of course many similar examples great and small.

So, if Americans as a people have given our consent to be bound by the Constitution, we might be bound even when we disagree with what the Constitution requires. In fact, we might be bound even if what the Constitution requires would (otherwise) be morally wrong or suboptimal. The moral obligation created by our consent conceivably might outweigh or alter the preexisting demands of morality,

[31] The account offered by Hadley Arkes (1990; 1994) might be Barnett's only rival in this respect. Unlike Barnett, however, Arkes does not directly address the question of the Constitution's authority, and unlike Barnett, Arkes is not an originalist: He advocates direct resort to natural-law principles in constitutional adjudication. Other accounts that might be read to ground originalism in Values Imposition are those of Richard Kay (1998) and Lee Strang (2006). Kay, at least, joins Barnett in adopting a relatively libertarian understanding of the values the Constitution is designed to implement; Strang is less committal on this point, identifying the Constitution with what he terms the "Aristotelian tradition" of pursuing "the common good."

just as my consenting (for example) to adopt a child imposes moral duties to that child that would not exist without my consent.

Some prominent originalists have suggested that their methodology can be justified by this normative power of consent. Edwin Meese (1986, 102), who served as Ronald Reagan's second Attorney General and was an influential catalyst of the burgeoning originalist movement in the 1980s, described the Constitution as "the instrument by which the consent of the governed—the fundamental requirement of any legitimate government—is transformed into a government."[32] Following Meese, law professor Steven Calabresi (2007b, 21) argues that the consensual authority of the Constitution implies both the necessity of originalist interpretation and the illegitimacy of stare decisis:

> [I]t is only the text of the written Constitution to which we the people of the United States have given our consent. The people have never consented to be governed in a formal way by the five hundred volumes of the *U.S. Reports* [which contain the text of Supreme Court decisions]. We know from the Declaration of Independence that a fundamental precept of our constitutional order is that governments are instituted and dissolved by the people and that legitimate government requires the consent of the governed. The American people have consented to be governed by the Constitution, but they have not consented to be governed by the Supreme Court's decisional case law.

To similar effect are theories, like those of Keith Whittington (1999) and Kurt Lash (2007), that ground originalism in the consensualist notion of "popular sovereignty." "By construing the Constitution in terms of the intent of its creators," Whittington (1999, 111) writes, "originalism … enforces the authoritative decision of the people acting as sovereign."

Because it purports to identify a content-independent obligation to act, what I will call a *Consent* account avoids the conceptual failure of a Values Imposition account as a justification of constitutional authority. But a Consent account fails for another reason: Its descriptive precondition—the existence of actual consent—has not plausibly been met in contemporary America, and probably cannot plausibly be met in any reasonably complex modern society.

To see why, we can start with the observation that the first three words of the Constitution, "We the People," are a fiction.[33] Even in 1789, when the original Constitution took effect by its own terms, the electorate eligible to participate in the ratification process was only a subset of "the People" as a whole, that is, of the population that would be bound by the document. Slaves of course could not vote; neither could women in any state, or those without property in many states, or free

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[32] Meese's attribution of constitutional authority to "the consent of the governed" has a distinguished pedigree. Alexander Hamilton and John Marshall, two titans of the founding generation, both famously described the Constitution as the consensual act of "the people." See Hamilton, *Federalist No. 78* (1826), and *Marbury v. Madison*, 5 U.S. 137 (1803). Quoting the Declaration of Independence, Lincoln (1946, 304) described "the sheet anchor of American republicanism" as the principle "that no man is good enough to govern another man, *without that other's consent*" (emphasis in original).

[33] I owe this admittedly provocative but quite accurate phrasing to Randy Barnett (2004, 14).

blacks in some. And even among those who could participate in the ratification process, approval of the new Constitution was far from unanimous. A substantial percentage of the American people at the time of the Framing therefore cannot be said to have consented to the Constitution in any affirmative sense.

This consent gap is only compounded by what is sometimes called the "dead hand" problem: the chronological distance between our own time and the crucial Framing periods. No American alive today was alive when the original Constitution was ratified in 1789, or when the Bill of Rights was added in 1791, or when the Reconstruction Amendments were added between 1865 and 1870; so none of us could have given our consent to those actions when they occurred. And our failure to amend the Constitution pursuant to the procedures specified in Article V cannot amount to consent, because we did not consent to Article V either.[34]

It is true that some living Americans have expressly consented to be bound by the Constitution. Naturalized citizens do so when they take their citizenship oaths, and government officials are required by Article VI to swear or affirm that they will "support this Constitution."[35] But this is a very small percentage of the citizenry. The vast majority of us have not given our express consent to the Constitution's authority.

Of course, there are theories of *tacit* consent, like those of Rousseau (1954, 168), who located consent to be bound by law in the act of "residing within the state after its … establishment", and Locke (1960, 392), who found consent in the "Possession, or Enjoyment, of any part of the Dominions of … government." But these theories are unconvincing because they suppose a choice that, for most people, does not exist. Most of us cannot simply pick up and leave our homes, our families, and our jobs to emigrate elsewhere; the costs of doing so would be prohibitive, or at least considerably higher than the costs of living under a Constitution to which we would not consent if given a meaningful choice. And where would we go if we could leave? Except perhaps for billionaires who can purchase remote private islands, most of us could move only to other extant societies with their own existing systems of government, which may or may not be preferable on the whole to the one we are considering leaving. Valid consent requires the option to *withhold* consent, to say "no" (see Barnett 2004, 16-17); but for very few (if any) of us is this a realistic alternative.

The idea that we have an obligation to obey the Constitution by virtue of our consent, then, is implausible; "government by consent," in the conditions of contemporary America, is simply loose talk. And it is worth noting that even if constitutional authority by consent were descriptively plausible, it would not provide the

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[34] On this point, see Siegel (2009), 1404-05.

[35] On its most natural reading, the oath required by Article VI compels officials only to support the Constitution while carrying out their official duties, not to obey it in other capacities. And keep in mind that if an official has no duty to obey the Constitution generally, she has no duty to obey Article VI's oath requirement in particular. It is at least debatable whether an official who has taken the required oath, believing that she is under no obligation to obey the Constitution, would be subject to such an obligation simply by virtue of having taken the oath.

strong support for adopting originalism and rejecting stare decisis that originalists like Calabresi (2007b) claim for it. To imagine that we have consented to the Constitution is not to imagine that we have consented to an exclusively originalist method of interpreting the Constitution. The system of government under which we now live and from which we benefit (contra Calabresi 2007b) does in fact include the Court decisions reproduced in the *U.S. Reports*, and has since almost the beginning of the Republic. And if we read through those decisions, we will find examples of many different methodologies for interpreting the constitutional text employed by the Court over the years, including but hardly limited to originalism. (Indeed, the "original public meaning" version of originalism now popular is a relatively recent innovation, having supplanted the older "original intention" variant only in the last quarter century or so.) It is difficult to see how we can be said to have implicitly consented to one of these methodologies but not to any of the others. As Reva Siegel (2009, 1405) writes, "[I]f we are to construe the living as having implicitly consented to any constitutional understanding or arrangement, it is to the Constitution as it is *currently* interpreted, with its many pathways of change."

Consent cannot plausibly underwrite the authority of the Constitution, and so it cannot underwrite a particular methodology for interpreting it or a theory of whether and when erroneous interpretations are binding. And even if it could, originalism unadulterated by stare decisis would not be the result. If we are looking for a way to justify originalism, to condemn stare decisis, or both, we will have to look elsewhere.

6 Moral Guidance

Many influential theories of constitutional law and judicial review, including some originalist theories, imply a justification of constitutional authority that I will call a *Moral Guidance* account. According to a Moral Guidance account, the authority of constitutional law rests in its capacity to promote morally correct action, not in a specific sense (as defined by particular moral values or outcomes), but rather in a general sense—as an increased likelihood of acting correctly, whatever correct action may entail in any given case.

As we've seen, constitutional authority cannot be built on the desire to achieve particular (controversial) values or other outcomes; those who disagree with the desired values would have no reason to acknowledge the Constitution's authority. But as Jeremy Waldron (2006, 1373-74) notes, we might be able to attribute authority to procedures we think are likely to generate good outcomes, even if we can't agree ahead of time on what those outcomes are:

> Instead of saying (in a question-begging way) that we should choose those political procedures that are most likely to yield a particular controversial set of rights [or moral values or other outcomes], we might say instead that we should choose political

> procedures that are most likely to get at the truth about rights [or values, or outcomes, etc.], whatever that truth turns out to be.

If we can agree that constitutional procedures are, generally speaking, more likely to generate morally good outcomes (with respect to certain matters, at least) than are ordinary democratic procedures, we might then attribute authority to constitutional law even if we disagree with some of the particular results it produces. A useful analogy is the policy of subjecting children to their parents' control until they turn 18. We may not agree with every decision a given parent makes, but we think parents are, as a general matter, more likely to make good decisions regarding the child's welfare than is the child herself (or, for that matter, other potential decisionmakers, such as the state). So we generally cede decisionmaking authority to parents, knowing that we will not agree with how they exercise that authority in every instance.

Grounding constitutional authority in the general capacity for moral guidance, not in particular moral values or outcomes, can skirt the content-dependence problem that dooms Values Imposition accounts. Of course, Moral Guidance accounts cannot provide a reason to obey constitutional commands one *knows* to be morally erroneous; they cannot provide a reason to do the wrong thing. But they can leverage the ubiquitous fact of uncertainty about morality to create a reason to obey commands one *thinks* are erroneous. The premise of Moral Guidance accounts is that the constitutional process is more likely to generate morally good outcomes than the alternatives.[36] If one accepts this premise, then one has a reason to obey even a constitutional outcome with which one disagrees. That reason is that the constitutional process is more likely to have gotten it right, morally speaking, than

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[36] One can imagine a Moral Guidance account that depends, not on the superior quality of the outcomes generated by the constitutional process itself, but rather on the quality of the outcomes likely to be generated by a legal subject's *interaction* with the constitutional process. The idea would be that even if there is no reason to think the constitutional process is morally wiser (more accurate) than the alternatives, a decisionmaker's need to take account of constitutional commands promotes moral wisdom (and thus morally correct outcomes) by forcing her to question the judgment she would reach were it not for those commands. This strikes me as a sort of Burkean notion—an argument for a presumption against changing the status quo without some strong, articulable reason to do so.

And indeed we need not stretch our imagination too far to conceive of such an account, as Deborah Hellman's "epistemic" justification of precedent-following in Chapter 3 of this volume appears to be one, albeit in modest form. It is important to note, however, that Hellman's account is intended to justify only the presumptive force of constitutional stare decisis, not the authority of constitutional law writ large. Her account is appealing as a justification (again, Burkean in its character) of a default rule in favor of following precedent absent a good reason not to. But constitutional law writ large, unlike constitutional stare decisis (on Hellman's reasonable understanding in any event), presents itself as an absolute requirement, not as a default rule. Our purported obligation to constitutional law is to obey it, full stop, not simply to follow it unless we can think of a good reason to do otherwise. So this Burkean version of Moral Guidance is less viable as an account of constitutional authority in general than as a justification of presumptive precedent-following in particular. And I am not aware of any advocate of originalism who has attempted to ground that methodology in this kind of Burkean argument.

the alternative decisionmaking procedures—including the exercise of one's own judgment. This reason for obedience stems from one's own uncertainty about what morality requires, and from one's willingness to defer to the constitutional process in cases of uncertainty. Again, parental authority is a good analogy: Even if we disagree with a particular decision a parent makes about her child, our general confidence in the comparative superiority of parental decisionmaking gives us reason to defer to that decision anyway.

Some influential constitutional theories can be read to attribute this sort of Moral Guidance authority to the act (or acts) of constitutional Framing. Alexander Hamilton, for example, suggested such an approach in *Federalist No. 78* when he elevated the "solemn and authoritative act" of creating a constitution above whatever might result from the "ill humors" and "momentary inclination[s]" of ordinary politics (Hamilton 1826). Much more recently, Bruce Ackerman's (1998) notion of "dualist democracy" invokes a Moral Guidance approach in distinguishing between the extraordinary participation and deliberation characteristic of "constitutional moments" and the rough-and-tumble of "normal politics." These approaches seem to have in common a belief that something special about the Framing process—its broadly participatory scope, its deeply deliberative nature—generates special moral wisdom that justifies our obedience to its results.

It is not difficult to see how this type of Moral Guidance account might underwrite originalism. If our reason for obeying the Constitution stems from the special moral wisdom of the Framing, then we ought to identify those judgments actually made by the Framers and apply them, so far as we can, to current problems. It is the Framers' judgments that contain the comparative moral wisdom that justifies obedience; the farther away we move from actual judgments of the Framers, the more attenuated our reason for obeying the Constitution becomes. Nonoriginalist constitutional law therefore is not (authoritative) *law* at all; it has no claim to our obedience. If we want constitutional law to be law, we have to interpret and apply it using an originalist methodology.

And in fact some originalists expressly ground their methodology in versions of the Moral Guidance account. The most prominent example is the work of John McGinnis and Michael Rappaport (2007; 2010), who argue that requirements of supermajoritarian approval, like those used to adopt the original Constitution and those that apply to subsequent amendments, tend to produce rules that are conducive to the public good. This is so, McGinnis and Rappaport contend, because supermajoritarian requirements necessitate broad consensus and, given the difficulty of amending the rules they generate, impose a sort of Rawlsian "veil of ignorance" that discourages narrowly self-interested rulemaking. Obtaining the benefits of the supermajoritarian procedures of the Framing requires implementing rules actually approved by those procedures—that is, it requires originalist methodology.[37]

[37] Note that the particulars of the Moral Guidance account in question seem likely to determine the type of originalist methodology that should be used. If we attribute the special moral wisdom of the Framing to characteristics of the overall process, as Hamilton, Ackerman, and McGinnis and Rappaport seem to do—to its participatory and deliberative nature, for example, or to the su-

A Moral Guidance justification of originalism might deflect the content-dependence problem of a Values Imposition account, as I've explained. And Moral Guidance seems more plausible than a Consent account, at least as an initial matter, because it does not depend on the problematic notion that most or all Americans today have somehow consented to be bound by what the Framers decided generations ago. Moral Guidance accounts depend, rather, on whether the *process* of constitutional Framing is the procedure that is "most likely to get at the truth" about rights or other moral matters, in Waldron's (2006, 1374) phrase. If the answer to this question is yes, then arguably we would be justified in imposing the results of that process even on those who have not consented to be bound by them.

Versions of Moral Guidance accounts that focus on the special capacities of the Framing process, moreover, like that of McGinnis and Rappaport, seem capable of underwriting the typical originalist distrust of constitutional stare decisis while also potentially tempering that skepticism in certain contexts. If the authority of constitutional law resides in decisions made by the (comparatively wise) Framing process, then any departure from those decisions undermines that authority. A precedent that resolves a constitutional question without invoking the special wisdom of the Framing would lack legitimate authority, on a Moral Guidance account, and thus a subsequent decision following that precedent would lack authority as well. To follow erroneous precedent is to obey nonauthoritative law, and to require that others (those subject to the Court's rulings) obey it.

McGinnis and Rappaport (2009b) identify three possible exceptions to this principle, however. The first is simply a case in which the costs of disregarding precedent, measured in the familiar rule-of-law terms I described in Part 2.1, would be disastrously high (834, 836-37). The second and third exceptions are derived directly from the particulars of McGinnis and Rappaport's Moral Guidance account and as such are more interesting. A precedent that was decided erroneously by originalist standards might nonetheless become so entrenched, McGinnis and Rappaport acknowledge, that the precedent itself attains the equivalent of supermajoritarian approval, giving it a moral status roughly equal to rules generated at the Framing (837-41). Even more intriguingly, McGinnis and Rappaport (842) contend that some erroneous (i.e., nonoriginalist) precedents should be followed because they "operat[e] to correct imperfections in the supermajoritarian [Framing] process" itself. As I explain in Part 7.1 below, the processes of framing the original Constitution, the Bill of Rights, and the Reconstruction Amendments were saliently flawed in their exclusion of slaves and many free blacks, not to mention women and some other classes of citizens. McGinnis and Rappaport sug-

permajority requirement—then we ought to prefer the sort of "original public meaning" approach favored by most current originalists. That approach, after all, seems most likely to capture the superior wisdom in question, which flows (on this view) from the broadly public nature of the Framing. On the other hand, if we attribute special wisdom to something about the Framers themselves— to their extraordinary erudition or foresight or abilities as statesmen, say—then we should look more specifically for actual intentions or judgments of those particular people (an "original intentions" approach that is currently out of fashion).

gest that if *Brown v. Board of Education* was incorrect on originalist grounds,[38] it might still have precedential value as an "attempt to correct" one of these "defects" (the exclusion of slaves and other blacks) "by interpreting the Constitution so that it has the content that appropriate supermajority rules would have produced" (841-43).[39]

7 Moral Guidance and Plausibility

Moral Guidance accounts avoid the salient objections that apply to Values Imposition and Consent accounts. But they come with their own baggage. The claims they make about the superior moral wisdom of the Framing as a general matter are subject to reasonable doubt, to say the least. In particular cases, moreover, those claims will be especially vulnerable, for two related reasons. First, particular cases often will involve issues that the Framing generation could not have anticipated and therefore could not have used its supposedly superior wisdom to resolve. Second, the fact that a person subject to a constitutional command disagrees with the substance of that command will serve, for that person, as a reason to doubt the moral wisdom of the process that generated it, and thus to reject the command's authority in that case.

I will address each of these problems in turn, using the example of a hypothetical member of Congress, Cato, who must decide whether to obey the Constitution despite his disagreement with its content in his case. Suppose Cato is asked to vote for a bill that would allow suspected terrorists to be detained indefinitely without

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[38] McGinnis and Rappaport (2009b, 842-43) do not believe *Brown* was incorrect on originalist grounds; but they assume it was incorrect for purposes of demonstrating their notion of "corrective" precedent.

[39] While I mostly want to avoid critiquing particular justificatory theories of originalism, I can't resist noting that McGinnis and Rappaport's maneuver here—validating nonoriginalist precedents that "interpre[t] the Constitution so that it has the content that appropriate supermajority rules would have produced"—operates as a sort of bait-and-switch. McGinnis and Rappaport justify constitutional authority on the ground that supermajoritarian requirements for making constitutional law generally produce good outcomes; the idea is that there is something special about the supermajoritarian process that generates wise decisions. For the Court to give the Constitution "the content that *appropriate* supermajority rules *would have produced*," however, is to substitute the Court's own (normative) judgment—a judgment about what *appropriate* supermajority processes *would* decide—for the (descriptive) decisions actually generated by supermajoritarian means. The distinction is analogous to that between *actual* consent (a matter of descriptive fact) and *hypothetical* or "constructive" consent of the Rawlsian sort (necessarily the result of normative judgment). (On this distinction between actual and constructive consent, see Peters [2011], 53-54.) Once the Court starts playing the normatively laden game of determining what an "appropriate" process "would have" decided, it is hard to see why the Court should accept *any* decision actually produced by supermajoritarian procedures if the Court finds that decision disagreeable. The disagreeable nature of such a decision, after all, would serve as evidence that the procedure that generated it was in some way not "appropriate."

trial. Cato thinks the bill is good policy, perhaps even necessary for national security. But he also believes the bill would violate the Constitution's guarantee of due process of law. What reason does Cato have to obey the Constitution despite his substantive disagreement with the outcome of doing so?

7.1 The salient defects of the Framing

On a Moral Guidance account, Cato's reason to obey the Constitution is that the Framing process was morally wiser than the ordinary democratic process of which he is a part. Thus Cato is more likely to do the right thing, morally speaking, by obeying the Constitution than by acting on his own judgment. But Cato will have good cause to doubt the underlying premise of this account.

The generation that framed the original Constitution (ratified in 1788) and the Bill of Rights (1791) tolerated slavery, and indeed affirmatively protected it in the document.[40] It excluded women, many people of color, and most non-propertied people from the vote. It viewed Native Americans as uncivilized savages and barred most of them from citizenship altogether.[41] Whatever decisional advantages might have flowed from the unusually participatory and deliberative nature of the Framing probably will seem, to Cato, to have been compromised, if not entirely negated, by these salient exclusions from the process. And the supposed moral wisdom of those who did participate will appear suspect in light of their tolerance (often their endorsement) of slavery, colonial genocide, racism, gender hierarchy, and property-based oligarchy.

Now it may seem that a requirement that the Framing process *generally* be morally wiser than ordinary politics sets the bar too high. A Moral Guidance account demands only that the Framing process be relatively wise with respect to certain issues—namely those governed by the Constitution. But in fact this demand is more ambitious than it may at first appear. The Framing process, after all, determined both what to include in the Constitution and what to leave out of it. If Cato and the rest of us are bound by the Constitution, we are bound both by what the Constitution contains—by rules like the Due Process Clause and the Commerce Clause—and also by what the Constitution does *not* contain, in the sense that we are not free to give constitutional status to rules the Framers did not in fact include in the Constitution. So, for example, when originalists criticize decisions like *Roe v. Wade* for illegitimately "creating" or "expanding" constitutional rights,

[40] Article I, § 9, cl. 1 prohibited Congress from banning the importation of slaves until 1808. Article IV, § 2, cl. 3 prohibited free states from emancipating or harboring escaped slaves. In addition, Article I, § 2, cl. 3 counted slaves as three-fifths of a person for purposes of congressional representation (and therefore also representation in the Electoral College, see art. II, § 1, cl. 2) and direct taxation.

[41] Article I, § 2, cl. 3 entirely excludes "Indians not taxed" from the population to be counted for representation purposes.

they are claiming that the judges who decided those cases were disobeying the Constitution, not by failing to implement rules it includes, but rather by implementing rules it does not include.

If Cato is to defer to the judgments of the Framing generation with respect to the rules they included in the Constitution, then he also must defer to their judgments with respect to the rules they left out of it. Cato must defer to the Framing, for example, on questions involving the rights to life, liberty, and property—subjects unquestionably included within the scope of the Due Process Clauses—and also on questions involving claimed rights to, say, education or health care, subjects (arguably) not included within the scope of those Clauses. Cato must treat life, liberty, and property as constitutionally protected, and he must *not* treat education or health care as constitutionally protected.[42] On a Moral Guidance account, this means Cato must attribute to the Framing a moral wisdom that is quite broad—extending not only to the rules included in the Constitution, but also to the choice of which rules to include and which rules to omit. It will not be enough, on a Moral Guidance account, for Cato to believe that the Framing possessed superior moral wisdom on issues clearly covered by constitutional rules, like the protection of life, liberty, and property, or the freedom of speech and religion, or equality, or the regulation of interstate commerce. Cato also will have to believe that the Framing was comparatively wise with respect to issues not covered by constitutional rules, like education and health care.

Moral Guidance accounts thus make bold claims about the relative moral wisdom of the Framing. It is quite unlikely that the Framing can live up to these claims, given its salient substantive misjudgments (the protection of slavery, for example) and its troubling procedural defects (the omission of women, of many people of color, and of most nonpropertied citizens). So it will take a very big leap of faith for Cato to buy into the Moral Guidance account in the first place.[43]

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[42] The fact that Cato and others subject to constitutional law are prohibited from treating these entitlements as constitutional in stature does not, of course, prevent Congress or other sub-constitutional lawmakers from protecting them through statutes or other sub-constitutional means. And I should make it clear that I am not assuming that rights to education or to health care cannot in fact legitimately be found in the Constitution. These seem like plausible examples of subjects "left out" of the Constitution, but there may be reasonable arguments to the contrary. I use them here only by way of example.

[43] In presenting the foregoing argument to various audiences, I often am confronted with objections along the lines of "But the Framers were extraordinarily wise, tolerant, cosmopolitan, etc. in comparison to most people of their time." While I'm not ready to accept the historical accuracy of this proposition on its face, I have no trouble granting it for the sake of argument. Even if we assume that the Framers were comparatively morally wise for their time, that is beside the point. The Moral Guidance account rests on the notion that the Framing process is comparatively wise as compared to the alternative *present-day* decisionmaking procedures, including most relevantly the procedures of majoritarian representative democracy. Even if the Framers were wise by the standards of their day, this fact does not establish (and in my view does not even serve as evidence) that the Framing process is more likely to generate morally correct answers to the relevant questions than is contemporary democracy.

7.2 The problem of unforeseen circumstances

But suppose Cato does accept the Moral Guidance premise that the Framing process, as a general matter, is morally wiser than he is (as a participant in ordinary democratic politics). Cato still might reasonably reject that premise as applied to his particular case.

In creating the rule embodied in the Due Process Clause—"No person shall … be deprived of life, liberty, or property, without due process of law"—the Framing generation, after all, could not have had the facts of his case in mind. Americans in the late eighteenth century had no experience of worldwide terrorist movements, the threat of nuclear or biological terrorism, the hijacking of jetliners for use as passenger-laden missiles, or for that matter of a society anywhere near as ideologically, racially, ethnically, and religiously diverse as our own. Indeed they could not have anticipated these developments with even the remotest degree of accuracy. In requiring due process for the deprivation of liberty, then, the Framing generation was not bringing its (by-hypothesis) superior moral wisdom to bear on anything like the actual problem Cato now faces.

So even if Cato is inclined to defer to the judgments of the Framing as a general matter, he has no reason to defer to the judgment of the Framing as applied to his particular case—simply because there is no such judgment to defer to. The rule embodied in the Due Process Clause does not include a specific judgment about how the facts of Cato's case, unforeseen and unforeseeable by the Framers, should be resolved.

To be clear, the problem here is not that there is no constitutional *law* on the issue Cato faces. Cato, remember, has interpreted the Due Process Clause to prohibit the bill he is considering. So we are putting to one side the indeterminacy issues that might hinder the identification of "original meaning" in any given case. The problem at hand, rather, is that the (by-hypothesis) applicable legal rule does not reflect (cannot reflect) an actual judgment by the rulemaker—the Framing process—with respect to the particular circumstances confronting Cato. In enacting a rule that covers Cato's case, the Framers did not specifically consider Cato's case itself. In this respect, the Due Process Clause is no different from most general normative rules: It applies in cases that its enactors could not have foreseen.[44]

Nor is the problem here the worry that the Framing process, had it actually considered these circumstances, would not or might not have resolved them wisely. The problem is that the Framing process *did* not consider (*could* not have considered) these circumstances and thus did not resolve (*could* not have resolved) them

[44] This is one cause of the phenomenon noted by Aristotle in Book V of the *Nicomachean Ethics*: that "all law is universal but about some things it is not possible to make a universal statement which shall be correct." General normative rules often produce "incorrect" results in particular cases because those cases involve circumstances the rulemakers did not anticipate.

at all. So Cato cannot know *how* the Framing would have resolved his case if it had considered it. And he cannot defer to a nonexistent judgment.[45]

Note, too, that this problem cuts in two directions: It afflicts both cases where a constitutional rule applies and cases where no constitutional rule applies. In Cato's case, his obedience to an applicable constitutional rule ("No person shall … be deprived of life, liberty, or property, without due process of law") would not be justified by the premise of the Moral Guidance account, because there is no specific judgment of the Framing to defer to in his case. But imagine a case in which no constitutional rule applies.

Suppose, for example, that an originalist judge in 1954—call him Gaius—must decide whether enforced racial segregation in public schools should be declared unconstitutional; and suppose that Gaius believes that the original meaning of the applicable constitutional provision, which provides that "No State shall … deny to any person within its jurisdiction the equal protection of the laws," allows school segregation. By Gaius's lights, there is no constitutional rule on the issue of segregation: The Constitution neither prohibits it nor requires it.[46]

Nonetheless, Gaius reasonably might conclude that because the process of framing the Fourteenth Amendment, which includes the equal-protection rule, did not consider (*could* not have considered) "public education in the light of its full development and its present place in American life throughout the Nation"[47] in 1954, there is no actual judgment of the Framing to defer to. And thus Gaius might decide to, in effect, disobey the Constitution by ruling that the Constitution prohibits school segregation, on the ground that the Moral Guidance account offers no reason to defer to a nonexistent judgment of the Framing. Gaius's disobedience would take the form, not of disobeying an existing constitutional rule, but rather of enforcing a nonexistent one.[48]

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[45] Of course, Cato might attempt to construct a specific judgment that the Framers *might* have rendered had they considered the particular circumstances he faces. But now—as with McGinnis and Rappaport's (2009b) notion of "corrective" constitutional precedents (see the discussion in note 39)—Cato has left the realm of descriptive identifications of judgments actually made by the Framers, and entered the very different sphere of normatively infused imaginings of what the Framers would or could or should have decided. Whatever comparative moral wisdom resides in the judgments of the Framers has become attenuated and perhaps has been completely abandoned.

[46] Or we might say, without affecting the substance of the argument, that there is a constitutional rule *allowing* (but not prohibiting or requiring) school segregation.

[47] This language is of course taken from the Supreme Court's actual decision in *Brown v. Board of Education*, 387 U.S. 483, 492-93 (1954), in which the Court held that enforced racial segregation in public schools violates the Equal Protection Clause. One way to read *Brown* (not the only way, and probably not the best way) is as an act of justified disobedience of the original meaning of the Equal Protection Clause—disobedience, because the original meaning of the Clause allowed school segregation; justified, because the Moral Guidance account offers no reason to obey the Constitution absent a specific judgment of the Framing.

[48] Or (again) we might say that Gaius has disobeyed an existing constitutional rule to the effect that school segregation is allowed (but not prohibited or required).

We can begin to see now the serious plausibility problems that afflict Moral Guidance accounts. Those accounts make ambitious claims about the general moral wisdom of the Framing process, claims that are substantially undermined by the salient moral errors and procedural deficiencies of the Framing. And they require a relatively specific judgment of the Framing in any given case, a judgment that is increasingly unlikely to exist as we move farther away from the world the Framing generation knew.

7.3 The problem of disagreement

Cutting across these two considerable difficulties is a third: A person subject to constitutional law, like Cato or Gaius, will disagree with the substance of the Constitution in most cases that matter. A subject who agrees with what the Constitution requires in her case will of course simply do whatever that thing is; she will not need to ask whether to obey the Constitution at all. Constitutional authority (like all legal authority) makes a real difference only when a legal subject disagrees with the content of a constitutional command.[49]

The problem for Moral Guidance accounts, however, is that a subject's disagreement with a constitutional command also serves as a reason to reject that command's authority. This is because substantive disagreement constitutes evidence that the basis of that authority—the superior moral wisdom of the Framing process—does not in fact exist.

Consider Cato's belief that the terrorist-detention bill is morally good policy. The Moral Guidance account tells Cato that, despite this belief, he should obey the Due Process Clause and vote against the bill, because the process of Framing that Clause was morally wiser than he (as part of the democratic process) is. But Cato's moral approval of the bill is evidence, for Cato, that the Clause's prohibition of the bill is morally incorrect; and this in turn is evidence that the Framing process that authored the Clause was not so morally wise after all. Cato's disagreement with the content of constitutional law thus gives Cato reason to question the authority of constitutional law. And the requirement of content-independence—

[49] The existence of a constitutional command also might make a difference where a legal subject is uncertain about how to act: She might default to the action commanded by the Constitution. Whether legal obedience as a default rule is an instantiation of legal authority depends on the reason why the subject defaults to obedience. If she defaults to obedience for fear of sanctions for disobedience, she is not treating the law as truly authoritative, as I explained in Part 4.1. The same holds true if she defaults to obedience because the existence of the legal command serves as evidence for her that the action commanded is the morally correct or best one; now she is acting based on content-dependent reasons (reasons to attribute a certain moral status to her action) rather than content-independent reasons as legal authority requires. (Again, see the discussion in Part 4.1.) Only if she defaults to obedience for some content-independent reason—a reason to act that is unrelated to the moral status of the action—is she treating the law as authoritative.

that legal authority be based on something other than the moral status of what the law requires—is undermined.

I said in Part 6 that a Moral Guidance account cannot provide a reason to obey constitutional commands one *knows* to be erroneous; Moral Guidance accounts require uncertainty about the content of morality. We can assume for purposes of the argument that Cato is afflicted by this uncertainty, and that most actual subjects of constitutional law share this affliction. This is not the same thing, however, as assuming that subjects of constitutional law like Cato typically lack strong beliefs about the content of morality. It seems likely that most people in a position to decide whether to obey the Constitution will, most of the time, have their own views about what morality requires; indeed we should hope this is the case, as a world in which legislators, government officials, and for that matter ordinary citizens typically are entirely at sea about what they ought to do would be a very scary place in which to live. So we can assume that many or most decisionmakers like Cato, while recognizing their own *uncertainty* about what morality requires, will at the same time have *beliefs* about what morality requires, beliefs upon which they would feel comfortable acting absent a constitutional command to the contrary.

To believe that morality requires some action (*X*) is to believe that a command to do *not-X* is morally wrong. If Cato believes, then, that morality requires *X*—say, the detention without trial of suspected terrorists—then Cato believes that a command to the contrary—say, the constitutional requirement of due process of law—is morally wrong. Now this belief by itself need not convince Cato to disobey the constitutional command. Cato, we are assuming, accepts the premise of the Moral Guidance account that the Constitution, in essence, is more likely to be morally correct than he is. Cato's acceptance of this premise might convince him to disregard his (inconsistent) belief that the Constitution is, in this instance, morally incorrect.

But Cato's belief that the Constitution is morally incorrect in this instance will serve as *evidence*, for Cato, against the proposition that the Constitution is more likely to be morally correct than he is. Consider again the analogy of parental authority. We can accept the premise that parents, generally speaking, are the best decisionmakers about their children's welfare while simultaneously believing that a particular parental decision is incorrect. But our belief that a particular decision is wrong will undermine our acceptance of the general premise of parental authority. If we perceive a particular parental judgment—say, the decision not to inoculate one's children—as especially foolish, our confidence in the general principle of superior parental decisionmaking capacity will be called into doubt.

And note that—crucially—we need not reject the premise of parental authority as a general matter in order to determine that it fails *in this particular case*. We may believe that parents are the best decisionmakers for their children in many more cases than not, and even that *these* particular parents are the best decisionmakers in many more cases than not, while still concluding, based on this one (by our lights) extraordinarily foolish decision, that these parents are *not* the best

decisionmakers *in this case*. Our belief that a particular decision is wrong, in other words, may convince us that this case is an *exception* to the general rule of parental authority.

The same possibility obtains with respect to Cato. Cato's belief that the requirement of due process is morally erroneous in his case might lead him to question the underlying Moral Guidance premise of constitutional authority, namely the supposedly superior wisdom of the Framing process. Or, less dramatically and therefore more probably, it might cause him to reject the application of that premise to his particular case, even as he continues to accept it more generally. Cato might conclude that because the Constitution (by his lights) is morally wrong in this case, the premise of superior constitutional wisdom therefore does not apply in this case. And so Cato might conclude that the Constitution simply does not possess authority in his case; he has no obligation to obey its command.

Note, too, that the persuasiveness of this skepticism is enhanced to the extent there are independent grounds to question the wisdom of the Constitution. And we have already seen that at least two independent grounds are likely to exist in any given case. The first is the set of reasons to question the plausibility of Moral Guidance accounts as a general matter: the arbitrarily exclusionary nature of the Framing and the saliently erroneous moral judgments made by the Framers. The second is the unlikelihood that the Framers considered any given set of circumstances like Cato's when they framed their constitutional rules. These grounds, in combination with the evidentiary force of disagreement, spell trouble for a Moral Guidance account. For the account to work, legal subjects like Cato will have to accept its rather questionable premise of generally superior moral wisdom; they will have to agree that this premise applies specifically to a given case the Framers could not have foreseen; and they will have to do so in spite of their substantive disagreement with the constitutional law in that case and their consequent doubt about the basis for the law's authority.

At bottom, then, the Moral Guidance approach is not a very persuasive grounding for constitutional authority. Part of the problem is context-sensitive: The salient moral failings of the American Framing are not inevitable features of any constitutional framing process. Nonetheless, they are features of the system we have. And the other components of the problem seem more universal. No process of constitution-making can envision every circumstance in which its rules will apply; as a constitution gets older and older, this shortcoming will grow more and more apparent. And every constitution must be capable of motivating obedience even by those who strongly disagree with the substance of its commands. If the only ground for obedience is Moral Guidance, then, constitutional authority often will fail, in our system or in any other.

If a Moral Guidance account cannot persuasively justify constitutional authority itself, then it cannot persuasively dictate methods of constitutional interpretation or determine the propriety of constitutional stare decisis. Like Values Imposition and Consent accounts, it can explain neither a preference for originalism nor a distrust of precedent.

8 Dispute Resolution

Where, then, can originalists turn? In theory, the three accounts of constitutionality I've canvassed to this point—Values Imposition, Consent, and Moral Guidance—all might support originalism and reject, or at least cast doubt on, constitutional stare decisis. But none of them works as a plausible account of authority.

There is a fourth type of account available, which I will call a *Dispute Resolution* account. A Dispute Resolution account locates constitutional authority in the capacity of constitutional processes to resolve, avoid, or mitigate certain kinds of disagreements. Our reason to obey constitutional commands on this account is not that we think the constitutional process is wiser than we are, but rather that deferring to that process will avoid some of the costs of disputes that ordinary democracy cannot resolve.

Dispute Resolution accounts seem more promising than their rivals as justifications of constitutional authority, for reasons I will briefly explain below. As I also will explain, however, they can support only a selective, modest form of originalism, and they are likely to favor rather than distrust constitutional stare decisis.

8.1 Footnote Four

The most prominent example of a Dispute Resolution account in American constitutional theory is what we might call the *Footnote Four* account, so named for its origin in the well-known footnote of that number in the Supreme Court's 1938 *Carolene Products* decision.[50] As later expounded by John Hart Ely (1980), the Footnote Four account holds that aggressive constitutional review of legislation is justified in two types of circumstance where the democratic process cannot be trusted to decide issues fairly. First, those holding democratic power might have a strong interest in consolidating that power by restricting the political process (by, e.g., gerrymandering voting rules or penalizing criticism of the government). Second, democratic decisionmaking might be distorted by irrational bias against "discrete and insular minorities" defined by traits like race or religion (as with laws, e.g., requiring racial segregation in public schools).

Footnote Four justifies constitutional judicial review as a means of preventing or remediating these democratic dysfunctions. Well-constructed constitutional rules might prevent dysfunction from occurring in the first place, by prohibiting unjustified restrictions on political speech, for example, or barring unequal treatment based on race without a demonstrably compelling reason. And politically insular constitutional courts, protected by life tenure, might impartially resolve disputes over the application of these rules, determining whether a particular speech

[50] United States v. Carolene Products Co., 304 U.S. 144, 152 at n.4 (1938).

restriction or a given racial classification is justified. Citizens will be more likely to accept constitutional resolutions of these issues than resolutions through ordinary democratic procedures, because they will see the constitutional process as relatively fair and impartial.

Footnote Four thus implies a Dispute Resolution account of constitutional authority. It holds that establishing, obeying, and applying certain constitutional rules will resolve some disputes better than ordinary democracy could resolve them. A person's reason to obey a constitutional command with which she disagrees, on this account, is that doing so will resolve (or avoid, or mitigate) some costly disagreement that otherwise would not be so well resolved (or avoided or mitigated).

As proffered by the *Carolene Products* Court and elucidated by Ely, the Footnote Four account emphasizes the impartiality of the judicial process relative to ordinary democratic politics. But the focus of the account might be enlarged somewhat, to encompass not just constitutional adjudication but the process of constitutional framing as well. Just as federal judges in the United States are buffered from the self-interests and biases of ordinary politics by the device of life tenure, so the Framers are shielded from those influences by the passage of time. Because the Framers of most key constitutional provisions have been dead for one or two centuries, they could not possibly have had a stake in the particular political controversies of our own era. Deferring to decisions made by the Framers, then, might enhance the perceived impartiality of the constitutional process. The "dead hand" problem that haunts Consent and Moral Guidance accounts is not a problem at all on the Footnote Four account, but rather an advantage.

Thus enlarged, Footnote Four might be thought to imply some version of originalism. I will have more to say on this point below. Allow me to note first, however, that a Dispute Resolution account like Footnote Four seems capable of avoiding the fatal flaws in the other justifications of constitutional authority I've canvassed. Unlike Values Imposition accounts, Footnote Four offers a content-independent reason to obey the Constitution, namely that doing so will resolve certain disputes more effectively than ordinary democracy could. Unlike Consent accounts, Footnote Four need not pretend that Americans today have consented to be bound by everything the Framers decided; it requires only that most contemporary Americans accept constitutional law as a relatively fair means of dispute resolution. And unlike Moral Guidance accounts, Footnote Four is not undermined by the obvious moral fallibility of the Framers, by their inability to predict how their rules would apply, or by inevitable substantive disagreement with what the Constitution commands. Whether the Framers were morally wise or prescient is not important on the Footnote Four account; what is important is that the rules they devised, as interpreted and applied by politically insular courts, are more impartial than ordinary democratic politics with respect to the issues they resolve.

So there is some cause to believe that Footnote Four is a more robust platform for constitutional authority than the other approaches I've discussed.[51] But what might the Footnote Four account tell us about constitutional interpretation and stare decisis?

First, it might support originalism—but only selectively, and far from exclusively. Where the Framers can be seen as relatively impartial with respect to current controversies, Footnote Four suggests deferring to their judgments. If there is a danger of power-entrenchment by a current democratic majority, for example—laws restricting political speech, say—it might make sense to obey decisions made by the Framers, who had no interest in consolidating the political power of a majority that would exist many generations later. On some constitutional issues, however—race relations, for instance, or gender hierarchy, or religious tolerance—the Framers' relative impartiality will be far less evident, to say the least. Deference to the Framers' judgments in these areas would not be justified by Footnote Four.

Footnote Four, moreover, allows for nonoriginalist techniques where on-point judgments of the Framers do not exist or cannot be found. This is because Footnote Four attributes relative impartiality not just (or even primarily) to the Framing, but also (and perhaps more importantly) to the adjudicative process. The eighteenth-century Framers could not have considered the problems of international terrorism and weapons of mass destruction when they authored the Due Process Clause, but twenty-first-century constitutional judges can take account of those phenomena in applying the Clause. If, as Alexander Hamilton (1826) suggested in *Federalist No. 78*, "the independence of the judges" insulates them from the political self-interest that afflicts ordinary politics, then judges can apply the Due Process Clause with authority, even if what they are applying is something other than the particular judgments made by the Framers. The authority of their decisions flows not from the Framers' supposed moral expertise, but from the comparatively impartial posture of the judges themselves.

So Footnote Four seems likely to reject originalism altogether in some circumstances, and to allow for nonoriginalist techniques where originalism is indeterminate. What about constitutional stare decisis? Footnote Four will be far more receptive to stare decisis than, say, the Moral Guidance account, and in fact it may see stare decisis as a benefit. The Moral Guidance account derives the entirety of the Constitution's authority from the supposed wisdom of the Framers, and so if the Court gets the Framers' judgment wrong, the resulting decision lacks authority. In contrast, Footnote Four attributes some constitutional authority to the adjudicative process itself. Getting the Framers' judgment wrong therefore is not necessarily fatal to the authority of a constitutional decision on the Footnote Four approach. Indeed, "getting it wrong" according to whatever interpretive method-

[51] Elsewhere I have described and defended at length a justification of constitutional authority that might be considered an expanded version of the Footnote Four account (Peters 2011, 246-348).

ology the Court uses need not deprive the Court of its authority—so long as the general perception of the Court's relative impartiality remains intact. Adherence to an "incorrect" precedent, then, need not be anathema on the Footnote Four account.

Indeed, adherence to precedent might actually bolster the Court's perceived impartiality (and thus its authority) on that account. Stare decisis can promote the perception of impartiality by visibly preventing the Court from reaching its preferred result; this is the essence of the most-controversial argument in defense of stare decisis offered by the plurality in the *Planned Parenthood v. Casey* decision,[52] much discussed elsewhere in this volume. A Court that is seen to be following precedent is a Court that is seen as impartial to that extent. In this sense, stare decisis might be an element of constitutional authority on the Footnote Four approach rather than an obstacle to it.

8.2 The rule of law

Footnote Four is not the only variety of Dispute Resolution account that might be thought to support originalism. Originalists sometimes defend their methodology as a way to promote the familiar rule-of-law values of predictability, consistency, protection of reliance interests, and the like (see Solum 2008, 129). The notion is that tethering constitutional interpretation to original intent or original meaning prevents courts from reaching unanticipated or widely divergent results.

The rule-of-law values might be thought to justify constitutional authority on Dispute Resolution grounds. The existence of clear, determinate constitutional rules, as I suggested in Part 2.1, would avoid most legal disputes about the issues covered by constitutional law[53] and would make those disputes that do arise relatively easy to resolve. The dispute-avoiding benefits of clear constitutional rules would, on this account, serve as a content-independent reason to obey them, thus potentially justifying their authority. The familiar insight here is that sometimes it is better for things to be (clearly) decided then for them to be decided correctly.

As an initial matter, however, it is doubtful that the rule-of-law values by themselves can justify any but the most bare-bones version of constitutional law. On some constitutional issues, it may indeed be more important that the rules be clear than that they be correct; the basic structural features of democratic government (who makes the laws, who enforces them, who interprets them) come to mind. Democratic government, or government in general, could not exist without these literally *constitutive* constitutional rules. And indeed most of the foundational constitutive rules of American constitutional law are expressed with relative determi-

[52] 505 U.S. 833, 861-64 (1992).

[53] Of course, clear, determinate rules would not avoid *factual* disputes about whether a constitutional rule has been violated in any given case.

nacy in the text—rules like the qualifications to serve in Congress or as President,[54] for example, or the means of electing those officials,[55] or the procedures for enacting legislation.[56] Once a basic governmental framework is in place, however, the government created by that framework is likely to be capable of fulfilling the rule-of-law values reasonably well through ordinary legislation. Those values themselves cannot explain why constitutional law should constrain that government beyond what is necessary to constitute it.

Even where these rule-of-law values seem capable of justifying constitutional authority, they are unlikely to support either strong originalism or an outright rejection of constitutional precedent. This is because, as I noted in Part 2.1, originalism is endemically underdeterminate; rarely can it provide a clear, noncontroversial answer to a constitutional question. And while originalism might be no worse (and in some cases might be better) than other interpretive approaches in this regard, the best way to enhance the determinacy of constitutional law is likely to be the very system of stare decisis that many originalists distrust. Thomas Merrill (2007, 226) identifies three reasons to think this is so. First, "the legal norms that we apply in resolving disputed questions of law are much thicker if we look at the universe of precedent than if we look at originalist materials"; it is much more likely that the Court has addressed a particular issue, or a closely analogous issue, than that the historical materials will reveal a clear originalist answer to that issue. Second, precedent is more accessible to the relevant decisionmakers than is evidence of original understanding; Court decisions are published in publicly available, indexed, searchable reporter volumes, while "[t]he materials that bear on original understanding are vast, are frequently inaccessible, and in some cases are only now being discovered." Third, "the style of reasoning from precedent is much more congenial with the skill set of the typical American judge or justice, than is reasoning from originalist materials"; judges are trained as lawyers, not as historians.

Originalism's "special difficulty with precedent" therefore cannot be explained by reference to the rule-of-law values. More generally, a Dispute Resolution account of constitutional law lends only tepid support for originalism and cannot justify a thoroughgoing distrust of constitutional stare decisis.

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[54] See, e.g., U.S. Const. art. I, § 1, cls. 1-2 (stating the qualifications of members of the House of Representatives); art. I, § 2, cl. 3 (stating the qualifications of members of the Senate); art. II, § 1, cl. 5 (stating the qualifications of the President).

[55] See, e.g., U.S. Const. art. I, § 2, cl. 3, & amend. XIV, § 2 (stating the election procedures for members of the House); art. I, § 3, cls. 1-2, & amend. XVII (stating the appointment (and later the election) procedures for members of the Senate); art. II, § 1, cls. 1-4, and amend. XII (stating the election procedures for the President).

[56] See U.S. Const. art. I, § 7.

9 The Centrality of Authority

So where does the "special difficulty" come from? The accounts of constitutional authority that answer this question are not plausible accounts. The accounts that are plausible can't answer the question.

The most honest answer might be the one given by Randy Barnett. Barnett frankly defends originalism as a means of promoting the libertarian natural rights he believes the Framers intended to protect. And he admits to ambivalence about constitutional stare decisis, rejecting those precedents that fail to protect natural rights but grudgingly accepting those that, like *Brown*, seem to correct the Framers' rare moral mistakes.

While Barnett's theory has the advantage of honesty, it suffers from the considerable drawback of failing altogether as an account of constitutional authority. Barnett offers no reason to obey the Constitution to someone who disagrees with his (or the Framers') views on natural rights. But his theory is useful nonetheless, because it casts in stark relief a fundamental truth about constitutional methodology. We cannot answer methodological questions without first deciding why the Constitution binds us at all. Originalism and stare decisis are defensible only insofar as they reflect a defensible theory of constitutional authority.

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