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Political and Constitutional Obligation

Louis Michael Seidman^{*}

In his provocative, courageous, and original new book,¹ Abner Greene argues that there is “no successful general case for a presumptive (or ‘prima facie’) moral duty to obey the law.”² In my own book,³ I argue that there is no moral duty to obey our foundational law – the Constitution of the United States. This brief article addresses three issues related to these claims. First, I discuss what seem to me to be important ambiguities in and problems with Professor Greene’s argument. Second, I defend my own stance against criticisms advanced by Greene and others. Third, I explore the relationship between his claims and mine.

I.

In the first half of his book, Professor Greene makes two separate claims. First, he insists that there is no general prima facie obligation to obey the law.⁴ Second, he defends a concept that he labels “permeable sovereignty.”⁵ On this view, the state sometimes, but not always, has an obligation to permit individuals acting pursuant to religious or other norms to disregard the law.⁶

Professor Greene is not as clear as he might be about the relationship between these two claims. Greene does not think that the government is always obligated to permit conscientious objectors to disregard its laws. He favors a “balancing approach” under which “[t]he required exemptions would be prima facie only, permitting government to resist them through showing a compelling state interest.”⁷

The ambiguity about the relationship between Greene’s two claims arises when we examine the cases that are not covered by permeable sovereignty. Perhaps Greene thinks that recognition of a right to disregard the law in some cases is sufficient to establish an obligation to obey the law in other cases. Alternatively, he may believe that although desirable, permeable sovereignty is insufficient to establish a general duty to obey the law.

Unfortunately, both interpretations of Greene’s argument create problems. In Section A, I argue that if the first interpretation is right, then Greene is not really rejecting political

^{*} Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center. I am tremendously grateful to James Fleming and Boston University School of Law for organizing the symposium that provided the occasion for this article. Thanks as well to Robin West and to Abner Greene and to the other participants in the symposium for their comments.

¹ ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* (2012).

² *Id.* at 2.

³ LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* (2013) [hereinafter SEIDMAN, *CONSTITUTIONAL DISOBEDIENCE*].

⁴ *See* GREENE, *supra* note 1, at 35-113 (explaining why agent-centered, natural duty, and systemic stability theories do not create a general obligation to obey the law).

⁵ *Id.* at 2-3 (“[W]e should see sovereignty as permeable through to our plural sources of obligation, rather than as absolute in the state and its laws.”).

⁶ *See id.* at 114-60 (discussing three exemptions to general legal obligation in favor of other sources of normative authority). [ES: I corrected the page span and removed the extra comma after “id.” I also italicized “id.” This page span is long, but this covers a chapter that discusses the concept of “permeable sovereignty.” There is a subsection called “Permeable Sovereignty and the Religious Clauses,” but this section is very narrow and I think some of the other sections in this chapter do a better job of expanding on the idea of permeable sovereignty.]

⁷ *Id.* at 118.

obligation, at least as that concept is usually understood. In Section B, I argue that if the second interpretation is right, then individuals outside the realm of permeable sovereignty have no obligation to obey the law. Because Greene thinks that individual obligation and state legitimacy are correlative, the state acts illegitimately when it punishes these individuals. But what, then, could it possibly mean to say that permeable sovereignty does not cover these cases?

A.

We cannot hope to sort out these problems without first clarifying what the political obligation controversy is about in the first place. I take the controversy to be about whether law can have a trans-substantive, bridging function. What I mean by this is that for political obligation to take hold, we must provide reasons why people should obey a law even when they have moral and political views that are inconsistent with the law. In other words, we must explain why the law bridges our substantive moral differences and why it trumps our substantive moral commitments.

There are, of course, a wide variety of theories of varying plausibility that attempt to respond to this challenge. For present purposes, the important point is that none of these theories holds that just anything that calls itself “law” can serve a trans-substantive bridging function. In this sense, all theories of political obligation are limited. Of course, some are more limited than others. For some theorists, law must satisfy only the most minimal standards to command obedience; for others, the standards are more demanding. But virtually no one defends the authoritarian claim that anyone claiming to speak for the law must be obeyed.⁸

I will not attempt to survey all of these theories here. Instead, I limit myself to some of the most prominent examples. Some natural law theorists approach,⁹ or at least have been understood to approach,¹⁰ the problem of political obligation as one of defining what constitutes law. On this view, unjust laws simply are not laws. John Finnis, perhaps the most prominent modern natural law theorist, denies that natural law theory depends upon the definition of law. He claims that “a theory of natural law need not have as its principal concern . . . the affirmation that ‘unjust laws are not law’” and asserts that he “know[s] of no theory of natural law in which that affirmation, or anything like it, is more than a subordinate theorem.”¹¹ But even if the problem cannot be resolved by definition, Finnis, together with virtually all natural law theorists, insists that “for the purpose of assessing one’s legal obligations in the moral sense, one is entitled to discount laws that are ‘unjust’ Such laws lack the moral authority that in other cases comes simply from their origin, ‘pedigree’, or formal source.”¹²

Other variants of the natural law position are also conditional. For example, Ronald Dworkin’s influential if idiosyncratic version of natural law theory holds that law should be obeyed, but only if it exhibits integrity and treats everyone with equal concern and respect.¹³

⁸ Cf. Nimmer Sultany, *The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification*, 47 HARV. C.R.-C.L. L. REV. 371, 378-81 (2012) (arguing that liberal constitutional theory is preoccupied with the conditions necessary to make law legitimate).

⁹ For citations to St. Augustine, Plato, Cicero, Aristotle, and Aquinas asserting that unjust laws should not count as laws, see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 363-64 (2d ed. 2011) (explaining that St. Augustine, Plato, Cicero, and Aristotle often remarked that unjust laws were not truly laws, and Aquinas agreed with a slightly different but related proposition).

¹⁰ See, e.g., H.L.A. Hart, *Positivism and the Separation of Law and Morals*, in *THE PHILOSOPHY OF LAW* 17, 32-33 (R.M. Dworkin ed., 1977) (asserting that natural lawyers believe that “what is utterly immoral cannot be law”).

¹¹ FINNIS, *supra* note 9, at 351.

¹² *Id.* at 360.

¹³ See RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 330 (2011) (“A political community has no moral power to create and enforce obligations against its members unless it treats them with equal concern and respect; unless, that

Similarly, Lon Fuller's procedurally inflected version of natural law holds that law must be obeyed to the extent that it comports with law's internal morality.¹⁴

Positivists, like H.L.A. Hart, resist the natural lawyer's alleged insistence on resolving political obligation through definitional fiat. Positivists deny the claim that law, by its very nature, must satisfy moral criteria. Something can count as "law" even if it is morally repulsive.¹⁵ Nonetheless, positivists also limit the legal duty to obey. This is true in two respects. First, positivists have their own definitions limiting what counts as law. These definitions do not include a moral component, but they also do not include everything.¹⁶ Obviously, there is no legal obligation to obey a measure that is not a law in the first place. Second, the fact that positivists reject the incorporation of the "ought" question into the definition of law does not mean that they reject the necessity of answering that question. On the contrary, the fact that law can be evil puts the "ought" question into sharper focus. Precisely because law can be morally bad, there may be a right – indeed, perhaps an obligation – to disobey some laws.¹⁷

Proceduralists like Henry Hart and Albert Sacks attempt to bridge this is/ought divide. Like positivists, they claim that law can be substantively immoral, but like natural lawyers, they also claim that law nonetheless has an "ought" component – but importantly, only because it is formulated by fair procedures that people with different views could accept as a mode of settling their differences.¹⁸ It seems to follow from this stance that the "ought" component of law drops out if it is not formulated by these procedures.

Similarly, John Rawls's entire, massive philosophical project revolves around the effort to give an account of the liberal state such that people with diverse "comprehensive doctrines" will have an obligation to respect political outcomes.¹⁹ The project makes sense only on the

is, its policies treat their fates as equally important and respect their individual responsibilities for their own lives."). *CF.* RONALD DWORKIN, *LAW'S EMPIRE* 166-67, 190-216 (1986) (discussing Dworkin's theory of the "virtue of political integrity").

¹⁴ See LON L. FULLER, *THE MORALITY OF LAW* 96-97 (rev. ed. 1969) ("What I have called the internal morality of law is . . . a procedural version of natural law The term 'procedural' is . . . broadly appropriate as indicating that we are concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be.").

¹⁵ See Hart, *supra* note 10, at 32-34 (distinguishing between the natural law idea that law cannot be immoral, and the simpler and more useful proposition that "laws may be law but too evil to be obeyed").

¹⁶ See, e.g., JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 9-13 (Noonday Press 1954) (law consists of commands of the sovereign backed by the threat of force); H.L.A. HART, *THE CONCEPT OF LAW* 56-61 (2d ed. 1994) (law consists of measures as to which certain actors take an "internal point of view").

¹⁷ See Hart, *supra* note 10, at 32-34 (distinguishing between the natural law idea that law cannot be immoral, and the simpler and more useful proposition that "laws may be law but too evil to be obeyed").

¹⁸ See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW* 4 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("[D]ecisions which are the duly arrived at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed.").

¹⁹ See JOHN RAWLS, *A THEORY OF JUSTICE* 115 (1971) ("[I]f the basic structure of society is just, or as just as it is reasonable to expect in the circumstances, everyone has a natural duty to do his part in the existing scheme."); JOHN RAWLS, *POLITICAL LIBERALISM* 217 (expanded ed. 2005) ("[O]ur exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational. This is the liberal principle of legitimacy.").

assumption that states that do not meet minimal liberal criteria do not deserve respect and obedience.²⁰

All of these thinkers, then, defend various forms of conditional political obligation. People must obey the law, but only *if* the law is conceived of in a certain way or meets certain standards. Their stance is trans-substantive and bridging in the sense that the criteria for legitimacy do not include mere personal disagreement with a particular law. The position of these thinkers is nonetheless limited because their very project is to formulate law in a fashion that generates obligation to obey.

In contrast, opponents of political obligation think that there is no such formulation. Their claims are also limited, but in a different way. Just as defenders of political obligation are not authoritarians, opponents of obligation are not nihilists. Opponents reject *political* obligation, but not all obligation. On the contrary they reject a *prima facie* obligation to obey legal norms precisely because they privilege obligation to some extra-legal set of norms.²¹

Of course, it does not follow from this position that all laws should be disobeyed. Where law coincides with extra-legal norms or where the extra-legal norms do not speak to the issue, one may indeed be obligated to do what the law commands.²² Opponents of political obligation merely insist that this obligation cannot be separated from the rightness of the extra-legal norms that are the obligation's source. On this view, we cannot decide whether it is right or wrong to obey a particular law without first resolving our disagreement about whether the particular law is just.²³

Greene characterizes his project as defending this anti-obligation stance against the proponents of political obligation, but I am not so sure that this is really what he has done. At least on one reading, his argument fits comfortably within the political obligation canon. If he is indeed arguing that recognition of permeable sovereignty is sufficient for law to claim obedience, then, like virtually all defenders of political obligation, he is setting forth criteria for when obligation takes hold.²⁴

²⁰ See JOHN RAWLS, THE LAW OF PEOPLES WITH "THE IDEA OF PUBLIC REASON REVISITED" 78-80 (1999) (arguing that respect for human rights is a necessary condition for legitimate state authority).

²¹ See, e.g., A. John Simmons, *The Duty to Obey and Our Natural Moral Duties*, in IS THERE A DUTY TO OBEY THE LAW? 91, 190-91 (2005) ("[I]f by 'legal disobedience' we mean simply 'not performing the act (or forbearance) identified by the law as obligatory,' then nothing so dramatic about the moral justification of disobedience to law in fact follows from my conclusion. . . . [W]e often have good moral reasons, and even moral duties and obligations, to perform in the ways the law makes institutionally obligatory.").

²² See, e.g., *id.* at 91 ("[W]e often have good moral reasons, and even moral duties or obligations, to perform in the ways the law makes institutionally obligatory.").

²³ See, e.g., *id.* at 95, 101 (defining moral duty to obey the law as "a duty to do as the law requires *because* it is required by valid law . . . not to do as it requires just insofar as it happens to overlap with independent moral duties" and arguing that there is no "widespread duty to obey the law, even in reasonably just political societies").

²⁴ In his article published in this symposium, Greene denies that his book promotes permeable sovereignty as sufficient to establish general political obligation. See Abner S. Greene, *What is Constitutional Obligation*, 93 B.U. L. REV. n. 4 (2013) ("I do not argue that if the state accommodates a citizen's religious or other practice, the citizen thereby has a moral duty to obey the law, i.e., political obligation. Accommodation is at best a partial remedy for the problem posed by the state's claiming a general authority over all of us through all of its laws."). Of course, no one knows better than Greene himself what argument he intended to make in his book. Nonetheless, there are passages in the book that are at least ambiguous on this score. See *infra* note 26 (noting language where Greene seems to concur with proponents of political obligation in arguing that permeable sovereignty is trans-substantive and bridging). More to the point, if Greene really thinks that permeable sovereignty does not establish general obligation, then it is hard to make sense of his argument for limits on permeable sovereignty. I explore this point below. See *infra* Part I.B. (explaining that if permeable sovereignty does not establish a general political obligation,

Of course, his criteria are different from those advanced by others. The criteria deserve to be evaluated on the merits, a task I undertake in the next section.²⁵ For now, though, the important point is that on this reading of his book, Greene's difference with other believers in political obligation is not about the basic point of the enterprise. He is not claiming that questions of obligation are inevitably inseparable from questions of substantive justice. On the contrary, he seems to believe that many people who will benefit from permeable sovereignty are acting in the interests of unjust causes.²⁶ Greene's claims for permeable sovereignty are therefore trans-substantive and bridging. He wants people with different substantive views to embrace his system of permeable sovereignty, and he thinks that the system will bridge our moral and political differences.

B.

If this reading is correct, then Greene has mistitled his book and mischaracterized his project. That is reason enough to doubt that the reading is correct, and these reasons are reinforced by Greene's article in this symposium disavowing this interpretation.²⁷ Accordingly, in this section I pursue an alternative reading of his book. Perhaps Greene does not think that his permeable sovereignty proposal solves the problem of political obligation.²⁸ On this reading, state-recognized exemptions for conscientious objectors softens the problem but does not eliminate it. Although the conflict will arise in fewer cases, it will still be true that objectors who do not satisfy Greene's criteria for an exemption will have no obligation to obey the law.

If this is what Greene means, then he has indeed advanced an argument against political obligation. But this reading presents a couple of serious problems of its own. First, Greene believes that questions of personal obligation on the one hand and state legitimacy on the other are correlative.²⁹ State commands are legitimate only if the individual has an obligation to obey the commands. If permeable sovereignty does not solve the problem of political legitimacy, then individuals have no obligation to obey commands not covered by permeable sovereignty when those commands conflict with their moral commitments. Moreover, the correlativity thesis means that because these individuals have no obligation to obey, the state acts illegitimately when it insists on obedience. But if the state command is illegitimate, then the state should not have issued it in the first place. The result is the creation of a right to exemption in cases where Greene claims that there is no such right.³⁰

then individuals who do not fall within Greene's envisioned exemptions have no obligation to obey the law, and the exemptions themselves lose meaning).

²⁵ See *infra* Part I.B.

²⁶ See GREENE, *supra* note 1, at 157 ("[M]y position is deferential to (even illiberal) persons/groups desiring to depart from law and live by their own lights.").

²⁷ See *supra* note 24 (quoting the passage from Greene's symposium response disavowing the idea that permeable sovereignty implies a general political obligation).

²⁸ At one point, Greene asks whether permitting qualified exit from laws should be viewed as supporting the state's legitimacy or only as a partial remedy for citizens confronted with laws that conflict with their normative commitments. He asserts that his "inclination is to view exit options as a remedy, rather than as the missing piece of the legitimacy/obligation puzzle. For even a robust system of exit options doesn't fix the problems . . . with theories of political obligation; rather, it acknowledges the difficulties and responds by letting people free from the clutches of the state." GREENE, *supra* note 1, at 114-15. He then proceeds, though, by claiming that either way one views the problem, we should dispense with plenary state authority. *Id.*

²⁹ See *id.* at 5 (endorsing "a principle of correlativity, arguing that the state's political legitimacy and a citizen's moral duty to obey the law go hand in hand").

³⁰ For a similar criticism along these lines, see David Lyons, *Reason, Morality, and Constitutional Compliance*, 93 B.U. L. REV. (2013) ("Professor Greene argues that the government should grant exemptions to some of its restrictive laws. That is a moral not a legal argument, which presupposes that the government *has* a moral right to

A specific example helps illuminate the contradiction. Greene strongly suggests that a pharmacist who resists dispensing an abortifacient medication on religious grounds should not be entitled to an exemption when the abortifacient would otherwise be unavailable, especially to indigent women.³¹ Suppose, then, that the state attempts to enforce its general statute requiring the sale against a pharmacist with such a religious belief in the circumstances Greene describes. Because permeable sovereignty does not solve the problem of political obligation, the pharmacist has no obligation to obey the law. But then the state is acting illegitimately when it insists that the pharmacist obey, and under Greene's logic the pharmacist is entitled to an exemption after all.

This first problem suggests that on Greene's own argument, he has not extended the exemption right far enough. If permeable sovereignty is insufficient to rescue political obligation, then the opt-out right must be generally available. A second problem is that he may have extended the right too far. Recall that true opponents of political obligation insist that obligation to obey cannot be disentangled from substantive moral positions. If one assumes this stance, then what are we to make of Greene's insistence that officials have an obligation to respect a putative constitutional right to an exemption? Why should not this right itself be tied to the moral worthiness of the cause supported by the particular exemption? If law really cannot serve a trans-substantive bridging function, then how can the law of exemptions stand above our moral disagreements?

Perhaps the answer depends on a rule utilitarian argument. While a specific claim to exemption may rest on substantively unjust grounds, we might nonetheless be better off with a general rule providing for exemptions. Greene suggests that such a rule might be justified by epistemic modesty.³² We cannot be sure that we reach morally sound conclusions, so as a general rule it makes sense to respect moral difference.

Unfortunately, this position is in some tension with Greene's insistence elsewhere that obligation must be justified on the retail, rather than the wholesale level.³³ After all, proponents of the general obligation to obey the law make a similar rule utilitarian argument. They claim that the systemic benefits derived from obedience outweigh the individual costs of obeying a few unjust laws.³⁴ Ironically, this claim is also rooted in epistemic modesty: How can dissenters be certain enough that they are right to justify defiance of the majority? Greene rejects this kind of

demand compliance with the laws in question. But Professor Greene seems to give us *no* reason to suppose that the government *has* a moral right to demand compliance with *any* of the laws to which he believes exceptions should be made. And, until the case for a moral right to demand compliance with those laws is made, there is no need to justify exemptions.”).

³¹ See GREENE, *supra* note 1, at 156-57 (“[T]he exemption right is *prima facie* only, and is subject to a balancing test, which here would include considerations such as the medical situation of the woman requesting an abortion and the availability of abortion providers. How to balance the equities in the case of pharmacists who resist dispensing abortifacient medication on religious grounds also depends on the circumstances, which include the availability of such medications in the community, especially for indigent women.”).

³² See *id.* at 3 (defending the “virtues of seeing things differently”).

³³ See *id.* at 32-33 (“[B]asically legitimate governments can exercise justified coercive authority – but on a law-by-law or case-by-case basis, rather than wholesale, as the justification conception requires. And when the state exercises justified authority law by law or case by case, then subjects have a moral duty to obey that particular law or instance of law’s application. Government can produce benefits from its coercive authority and its institutionality that private action cannot yield.”).[ES: “Id.” should be italicized and it does not need to be followed by a comma. I also swapped the author’s pincite for a pin that seems to better support the proposition in the text.]

³⁴ See, e.g., KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 106-07 (1989) (characterizing rule utilitarian argument for obedience as one “that did not reduce to a balance of consequences on the particular occasion”).

argument with regard to a general obligation to obey the law. Why does he accept it with regard to obedience to a regime of exemptions?

Moreover, even if a rule utilitarian justification is persuasive in principle, there are reasons to doubt the attractiveness of the particular proposal that Greene defends. I explore three such reasons below.

First, Greene's approach seems to ignore a great lesson of American Legal Realism: Granting a right to one party often amounts to denying a right to another party. The Supreme Court's well-known decision in *Miller v. Schoene*³⁵ illustrates the problem. Faced with the problem of cedar rust, an insect infestation that is harmless to cedar trees but kills apple trees when it is spread to them, Virginia law provided for the destruction of the cedars. Cedar owners claimed that the statute violated their property rights, but Justice Stone, writing for the Court, pointed out that failure to pass the law would violate the property rights of apple owners, who would see their property destroyed if the state did nothing. As Justice Stone explained, "the state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked."³⁶

A similar problem plagues religious opt-outs. Consider Greene's example, drawn from the work of Brian Barry,³⁷ concerning a statute requiring all animals to be stunned before slaughter. The statute is favored by animal rights advocates who argue that animals so treated suffer less pain and distress, but it interferes with religious beliefs of some Muslims and Jews who insist on the ritual slaughter of animals that will be consumed by humans. Greene characterizes this as a conflict between a "claim on behalf of the animals" and a "claim from religious truth."³⁸ He recognizes that the case is hard, but concludes that the religious claim should prevail.³⁹

Greene is able to reach this conclusion only because he mischaracterizes the conflict, at least in some cases. Instead of a conflict between animals on one side and a human religious claim on the other, there are often human religious claims on both sides of the dispute. There are people whose religious convictions are violated by eating meat not slaughtered in a certain way, but there are other people whose religious convictions are violated by permitting the infliction of suffering on animals.⁴⁰ If we enforce the stunning law against Jews and Muslims, they will have to choose between their loyalty to the state and their loyalty to other normative systems. But if we grant them an exemption, then enforcement of our background laws that prevent animal rights advocates from using self-help forces a similar choice on these advocates. The problem,

³⁵ 276 U.S. 272 (1928).

³⁶ *Id.* at 279.

³⁷ See BRIAN BARRY, CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM 40-42 (2001) (describing the conflict between humane slaughter statutes and religious precepts).

³⁸ GREENE, *supra* note 1, at 127.

³⁹ *Id.* ("Exempting ritual slaughter from the stunning rules is a plausible way of finding a middle ground between two claims of right – the claim on behalf of the animals and the claim from religious truth. . . . It is not inconsistent to believe that the state has a sufficient interest for the baseline regulation, but an insufficient one when confronted with an exemption claim arising from a comprehensive belief system.").

⁴⁰ For an example, see Robert Tappan, *Why Religion is Important to the Animal Rights Movement*, JESUSVEG.COM, <http://www.jesusveg.com/2.html> (last visited Mar. 21, 2013) (identifying the conflict between many religious belief systems and animal rights, and discussing alternative religious perspectives that support vegetarianism and animal rights).

then, is not whether to recognize religious sources of obligation, but *which* religious sources to recognize.

This dilemma is only a particular instantiation of the general point that claims of obligation cannot be disentangled from substantive claims on the merits. The law of exemptions, like all law, cannot be trans-substantive because it forces us to choose between conflicting moral claims. A thoroughgoing opponent of legal obligation would embrace this point, but Greene must instead resist it because he inconsistently wants us to acknowledge an obligation to obey the system of exemptions that he favors.

Just as legal realists have something to teach us about the exemption problem, so too do economists, and economics provides a second reason for doubt about Greene's position. An economist would be quick to point out that allowing people to escape distasteful obligations because of their insistence that the obligations violate their religious commitments incentivizes them to have more religious commitments.⁴¹ This is not just a problem of dishonesty, although of course that is part of the problem. Even people who are completely honest will be more likely to come to hold views when they benefit from holding them.⁴²

This phenomenon provides part of the reason why many economists are distrustful of merely verbalized preferences and insist instead on revealed preferences – preferences that people are willing to vindicate by giving up something in return.⁴³ For example, no economist would contemn choosing between apple owners and cedar owners based on who complained most vociferously and moralistically about the destruction of their trees. Nor do we award people things like automobiles or houses simply because they assert that they need these things more than their present owners. Economists insist that people put their money where their mouths are.

Should we, then, insist that religious objectors put their money where their mouths are? Greene is ambivalent about whether we ought to,⁴⁴ and American law has taken inconsistent positions on this subject. On the one hand, we have a long tradition of requiring alternative service by conscientious objectors to the military draft. On the other, almost no one claims that churches that utilize the ministerial exception to fire employees otherwise covered by our antidiscrimination law should pay a special discrimination tax.⁴⁵

There is something to be said for both sides of this argument, but I ultimately side with the economists. The point is not just that making people pay for their asserted preferences measures the existence and weight of these preferences. It is also fundamentally unfair to allow some people to opt out of our common social obligations without giving up something in

⁴¹ See, e.g., STEVEN E. LANDSBURG, *THE ARMCHAIR ECONOMIST: ECONOMICS AND EVERYDAY LIFE* 3 (1993) (“Most of economics can be summarized in four words: ‘People respond to incentives.’ The rest is commentary.”).

⁴² For an introduction to the large literature explaining the psychological processes by which people “creatively combine accessed knowledge to construct new beliefs that could logically support the desired conclusion,” see Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 483 (1990).

⁴³ See, e.g., Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 119 (1979) (“The only kind of preference that counts in a system of wealth maximization is . . . one that is backed up by money – in other words, that is registered in a market.”).

⁴⁴ See GREENE, *supra* note 1, at 129-30 (arguing that there are circumstances where it makes sense to impose a burden on those requesting religious exemptions, but in general these burdens are not necessary to determine the validity of religious beliefs and simply impose another burden on “the oft-beleaguered minority”).

⁴⁵ The Supreme Court mandated a ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 709 (2012) (explaining that the ministerial exception “ensures that the authority to select and control who will minister to the faithful . . . is the church’s alone”).

return.⁴⁶ Perhaps religious believers are entitled to an exemption from laws they cannot in good conscience obey, but I know of no conscientiously held system of beliefs that entitles them to a free ride. A person who wishes to use peyote for a religious ritual cannot simply take peyote belonging to another without paying for it. Why not impose similar obligations on people who take collective goods? If war resisters must pay in kind for their resistance, then what about antidiscrimination resisters?

I think that the argument for insisting on compensatory payment is quite strong, but it is easy to see why Greene wants to resist it. The problem is that recognition of a duty to pay has the potential to destroy the accommodationist position. After all, on a Holmsonian theory, the damages violators of antidiscrimination law must pay represent the price society charges for violating these laws.⁴⁷ More broadly, on both standard Kantian and utilitarian theories, criminal punishment is conceptualized as the payment for seizing social goods. Kant famously believed that criminal punishment was necessary to settle accounts – to put the universe back in balance after the criminal takes something without paying for it.⁴⁸ Similarly, on utilitarian theories of punishment, the criminal sanction does no more than make criminals internalize the cost of their crimes.⁴⁹ Put differently, criminal punishment assures that the crime reflects the criminal's revealed preference.

⁴⁶ Greene's response to this argument is that "[m]embers of minority religious groups . . . are subject to many social costs from the gamut of laws that don't respond to their notions of the right or the good; an occasional legislatively or judicially awarded exemption is unlikely to put them in a superior position to others from an overall cost perspective." GREENE, *supra* note 1, at 130.

This argument is unpersuasive. Perhaps, as Greene asserts, there is no general obligation to obey the law. But presumably not even Greene thinks that disadvantaged individuals have a special right to disobey laws because they come out on the short end of the social contract. An individual who pays very high taxes and uses very few social services does not have a special right to disobey "no parking" signs. We impose a general obligation on people to incur social costs without attempting the impossible task of calculating global costs and benefits on an individual level. It is fair for everyone to obey generally applicable laws because individuals are part of a society, not because the costs and benefits of our laws impact everyone equally.

Greene does not appear to disagree with this general proposition. He favors a departure from it only for individuals who conscientiously oppose a particular law. But once we acknowledge that we do not generally permit disobedience because of individualized judgments about the costs and benefits of the social contract, Greene needs to explain why conscientious objectors should, uniquely, be given a free ride. Notice that the answer cannot be that violation of a religious commitment imposes especially severe costs on believers. According to the proposal discussed in Greene's book, no one is required to violate a religious commitment. Individuals asserting religious claims are merely required to pay a fair price for avoiding obligations to which everyone else is subject.

⁴⁷ See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897) ("One of the many evil effects of the confusion between legal and moral ideas . . . is that theory is apt to get the cart before the horse, and to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward. But . . . a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court."). Holmes extended this point even to the death penalty. See 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935, at 806 (1953) ("If I were having a philosophical talk with a man I was going to have hanged . . . I should say, I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises.")

⁴⁸ IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 105-06 (Mary Gregor ed., 1996).

⁴⁹ See, e.g., JEREMY BENTHAM, *THEORY OF LEGISLATION* 325 (R. Hildreth trans., 1864) ("[T]o prevent an offence, it is necessary that the repressive motive should be stronger than the seductive motive. The punishment must be more an object of dread than the offence an object of desire.").

It follows that if one accepts the argument for compensation, one backs into something like the test articulated by the Supreme Court in *Employment Division v. Smith*.⁵⁰ On this view, the state has no obligation to accommodate religious practice, but neither can it single out such practice for special penalties.⁵¹ Of course, Greene wants to reject *Smith*.⁵² But that rejection entails acceptance of a constitutional requirement that religious believers systematically bear less of the collective social burden than the rest of us. This position needs to be defended, and I find no adequate defense of it in Greene's book.

This problem, in turn, leads to a third difficulty. Suppose that Greene is right when he insists that we should respect alternative sources of normative authority. I think that Greene pays insufficient attention to how we should manifest that respect. Paradoxically, the best way to manifest respect may be by punishing violators. This conclusion is undoubtedly counterintuitive, but it flows naturally from taking seriously the possibility of sources of authority that are authentically incompatible with state authority.⁵³

To see why this is so, we need to understand why claims grounded in these sources of authority are arguably entitled to special treatment. No one thinks that proponents of, say, government subsidies for dairy farmers or of raising the minimum wage are entitled to special legislative or judicial solicitude. This remains true even if these proponents feel very strongly about the subject and even if the measures they favor are essential to their ways of life. Why should we treat religiously-motivated actors differently?

The best answer – an answer that I think Greene would endorse – is that religious objectors are using a different and incompatible metric to judge the rightness of actions. Dairy farmers and advocates of workers' rights may feel strongly about their causes, but they are nonetheless speaking the lingua franca of interest group politics. They have things they feel strongly about, but other groups have claims upon us that they also feel strongly about. These groups settle their differences within the norms and boundaries set by liberal democracies.

Religious claims are special because they are founded on a rejection of these norms and boundaries. Religious systems of belief are incompatible with western democratic liberalism in the sense that they require commitments that are outside the realm of compromise and interest group trades. As Greene rightly points out, it is for these reasons that the secular state is precluded from endorsing these claims. The other half of the bargain, he insists, is that the state respects these claims by exempting those who make them from ordinary laws.⁵⁴

⁵⁰ *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 881-82 (1990).

⁵¹ *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993) (“[O]ur cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. . . . A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.”).

⁵² Greene, *supra* note 1, at 116 (“I criticize the Court’s holding in *Employment Division v. Smith*, which refused to engage in stepped-up judicial scrutiny for laws incidentally burdening religions practice; I maintain that judicial exemptions for the free exercise of religions should be considered a matter of constitutional right.”).

⁵³ For a fuller articulation of this argument, see Mark Tushnet, *In Praise of Martyrdom?*, 87 CAL. L. REV. 1117, 1118-19 (1999) (explaining the view that political accommodations may damage religions because “believers may be disappointed when the State’s accommodations reach their limit,” and because religious institutions may change to secure attractive accommodations).

⁵⁴ *See* GREENE, *supra* note 1, at 155 (“[T]he Free Exercise Clause can be seen as providing a political counterweight to the Establishment Clause. If the latter should be read to prevent religious faith from being the predominant, express justification for law, then the former should be construed to make religious faith a ground for avoiding the obligations of law.”).

This is indeed a powerful argument for the special status of these claims, but unfortunately for Greene it points away from rather than toward a system of exemptions. We can see this by examining the precise mechanisms by which exemptions are granted and withheld. If we join Greene in rejecting the notion that religious believers are entitled to a blanket exemption from any law that they oppose, then we will need some decision making body to determine the occasions for and extent of exemptions.

For obvious reasons, these decisions cannot be made by the religious believers themselves. At least in theory, one might imagine a neutral institution outside the state or religion making these decisions. But although this is a theoretically possible solution, it is not a realistic one and not one that Greene proposes.

The only practical means of resolving controversies of this sort is for the government to decide when to defer to religious authority. But government decisions of this sort do not involve true deference to that authority. Governments that make these decisions will use the tools and criteria that governments use. If government and religion are truly incompatible, then the use of these tools and criteria will inevitably create a government version of religion rather than religion itself. The result is not deference to religion, but corruption of it. What was once a truly subversive and destabilizing alternative world view is normalized and defanged.

It is just this mindset that has produced abominations like the “plastic reindeer” rule for permitting Christmas displays on public property⁵⁵ and the endorsement of ceremonial deism that permits references to religious belief in the public square precisely because these references have lost their meaning.⁵⁶ When the government accommodates religion, it will do so for “safe” religions that mandate relatively harmless idiosyncrasies like the use of drugs in a religious ritual or the teaching of creationism by home schoolers. What the state will not tolerate is a fundamental challenge to its authority – for example, acting on a claim that the organizing norms of the secular state are illegitimate and should be replaced by overtly religious commitments. Claims such as these are what make religion truly destabilizing and demonstrate the true incompatibility between religious and secular authority. But for just these reasons, the state cannot possibly accommodate them. To do so would be to sacrifice the trans-substantive, bridging function that is thought to give secular law its authority in the first place.

The upshot is cooptation of religion to serve state purposes, rather than authentic respect. If the state wants to show true respect for religion as an authentically incompatible world view – if it wants to truly recognize the mortal threat that religion poses to state authority – then it can act in only one way. It must punish believers when they disobey state authority. Any other reaction denies and destroys the incompatibility that makes religion dangerous and attractive in the first place.

II.

⁵⁵ See *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (finding no violation of the Establishment Clause in a city’s public display of a nativity scene, which the Court viewed “in the context of the Christmas season,” rather than focusing “exclusively on the religious component”). For representative criticism of the rule, see Frederick Mark Gedicks, *Lynch and the Lunacy of Secularized Religion*, 12 NEV. L.J. 640, 643 (2012) (“[E]ven theologically potent symbols of majoritarian religion may be appropriated and deployed by government so long as surrounded by some minimum of secular symbols – like, say, three plastic reindeer. Thus was born one of the silliest and most incoherent lines of Supreme Court decisions ever, one in which the Court is still hopelessly entangled.”).

⁵⁶ See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 44 (2004) (O’Connor, J., concurring) (“Any coercion that persuades an onlooker to participate in an act of ceremonial deism is inconsequential, as an Establishment Clause matter, because such acts are simply not religious in character.”).

The main thesis of my book is that American constitutional law cannot serve a trans-substantive bridging function. Unlike Greene, I make no claim about law in general, or even about constitutional law in general. My more modest claim is that the American Constitution, replete with senseless and pernicious eccentricities, written a very long time ago by people far removed from our modern lives and culture, and extremely difficult to amend, should not bind those who disagree with its substantive commands. The claim that it is binding distorts political argument by shifting it from the substantive merits of various proposals to a counterproductive and ultimately pointless argument about constitutional doctrine. Instead of arguing about whether the Affordable Health Care Act makes sense, we end up arguing about the true meaning of The Federalist Papers and the precise holding of *Wickard v. Filburn*.⁵⁷

It follows that whatever hold law in general has over us, we should free ourselves from the shackles of the American Constitution. Not surprisingly, this claim has not exactly met with universal assent. In this section, I respond to some of the criticisms that have been advanced against it.

A.

I start with Professor Greene's generous comments⁵⁸ and with related, and similarly generous, comments by Professors Hugh Baxter⁵⁹ and James Fleming.⁶⁰ If I understand Professor Greene's position correctly, he rejects original meaning and precedent as well as modern Supreme Court pronouncements as sources of constitutional authority.⁶¹ Professor Fleming professes greater concern for "fit," but he too insists that fidelity to the Constitution means fidelity to our aspirations at a very high level of generality. As he puts it, "Fidelity on this understanding is not obedience to decisions already made for us in the past by people long dead or who were ignorant of the challenges and problems of our age. Fidelity rather is an attitude of commitment to making the scheme work and to further developing it . . . in ways the better to realize its ends and our aspirations."⁶²

If this position entails the view that the Constitution can mean anything we want it to mean, then I have no serious disagreement with either Greene or Fleming. I have no quarrel with Greene's suggestion that at any particular moment in time, people should think about the

⁵⁷ 317 U.S. 111, 125 (1942). *Compare, e.g.,* *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2588 (2012) (Roberts, C.J.) ("The farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce. The Government's theory here would effectively override that limitation."), *with id.* at 2621 (Ginsburg, J., concurring in the judgment) ("Nor does our case law toe the activity versus inactivity line. In *Wickard*, for example, we upheld the penalty imposed on a farmer who grew too much wheat, even though the regulation had the effect of compelling farmers to purchase wheat in the open market.").

⁵⁸ See generally Greene, *supra* note 24 (arguing that, in analyzing our constitutional obligations, we should "distinguish obligation to the Constitution as a text, as a governing and structuring document, from obligation to any particular interpretation or purportedly authoritative meaning of that text").

⁵⁹ See generally Hugh Baxter, *Critical Reflections on Seidman's On Constitutional Disobedience*, 93 B.U. L. REV. (2013) (critiquing Seidman's concept of "constitutional disobedience" and likening it to "constitutional irreverence").

⁶⁰ See generally James E. Fleming, *Fit, Justification, and Fidelity in Constitutional Interpretation*, 93 B.U. L. REV. (2013) (advocating for "a 'philosophical approach' to constitutional interpretation").

⁶¹ See GREENE, *supra* note 1, at 161-209 (critiquing the idea of obligation "to prior sources of constitutional meaning, [and] rejecting an interpretive duty to follow either original understanding or meaning or the teachings of [Supreme Court] precedent").

⁶² Fleming, *supra* note 60, at

relationship between the structure of government and their deeper commitments,⁶³ or with Fleming's view that political debate should be about the best method to achieve our joint aspirations.⁶⁴ If one wants to call this kind of debate "constitutional," I have at most mild objections to the label. This is a "constitution" that sharpens deliberation rather than ends it, that forces us to confront our differences rather than attempting to bridge them. Such a constitution imposes an obligation to think and to debate, but not an obligation to obey.

I fear, though, that this is not quite what Greene and Fleming mean. First, I wonder what Fleming and Greene think of hard wired and unambiguous constitutional text. Consider, for example, the provision in Article I providing for two senators from each state without regard to population. Fleming says that past decisions do not "deserve our fidelity" when they "fall[] short of our aspirations."⁶⁵ If a grossly malapportioned Senate "falls short of our aspirations," as it surely does, does that mean that we can ignore the clear text of Article I? If it does, then Fleming and I have no disagreement at all. But I doubt that this is what Fleming means because disregard of clear text would seem to jettison the "fit" requirement to which he is attached.

Similarly, I am not sure how seriously to take Greene's rejection of standard sources of constitutional authority. As I discuss above,⁶⁶ Greene advances a constitutional argument for a limited requirement of religious accommodations.⁶⁷ I suspect that when he says that these accommodations are constitutionally mandatory, he means something other than that they are simply provisions he favors. Greene seems to be making the assertion that even people who do not favor religious accommodations are somehow obligated to endorse them. But what is the source of this obligation? How can Greene oppose legal obligation in general, but endorse constitutional obligation, which is, after all, a form of legal obligation?⁶⁸

This question leads to my primary concern with the positions that Fleming and Greene advance. They present their positions as if constitutional argument amounted to no more than a good faith dialogue about how to achieve our deepest commitments as a country. But as things presently stand, constitutional law is a way that some people exercise power over other people. When the Supreme Court renders a decision prohibiting state officials from using affirmative action or requiring them to recognize gay marriages, it is not just engaging in dialogue; it is ordering people to do things against their will. I am certainly no originalist, but at least fidelity to text and original understanding attempts to ground this coercion in something other than the untrammelled desires of nine people. The same cannot be said for exercises of power untethered to anything other than deeply contestable views about the best version of our national commitments. If we choose to have nine people exercising power in this way, then we ought to stop pretending that they are engaged in anything recognizable as constitutional interpretation. I am afraid that the positions advanced by Greene and Fleming promote this pretense.

⁶³ Greene, *supra* note 24, at ("[C]itizen acceptance may just involve a sociological fact of treating the Constitution as the relevant, salient document constructing the basic legal order, That is, citizens may adopt an internal point of view about the Constitution as theirs . . . [and] may see the Constitution's norms as guides to their own conduct.").

⁶⁴ Fleming, *supra* note 60, at ("The Constitution – to be worthy of our fidelity – must reflect our aspirations to realize the ends proclaimed in the Preamble. To do that, we must reject any idea of an obligation to follow original expected applications or precedents as such. Fidelity to our imperfect Constitution entails fidelity in pursuit of our constitutional aspirations and ends.").

⁶⁵ Fleming, *supra* note 60, at

⁶⁶ See *supra* Part I.B. (describing and critiquing Greene's argument for religious legal exemptions).

⁶⁷ See GREENE, *supra* note 1, at 149-157 (arguing for the lifting of legal burdens "as a matter of constitutional right, applicable to religious practice only").

⁶⁸ See *infra* Part III.

Professor Fleming doubts that an open discussion about what is to be done would produce better outcomes than one that is labeled constitutional.⁶⁹ Similarly, Professor Baxter fears that an open-ended discourse of this kind would have bad consequences. Baxter asks why *all* fundamental values talk, whether or not grounded in constitutional obligation, does not poison political discourse.⁷⁰ Of course, Baxter is correct that discussions of foundational concepts like “liberty” and “equality,” can end in a shouting match even when disentangled from claims of constitutional obligation. In a country with wildly diverse political and moral views, shouting matches are inevitable. But when we divorce this debate from constitutional rhetoric, at least the shouting will be about something that really matters. One cannot talk meaningfully about topics like health care reform without addressing our underlying conceptions of liberty and equality. One can and should talk about these proposals without talking about James Madison’s views on liberty and equality.

Moreover, people in our political culture understand that nonconstitutional foundational principles are contestable. I may feel very strongly about my particular conception of liberty and equality, but I and everyone else understands that this conception is controversial. In contrast, many constitutional provisions are not open to contestation. Like it or not, the Constitution provides for an electoral college, a malapportioned Senate, and a president who cannot be a naturalized citizen. One could conceive of the Constitution’s more open, textured language as a site for contesting foundational principles. If everyone thought of the Constitution in this way, I would have much less difficulty with constitutional argument. But too many people do not think of the Constitution this way. They think of it as a document that commands obedience, not one that facilitates argument.

Both Baxter and Fleming point out that our constitutional tradition will inevitably influence our views about concepts like liberty and equality.⁷¹ Of course, they are correct about this. Jettisoning constitutional obligation is not the same thing as wiping the slate clean. It is foolish to pretend that our current situation is not the product of several centuries of American history or that that history is not influenced by the Constitution. This is precisely why embracing constitutional disobedience is much less dangerous than many people think. We have deeply engrained habits of thought and action that we are unlikely to abandon just because the yoke of constitutional obligation has been lifted. This fact provides no reason why the yoke should not be lifted.

On a more specific level, Greene and Baxter both worry that by taking an oath to support and defend the Constitution, public officials assume an obligation to obey it.⁷² More broadly,

⁶⁹ Fleming, *supra* note 60, at (“Constitutional arguments that fit and justify our constitutional document and practice exert a greater claim on people than do utopian arguments: for the former are arguments about the best understanding of our practices, commitments, and aspirations.”).

⁷⁰ Baxter, *supra* note 59, at (“Seidman needs to explain why fundamental-values talk poisons and polarizes discourse only when constitutionalized, or at least why it’s especially dangerous in that form.”).

⁷¹ See *Id.* at (“[I]t seems likely that some of the inclinations Seidman locates in ordinary all-things-considered thinking are shaped by our constitutional tradition and its norms. And so constitutionalism may have real effects – even effects Seidman might approve – outside of ‘constitutional obedience’ in Seidman’s sense.”); Fleming, *supra* note 60, at (“Constitutional arguments that fit and justify our constitutional document and practice exert a greater claim on people than do utopian arguments: for the former are arguments about the best understanding of our practices, commitments, and aspirations.”).

⁷² See Greene, *supra* note 24, at [manuscript p. 3-5] (“[V]ia the oath or taking and doing their jobs or some combination, officials accept . . . the Constitution’s rules, which include duties and powers and limits on both. This gives us both a legal system, in Hart’s terms, and arguably, constitutional obligation, for officials.”); Baxter, *supra* note 59, at [manuscript p.1] (“When the U.S. Constitution directs or forbids action, usually it is understood to be

even without such an oath, public officials who assume offices derived from the Constitution incur a positional obligation of obedience. Baxter thinks that this point is so obvious that he generously refuses to believe that I have failed to recognize it. He therefore claims that my book “is not best understood as a manifesto urging government officials to violate their oaths and abandon support for the Constitution.”⁷³

I appreciate Professor Baxter’s desire to save me from embarrassment, but I’m afraid that my book is just such a manifesto. Perhaps I misunderstand the contrary position that Greene and Baxter advance, but it seems to me that their argument depends upon the very position that I insist on rejecting. The oath requirement is, itself, contained in Article VI, Section 3 of the Constitution. If, as I contend, we should not be bound by the Constitution then, prospectively at least, government officials should not be required to take the oath the Constitution mandates.

What about officials who have already taken the oath? At most, qualms about oath violation would delay implementation of the new regime until the terms of office of these officials expire. Since my proposals are unlikely to gain general acceptance any time soon, I can certainly live with this delay. In any event the kind of “constitution” that I believe these officials have sworn to defend is not one that imposes obligation.

Greene suggests that officials who take the oath or assume positions within our constitutional order often adopt H.L.A. Hart’s internal point of view⁷⁴ and believe that the Constitution is binding on them. No doubt they do, but I argue that this belief is incorrect. Merely pointing out that some people presently disagree with my position is not an argument against it.

B.

Professor David Lyons is correct when he says that his “reconstruction” of my argument is “more categorical than [I] intended.”⁷⁵ For example, he treats my assertion that other nations have gotten along fine without written constitutions as if I thought that this fact alone proved that the United States would be similarly successful if it abandoned constitutional obligation. I make no such claim. On the contrary, I have tried to be very careful in insisting that judgments about constitutional obligation need to be sensitive to the time, place, and circumstances where they are made.⁷⁶ The experiences of other countries like the United Kingdom and New Zealand are instructive. They refute the claim that written constitutions are essential to the protection of individual liberties, and they provide some evidence that we might be able to thrive without constitutional obligation. It therefore seems appropriate to cite these examples in support of my argument. If I thought that these examples alone were dispositive, I would not have bothered to write an entire book advancing many other reasons why the United States would be better off without constitutional obligation.

action on the part of government officials rather than ordinary citizens. And those officials take an oath to support the Constitution – an oath required by the text of the Constitution itself.”).

⁷³ Baxter, *supra* note 59, at

⁷⁴ See Greene, *supra* note 24, at (“[V]ia the oath or taking and doing their jobs or some combination, officials accept - in a Hartian sense - the Constitution’s rules, which include duties and powers and limits on both. This gives us both a legal system, in Hart’s terms, and arguably, constitutional obligation, for officials.”).

⁷⁵ Lyons, *supra* note 30,

⁷⁶ See CONSTITUTIONAL DISOBEDIENCE, *supra* note 3, at 18-19 (using Presidential decisions during the Civil War and Great Depression to illustrate the fact that we need to make “contextual decisions” about when the risk of anarchy are real, and “whether and when they outweigh countervailing reasons for ignoring the text”); see generally Louis Michael Seidman, *Acontextual Judicial Review*, 32 CARDOZO L. REV. 1143, 1143 (2011) (“Like any other institution, constitutional review must be evaluated within a particular temporal, cultural, and political context.”).

Similarly, Lyons claims that I believe that “public discussion of laws and public policies is healthy and robust when constitutional issues do *not* arise.”⁷⁷ Of course, I believe no such thing. There are many pathologies infecting modern American politics, perhaps the most egregious of which are the tremendous differences in education and wealth that people bring to public discussion. I wrote a book about one problem. The fact that we have many other problems is no excuse for not dealing with this one.

Lyons complains that I fail to “tell us what we could expect if we got rid of our written constitution” and that, in particular, I have not predicted whether we would “maintain the same constitutional framework.”⁷⁸ If Lyons means by this that I have not made precise predictions about the future of American politics, I plead guilty. Neither I nor Professor Lyons can predict the trajectory of American politics if (as seems overwhelmingly likely) a regime of constitutional obedience remains in place. Why should he expect more on the assumption that the shackles of constitutionalism are lifted?

If Lyons’ complaint is instead about my failure to specify the broad outlines of our constitutional order in the wake of the changes I propose, then I am afraid he has not read my book carefully enough. I devote many pages to defending my predictions that civil liberties are likely to remain intact,⁷⁹ that we will not devolve into Hobbesian chaos,⁸⁰ and that inertial forces are likely to keep the main institutions of government in place.⁸¹

Lyons claims that a “preoccupation with constitutionality does not result from the Constitution’s being written; it is occasioned by the practice of judicial review.”⁸² This undefended claim rests on a serious misunderstanding of American constitutional law. As advocates of popular constitutionalism and departmentalism have demonstrated, other political actors are perfectly capable of respecting constitutional obligation.⁸³ For example, no court has ever held that Arnold Schwarzenegger could not run for President because he was born outside the United States. If the issue were to arise, a court might well hold that the issue was a nonjusticiable political question. Yet a Schwarzenegger candidacy was never a serious possibility because of general acquiescence to constitutional commands.

The point that Lyons misses is that while judicial review is one way to enforce the Constitution, it is not the only way. Of course, if the Constitution were completely unenforced, then constitutional obligation would disappear. But the method of enforcement is beside the point. Even if enforced only by political actors, constitutionalism requires replacing our present all-things-considered judgments with archaic and often pernicious decisions made by people who are long dead.

⁷⁷ Lyons, *supra* note 30, at

⁷⁸ *Id.*

⁷⁹ See CONSTITUTIONAL DISOBEDIENCE, *supra* note 3, at 19-20 (using countries without written constitutions and infamous Supreme Court decisions to demonstrate that “[i]t is far from obvious that . . . countries, which lack written constitutions, have less robust traditions of protection for civil liberties”).

⁸⁰ See *id.* at 18-19 (“When the risks of unraveling [into anarchy] are small, or . . . when constitutional obedience itself might produce unraveling, the anarchy and tyranny argument does nothing to support constitutionalism. When the risks are large, constitutional obligation is unnecessary because almost everyone will make an all-things-considered judgment that we should follow constitutional text.”).

⁸¹ See *id.* at 63-91 (responding to fears about what society would look like in the absence of a constitution by arguing that “we do not need to speculate about a world with widespread constitutional violation because this is the world in which we already live”).

⁸² Lyons, *supra* note 30, at

⁸³ For an extended discussion, see MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 33-94 (1999).

Lyons himself recognizes that the presumption in favor of constitutional obedience can be “overridden by considerations of justice and humanity.”⁸⁴ Unfortunately, however, he fails to explain why he thinks that there should be a presumption in favor of constitutional obedience at all. Constitutionalists ask us to settle the issues that divide us according to commands authored centuries ago by people who knew nothing of our present circumstances, who entertained many bizarre ideas about the world, and who themselves acted unlawfully. If we are to have presumptions, then surely the presumption should be against fidelity to their work.

C.

Khiara Bridges understandably worries that “abortion access in an era of constitutional infidelity would likely be reduced substantially from the levels that adult women with the ability to pay enjoy in our present era of constitutional fidelity.”⁸⁵ For those of us who share Professor Bridges’ commitment to reproductive autonomy, her warning poses a serious challenge to my argument.

It is at best debatable, however, whether constitutional obligation played an important role in establishing the abortion right a generation ago. As Bridges acknowledges,⁸⁶ even many defenders of *Roe v. Wade*⁸⁷ doubt that Justice Blackmun’s constitutional argument deserves to be taken seriously. As she puts it, the abortion right was established “by hook or crook.”⁸⁸ If she is correct, then the abortion right was established by constitutional disobedience, not constitutional fidelity.

Nor is it clear that constitutional obligation has provided a secure foundation for abortion rights. As things stand now, the abortion right depends upon the uncertain vote of a single, elderly justice. It seems obvious that the future of reproductive freedom rests more on the life expectancy of the justices, the vagaries of presidential politics, and the trajectory of cultural change than on constitutional obligation.

There is a more fundamental problem with Bridges’ position. On careful reading, it becomes clear that she, herself, does not believe in constitutional obligation. Her claim is not that women should have access to abortions because this is what the text of the constitution demands. Instead, her belief in reproductive freedom, like mine, rests on extra-constitutional norms. Her argument is entirely instrumental: the belief *by others* in constitutional obligation might preserve rights that she favors for reasons that have nothing to do with the Constitution.

Perhaps Bridges is right about this, but it is important to see that this is not an argument in favor of constitutional obligation. It is, instead, an argument in favor of tricking others into believing in an obligation so as to achieve extra-constitutional objectives. The point becomes obvious if we imagine that Professor Bridges came to believe that the Constitution, properly interpreted, prohibited states from allowing abortions. On this set of facts, none of the arguments Bridges advances in her comments would support constitutional obligation. On the contrary, her arguments would support disobedience.

Properly understood, Professor Bridges’ argument poses perhaps the most difficult problem in political theory: Is it appropriate to manipulate others through arguments that we

⁸⁴ Lyons, *supra* note 30, at (emphasis omitted).

⁸⁵ Khiara M. Bridges, *Abortion Access in an Era of Constitutional Infidelity*, 93 B.U. L. REV. (2013).

⁸⁶ *Id.* at (citing Ruth Bader Ginsburg’s *Madison Lecture* to support the proposition that “[t]here are even those who support a woman’s right to choose . . . who disagree with the reasoning in *Roe*” and think the Court should have decided the case on equal protection grounds).

⁸⁷ 410 U.S. 113, 153 (1973) (holding that the Constitution guarantees a right of privacy that is “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”).

⁸⁸ Bridges, *supra* note 85, at

ourselves do not believe in order to achieve results that we favor? I am not sure of the answer to this question, and I do not propose one in my book. These are the sorts of questions we will have to confront once we get over the silly idea that the right to an abortion ought to depend on the proper interpretation of a particular text.

III

In this final section, I discuss the relationship between my argument and Professor Greene's. Does constitutional obligation entail general political obligation? Does the rejection of general political obligation entail constitutional disobedience?

In an earlier book, I argued that constitutional obligation requires obedience to lower level lawmaking made pursuant to the constitution.⁸⁹ Professor Greene rejects this conclusion, but his reasoning is unclear. He writes:

The legitimacy of a constitution . . . may result from conditions of its acceptance or from its justness or participatory rights or some combination, and thus be a constitutional order worthy of support and one we should not actively undermine. But this is not the same thing as saying government under such a constitution is justified in demanding that its subjects always obey the law, or that we have an obligation to do so.⁹⁰

I am puzzled by this assertion. Constitutions set out the mechanisms by which laws become binding. Articles I and VI of our Constitution, for example, provide that measures passed by majorities of both Houses of Congress, signed by the President, and in conformance with the various internal and external constitutional constraints on congressional power are the "supreme law of the land." If these procedures are followed, and if we have an obligation to obey the Constitution, then it would seem that we have a subsidiary duty to obey provisions that the Constitution makes binding.

Of course, the Constitution itself negates legal obligation to obey some measures passed by Congress and signed by the President. A statute prohibiting criticism of government officials does not have the force of law. Professor Greene seems to think that the Constitution contains a prohibition on the enforcement of some laws against some conscientious objectors to those laws. If this is correct, and if the Constitution binds us, then we are bound to disregard these measures.

The puzzle is how Professor Greene can argue that we are bound by this constitutional prohibition. If, as he insists, conditions of acceptance, justness, and participatory rights are insufficient to create *prima facie* general political obligation, then why are they sufficient to create constitutional obligation, which is, after all, a form of political obligation? More generally, I think that a full defense of Greene's argument for constitutional opt outs requires an answer to the many objections I have made to any form of constitutional obligation.

For these reasons, I believe constitutional obligation entails more general political obligation, and a rejection of political obligation entails constitutional disobedience. Does it follow that a rejection of constitutional obligation entails a broader rejection of general political obligation? I think not. I set out my reasons for this conclusion at length in my book,⁹¹ so I will only sketch the argument here.

⁸⁹ See LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* 17 (2001) ("Law made pursuant to a scheme that is binding is itself binding precisely because it is made pursuant to a binding scheme. For example, if a constitution permits statutes to be entrenched, and if the constitution itself is legitimate, it would follow that the entrenchment the constitution permits is also legitimate.").

⁹⁰ GREENE, *supra* note 1, at 26.

⁹¹ *CONSTITUTIONAL DISOBEDIENCE*, *supra* note 3, at 117-30 (explaining why "[o]ne can forego constitutional obligation without giving up on legal obligation more generally, and one can condemn using the Constitution as a foundation without giving up on a more general foundationalism").

On the one hand, constitutional obligation imposes costs that more general political obligation does not. In our political culture, the Constitution is thought to settle arguments with finality. If I persuade you that the Constitution prohibits X, it is not an acceptable response to say that the Constitution is evil. In contrast, people regularly argue that ordinary statutes are evil and should be repealed.

On the other hand, there are arguments for obedience to ordinary statutes that do not apply to constitutional obedience. For example, defenders of general political obligation argue that societies cannot survive without law and that because we all get the benefit of law, we have an obligation to each other to obey it. Greene rejects these arguments, and perhaps he is right to do so. But whether he is right or not, it is simply untrue that societies cannot survive without constitutions. On the contrary, to the extent that we have obligations to each other, we owe it to our fellow citizens to undermine the slavish adherence to a constitutional text that has stood in the way of authentic political freedom for far too long.