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It is a surprising fact of American constitutional practice that we cannot agree on a methodology of constitutional interpretation. What can explain our disagreement? Is it the product of a deeper, principled dispute about the meaning of constitutional law? Or is it just a veneer—a velvet curtain obscuring what is really a back-room brawl over political outcomes?

This Article suggests that these, in essence, are the only viable possibilities. Either we disagree about interpretation because we disagree (or are confused) about constitutional *authority*—about why the Constitution binds us in the first place; or we disagree because we disagree politically about the particular results of using one methodology versus another.

This Article contends that methods of interpretation must be defended by reference to accounts of constitutional authority. It takes as its case in point the family of interpretive approaches known as *originalism*, which favors resolving constitutional issues according to a meaning fixed at the Framing. Originalism is an apt case study because it currently is ascendant in both academic theory and judicial practice and, not incidentally, because it often is suspected of being a cover for controversial political commitments.

This Article illustrates the relationship between interpretation and authority by assessing the "natural rights" defense of an originalist Constitution offered by the influential New Originalist

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Randy Barnett. Barnett's account fails, the Article contends, because it cannot explain the authority of the Constitution it purports to justify. But its failure underscores the centrality of authority to methods of interpretation.

The Article then examines three general accounts of constitutional authority that might be thought to entail originalism. Accounts based on "consent" or "popular sovereignty," while rhetorically appealing, lack any basis in the realities of modern society. Accounts based on what the Article terms "Moral Guidance"—the supposedly superior wisdom of the Framing process—are both descriptively implausible and conceptually problematic. Only accounts based on "Dispute Resolution," such as the well-known "Footnote Four" approach from the Supreme Court's *Carolene Products* decision, can overcome the fatal flaws of these other accounts. But Dispute Resolution can support only a selective, modest use of originalism.

Originalists, then, are left with a choice, the Article concludes. They can moderate their interpretive methodology as the Footnote Four approach suggests. Or they can insist on thoroughgoing originalism—with nothing to back it up but the bare desire for politically controversial results.

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I. INTERPRETATION AND DISAGREEMENT

Here is a remarkable fact. Americans live under the most successful written constitution in history, a document that over more than two centuries has survived civil war, endured tumultuous debates over race and regulation and rights and the role of government, inspired countless imitations around the world, and earned the nearly religious reverence of citizens rich and poor, urban and rural, natural-born and naturalized, Republican and Democrat. And yet we cannot agree on the seemingly fundamental question of how that document should be interpreted.

Our disagreement is not just an academic one, though it thrives in academic circles. It is both real and important: real, in the sense

that actual constitutional decision-makers are swept up in it; and important, in the sense that some of those decision-makers are Justices of the United States Supreme Court.

Consider two influential books by current Justices. Antonin Scalia's *A Matter of Interpretation* is a "New Originalist" manifesto, a typically merciless (but far from humorless) battle cry on behalf of "original meaning" interpretation.[1] Stephen Breyer's *Active Liberty* is a spirited defense of a flexible, adaptable "living Constitution" that reads like a reply brief to Justice Scalia despite never mentioning Scalia by name.[2] These are men whose job it is to render binding interpretations of the Constitution, and yet they could hardly disagree more fundamentally about how that job should be performed.

It is relatively rare for sitting Justices to defend their methodology at length and in public, as Justices Scalia and Breyer have done. But it is common for clashes of methodology to decide constitutional cases, or at least to be deployed as if they will decide them. *Roe v. Wade*, probably the most contentious Supreme Court decision since *Dred Scott*, pitted what would now be called the "living constitutionalism" of Justice Blackmun against the textualism of Justice White and the originalism of Justice Rehnquist.[3] (Living constitutionalism won that round.) *NFIB v. Sebelius*, the recent

1. ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 37–39 (1997) [hereinafter SCALIA, *Common-Law Courts*].

2. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005).

3. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (Blackmun, J., for the Court):

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . .
>
> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

See also id. at 221 (White, J., dissenting) ("With all due respect, I dissent. I find nothing in the language or history of the Constitution to support the Court's judgments. The Court simply fashions and announces a new constitutional right . . . ."); *id.* at 171, 174 (Rehnquist, J., dissenting) ("To reach its result, the Court necessarily has had to find within the Scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment.").

"Obamacare" case, matched the increasingly vehement originalism of, respectively, Chief Justice Roberts, Justice Scalia, and Justice Thomas against the levelheaded pragmatism of Justice Ginsburg.[4] (Point to the originalists.) There are far too many other examples to list.

We have managed to squeak by for more than two hundred years without a consensus approach to constitutional interpretation. Perhaps our interpretive disagreement even deserves some credit for this: no single approach dominates, so everyone's preferred approach is always in play. Still, it is profoundly strange that we agree so broadly that the Constitution is the supreme law of the land but diverge so widely on how to determine just what that law requires of us.

I will not attempt the Sisyphean task of resolving that disagreement in this Article. But I will try to construct (perhaps to excavate) a framework around which the components of a resolution might be assembled. I will contend that methodological debates must first be carried out as foundational debates about the Constitution's authority—about why the Constitution we are interpreting binds us in the first place. Interpretive methods presuppose accounts of constitutional authority. So we should focus on the question of authority before we enter the methodological fray. Answering the question of authority may solve the problem of interpretation for us—or at least make the outlines of that problem more clear.

I also will evaluate the reasonably plausible attempts to answer the authority question, the question of why the Constitution obligates us. I will find all of them wanting in some ways and most of them wanting in ways that are fatal. And I will suggest that a

4. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2589 (Roberts, J., for the Court) ("The Framers gave Congress the power to *regulate* commerce, not to *compel* it. . . .") (emphasis in original); *id.* at 2642, 2644 (Scalia, J., concurring in part and dissenting in part) ("If this provision 'regulates' anything, it is the *failure* to maintain minimum essential coverage. One might argue that it regulates that failure by requiring it to be accompanied by payment of a penalty. But that failure—that abstention from commerce—is not 'Commerce.'"); *id.* at 2677, 2677 (Thomas, J., concurring in part and dissenting in part) ("I adhere to my view that 'the very notion of a "substantial effects" test under the Commerce Clause is inconsistent with the original understanding of Congress' powers . . . .'"); *id.* at 2609, 2616 (Ginsburg, J., concurring in part and dissenting in part) ("Consistent with the Framers' intent, we have repeatedly emphasized that Congress' authority under the Commerce Clause is dependent upon 'practical' considerations, including 'actual experience.'").

persuasive approach to interpretive methodology must be built upon the most promising account of authority. If methodology doesn't follow authority, then it is deeply flawed methodology. Perhaps worse, it is methodology that can only be defended as a means to generate the interpreter's preferred results.

I will frame my arguments here around a particular family of interpretive methodologies that usually travel under the name *originalism*. I use originalism as my case in point for several reasons. First, originalism is ascendant; it may not yet dominate the bench, and it certainly doesn't dominate the academy, but its star undeniably is on the rise. So in focusing on originalism, I am focusing on a subject of considerable contemporary interest.

Second, largely for the first reason, there is far more good recent writing about originalism (pro and con) than about any competing methodology, giving me a great deal of material to work with.

Third, contemporary originalist theory features enough commonality that it makes sense to consider "originalism" as a relatively cohesive approach—much more so than the various nonoriginalist methods sometimes lumped together under the label "living constitutionalism."

And I must admit to a somewhat discreditable fourth reason. As a nonoriginalist, I have long labored under the suspicion that originalism is driven by outcomes rather than the other way around—that, to quote the pugnacious title of an article by a fellow nonoriginalist, "originalism is bunk,"[5] a sophistic and increasingly sophisticated attempt to put constitutional lipstick on a nakedly political pig. I doubt that I am alone among nonoriginalists in my skepticism. This Article presents an opportunity to prod and test that skepticism a bit, by examining what might lie beneath originalism other than political opportunism.

My conclusions do not validate my skepticism, exactly. But they don't entirely dispel it either.

I begin in Part II by introducing, tentatively, the relationship between interpretive methodology and constitutional authority. I present a "Cynical Narrative" of originalism, one that shamelessly indulges my skepticism about its motivations. Then I examine the account of constitutional authority and its connection to originalism offered by Randy Barnett, a prominent New Originalist. I argue that

5. *See* Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009).

Barnett's account is, at bottom, no more than a deeply theorized version of my Cynical Narrative. And I use this contention to demonstrate originalism's (or any methodology's) need for a good underlying theory of authority.

In Part III, I defend further the claim that authority is central to methodology. After defining my subject more carefully, in a way that takes account of the New Originalists' distinction between constitutional "interpretation" and constitutional "construction," I argue that interpretive approaches must be consistent with some theory of constitutional authority as a practical matter. And I explain why the claim made by Lawrence Solum, another New Originalist, that interpretive questions are in part non-normative does not threaten the authority/interpretation connection I am trying to draw.

Having made a *prima facie* case for an intrinsic relationship between interpretation and authority, I devote the remainder of the Article to presenting, and critically assessing, three general accounts of constitutional authority that might plausibly lead towards originalism. If any of these accounts both succeeds as a justification of constitutional authority and entails originalism, then we have a viable alternative to the jaundiced Cynical Narrative of originalism's underpinnings. But if no plausible account of constitutional authority also entails originalism, then the Cynical Narrative becomes more credible.

In Part IV, I contend that the related concepts of consent and popular sovereignty, which sometimes are offered by originalists in support of their approach, cannot persuasively justify the authority of our Constitution or, probably, of any other constitution in the circumstances of modern political life.

Part V tackles a considerably more nuanced attempt to justify constitutional authority that I call a *Moral Guidance* account. A Moral Guidance account locates authority in the supposedly superior wisdom of some aspect or aspects of the constitutional process, such as the Framing. In a certain form, it entails a strong version of originalism. But it also faces serious obstacles, some contingent on the circumstances of our actual Framing, some more conceptual and universal. I argue that these obstacles render Moral Guidance accounts implausible as justifications of constitutional authority and thus as defenses of originalism.

Finally, in Part VI, I examine a very different way of justifying constitutional authority, which I call a *Dispute Resolution* account.

Dispute Resolution accounts attribute authority to the Constitution, not because its procedures are especially wise, but because they are especially fair or determinate and, as such, are capable of avoiding or resolving certain kinds of disputes that ordinary democracy cannot avoid or resolve. The best-known example of a Dispute Resolution account is the "representation reinforcement" approach suggested by the famous Footnote Four of the *Carolene Products* decision and later elaborated by John Hart Ely. I argue that this Footnote Four approach is viable as an account of constitutional authority—more viable, in any event, than its competitors. I also argue, however, that the Footnote Four approach supports at best a selective, modest form of originalism.

In Part VII, I conclude that because constitutional interpretation and constitutional authority are joined at the hip, originalists face a choice. They can accept a moderate form of originalism, which is the only kind justified by a plausible theory of constitutional authority. Or they can insist on thoroughgoing originalism, with no normative warrant other than the bare desire for politically conservative results.

II. ORIGINALISM, VALUES, AND AUTHORITY

Let's begin with a surprisingly difficult question. What exactly would be wrong with an approach to constitutional interpretation—say, originalism—that can be defended only as a means of implementing certain politically controversial results?

This Part answers that question by deploying the conceptual mechanics of constitutional *authority*—of the Constitution's capacity to bind us. I introduce the concept of authority by posing a thought experiment involving a "Cynical Narrative" of originalism's motivations, and then juxtaposing that thought experiment with the sophisticated and provocative New Originalist theory of Randy Barnett. Barnett's theory fails to make sense of constitutional authority, I explain, and yet a good account of authority is required to debunk the Cynical Narrative. Originalism, or any interpretive methodology, must come to grips with the question of authority.

Before going any further, however, I need to define with more care the "originalism" to which I will be referring throughout the Article.

A. "Originalism"

Originalism is a type of answer to the fundamental, persistently unresolved question I referenced in my introduction, the question of *interpretive methodology*: how should courts (or other interpreters) go about the task of determining whether and how the Constitution applies to particular issues or disputes? 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.[6] But what exactly is "originalism?"

Both the core and the boundaries of originalism are contested, by originalists and by their critics;[7] and, like most commonly used terms that invoke complex and disputed concepts ("democracy," "the rule of law," "family"), no doubt "originalism" often is used carelessly. It probably is impossible to define "originalism" in a way that is consistent with every careful use of the term, much less with every careless use of it. But we need not attempt that impossible project. For purposes of this Article, I will use "originalism" in the following rather general sense:

Originalism holds that the application of the Constitution to an issue or dispute should be determined, to the extent possible, by its meaning at the time of framing or ratification.

I think this definition is a fair statement of the common ground that unites most contemporary originalists.[8] Within the spacious

6. Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMM. 257, 257 (2005) [hereinafter Barnett, *Trumping Precedent*].

7. *See, e.g., infra* notes 9–16 and accompanying text.

8. In gaining some understanding of contemporary originalism and in fashioning this very general definition, I am indebted to the work of Lawrence Solum, who is both one of the leading theorists of contemporary originalism and a tireless chronicler of the movement. Solum's paper "Semantic Originalism," available only in draft form and online as of this writing, contains an extensive discussion of the history and current state of originalist thought, including points of dispute within originalism. *See* Lawrence B. Solum, Semantic Originalism 13–27 (Nov. 22, 2008) (unpublished manuscript), *available at* http://ssrn.com/abstract=1120244 [hereinafter Solum, Semantic Originalism].

I believe the general definition I offer in the text is consistent with Solum's intricate attempt to define the core of originalism in "Semantic Originalism," though it is far from coextensive with it. Solum offers the following statement of what he calls "Pure Normative Originalism": "Constitutional practice should be substantially guided by the original public meaning of the text." *Id.* at 30. The general statement I use here is similar to this and not inconsistent with it, though there are at least two differences. First, Solum specifies the meaning of the Constitution as "the original public meaning," which rules out "original intent" positions.

margins of this general definition, of course, lurks much disagreement.[9] For example, originalists disagree on how to determine the "meaning" of the Constitution at the time of its framing or ratification (and thus on whether "framing" or "ratification" is the operative event). Some originalists would determine original meaning by looking for the "intent" of the Framers;[10] others look for the meaning that would have been attributed by a reasonable member of the public at the time the document was ratified (the "original public meaning").[11] Originalists also disagree on how often the meaning of the text will be underdeterminate[12] and, when it is, on how to "construe" the

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This is entirely consistent with Solum's arguments regarding the semantic meaning of the Constitution, but for my purposes I want to include original-intent positions within the realm of the "originalism" I am examining.

Second, Solum's statement requires "constitutional practice" to be "substantially guided by" original public meaning. I take "constitutional practice" to be shorthand for "the application of the Constitution to an issue or dispute," as I phrase it in my definition. *See id.* at 29 (describing "constitutional practice"). It seems possible, however, that constitutional practice might be "substantially guided by" original public meaning without being "determined, to the extent possible" by that meaning, as my definition requires. In this sense Solum's statement of "normative" originalism might be less demanding than my definition.

9. In briefly enumerating in the following text some of the points of disagreement among originalists, I will cite a few examples of each position; but I refer the reader to Solum's work for a far better understanding of contemporary originalist theory than I can provide here, including citations to important statements and critiques of originalism. *See* Solum, Semantic Originalism, *supra* note 8; *see also* Larry Solum, *Legal Theory Lexicon 019: Originalism*, LEGAL THEORY BLOG (last revised Feb. 19, 2012), http://lsolum.typepad.com/legal_theory_lexicon/2004/01/ legal_theory_le_1.html [hereinafter Solum, *Originalism*].

10. Leading statements of this "original intention" position include Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977); Edwin Meese III, United States Attorney General, Speech Before the American Bar Association (July 9, 1985), *reprinted in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE 47–54 (Steven G. Calabresi, ed. 2007) [hereinafter ORIGINALISM].

11. This appears to be the consensus position among originalists as of this writing. Prominent expositions include ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143–85 (1990) [hereinafter BORK, TEMPTING OF AMERICA]; Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 875 (1992); SCALIA, *Common-Law Courts*, *supra* note 1; KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1127 (2003); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004) [hereinafter BARNETT, LOST CONSTITUTION]; and Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*,104 YALE L.J. 541, 553 (1994).

12. *See* Larry Solum, *Legal Theory Lexicon 063: Interpretation and Construction*, LEGAL THEORY BLOG, http://lsolum.typepad.com/legal_theory_lexicon/2008/04/legal-theory-le.html (last

text to resolve the issue at hand despite this underdeterminacy.[13] They disagree on the extent to which original meaning (when it is determinate) contributes to the content of constitutional law: on whether original meaning is all there is to constitutional law,[14] whether original meaning is part of constitutional law but not all of it,[15] or whether original meaning might become part of constitutional law but need not do so.[16] And they disagree on other matters as well.

The substance of these various disagreements need not concern us, however. Nothing significant in my arguments will turn on particular resolutions of these disputes or on other intricacies of originalist thought. Where differences within originalist theory might be relevant to what I have to say, I will try to note that fact.

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updated Dec. 23, 2012) ("Old Originalists seemed to believe that the original intentions of the framers fully determined the translation of the constitutional text into the correct set of legal rules: interpretation could do all the work."). By "Old Originalists," Solum seems to have in mind many or all of the theorists listed *supra* note 10. I would add to this list a progenitor of the so-called New Originalism, which looks not to original intent but to original public meaning: Antonin Scalia, who often writes or speaks as if the project of identifying original meaning is all there is to the application of the Constitution to particular disputes. *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) [hereinafter Scalia, *Lesser Evil*].

13. For originalist descriptions of the phenomenon of textual underdeterminacy, see Solum, Semantic Originalism, *supra* note 8, at 67–75; BARNETT, LOST CONSTITUTION, *supra* note 11, at 118–21. For a survey of differing originalist approaches to the project of "constitutional construction"—the application of the text when its original meaning runs out—see Solum, Semantic Originalism, *supra* note 8, at 75–79.

14. Solum believes that "no actual proponent of originalism has endorsed this extreme position." Solum, Semantic Originalism, *supra* note 8, at 6. But "Old Originalist" beliefs that original meaning "can do all the work," *see supra* note 12, seem to assume this position. If correctly identifying original meaning is capable of completely resolving all constitutional issues, one way or another, then original meaning just *is* constitutional law: there are no constitutional rules or commands other than those specified by original meaning.

15. This "moderate" position is the one necessarily assumed by Solum and other New Originalists who agree that constitutional "construction" is required to resolve issues once original meaning runs out. *See* Solum, Semantic Originalism, *supra* note 8, at 6–7, 67–75. It also is the position taken by originalists who believe the Court should presumptively defer to (at least some) nonoriginalist precedents.

16. This "weak" position is taken by those who believe that constitutional law *qua* law is created by judicial decisions, not by the sources relied upon by judges in making those decisions. *See id.* at 7–8, 8 n.26 (citing as an example Mark Greenberg, *The Standard Picture and its Discontents*, UCLA School of Law Research Paper No. 08-07, *available at* http://ssrn.com/abstract=1103569).

B. Originalism: A Cynical Narrative

With the concept of originalism thus loosely defined, allow me to introduce the relationship between constitutional interpretation and constitutional authority with a brief thought experiment. Imagine that someone presents to you the following supposedly descriptive account of originalism:[17]

> The Cynical Narrative
>
> Contemporary originalism began in the 1970s, not as a principled theory of constitutional interpretation, but rather as a politically conservative device to critique liberal Warren Court and early Burger Court decisions[18] like *Roe v. Wade*, *Griswold v. Connecticut*,[19] and *Miranda v. Arizona*.[20] Originalism was a natural vehicle for this critique: it combined an appeal to patriotism and historical nostalgia (well-timed to coincide with the 1976 Bicentennial) with a popular sense that the Court had overreached in many of these cases.
>
> These early critical uses of originalism, designed as they were primarily for rhetorical purposes, were superficially appealing to those who shared the political commitments of their proponents but also, not surprisingly, were undertheorized. The first wave of originalists failed to carefully think through the conceptual mechanics of "original intent"—whose intent mattered, how it should be identified, what mental states counted as "intent," and so forth. They also neglected to offer any account of originalism's normative underpinnings besides a vague promise of "judicial constraint."[21] These and

17. This account is a cynical version of the much-more-charitable (or sympathetic) history offered in Solum, Semantic Originalism, *supra* note 8, at 13–27. I don't intend to present this account as fact. But I think it is a plausible interpretation of fact, and so, in presenting the Cynical Narrative, I will cite actual sources that might be used to support such an interpretation.

18. Classic uses of originalism in this conservative-critical vein include the sources cited *supra* note 10, as well as BORK, TEMPTING OF AMERICA, *supra* note 11.

19. 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*.

20. 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.

21. *See* Scalia, *Lesser Evil*, *supra* note 12, at 863–64; BORK, TEMPTING OF AMERICA, *supra* note 11, at 4–5. The "judicial constraint" rationale is of course not original with modern

other shortcomings made the "Old Originalism" a relatively easy target for the counterattacks that came from the (mostly liberal) legal academy in the late 1970s and into the 1980s.[22]

During the same period, however, conservatives were gaining more power in national politics and thus, eventually, among the judiciary, including on the Supreme Court. Ronald Reagan's election in 1980 brought a new, conservative Chief Justice, William Rehnquist, and the appointment as Associate Justice of Antonin Scalia, who would become a flagbearer of originalism. From 1980 through 2010, seven of the eleven new Justices were appointed by Republican presidents. These Justices had an incentive to develop originalism as an apparently principled ground for overturning liberal Burger Court, Warren Court, and perhaps even New Deal precedents. They were aided and abetted in this endeavor by the formation in 1982 of the Federalist Society,[23] an organization of conservative law professors and students that lent academic credibility and intellectual firepower to the effort to rehabilitate originalism.

The result was the "New Originalism"—a better-theorized attempt to patch the holes in the old version.[24] New

originalists. Chief Justice Taney famously used it in his infamous opinion in *Dred Scott v. Sandford*, the 1857 decision holding that slaves, former slaves, and their descendants 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.

60 U.S. 393, 405 (1857).

22. Among the most important early examples are Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981), *reprinted in* RONALD DWORKIN, A MATTER OF PRINCIPLE 33–71 (1985) [hereinafter DWORKIN, MATTER OF PRINCIPLE]; and H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 886 (1985).

23. *See* ORIGINALISM, *supra* note 10, at 1 (citing 1982 as the date the Federalist Society was formed). The *Originalism* book is a collection of reprinted speeches by leading lights of contemporary originalism, combined with the transcripts of panel discussions held to celebrate the Society's 25th anniversary in 2007.

24. "New Originalism" and "New Originalists" are terms sometimes used to describe a loosely defined school of theory that has arisen during the past generation or so and that is largely responsible for the move away from "original intention" originalism and toward its "original public meaning" iteration. *See, e.g.*, Solum, Semantic Originalism, *supra* note 8, at 18–

> Originalists replaced the problematic quest for "original intent" with the seemingly more concrete notion of "original public meaning."[25] And they began to devise deeper normative theories to support originalist methodology.[26] They held conferences, wrote books and articles, and earned chairs and named professorships at elite law schools. Most importantly, their work began to bear the fruit of significant results on the Court, such as 2008's *District of Columbia v. Heller*, an originalist-to-the-bone decision that recognized for the first time an individual right to bear arms under the Second Amendment.[27]
>
> But the New Originalism, like the Old, remains a stratagem for imposing politically conservative values in the guise of constitutional interpretation. Nowhere is this more evident than in what New Originalist Randy Barnett has called originalism's "special difficulty with precedent."[28] Originalism is no different from any other methodology in the conflict it presents with existing Court decisions that it concludes are wrongly decided. Yet originalists tend to

19. Although I will use these labels as convenient shorthand in this Article, I do so somewhat reluctantly, as they remind me of the following exchange from the movie *This Is Spinal Tap*:

> Marty: Let's . . . talk a little bit about the history of the group. I understand, Nigel, you and David originally started the band . . . was it . . . back in 1964?
> David: Well, before that we were in different groups. I was in a group called The Creatures . . . which was a skiffle group.
> Nigel: I was in Lovely Lads.
> David: Yeah.
> Nigel: And then we looked at each other and says well, we might as well join up, you know, and uh . . . .
> David: So we became The Originals.
> Nigel: Right.
> David: And we had to change our name actually . . . .
> Nigel: Well, there was . . . another group in the East End called The Originals, and we had to rename ourselves.
> David: The New Originals.
> Nigel: The New Originals. And then, uh, they became . . . .
> David: The Regulars. They changed their name back to The Regulars, and we thought, well, we could go back to The Originals, but what's the point?

THIS IS SPINAL TAP (MGM 1984).

25. *See* sources cited *supra* note 11; *see also* Solum, Semantic Originalism, *supra* note 8, at 18–19.

26. *See* Solum, *Originalism*, *supra* note 9.

27. *See* District of Columbia v. Heller, 554 U.S. 570 (2008).

28. Barnett, *Trumping Precedent*, *supra* note 6, at 262.

> obsess about stare decisis.[29] This is because originalism is caught between the Scylla of its true raison d'être—as a device for overturning liberal precedents—and the Charybdis of those few nonoriginalist precedents (e.g., *Brown v. Board of Education*)[30] with which even originalists cannot bear to part. (No surprise, then, that many originalist theorists conclude that *Brown* should not be overturned while insisting, almost in the same breath, that *Roe* must be.)[31]
>
> Originalism, in short, is a cynically instrumentalist philosophy. It reflects not a good-faith attempt to derive the actual meaning of the Constitution, but rather a politically motivated effort to overturn liberal results and impose conservative ones.

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29. Examples of ink spilled, and lecture halls filled, by originalists on the topic of *stare decisis* include the following. Ink spilled: Barnett, *Trumping Precedent*, *supra* note 6; Kurt T. Lash, *Originalism, Popular Sovereignty, and* Reverse *Stare Decisis*, 93 VA. L. REV. 1437 (2007); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994); Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803 (2009) [hereinafter McGinnis & Rappaport, *Reconciling Originalism*]; Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005); Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2731–34 (2003); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419 (2006). Lecture halls filled: Panel on Originalism and Precedent, *in* ORIGINALISM, *supra* note 10, at 199–252.

30. 347 U.S. 483 (1954). In *Brown*, the Court explicitly rejected originalist methodology in invalidating mandated racial segregation in public schools under the Equal Protection Clause.

31. To my knowledge, the first originalist to argue that *Brown* was in fact correctly decided—that racial segregation was in fact contrary to original meaning or original intent—was Michael McConnell. *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). McConnell's arguments swim upstream against a strong consensus of historical and legal scholarly opinion. *See, e.g.*, BERGER, *supra* note 10, at 117–33; Alfred Avins, *De Facto and De Jure School Segregation: Some Reflected Light on the Fourteenth Amendment from the Civil Rights Act of 1875*, 38 MISS. L.J. 179 (1967); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Michael Klarman, *An Interpretative History of Modern Equal Protection*, 90 MICH. L. REV. 213, 252 (1991); Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995). Nonetheless, his conclusion has been endorsed in a number of subsequent originalist writings, always without independent historical analysis. *See* Barnett, *Trumping Precedent*, *supra* note 6, at 260; McGinnis & Rappaport, *Reconciling Originalism*, *supra* note 29, at 842–43.

Even originalists who reject McConnell's conclusion that *Brown* was rightly decided as an originalist matter (or who suspend judgment on that conclusion) often conclude for other reasons that it should not be overturned. *See, e.g.*, Barnett, *Trumping Precedent*, *supra* note 6; McGinnis & Rappaport, *Reconciling Originalism*, *supra* note 29, at 837–41; Lash, *supra* note 29, at 1469–71; Strang, *supra* note 29, at 480–82. Many of these same originalists insist that *Roe* should be overruled. *See* McGinnis & Rappaport, *Reconciling Originalism*, *supra* note 29, at 840–41; Lash, *supra* note 29, at 1469–71; Strang, *supra* note 29, at 482–84.

Having read this Cynical Narrative, imagine that you are a committed originalist. (Perhaps in fact you are one.) Would you be (are you) offended by the Narrative? Would you (do you) find something insulting, perhaps even threatening, in its implications? Would you be (are you) motivated to refute it as best you could (can)?

Now suppose that the Cynical Narrative turns out to be true. So what? Would its truth be grounds to doubt originalism if you are an originalist? To criticize it if you are not?

The fact is that few if any originalists accept, much less promote, the Cynical Narrative. Few originalists defend their approach as a way to implement politically conservative (or any other particular kind of) results. But in many, perhaps most, cases, the results originalists claim for their methodology coincide with results that political conservatives would approve (or at least would find more palatable than the alternatives). Most originalists claim *Roe* was wrongly decided; most political conservatives disapprove of an abortion right. Many people in this country consider themselves political conservatives; politicians appeal openly to their views as a matter of course. Why then have originalists not used the attainment of conservative results as an explicit justification for their methodology?

The most likely intuitive reaction to the Cynical Narrative, I believe, is that it is borderline defamatory if false and deeply problematic for originalism (perhaps even disqualifying of it) if true. Intuitively, there is something very wrong with staking one's preferred approach to constitutional interpretation entirely on the achievement of certain politically controversial outcomes.

I think this intuition is correct, and that the implications of its correctness are important. To explain why, I begin with a rare and refreshing exception to the rule: a thoughtful originalist who does in fact defend his approach as a way to implement politically conservative—to be completely accurate, politically libertarian—results. I'm referring to Randy Barnett.

C. Barnett's Libertarian Constitutional Theory

Barnett 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.[32] "Why should we pay any attention to it?"[33] Barnett agrees that, as I will argue in Part IV, this question cannot satisfactorily be answered with the notion that we have *consented* to be bound by the Constitution.[34] 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."[35] And he asserts that justice consists of certain "natural rights" that protect liberty.[36] "[I]f a constitution contains adequate procedures to protect these natural rights, it can be legitimate," he says.[37]

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."[38] The Constitution as created by the Framers, then, is legitimately authoritative, according to Barnett; it is authoritative because obeying it will promote the libertarian rights it was designed to protect. 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."[39]

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32. BARNETT, LOST CONSTITUTION, *supra* note 11, at 9.

33. *Id.*

34. *See id.* at 11–31.

35. *Id.* at 9; *see id.* at 32–52.

36. *See id.* at 53–86.

37. *Id.* at 4.

38. *Id.* at 53; *see id.* at 53–86.

39. *Id.* at 90; *see id.* at 89–117. "In the first instance," because Barnett recognizes that there will be no identifiable, determinate original meaning with respect to many constitutional questions. *See id.* at 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." *Id.* at 121; *see id.* at 118–30. I discuss this "interpretation"/"construction" distinction in Part III.A, below.

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

Barnett's approach thus presents originalism as an entailment of an account of constitutional authority—as an implication of the reason why the Constitution binds us in the first place. And Barnett justifies constitutional authority as a means of promoting particular substantive values, in the form of libertarian "natural rights."

For our purposes here, there are two interesting features of Barnett's account. One is its suggestion that we need to explain constitutional authority before we can understand constitutional methodology. The second is the particular explanation of constitutional authority he offers—an explanation grounded in the pursuit of certain (undoubtedly controversial) outcomes or values. In exploring why this second feature of Barnett's account is flawed, we can begin to see why the first feature must be correct.

D. Values Imposition, Content-Independence, and Authority

The problem with Barnett's account of constitutional authority is that it is not really an account of constitutional *authority* at all. It can neither justify nor motivate obedience to the Constitution.

The concept of authority is among the most elusive in legal philosophy.[40] For present purposes, we can define authority as follows:

Authority is the capacity to impose a moral obligation of obedience to whatever agent or norm possesses it.

If constitutional law possesses authority, then those subject to it (legislators, executive-branch officials, citizens, judges) have, for that reason, a moral obligation to obey it. If constitutional law lacks authority, those subject to it may have *reason* to obey it—the fear of sanctions 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

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").

40. For a thorough exploration of its problematics, see Scott J. Shapiro, *Authority*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 382 (Jules Coleman & Scott Shapiro eds., 2002).

even absent a meaningful threat of sanctions for disobedience. As H.L.A. Hart observed, our attitude toward valid legal commands differs from our attitude toward the orders of an armed gunman.[41] 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,[42] 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*.[43] 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 status we attribute to that action; the law must be capable of obligating us to take actions we (otherwise

41. H.L.A. HART, THE CONCEPT OF LAW 82–91 (2d ed. 1994).

42. On this point, see CHRISTOPHER J. PETERS, A MATTER OF DISPUTE: MORALITY, DEMOCRACY, AND LAW 33–36, 44–47 (2011).

43. For a reasonably clear explanation of content-independence, see Shapiro, *supra* note 40, at 389.

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 the Constitution's 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 very often is 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 should mandate 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 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.[44]

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.

44. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1371 (2006) [hereinafter Waldron, *Core*] (citations omitted).

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 reason to obey 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."[45]

Barnett's theory therefore is, in essence, a deeply theorized, entirely noncynical version of the Cynical Narrative. It defends originalism, ultimately, on the ground that originalism promotes certain libertarian values or outcomes, values that the proponent endorses but that inevitably will be controversial among a broader audience. If promoting Barnett's libertarian values is the only reason to obey an originalist Constitution, then someone who disagrees with those preferred values has no reason for obedience. Such a person will—*must*—either reject Barnett's originalism or reject the authority of the Constitution altogether.

Barnett thus offers us an example—rare in its honesty[46]—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

45. *Id.*

46. Rare, but not quite unique. Political philosopher Hadley Arkes, like Barnett, interprets the Constitution as the embodiment of certain libertarian-leaning natural rights. *See* HADLEY ARKES, BEYOND THE CONSTITUTION (1990); HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS (1994). 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; *see* Richard S. Kay, *American Constitutionalism*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 16 (Larry Alexander ed., 1998); and Lee Strang, *see* Strang, *supra* note 29. 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." *See* Strang, *supra* note 29, at 437-41.

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, these accounts fail to motivate obedience by those who disagree with the values or results in question.

III. INTERPRETATION WITHOUT AUTHORITY?

Barnett grounds his theory of interpretative methodology in a theory of constitutional authority; his theory of authority fails, and therefore his theory of methodology does too. This suggests that a theory of interpretation needs a theory of authority, but it does not prove it. Perhaps the centrality of authority to interpretation is an unusual property of Barnett's particular theory.

Much of the remainder of this Article is devoted to demonstrating, directly or obliquely, that Barnett's theory is representative rather than unique in this regard; a good theory of authority really is necessary for a good theory of interpretive methodology. In Parts IV through VI, I make this case indirectly, by examining accounts of constitutional authority and explaining how they entail certain approaches to constitutional interpretation. In this Part, however, I make the case directly. I begin with a relatively practical argument that interpretive methodology must at least be consistent with some account of constitutional authority. I then address the possibility, suggested by Lawrence Solum, that an approach to constitutional interpretation can be developed without resort to theories of authority or other normative arguments.

First, however, I need to resolve a potential ambiguity in what I mean by "constitutional interpretation."

A. "Interpretation" vs. "Construction"

My use of the term "constitutional interpretation" might be thought to beg a fairly important question. Many New Originalists, including Barnett, distinguish between the acts of constitutional "interpretation" and constitutional "construction."[47] Larry Solum defines constitutional *interpretation* as "the activity directed at

47. *See, e.g.*, BARNETT, LOST CONSTITUTION, *supra* note 11, at 118–30; Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010); Solum, Semantic Originalism, *supra* note 8, at 67–87; WHITTINGTON, *supra* note 11, at 195–212.

discerning the semantic content of the constitutional text" and constitutional *construction* as "the activity directed at resolving vagueness, ambiguity, gaps, and contradictions [in the text] and at constitutional implicature."[48] So understood, constitutional "interpretation" is limited to the project of determining what the words of the constitutional text mean, and constitutional "construction" is the additional project of determining how to apply the text to a particular issue or dispute where the application is not evident from the meaning of the words. As Solum puts it, "[c]onstitutional construction begins when the meaning discovered by constitutional interpretation runs out."[49]

Here is what I think is a straightforward example of the interpretation-construction distinction. Article I, section 8 of the Constitution gives Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution" the powers of the federal government that are expressly enumerated in the document.[50] "Interpretation" would be the project of determining what concept or concepts the phrase "necessary and proper" signifies. For example, does "necessary" include only those means that are absolutely essential to the execution of some enumerated power? Or, as John Marshall famously concluded in *McCulloch v. Maryland*, does it have a more capacious meaning, "import[ing] no more than that one thing is convenient, or useful, or essential to another"?[51] Answering this sort of question is the province of "interpretation" as that term is used by Solum and others.

Suppose we "interpret" the word "necessary" (putting aside the question of which technique we use to do this) in accordance with Marshall's broader definition. On the New Originalist understanding, the additional project of "construction" remains. We still have to "construe" the word "necessary," so interpreted, to determine how it applies to the particular case at hand—to determine whether a particular measure taken by Congress (say, the incorporation of a national bank) qualifies as "necessary" within that word's meaning. This additional task of "construction" is required

48. Solum, Semantic Originalism, *supra* note 8, at 67.

49. *Id.* at 69.

50. U.S. CONST. art. I, § 8.

51. 17 U.S. 316, 413 (1819).

because the word "necessary" by itself—even though we understand its meaning—does not resolve the particular issue we must decide.

In this Article, I mean the term "constitutional interpretation" to include both "interpretation" and "construction" in the New Originalist senses. I will use the following definition of "constitutional interpretation" going forward:

Constitutional interpretation is the process of determining whether and how the Constitution applies to an issue or dispute.

A court trying to resolve the *McCulloch* issue of whether Congress has the power to charter a Bank of the United States would have to determine both what Solum calls the "semantic meaning" of the Necessary and Proper Clause (the New Originalists' "interpretation"), *and* whether chartering a bank is consistent with that meaning (the New Originalists' "construction"). I lump both these tasks together under the label "interpretation." I do so in part because I believe this more-general sense of the concept "interpretation" is consistent with how lawyers, and indeed the general public, typically use the term; they do not usually draw the interpretation/construction distinction, helpful though that distinction may be in certain contexts. More fundamentally, I lump these tasks together because I think an account of constitutional authority is necessary to adequately theorize both of them, as I contend in the next two sections.

B. The Practical Necessity of Authority

So, must an account of constitutional interpretation (defined broadly as above) ultimately be grounded 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 our 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 Confederation in this way.[52] 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 theorize about the legitimate interpretation of 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.

52. 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* 1 MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 121 (3d ed. 2011).

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 relevant 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 individuals 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.[53] 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 should reflect, indeed promote, that moral grounding. Constitutional interpretation should further constitutional authority.

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

53. This is essentially Dworkin's understanding of the project of "interpretation" writ large. See his lengthy discussion in RONALD DWORKIN, LAW'S EMPIRE 45–86 (1986).

hockey (athletic competition, entertainment, physical exercise). Some even think wearing helmets impedes some of these goals. 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.

It would then 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 should follow from a persuasive answer to the question of constitutional authority.

C. Interpretation Without Tears? Solum's "Semantic" Approach to Interpretation

In his provocative essay "Semantic Originalism," New Originalist theorist Lawrence Solum suggests that significant portions of a theory of constitutional interpretation can be assembled without resort to accounts of authority or other deeply normative arguments. Solum describes and defends a core conception of originalism that consists of four basic assertions, or theses. The "Fixation Thesis" holds that "the meaning of constitutional provisions is fixed at the time of ratification."[54] The "Clause Meaning Thesis" holds (with a number of clarifications and qualifications) that the meaning of constitutional provisions is determined by their original public meaning.[55] The "Contribution Thesis" holds that the meaning of the Constitution (so defined) contributes to—that is, becomes part of—the content of the law.[56] The "Fidelity Thesis" holds that we are

54. Solum, Semantic Originalism, *supra* note 8, at 3; *see id.* at 2–4, 59–67.

55. *See id.* at 5, 38–58.

56. *See id.* at 6–8, 134–49. Solum subsequently has reformulated the Contribution Thesis

obligated to obey the Constitution (absent some overriding moral reason to the contrary) because it is part of the supreme law of the land.[57] Together these theses add up to roughly the following statement of originalism: we are obligated to obey the original public meaning of the Constitution.

What is most interesting in Solum's arguments for present purposes is his belief that most of (his definition of) originalism—the Fixation Thesis, the Clause Meaning Thesis, and the Contribution Thesis—can be defended purely as a descriptive matter, that is, purely as statements of fact about our linguistic and legal cultures, without the need to rely upon normative arguments.[58] Solum believes that the meaning of the Constitution *just is* its original public meaning at the time of ratification and that this meaning *just is* part of our law. He acknowledges that he may be wrong about how to identify constitutional meaning and whether it is part of our law, but he insists that *whether* he is wrong is a question purely of fact, not of normative evaluation. The questions of what the Constitution means, he contends, and of whether and how it contributes to our law, are in essence empirical questions, like the questions of when the Constitution was ratified or of the chemical composition of the parchment it was printed on.[59]

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as the "constraint principle": "the idea that the communicative content of the constitution . . . should constrain the legal content of constitutional doctrine and thereby should also constrain the way officials behave." Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147, 155 (2012) [hereinafter Solum, *Faith and Fidelity*]. I don't believe this reformulation is material to my treatment of Solum's approach in this Article.

57. *See* Solum, Semantic Originalism, *supra* note 8, at 8–9, 149–60.

58. Solum acknowledges that the Fidelity Thesis, holding that the Constitution must be obeyed, relies on normative arguments. *See id.* at 8 ("[T]he [Fidelity] [T]hesis is based on moral premises: it is a claim about political obligation and civic virtue."); *see generally id.* at 8–9, 149–60.

59. *See id.* at 8:

> The first three theses [Fixation, Clause Meaning, and Contribution] share an important characteristic: they all make factual claims that do not rely on moral premises. The fixation thesis and the clause meaning thesis make claims about the semantic content of the Constitution: as a matter of fact, the meaning of a given constitutional provision is fixed at the time of origin by its original public meaning. The contribution thesis makes a claim about the legal significance of the constitutions [sic] semantic content: as a matter of fact, the semantic content makes some contribution to American law. These factual claims are not based on arguments of political morality. The semantic content of the Constitution of 1789 was fixed at that

I am deeply skeptical of these assertions (which is not the same as saying I can refute them decisively). The extent to which we care about the semantic meaning (or "communicative content"[60]) of the constitutional text, I believe, depends on whether, and why, we think constitutional law is justified in the first place, and these questions inevitably will be matters of normative argument

For example, I might believe that constitutional law is justified because (and to the extent that) it provides relatively transparent and determinate rules that can help us avoid costly political disputes over important issues—a "rule of law" rationale that flows from what I call in Part VI a *Dispute Resolution* account of constitutional authority.[61] If this is my belief about the justification of constitutional authority, then it follows that I will want interpreters to look for (and be bound by) the semantic meaning of the text only insofar as it furthers this justification—that is, only insofar as it helps provide relatively transparent and determinate rules. If the search for semantic meaning does not regularly generate these kinds of rules (as in fact seems rather likely, given the historiographic and conceptual challenges of identifying original public meaning), I might then want interpreters to look elsewhere for the content of constitutional law—perhaps to (more-accessible) modern-day meanings, or perhaps to relatively specific court decisions of constitutional issues.

On the other hand, I might believe that constitutional law is justified because the process that created the constitutional text—the Framing—is especially reliable as a way of generating good moral rules or principles. (This would be a version of the *Moral Guidance* account of authority I discuss in Part V.)[62] If so, then I will want

> time because of the way that communication through language works, and not because it is a good idea to interpret the Constitution that way.

Id. at 8. The bulk of Solum's argument that the Fixation and Clause Meaning Theses are implications of purely descriptive semantic theory can be found in *id.* at 27–126. The bulk of his argument that the Contribution Thesis is an implication of purely descriptive legal positivism can be found in *id.* at 139–43.

60. In *Semantic Originalism*, Solum uses the terms "semantic meaning" and "linguistic meaning" to describe the content of the Constitution that he believes is fixed at the time of ratification and contributes to the law in some meaningful way. *See id.*, *passim*. In later work, Solum often uses the term "communicative content" in place of these terms. *See, e.g.*, Solum, *Faith and Fidelity*, *supra* note 56, at 154–55.

61. *See infra* Part VI.H.

62. *See infra* Part V.A–B.

interpreters to look for (and be bound by) the rules or principles that were in fact generated by the Framing process, which would seem to entail a search for the semantic meaning of the text, even if that meaning typically is not particularly transparent or determinate.

Whether and how much we care about the semantic meaning of the constitutional text, then, will depend on our normative purposes for practicing constitutional law (for interpreting it, implementing it, enforcing it, obeying it, and so on); it will depend on our (normatively driven) theory of constitutional authority. If this is right, then it refutes Solum's assertion that the Contribution Thesis is purely a matter of descriptive truth and not at all susceptible to normative argument. And while I am less confident that Solum's Fixation and Clause Meaning Theses rely similarly on normative premises, note that those theses become less relevant to the extent one rejects or waters down the Contribution Thesis. If the semantic meaning of the constitutional text contributes little or nothing to the content of constitutional law, then when and how that meaning is fixed becomes a matter of mostly academic concern.

Solum's arguments deserve a more robust evaluation than this, but that task will have to await another forum. For the purposes of the present Article, whether Solum is right or wrong about the non-normativity of "Semantic Originalism" is mostly beside the point. This is because Solum's conclusion applies only to the process he calls "interpretation"—the process of identifying the meaning of the text—and not at all to the process of "construction," of applying the text to resolve an issue where, as in most cases, the meaning of the text does not resolve that issue by itself.

1. Normative judgments in construction

Suppose Solum is correct that the meaning of the Constitution *just is* its public meaning at the time of ratification, and that this meaning *just is* part of our law. (This sums up the implications of his Fixation, Clause Meaning, and Contribution Theses.) Much work remains to be done to determine how the Constitution applies to particular issues and disputes, even with its meaning and its status as law determined. There is, first of all, the process that Solum and other New Originalists call "construction," which, as I noted in Part III.A, is what happens "when the meaning discovered by

constitutional interpretation runs out."[63] Constitutional text is endemically vague; many of its provisions "admit of borderline (or uncertain) applications," in Solum's phrase.[64] A few of many examples are the terms "legislative Powers," "executive Power," and "judicial Power" in Articles I, II, and III, respectively;[65] the grant of power to "regulate Commerce with foreign Nations, and among the several States" in Article I, section 8;[66] and the guarantees of "the freedom of speech" in the First Amendment,[67] "due process of law" in the Fifth and Fourteenth Amendments,[68] and "the equal protection of the laws" in the Fourteenth Amendment.[69] Constitutional text also sometimes is ambiguous, as with the word "necessary" in the Necessary and Proper Clause.[70] Solum identifies the additional possibilities that the text will have gaps or contradictions and that it will have implied content.[71]

In short, the meaning of the constitutional text is frequently, indeed systemically, underdeterminate. In order to apply that underdeterminate text to the resolution of a particular issue, an interpreter (what I suppose Solum would call a "construer") will have to make normative choices. She will have to decide on a general approach to construction—construe the Constitution in the way that promotes justice? Construe it the way the Framers would have done?—which decision inevitably will reflect normative judgments.[72] And, depending on which approach she chooses—"construe so as to promote justice," for example—she may have to make additional normative judgments in applying that approach.

My conclusion in this Article—that a theory of constitutional interpretation, broadly understood,[73] must rest on a normative account of constitutional authority—would hold true for this

63. Solum, Semantic Originalism, *supra* note 8, at 69.

64. *Id.* at 70.

65. *See* U.S. CONST. art. I, § 1; art. II, § 1, cl. 1; art. III, § 1.

66. *See* U.S. CONST. art. I, § 8, cl. 3.

67. *See* U.S. CONST. amend. I.

68. *See* U.S. CONST. amend. V; amend. XIV, § 1.

69. *See* U.S. CONST. amend. XIV, § 1.

70. U.S. CONST. art. I, § 8, cl. 18.

71. *See* Solum, Semantic Originalism, *supra* note 8, at 73–75.

72. Solum describes the various approaches to construction offered by contemporary originalists in *id.* at 76–79.

73. Broadly understood to include what Solum and other New Originalists call "construction." *See supra* Part III.A.

important and usually necessary process of construction, even if it does not hold true for the process of identifying the meaning of the constitutional text.

2. Other necessary normative judgments

My conclusion also would apply to other aspects of interpretation writ large. (Remember that I am defining "interpretation" fairly capaciously: as *the process of determining whether and how the Constitution applies to an issue or dispute.*[74]) Consider Solum's Contribution Thesis, which holds that the Constitution's original meaning contributes in some way to the content of our law but which does not specify how it contributes.[75] An interpreter often (perhaps usually) will have to answer this "how" question in order to apply the Constitution in a particular case.

Suppose, for example, that an originalist judge in 1954 determines that the original meaning of the phrase "deny[ing] . . . the equal protection of the laws"[76] in the Fourteenth Amendment is vague with respect to the question of enforced racial segregation in public schools—that is, that school segregation is neither clearly consistent nor clearly inconsistent with the original meaning of the Clause. The judge then must decide the implications of this indeterminacy—whether it ends the matter or simply opens the door to the further process of construction.

It would not be ridiculous for the judge to elect the former alternative—to conclude that, because the Constitution's text does not determine the issue, there simply *is* no constitutional rule governing school segregation (and thus segregation is left to be governed by sub-constitutional laws). Such a conclusion would be consistent with Solum's Contribution Thesis: the judge would be acknowledging that the Constitution's meaning contributes to the content of the law. But he would be making the further judgment that this contribution is limited to cases in which the Constitution's meaning is determinate. And that judgment may be, perhaps inevitably will be, a normative one. For example, the judge may justify his position as an implication of what I will call in Part V a

74. *See id.*

75. *See* Solum, Semantic Originalism, *supra* note 8, at 6 ("The contribution thesis itself does not answer questions about the strength or structure of that contribution.").

76. U.S. CONST. amend. XIV, § 1.

Moral Guidance account of constitutional authority: he might believe that constitutional commands should be obeyed because, and only to the extent that, they represent a trustworthy moral judgment of the Framers or of the people who ratified the document. The absence of a determinate textual resolution of the segregation issue might signal, for the judge, the absence of a relevant judgment of the Framers or the ratifiers that must be obeyed—and thus the absence of binding constitutional law.

Or suppose the judge identifies a determinate original meaning but is faced with precedent that, if followed, would mandate a result inconsistent with that meaning. Even assuming the judge accepts the Contribution Thesis, he will have to decide whether the Constitution's original meaning trumps the precedent or vice-versa. He will have to decide, that is, how to prioritize different sources of law (original meaning and precedent) when they conflict. And this decision too invites moral judgments.

So there is plenty of room for normative arguments and judgments in constitutional interpretation, even if Solum is right that a significant part of interpretation is non-normative. Solum puts it this way: "[T]he meaning of the written [C]onstitution"—the part Solum thinks can be identified non-normatively—"is important enough to make for a substantial mouthful even if it isn't the whole enchilada."[77] I would add that it usually takes quite a few more bites to finish the enchilada.

IV. AUTHORITY BY CONSENT

If I am right that a theory of constitutional interpretation requires a theory of constitutional authority, the next questions become: What are the plausible theories of authority? And what interpretive methods do they support?

I have been able to identify three potentially plausible ways to justify constitutional authority, each of which has been relied upon in some form to support originalist interpretation. This Part introduces, and critiques, the first such account, one based on *consent*. The problem with what I will call a *Consent* account, simply put, is that meaningful consent to be governed by the Constitution is not, and probably could not be, a widespread fact in modern society.

77. Solum, Semantic Originalism, *supra* note 8, at 28 n.109.

Most of us have not consented to constitutional law in a way that can justify its authority over us.

A. The Normative Force of Consent

Recall that a Values Imposition account of constitutional authority, like Randy Barnett's, fails because it cannot provide a content-independent reason to obey the Constitution.[78] Those who agree with the preferred set of values do not need the Constitution to tell them how to act. Those who disagree with those values have no reason to obey the Constitution as a way to implement them.

Consent, however, might provide a content-independent reason for obedience. Our consent is an exercise of our autonomy; by consenting to something, we are asserting our capacity to plan our own lives. As the legal and political philosopher Joseph Raz writes:

> There is some normative force to the fact that one gives one's free and informed consent to an arrangement affecting oneself . . . . Consent, whether wise or foolish, expresses the will of the agent concerning the conduct of his own life. Whatever mess results from his consent is, in part at least, of his own making. Since his life is his own, it is relevant whether it is under his control or not, and consent shows that it is.[79]

In order for consent to be effective as a means of planning or "controlling" one's own life, that consent must cause some actual change in the conditions of that life. My consent to something must actually obligate me somehow, or at least create a strong moral reason for me to act consistently with my consent; otherwise my consent would be ineffectual as an expression of my autonomy. And note that the power of consent to impose moral obligations (or create moral reasons) can apply even when what we are consenting to is in essence a *loss* of control, in the form of 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 disagree with it in substance. Indeed, by consenting to marry my spouse, I have agreed to stay with her through richer or poorer, in sickness and in health,

78. *See supra* Part II.D.

79. Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 152, 162–63 (Larry Alexander ed., 1998).

etc., even if I later decide I would prefer not to. 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 have consented to be bound by those rules, even if we think them burdensome or unwise. And so on.

As these examples suggest, the reason, perhaps the obligation, created by the act of giving consent is a content-independent one: it does not depend on the pre-existing moral status of what one has consented to, or on one's own views about that moral status. If I have consented to be governed by the decisions of a homeowner's association, I then have a reason, perhaps an obligation, to abide by those decisions, even if (a) I think those decisions are incorrect as a moral matter and (b) those decisions *are in fact* incorrect as a moral matter. My consent has in effect altered my moral universe, such that actions I would not have been required to take—perhaps even actions I would have been morally forbidden to take—prior to my consent are now, thanks to that consent, actions that I must take (or at least have a strong reason to take).

B. Consent as Popular Sovereignty

If an individual can create a self-imposed moral obligation by giving her consent, then perhaps a collection of individuals—a "people"—can create a collectively self-imposed moral obligation by consenting to be governed by a certain person or entity or process. Suppose we start with the premise that "the people" are sovereign—entitled to rule themselves—in a sense analogous to how the individual is autonomous (entitled to rule herself). "The people" then would be capable of exercising their sovereignty by consenting to be governed in a certain way—even if that form of government alienates some of that "people's" existing capacity to decide things for themselves. Consent to be ruled would be an exercise of popular sovereignty, even if what is being consented to is not a completely "popular" form of government.

This basic idea of popular sovereignty as consent to government goes back, of course, at least to Hobbes,[80] and runs forward through

80. *See* THOMAS HOBBES, LEVIATHAN 227–28 (C.B. Macpherson ed., 1968) (describing the formation of a commonwealth as an act of unanimous consent). Keith Whittington traces the notion even farther back, to the writings of the French philosopher Jean Bodin. *See*

Locke[81] and Rousseau[82] to the American Founders. The Declaration of Independence declared that "Governments . . . deriv[e] their just powers from the consent of the governed," and Alexander Hamilton leveraged the notion of consent into a theory of constitutional authority:

> [T]he power of the people is superior to both [the judicial and the legislative power], and . . . where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. . . .
>
> . . . .
>
> . . . [T]hough I trust the friends of the proposed Constitution will never concur with its enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness . . . . Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually . . . .[83]

Note that Hamilton holds the Constitution superior, not just to the legislature (which he earlier calls the "agents" of the people[84]), but also to "the people" themselves. Having engaged in the "solemn and authoritative act" of consenting to the Constitution, the people cannot later "alter or abolish" that Constitution simply because they "find it inconsistent with their happiness." They can do so only by means of another "solemn and authoritative act."

Hamilton's account thus can be read as a Consent account of constitutional authority: it justifies the binding nature of the

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WHITTINGTON, *supra* note 11, at 113–16 (citing generally JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH (M.J. Tooley ed. & trans., 1955)).

81. *See* JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT 305, 367–68 (Peter Laslett ed., 1960) (describing the creation of "civil society" as an act of unanimous consent).

82. *See* JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 16–27 (Willmoore Kendall trans., 1954) (describing the formation of a unanimous "original agreement" to transfer the private rights of individuals to a sovereign).

83. THE FEDERALIST NO. 78, at 439–40 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (footnote omitted) [hereinafter Hamilton, FEDERALIST NO. 78].

84. *Id.* at 439. Hamilton's logic on this point was cribbed by John Marshall in *Marbury v. Madison*, 5 U.S. 137, 176–78 (1803).

Constitution as a function of "the people's" sovereign act of consenting to its rule. The people gave their consent to the Constitution; the people now have a moral obligation to obey the Constitution, whether they agree with its commands (whether they "find it [c]onsistent with their happiness") or not.

We might recognize the threads of Hamilton's nascent account in contemporary theorist Bruce Ackerman's influential narrative of "dualist democracy."[85] Ackerman distinguishes between "normal politics"—everyday, typically self-interested decision-making through the mechanisms of representative democracy—and "higher lawmaking"—the creation of "supreme law in the name of the People."[86] Ackerman's "higher lawmaking" is supreme because it occurs on behalf of "the People," not just those who govern the People or some subset of the People. The constitutional law that emerges from higher lawmaking therefore, in Ackerman's view, is binding on normal politics going forward (and must be enforced, and periodically "synthesized" with earlier acts of higher lawmaking, by the Supreme Court).[87]

C. Consent and Originalism

Originalists sometimes ground their methodology in the normative force of consent, and it is not hard to see the connection. Suppose Hamilton and Ackerman are right that the Constitution was an act of popular sovereignty—of consent by "the people" (or "the People," with Ackerman's capital "P")—and that it therefore is supreme over the products of "normal politics." Suppose, in other words, that the Constitution is "the instrument by which the consent of the governed—the fundamental requirement of any legitimate government—is transformed into a government . . . ."[88] How do we know what it was that the People consented to?

85. The canonical statement of Ackerman's theory appears in BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

86. *Id.* at 6. Ackerman describes the basic distinction in *id.* at 6–7. He elucidates each concept at much greater length in *id.* at 230-65 ("normal politics") and *id.* at 266–94 ("higher lawmaking").

87. On the "preservationist" function of the Court, see *id.* at 9–10, 60–61, 72; on its function of "synthesis," see *id.* at 86–99, 113–30, 140–62.

88. These words belong to Edwin Meese, Ronald Reagan's second Attorney General and an influential catalyst of the burgeoning originalist movement in the 1980s. Edwin Meese III, The Law of the Constitution (Speech at Tulane University) (Oct. 21, 1986), *reprinted in* ORIGINALISM, *supra* note 10, at 99, 102.

The obvious answer is to determine what the actual people (small "p") who did the actual consenting—those who participated in ratifying the Constitution and its subsequent amendments—would have understood the text of the Constitution to mean. Consent theory thus appears to imply originalist interpretation, most likely in its "original public meaning" variant. As originalist theorist Keith Whittington writes, "originalism . . . enforces the authoritative decision of the people acting as sovereign."[89]

I should note that the popular sovereignty/originalism connection is not as inevitable as this quick statement of originalist logic suggests.[90] If an individual can consent to surrender her judgment to another, then a "People" might consent to surrender its judgment to another—perhaps to a subsequent iteration of "the People," perhaps even to constitutional judges. This raises the possibility that what the People consented to when they authorized the Constitution was in fact a nonoriginalist Constitution—a Constitution that could be interpreted by subsequent decision-makers in a way that goes beyond, perhaps even is inconsistent with, the original People's understanding of its meaning.[91] In short, the original understanding might have contemplated nonoriginalist interpretation. If so, then subsequent interpreters would be violating the principle of popular sovereignty rather than upholding it by pursuing originalist methods.[92]

I won't linger on this objection, however, because I want to focus on two more-foundational problems with the Consent account. First, the notion that "the People" during the crucial Framing periods actually gave meaningful consent to the Constitution is problematic. Second, whether or not "the People" in 1788 or 1791 or 1868 consented to the Constitution is, in an important sense, irrelevant, because those "People" are not *us*.

89. WHITTINGTON, *supra* note 11, at 111. To the same effect, see Lash, *supra* note 29.

90. Whittington, for his part, is well aware of the nuances of and potential objections to any attempt to ground originalism in popular sovereignty. *See* WHITTINGTON, *supra* note 11, at 111–13 (acknowledging that the connection has been "underdeveloped" in originalist thought and posing several important questions to be resolved); *id.* at 113–59 (addressing these questions).

91. This is, I think, a fair summary of Ackerman's actual position on constitutional interpretation. In any event, Ackerman clearly is not an originalist. *See, e.g.*, ACKERMAN, *supra* note 85, at 131–62 (describing the Court's interpretive function on a dualist theory).

92. This is the possibility argued for (with a focus on original intent rather than original public meaning) in Powell, *supra* note 22.

D. The Nonunanimous Framing(s)

We can start with the observation that the first three words of the Constitution, "We the People," are a fiction.[93] 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;[94] neither could women in any state,[95] or those without property in many states,[96] or free blacks in some.[97] And even among those who could participate in the ratification process, approval of the new Constitution was far from unanimous.[98] 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.

The same problems afflict each of the Constitution's amendments, though to a lesser extent as we move forward in time. Racial restrictions on the franchise actually increased between the Founding and the Civil War,[99] such that in 1868, when the Fourteenth Amendment was ratified, free blacks could vote in only eight of the thirty-three states.[100] Most property requirements had disappeared by then,[101] but women still could not vote in any

93. I owe this admittedly provocative but quite accurate phrasing to Randy Barnett. *See* BARNETT, LOST CONSTITUTION, *supra* note 11, at 14.

94. "[N]o [state or federal] regime either before or after the Revolution ever gave the vote to slaves . . . ." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 19 (2005).

95. *See id.* The minor exception was New Jersey, which "apparently did allow a few propertied widows to vote." *Id.*

96. Eleven of the thirteen states required ownership of property in order to vote at the time they ratified the Constitution. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 327–28 (2000) (Table A.1). Akhil Amar notes, however, that eight of these states suspended or liberalized their property requirements for purposes of electing delegates to their ratifying conventions. *See* AMAR, *supra* note 94, at 7.

97. Georgia, South Carolina, and Virginia barred free blacks from voting at the time of ratification. *See* KEYSSAR, *supra* note 96, at 327–28 (Table A.1).

98. *See* UROFSKY & FINKELMAN, *supra* note 52, at 121–28 (describing the contentious ratification process).

99. *See* KEYSSAR, *supra* note 96, at 53–60.

100. They were Connecticut, Iowa, Maine, Massachusetts, Minnesota, New York, Vermont, and Rhode Island. *See id.* at 87–88, 89. In New York, moreover, only propertied free blacks could vote. *See id.* at 87–88.

101. *See id.* at 351–55 (Table A.9) (showing only three states—New York, Rhode Island, and South Carolina—with property requirements as of 1855, one of which (New York) applied its requirement only to free blacks, the other of which (Rhode Island) applied it only to non-

state.[102] The Thirteenth and Fourteenth Amendments, moreover, were in essence forced upon the recently rebellious southern states: the former through ratification by provisional Reconstruction legislatures,[103] and the latter by the coercive device of making ratification a condition of readmission to the Union.[104] Many citizens, too, opposed ratification, as many had several generations earlier at the original Framing. With the enactment of the Fifteenth Amendment (prohibiting denial of the vote based on race), and then the Nineteenth (sex), the Twenty-Fourth (failure to pay a poll tax), and the Twenty-Sixth (age if at least eighteen), the most egregious exclusions have been eliminated over time. Certainly, however, no amendment has ever been ratified with the unanimous consent of the citizenry alive at that moment.

Can "the People" consent to a constitution in a way that binds dissenters? If consent is the mechanism doing the binding, it is hard to see how. A citizen who dissents from the Constitution has not somehow exercised her own autonomy by virtue of the fact that some other citizens (even a large majority of other citizens) voted for it. The result has been imposed upon her, not invited by her.

Perhaps we can claim that "the People" as a collective body has consented to something by virtue of a majority or super-majority of its components having consented to it. But this maneuver seems more rhetorical than real. The Constitution, after all, purports to bind citizens (and others) not just collectively, but in their individual capacities as well. It is true that our Constitution, with the exception of the Thirteenth Amendment, directly limits only actions taken by government, not those performed by private actors. But I cannot insist that the government take some action that I favor on the ground that I oppose the constitutional provision that forbids it. My ability as a citizen to use my vote and my power of political speech to create a legal regime I favor is limited by constitutional constraints on the content of that legal regime. I cannot somehow exempt myself from the Constitution merely because I failed to consent to it.

So it appears that consent cannot explain the authority of the Constitution, even with respect to all of those alive during the

native citizens).

102. *See id.* at 172–83.

103. *See* UROFSKY & FINKELMAN, *supra* note 52, at 476.

104. *See id.* at 502–04.

relevant framing periods. And this difficulty is likely to be endemic to any modern constitution, not just our own. Not every constitution suffers from the grievous exclusion of slaves and women at its framing. But any constitution framed to govern a large polity in the diverse conditions of a modern democracy will have its dissenters. By itself, the notion of consent cannot justify binding such people.

E. The Dead-Hand Problem

The nonunanimity problem with Consent accounts is 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 1788, 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. Even a (counterfactual) act of unanimous consent to the Constitution by the relevant Framing generation therefore cannot bind *us* on the theory that *we* have consented. "*We* the People" is really "*they* the People"; the Constitution was *their* act of popular sovereignty, not ours.

Just to be clear, note that the objection here is not to the Hamiltonian idea that "the People" might choose to bind themselves going forward. Prospective self-binding, after all, is what consent is all about. The objection is to the notion that "the People" who did the consenting in 1788 (or 1791 or 1868) is the same "People" that the Constitution purports to bind today. What is problematic about the Hamiltonian account is not the notion of self-binding that it endorses, but rather the tenuous conception of the "self" that it assumes.

Note too that we cannot dodge this difficulty by pointing to the possibility of amending the Constitution using the procedures specified in Article V. That possibility can't overcome our lack of consent any more than using those procedures, or failing to use them, can demonstrate our consent. We have not, after all, consented to Article V as the exclusive means to amend the Constitution, or to the principle that amending it (rather than simply ignoring it) is our only option if, in Hamilton's phrase, we

now "find it inconsistent with [our] happiness."[105] To derive consent from Article V is to engage in bootstrapping.[106]

Nor is the problem solved by the fact 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."[107] But this is a very small percentage of the citizenry. The vast majority of the people have not given express consent to the Constitution's authority.

There are a few more-sophisticated attempts to resolve the dead-hand problem, but none of them turns out to be very satisfying. There is the notion that we have given our *tacit* consent to the Constitution by living within the polity it supposedly governs. There is the device of *constructive* or hypothetical consent, which holds that we would or should have consented and therefore can be deemed to have done so. And there is the idea of what Keith Whittington calls "potential sovereignty"—the argument that we must recognize the Constitution as binding so that we in turn may use constitutional law to bind others. I address each in turn.

F. Tacit "Consent"

Some theorists have argued that the act of continuing to live within a regime amounts to a person's tacit consent to be bound by that regime. Rousseau, for example, attributed consent to be bound by law to the act of "resid[ing] within the state after its . . . establishment."[108] Locke similarly found consent in the "Possession, or Enjoyment, of any part of the Dominions of . . . government."[109]

105. Hamilton, FEDERALIST NO. 78, *supra* note 83, at 139–40.

106. On this point, see Reva B. Siegel, *Heller & Originalism's Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1404–05 (2009).

107. *See* U.S. CONST. art. VI, cl. 3. 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 by virtue of having taken the oath.

108. ROUSSEAU, *supra* note 82, at 168.

109. LOCKE, *supra* note 81, at 392.

But these theories are unconvincing because they suppose a choice that, for most people, does not exist. Most of us cannot simply pack 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";[110] but for very few (if any) of us is this a realistic alternative. Tacit consent is not real consent.[111]

G. Constructive "Consent"

Tacit consent is an attempt to deploy the mechanics of consent where actual consent is lacking. A similar maneuver is the idea of *constructive* (or hypothetical) consent, which holds that we should be treated as having consented to something if, presented with certain ideally fair decision-making conditions, we *would* have consented to it. The paradigmatic constructive-consent theory is John Rawls's device of a hypothetical "original position" from which equally situated individuals would choose the central features of an ideal political system.[112] Can we say the Constitution is binding because we *would* have consented to it if given the opportunity to do so in something like Rawls's original position?

The answer is either "no" or "kind of." If the suggestion is that constructive consent can substitute for actual consent, the answer is no. Actual consent has normative force because it is an exercise of a person's autonomy, her capacity to make her own decisions,

110. *See* BARNETT, LOST CONSTITUTION, *supra* note 11, at 16 ("[F]or consent to have any meaning, it must be possible to say, 'I do not consent' instead of 'I consent.'"). Barnett presents an extensive, and mostly persuasive, argument against the notion that the Constitution binds us because we have consented to it. *See id.* at 11–31.

111. *See* WHITTINGTON, *supra* note 11, at 130–31 (arguing against the validity of tacit consent).

112. *See* JOHN RAWLS, A THEORY OF JUSTICE 11–22 (1971). A similar idea is presented in JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 107, 447–50 (William Rehg trans., 1996).

whatever those decisions may be. As Raz aptly puts it, "[c]onsent, whether wise or foolish, expresses the will of the agent concerning the conduct of his own life. Whatever mess results from his consent is, in part at least, of his own making."[113] The normativity of actual consent flows from the very possibility of using it unwisely. We would hardly be autonomous if we were always required to make good decisions.

Constructive consent is entirely different. The point of the constructive-consent device is not to allow the individual to accept moral obligations in a way that furthers her autonomy, but rather to identify the kinds of decisions the individual would make if certain obstacles to rational decision-making were removed. Its point, in other words, is to identify good decisions. Perhaps we can say that a person is bound in some way by the decisions she would have made under conditions of hypothetical consent, by virtue of the fact that they are (or rather would be) good decisions. But we cannot say she is bound because she actually consented to those decisions. She did not actually consent to them. Actual consent, again, supposes the possibility of *bad* decisions—of consent given foolishly.[114]

So constructive consent cannot bring whatever obligations come from actual consent. This is not to say that the device of constructive consent cannot contribute in some way to the recognition of authority or of some other kind of obligation. By helping us identify good answers to certain kinds of questions, constructive consent might lead us to a satisfactory account of constitutional authority. Constructive consent asks us, in essence, to imagine the political system to which we would consent if freed from the real-world baggage of unequal bargaining power and knowledge of how our decisions will affect our own selfish interests. It is possible that we would determine that such a system includes an authoritative constitution, perhaps even one much like our own. (In this sense, constructive consent might "kind of" make the Constitution binding.) But constructive consent in this vein is merely a heuristic technique, a way of revealing some worthwhile account of authority

113. Raz, *supra* note 79, at 162–63.

114. On the failure of constructive or hypothetical consent to create obligations, see Raz, *supra* note 79, at 162–63 ("[E]ven if real consent is a source of authority, it is far from clear that hypothetical consent is. I know of no argument which shows that it is."); see also PETERS, *supra* note 42, at 52–57 (presenting an expanded version of the argument against authority by constructive consent).

that, because it is worthwhile, can stand on its own merits. The authority of the Constitution would exist by virtue of this stand-alone account identified using constructive consent, not by virtue of constructive consent itself.[115]

H. "Potential Sovereignty"

Keith Whittington, a New Originalist theorist, makes the intriguing suggestion that the Constitution has authority, not because it reflects any actual exercise of popular sovereignty, but because it makes possible our *potential* exercise of popular sovereignty.[116] The Constitution, Whittington writes,

> is not binding in a strong sense. We have not vested it with authority. Rather, it is binding in a weaker, but still sufficient sense, in that it represents our potential to govern ourselves. By accepting the authority of the Constitution, we accept our own authority to remake it. The existing Constitution is a placeholder for our own future expression of popular sovereignty.[117]

If I understand Whittington, he is claiming that we ought to obey the Constitution, not because we are bound by anything the long-dead "People" of the late-eighteenth or mid-nineteenth centuries did, but rather because obeying it now gives us standing to impose constitutional law on future generations later. To put this claim negatively, we cannot purport to assert sovereignty over future generations if we refuse to recognize the sovereignty of the Framing generation over us. So we ought to do the latter to preserve our ability to do the former.

This argument is interestingly original, but it is not convincing. There is no reason to think that our recognizing the (otherwise nonexistent) authority of a prior generation over us somehow gives us a claim to assert (otherwise nonexistent) authority over subsequent generations. Suppose, for example, that we (the current generation of Americans) follow this rationale and agree to accede to the otherwise nonbinding constitutional commands of our eighteenth- and nineteenth-century predecessors. And suppose we then attempt to express our own popular sovereignty by amending

115. On this point, see PETERS, *supra* note 42, at 53–57.

116. *See* WHITTINGTON, *supra* note 11, at 127–52.

117. *Id.* at 133.

the Constitution to bind future generations, or perhaps even "remaking" it altogether as Whittington suggests. What moral obligation can this impose on those future generations? They cannot be bound by our consent to the *existing* Constitution, any more than they can be bound by our act of consenting to a *new* constitution. What we consent to is our business; what they consent to is theirs. *We* the People are not *they* the People.

If our consent can't bind future generations, Whittington's rationale for giving that consent disappears. The dead-hand problem reemerges unresolved, and the idea of "government by consent" becomes simply loose talk. Consent cannot underwrite the authority of the Constitution, and so it cannot underwrite originalism or any other methodology for interpreting it.

V. AUTHORITY BY MORAL GUIDANCE

So far we have ruled out two accounts of constitutional authority that might be thought to justify originalism, for two different reasons. Values Imposition accounts are not really accounts of authority at all, because they provide no content-independent reason to obey the Constitution. Consent accounts might provide such a reason, but they are descriptively implausible under the conditions that obtain in the United States or, most likely, in any other modern democracy.

This section explores a third alternative, one that is less immediately recognizable than Consent but probably more prevalent and, as it turns out, considerably more nuanced. The account is less recognizable because those who employ or endorse it often do so implicitly and rarely acknowledge the common thread tying their views to the seemingly dissimilar views of others. I will refer to this justification of constitutional authority as a *Moral Guidance* account.

A. The Normative Force of Moral Guidance

According to a Moral Guidance account, the authority of constitutional law rests in the comparatively superior moral wisdom of the process (or processes) that created it. Our reason to obey constitutional commands is not that we have consented to them, or that they will generate *particular* results we prefer (as on a Values Imposition account), but rather that obeying the Constitution is more likely to lead us to *good* results than is ordinary democratic

politics—whatever those good results might be and however their goodness might be assessed.

As we saw from the failure of Values Imposition accounts, constitutional authority cannot be built on the desire to achieve particular (controversial) values or other outcomes. One way of stating the reason why is to note that those who disagree with the values or outcomes in question would recognize no reason to acknowledge the Constitution's authority. But as Jeremy Waldron points out, 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.[118]

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 eighteen. 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 decision-makers, such as the state). So we generally cede decision-making 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

118. Waldron, *Core*, *supra* note 44, at 1573–74.

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. 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 the alternative decision-making 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 decision-making gives us reason to defer to that decision anyway.

Some influential constitutional theories attribute—or can be read to attribute—this sort of Moral Guidance authority to the act (or acts) of constitutional Framing. Consider again the views expressed by Alexander Hamilton in *Federalist No. 78*, which we explored in discussing Consent in the previous Part. Hamilton asserted that the "solemn and authoritative act" of creating a constitution was superior to whatever might result from the "ill humors" and "momentary inclination[s]" of ordinary politics.[119] Viewed as a Consent theory, Hamilton's hierarchy is unconvincing, at least insofar as it contemplates imposing constitutional law on subsequent (nonconsenting) generations. In the alternative, however, we might read Hamilton's hierarchy as the expression of a Moral Guidance account of constitutional authority. Hamilton might be claiming authority for constitutional law, not on the ground that "the people" consented to the Constitution, but rather on the theory that something special about the "solemn . . . act" of constitutional lawmaking—its deliberativeness, perhaps, or its broadly participatory scope—renders that process more reliable as a source of moral wisdom than the flighty procedures of everyday politics, with its "ill humors" and "momentary inclination[s]."[120]

Or consider Bruce Ackerman's "dualist democracy." Perhaps the normative force of Ackerman's "higher lawmaking" flows, not from

119. Hamilton, FEDERALIST NO. 78, *supra* note 83, at 440.

120. *Id.*

the mere fact that "the People" have consented to it, but from the *way* in which they consented: by means of an extraordinarily deliberative and participatory process that occurred over an extended period of time and garnered the acquiescence of a diverse assortment of viewpoints and interests. Our reason for treating constitutional law as *higher* law, on this Moral Guidance version of Ackerman's theory, is our confidence in the relative wisdom of this process—our belief that constitutional lawmaking is more likely to get things right, morally speaking, than is normal democratic politics.

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 our acceptance of the *process* of constitutional Framing as a procedure that is "most likely to get at the truth" about rights or other moral matters, in Waldron's phrase.[121]

B. Moral Guidance and Originalism

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 or ratification process, then we ought to identify those judgments actually made by the Framers (or approved by the ratifiers) and apply them, so far as we can, to current problems. It is the Framers' or the ratifiers' judgments that contain the comparative moral wisdom that justifies obedience; the further away we move from actual judgments of the Framers or ratifiers, 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 Moral Guidance accounts. The most prominent example is the work of John McGinnis and Michael Rappaport,[122]

121. Waldron, *Core*, *supra* note 44, at 1374.

122. *See* McGinnis & Rappaport, *Reconciling Originalism*, *supra* note 29; John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693 (2010) [hereinafter

who argue that requirements of super-majoritarian 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 super-majoritarian requirements necessitate broad consensus[123] and, given the difficulty of amending the rules they generate, impose a sort of Rawlsian "veil of ignorance" that discourages narrowly self-interested rule-making.[124] Obtaining the benefits of the super-majoritarian procedures of the Framing requires implementing rules actually approved by those procedures—that is, it requires originalist methodology.[125]

C. Framing-focused and Court-focused Accounts

At the risk of complicating my terminology, I will refer to the type of Moral Guidance account described to this point—one that locates special moral wisdom in the process (or processes) of Framing and/or ratifying the Constitution or its amendments—as a *Framing-focused* account. I do this to distinguish it from another prevalent variant of Moral Guidance, which we might call a *Court-focused* account.

Some theorists can be read to ascribe special moral wisdom—not to the Framing, but rather to the process of subsequent constitutional adjudication. (Not coincidentally, these theorists usually are concerned with justifying judicial review in particular, not constitutional law more generally.) Hamilton wore this hat as well. In *Federalist No. 78*, he argued that "the independence of the

McGinnis & Rappaport, *Good Constitution*]; John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007) [hereinafter McGinnis & Rappaport, *Pragmatic Defense*].

123. *See* McGinnis & Rappaport, *Good Constitution*, *supra* note 122, at 1704–06, 1710–19.

124. *See id.* at 1706–10.

125. *See id.* at 1733–53. Note that the particulars of the Framing-focused 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 super-majority 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).

judges" from the political process would allow them to safeguard individual rights against "those ill humors which . . . sometimes disseminate among the people themselves."[126] The implication is that judicial review is a more trustworthy safeguard of rights than ordinary democracy—and thus that we ought to obey judicial rulings on rights as opposed to democratic decisions where the two conflict.

The mid-twentieth-century theorist Alexander Bickel, in a similar vein, defended the "counter-majoritarian force" of judicial review on the ground that "courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess."[127] Many contemporary proponents of judicial review—Christopher Eisgruber, Lawrence Sager, and Ronald Dworkin among them—similarly cite the "disinterestedness"[128] or "detach[ment]"[129] of life-tenured judges, or the "republican deliberation" characteristic of constitutional adjudication,[130] as grounds for assigning certain issues of "principle" or "justice" to the courts.

Framing-focused accounts point toward originalism, as we've seen. But Court-focused accounts need not support originalism and might very well oppose it. If life-tenured judges have special "capacities for dealing with matters of principle," requiring them to locate and implement decisions made by long-dead Framers would seem a wasted effort. Why not simply allow these judges to engage with issues of principle directly? (It is perhaps no accident that none of these recent Court-focused theorists pays much attention in his work to the Framing process, or that none of them is an originalist.)[131]

That said, there is nothing inconsistent about endorsing both Framing-focused *and* Court-focused versions of Moral Guidance, as Hamilton can be read to do. It might be the case that both the

126. Hamilton, FEDERALIST NO. 78, *supra* note 83, at 440.

127. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 25 (2d ed. 1986).

128. CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 57 (2001).

129. LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 74 (2004).

130. RONALD M. DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 31 (1996) [hereinafter DWORKIN, FREEDOM'S LAW].

131. Dworkin's critique of originalism is well-known, and its influence is evident in the critiques of Eisgruber and Sager, among others. *See* DWORKIN, MATTER OF PRINCIPLE, *supra* note 22, at 33–57; EISGRUBER, *supra* note 128, at 25–44; SAGER, *supra* note 129, at 30–69.

Framing process and the process of subsequent constitutional adjudication—individually, perhaps, or in combination—are morally wiser on the relevant issues than the processes of normal democratic lawmaking. Indeed, it would seem that New Originalists who distinguish between constitutional "interpretation" (the derivation of the text's original meaning) and constitutional "construction" (the application of the text to a particular issue when original meaning is underdeterminate)[132] would have to adopt some sort of hybrid account in order to justify both the act of interpretation and the act of construction. This point actually presents a difficulty for New Originalism, but I will put it aside for now and return to it in Part VI.E.

In my observation, these Court-focused versions of the Moral Guidance account handily outnumber their Framing-focused counterparts. If I am right about this, it might hint at something about the plausibility of Framing-focused versions, and of the originalism that flows from them. It is to this question of plausibility that I turn next.

D. The Implausibility of Framing-focused Moral Guidance

Framing-focused 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 case 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

132. On this distinction, see the discussion in Part III.A, *supra*.

suspected terrorists to be detained indefinitely without 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?

1. The salient defects of the Framing

On a Framing-focused 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 democratic 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.[133] It excluded women, most people of color, and many non-propertied people from the vote.[134] It viewed Native Americans as uncivilized savages and barred most of them from citizenship altogether.[135] Whatever decisional advantages might have flowed from the unusually participatory and deliberative nature of the Framing may well 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 Framing-focused account demands only that the Framing process be relatively wise with respect to certain issues—namely those

133. U.S. CONST. art. I, § 9, cl. 1 prohibited Congress from banning the importation of slaves until 1808. U.S. CONST. art. IV, § 2, cl. 3 prohibited free states from emancipating or harboring escaped slaves. In addition, U.S. CONST. art. 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 U.S. CONST. art. II, § 1, cl. 2) and direct taxation.

134. *See* sources cited *supra* notes 94–98.

135. U.S. CONST. art. I, § 2, cl. 3, for example, entirely excludes "Indians not taxed" from the population to be counted for representation purposes.

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, 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 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 treat education or health care as *not* constitutionally protected.[136]

On a Moral Guidance account, this means Cato must attribute to the Framing a moral wisdom that is quite broad—wisdom not only with respect to the rules included in the Constitution, but also with respect to the choice of which rules to include and which rules to omit. It will not be enough, on a Framing-focused account, for Cato

136. 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. To be bound by the Framers' decision not to include these rights in the Constitution is to be bound by their decision to leave these issues to ordinary, sub-constitutional democratic politics. 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. *See, e.g.*, SAGER, *supra* note 129, at 87–88 (suggesting that the right to medical care is part of a constitutionally guaranteed, but judicially unenforceable, "right to minimum welfare"). I use them here only by way of example.

to believe that the Framing possessed superior moral wisdom on issues 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 our actual 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 most people of color, and of many nonpropertied citizens). So it will take a very big leap of faith for Cato to buy into the Framing-focused Moral Guidance account in the first place.

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 world-wide 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 reflect 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 underdeterminacy issues that might hinder the identification of "original meaning" in any given case.[137] The problem at hand, rather, is that the (by-hypothesis) applicable legal rule does not reflect (cannot reflect) an actual judgment by the rule-maker—the Framing process—with respect to the particular circumstances confronting Cato. In enacting a general 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 by its terms to cases that its enactors could not have foreseen.[138]

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 these circumstances and thus did not resolve them 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.[139]

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137. On the typical underdeterminacy of original meaning and the consequent need, recognized by most New Originalists, for constitutional "construction," see the discussions in Part III.A, *supra*, and in Part III.C, *supra*, in the text accompanying notes 63–72.

138. This is one cause of the phenomenon noted by Aristotle in 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." ARISTOTLE, *Nichomachean Ethics*, *in* THE BASIC WORKS OF ARISTOTLE 927, 1020 (Richard McKeon ed., W.D. Ross trans. 1941). General normative rules often produce "incorrect" results in particular cases because those cases involve circumstances the rule-makers did not anticipate.

139. Of course, Cato could attempt to construct a specific judgment that the Framers *might* have rendered had they considered the particular circumstances he faces. If Cato attempts this, however, he 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. In this sense, the construction of counterfactual "judgments" of the Framers resembles the construction of hypothetical "consent." *See supra* Part IV.G. With both devices, whatever normative force flows from the fact of an *actual* decision (of the Framers, or of the consenting party) is lost when *imagined* decisions are substituted for actual ones.

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 Framing-focused 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.[140]

Nonetheless, Gaius 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" in 1954,[141] there is no actual judgment of the Framing to defer to. And thus Gaius reasonably might decide to, in effect, disobey the Constitution by ruling that the Constitution prohibits school segregation, on the ground that the Framing-focused 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.[142]

140. 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.

141. 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 Framing-focused Moral Guidance account offers no reason to obey the Constitution absent a specific judgment of the Framing.

142. 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 perceive now the serious plausibility problems that afflict Framing-focused 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 process deficiencies of the actual Framing. And they require a relatively specific judgment by 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.

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 any case that matters. 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.

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 Framing-focused 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—that legal authority be based on something other than the moral content of the law in question—is undermined.

I said in Part V.A 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

requirements 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 prevalent human affliction. This is not the same thing, however, as assuming that subjects of constitutional law like Cato typically lack strong beliefs about the requirements 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 decision-makers 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 incorrect. If Cato believes, then, that morality requires *X*—say, the detention without trial of suspected terrorists—then Cato necessarily also believes that a command to the contrary—say, the constitutional requirement of due process of law—is morally incorrect. 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 decision-makers about their children's welfare while simultaneously believing that a particular parental decision is incorrect. But our belief that a particular decision is wrong may undermine our acceptance of the general premise of parental authority. If we perceive a certain parental judgment—say, the decision not to inoculate one's children—as especially foolish, our confidence in the general

principle of superior parental decision-making 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 decision-makers for their children in many more cases than not, and even that *these* particular parents are the best decision-makers 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 decision-makers *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 (already questionable) underlying premise of constitutional authority, namely the supposedly superior wisdom of the Framing process. Or, less dramatically, 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 duty to obey its command.

Note, too, that the persuasiveness of this reasoning is enhanced to the extent there are independent grounds to question the wisdom of the Constitution. And under a Framing-focused Moral Guidance account, as we have already seen, 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 Framing-focused 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 Framing-focused account. In order 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 are unlikely to (perhaps 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.

4. The failure of the Framing-focused account

At bottom, then, the Framing-focused Moral Guidance approach is not a very persuasive grounding of constitutional authority. Part of the problem is context-sensitive: the salient moral failings of the American Framing are not inevitable features of any constitutional system. 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 become more and more relevant. 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.

Of course, if a Framing-focused Moral Guidance account cannot persuasively justify constitutional authority itself, then it cannot persuasively dictate originalism or any other method of constitutional interpretation. Framing-focused accounts are less saliently implausible than Values Imposition and Consent accounts, but they turn out not to be plausible enough.

E. A Word About Court-focused Accounts

Although I won't linger on Court-focused versions of Moral Guidance here (because they do not seem to support originalism), I should note before moving on that the difficulties of Framing-focused accounts will affect Court-focused accounts as well, though perhaps not quite so severely. Supreme Court decision-making does not feature the obviously exclusionary defects of our Framing, but it does feature many arguable defects of its own. The Court is an elite institution populated solely by lawyers, a disproportionate number of whom are white, male, and middle-aged or beyond. At any given time, moreover, it consists of no more than nine members, substantially limiting its experience of, and need to engage with, diverse viewpoints and interests as compared to democratic politics. The notion that the Justices decide cases free of political, moral, or

other predispositions or biases has long been discredited. As with the Framing, then, though mostly for different reasons, the idea that the Court is substantially wiser than ordinary democracy on the subjects covered (and not covered) by constitutional law is at the very least problematic.

The problem of unforeseen circumstances may not be as acute on Court-focused accounts as on their Framing-focused rivals, simply because the Court (unlike the Framing) is an ongoing institution capable of addressing new issues as they arise. In practice, however, a Court that decides fewer than 100 cases per year, most of which are not constitutional cases, cannot of course specifically address every possible variant of a given constitutional problem. There will be many cases of first impression that the Court has not directly considered, even though they are covered by some general rule or principle announced by the Court.

And the problem of disagreement applies to judicially created rules or commands just as it applies to rules or commands promulgated by the Framers. A person subject to a judicial doctrine or decision with which she strongly disagrees is just as likely, for that reason, to question the supposedly superior wisdom of the institution that issued that doctrine or decision as is a person subject to an original constitutional rule she finds disagreeable.

I am deeply skeptical, in short, that any version of a Moral Guidance account can convincingly justify the authority of constitutional law. But Court-focused accounts seem slightly less hopeless—or perhaps just hopeless in different ways—than the type of Framing-focused account that might entail originalism.

VI. AUTHORITY BY DISPUTE RESOLUTION

There is one more prevalent account of constitutional authority that might be used to justify originalism. I call it a *Dispute Resolution* account, and I explore it in this Part. In its most popular (and in my view most persuasive) form—what I call the *Footnote Four* version—Dispute Resolution can justify at most a selective use of originalism. Another form of Dispute Resolution (the *Rule of Law* version) has been offered in support of originalism; but it provides weak support at best and, more to the point, it is not particularly convincing as an account of authority.

A. The Normative Force of Dispute Resolution

There is a long and not entirely user-friendly history of justifying law as a means of resolving, avoiding, or mitigating disputes. Dispute resolution was at the core of Hobbes's now-infamous defense of absolute monarchy: absolutist law, Hobbes thought, was necessary to avoid the conflict and chaos that would prevail in a state of nature.[143] Though Locke's thought often is contrasted with that of Hobbes, and in particular is frequently cited for the proposition that government exists to protect natural rights, Locke too justified law at least in part as a way to resolve or avoid costly disputes. Locke's central objection to Hobbes, in fact, was his observation that a Hobbesian absolute monarch frequently would be self-interested and thus incapable of resolving disputes fairly.[144]

A somewhat oversimplified version of Hobbes's account illustrates the basic normative mechanics of Dispute Resolution. We are obligated to obey the sovereign, Hobbes suggested, because failure to obey will leave disputes unresolved, allowing society to fall into chaos.[145] This obligation applies even—indeed especially—when we disagree with the sovereign's commands; if we were free to disobey in cases of disagreement, the dispute-avoidance function of the sovereign would be entirely frustrated. The sovereign, in other words, has authority over us, not by virtue of its superior wisdom (a Moral Guidance account) or our agreement to be bound (a Consent account), but simply because obedience is the only way to avoid extremely costly disputes.

Notice that the goal of dispute resolution (or avoidance, or mitigation) on this account provides a content-independent reason for action. It gives us a reason (in Hobbes's view, a duty) to obey legal commands regardless of the content of those commands—regardless of whether what the sovereign orders us to do otherwise would be morally correct. Our disagreement with the content of a

143. *See generally* HOBBES, *supra* note 80.

144. *See* LOCKE, *supra* note 81, at 316–17, 369–74. For an extended discussion of Locke's dispute-resolution account of law and government, and in particular his critique of Hobbes, see PETERS, *supra* note 42, at 119–22.

145. In fact Hobbes filtered his dispute-resolution justification of law through the device of constructive consent: he argued in essence that subjects ought to obey an absolute monarch because, acting rationally, they would have consented to absolute monarchy, given the opportunity to do so, as a way to avoid chaos and violence. *See* PETERS, *supra* note 42, at 57–59. But we can put this consensualist overlay to one side for present purposes.

command is irrelevant to our duty to obey it. (Dispute Resolution accounts thus avoid the fatal flaw of Values Imposition accounts.) Moreover, our disagreement with the content of a command is not, by itself, evidence that the sovereign lacks authority over us—unlike on Moral Guidance accounts, which make authority contingent on superior moral wisdom. Conceptually speaking, then, a Hobbesian Dispute Resolution account has advantages over the Values Imposition and Moral Guidance alternatives. And descriptively speaking it is, or at least might be, an improvement on Consent accounts, because it does not demand that we (the subjects of law) give our actual consent to be bound by that law.

We might take this basic Hobbesian idea and deploy it to fashion a Dispute Resolution account of the authority of the Constitution. If the costs of obeying constitutional law are lower than the costs of the disputes that would result, or remain, if we disobey, then we have a content-independent, Hobbesian reason to obey the Constitution. We have, that is, an account of constitutional authority.

Of course, we are going to have to do much better than this bare Hobbesian account to justify constitutional authority convincingly. As Locke observed, the costs of obeying the law when that law is made by an absolutist monarch often will outweigh the costs of the alternatives. An absolutist monarch, after all, will be prone to "resolve" disputes in his own favor, leading to the sort of "long train of abuses" of which both Locke and, later, Thomas Jefferson (in the Declaration of Independence) complained.[146] So we will need to explain why the Constitution is a particularly trustworthy resolver of disputes—why it is especially impartial or fair, for example, in comparison to the alternatives—in order to endorse constitutional authority on Dispute Resolution grounds.

As it happens, we have such an account available to us. It is the account suggested by the Supreme Court in the famous fourth footnote of *Carolene Products* and later elucidated by the constitutional theorist John Hart Ely.

B. Footnote Four

In what has become known as "Footnote Four," the Court in its 1938 decision in *Carolene Products* suggested that aggressive judicial

146. *See* LOCKE, *supra* note 81, at 463; *see also* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

review of legislation is appropriate in circumstances where the democratic process cannot be trusted. The source of distrust might be the fact that the legislation in question "restricts . . . political processes,"[147] such as a law penalizing criticism of the sitting government. Or it might be a worry that the legislation reflects or perpetuates "prejudice against discrete and insular minorities,"[148] such as a law requiring racial segregation in public schools.

The *Carolene* Court offered its account only as a tentative rationale for non-deferential judicial review in some circumstances; John Hart Ely later expanded it into a rationale for judicial review itself.[149] Carefully considered, and perhaps enlarged somewhat, a version of the Footnote Four approach might in fact be deployed for greater purposes still: to ground the general authority of constitutional law.[150] The account acknowledges, first, that ordinary democratic politics are the preferred, default mechanism for resolving society's disputes about substantive values and outcomes, and thus for making law. But it holds that democratic politics cannot always be relied upon to resolve substantive disputes acceptably. The "ins"—those currently holding political power, namely the electoral majority and those who represent them in office—have strong incentives to "make sure the outs stay out," as Ely put it.[151] So legislation that has this effect—legislation restricting political speech or voting rights, for example—cannot be trusted as genuinely in the public interest; it might simply be a self-interested gambit to consolidate power. Rules of constitutional law (such as protections for freedom of speech) can make it difficult to enact these power-entrenching measures. Constitutional adjudication, moreover, can fairly resolve disputes over whether any given measure is in fact unjustifiably power-entrenching.

In a similar vein, majoritarian democracy sometimes is distorted by irrational biases against certain groups of citizens—those possessing disfavored racial or ethnic traits or religious beliefs, for example. The views and interests of these citizens might not be

147. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

148. *Id.*

149. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

150. Elsewhere I have described and defended at length a justification of constitutional law that might be considered an expanded version of the Footnote Four account. *See* PETERS, *supra* note 42, at 246–348.

151. ELY, *supra* note 149, at 106.

taken seriously in the political process, and as a result, they might be unfairly denied benefits or saddled with burdens, as (for example) with Jim Crow laws in the pre-Civil-Rights-era South. Constitutional rules (such as a requirement of "equal protection of the laws") can prevent or mitigate this kind of biased legislation; constitutional adjudication can resolve disputes about whether any given law is unfairly biased.

The Footnote Four approach therefore justifies constitutional law and adjudication on Dispute Resolution grounds. 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).

The Footnote Four approach depends, of course, on the premise that constitutional law and procedures are better than ordinary democracy at resolving the kinds of disputes to which they apply. Our justification of constitutional authority must be better than Hobbes's attempt to justify absolute monarchy; it must demonstrate that constitutional law can resolve disputes, not simply by force, but in a way that both sides can accept. (Recall in this regard Jeremy Waldron's central requirement for a dispute-resolving procedure: it must be capable of being "subscribed to by people on both sides of any . . . disagreements."[152]) Ely underwrote this premise with an emphasis on judicial independence: constitutional judges, because of their electoral insularity, are likely to be comparatively resistant to the majority's temptation to entrench its political power and to its occasional tendency toward irrational prejudice; they are "in a position to objectively assess claims" that these democratic malfunctions are occurring.[153] In a word, constitutional adjudication is more *impartial* than democratic politics on questions of democratic dysfunction. Judicial decisions on these issues therefore can be more readily accepted by those subject to them than (potentially self-interested or biased) democratic resolutions of these claims could be.

To Ely's invocation of judicial independence, we can add the observation that the Framing processes are even more insulated than

152. Waldron, *Core*, *supra* note 44, at 1371; *see supra* Part II.D.

153. ELY, *supra* note 149, at 103.

life-tenured judges from contemporary politics. The Framers who authored and ratified most of the Constitution's key provisions have long since died—a weakness of Consent accounts and Framing-focused Moral Guidance accounts, but an advantage on the Footnote Four approach. Those (now-dead) Framers obviously do not stand to benefit by entrenching the power of current majorities or officials; as such, the rules they authored can be seen as relatively impartial principles for regulating self-interest in current democratic government.

On the other hand, as I have noted, there is no good reason to believe that the Framers or their generation were less susceptible than we are today to the danger of irrational bias against "discrete and insular minorities." We might therefore not trust rules laid down by the Framers to govern disputes regarding the treatment of, say, racial minorities or women. This fact has implications for the type of interpretive methodology supported by the Footnote Four account, as I explain below.

C. Footnote Four and Originalism

The Footnote Four version of a Dispute Resolution account justifies constitutional authority as a relatively impartial way to prevent democratic power-entrenchment and bias and to resolve disputes about whether any given law or policy suffers from these failures. This approach turns out to provide only limited support for an originalist interpretive methodology, valuing it in some doctrinal areas and rejecting it in others. It also allows for (indeed demands) nonoriginalist interpretation where original meaning runs out. I discuss each of these implications below.

1. Selective originalism

On the Footnote Four account, there is no special magic in decisions made by the Framers; the value of deferring to those decisions lies in the impartiality that flows from that deference, not in the supposed moral wisdom of the Framing generation or the super-majoritarian process they employed. This means that a Footnote Four judge will employ originalist interpretation where it promotes impartiality and will reject it where it has the opposite effect.

As I suggested above, deference to the Framers on some constitutional issues seems likely to promote impartiality.

Government officials and political majorities have a salient self-interest in the resolution of disputes involving the potential entrenchment of their own power. But the Framers and their generation no longer have any self-interest at stake in these disputes; they have been dead for decades or centuries.[154] For a contemporary interpreter to defer to judgments of the Framers on these questions, then, is to enhance the impartiality, and the appearance of impartiality, by which these disputes are resolved.

Many important questions in constitutional law fall into this "potential power-entrenchment" category and thus are candidates for originalist interpretation. Questions of the scope and nature of political participation and political influence—involving the right to vote, for instance, or to engage in political speech, or to seek or hold office—are obvious examples. So are questions involving the allocation of power between the different levels and branches of government, which in American constitutional law typically are referred to as issues of federalism and separation of powers. Issues of criminal procedure—the processes by which those in power can wield the coercive force of the state—fit comfortably in this category. Indeed the category probably includes process-related questions more generally, such as the conditions under which government may choose the winners and losers of regulation (many equal-protection and so-called "substantive" due-process cases) or take private property for public use.

These topics comprise much of federal constitutional law in the United States. But they are far from the whole of it. The Footnote Four approach suggests a second function for the relative impartiality of constitutional law: it can protect members of "discrete and insular" minority groups against irrational majority bias. On this score, appeal to the judgments of the Framers is likely to be less useful, as I suggested above. On questions of race or gender relations, for example, contemporary citizens might perceive at least as much irrational bias among the eighteenth- and nineteenth-century Framers as among our own generation. Originalism, then, might be inappropriate in resolving disputes about racial or gender

154. McGinnis and Rappaport suggest that even recent constitutional amendments might be relatively immune to self-interest by virtue of the super-majority requirement for their enactment, which simulates a sort of Rawlsian "veil of ignorance." *See* McGinnis & Rappaport, *Good Constitution*, *supra* note 122, at 1708–10; McGinnis & Rappaport, *Pragmatic Defense*, *supra* note 122, at 388–89.

equality (as indeed the *Brown* Court suggested when it refused to "turn the clock back to 1868 when the [Fourteenth] Amendment was adopted"[155]), or about other arguable manifestations of equality (based on sexual orientation, for example) on which the danger of irrational bias seems at least as great among the Framers as in contemporary politics. The same point might apply to disputes over religious freedom or forms of nonpolitical expression (sexual speech, for example).[156]

A Footnote Four judge, then, need not be (*should* not be) committed to originalism across the board. Instead, she will pick and choose an originalist methodology as appropriate to enhance the perceived impartiality of her decisions. Originalism might be more appropriate in (say) political-speech or federalism cases than in (say) race-relations or freedom-of-religion cases.

2. Originalism as a starting point

Even where originalism seems an appropriate means of fostering impartiality, it does not exhaust an interpreter's options on the Footnote Four approach. A Framing-focused Moral Guidance account, remember, equates constitutional authority with judgments ratified at the Framing; if those judgments run out, so does the authority of the Constitution. But on the Footnote Four approach, the judgments of the Framers are only one potential source of impartiality. Indeed, both the *Carolene Products* Court and Ely looked for impartiality not primarily to the Framers, but to the Court and the adjudicative process of which it is a part. Their arguments suggest that the political insularity of constitutional judges, and perhaps the features of legal reasoning more generally (its obsession with authority, its language of general principle, its requirement of responsiveness to competing arguments), make constitutional adjudication a more impartial forum than ordinary politics for resolving questions of potential entrenchment or bias.[157]

155. Brown v. Board of Education, 347 U.S. 483, 492 (1954).

156. There is a significant potential caveat to this suggestion, however. If the Framers can be shown to have taken a particular position despite their evident bias, deference to that position can be perceived as impartial. So, for example, if the Framers of the Fourteenth Amendment did not object to race-based affirmative action, despite their demonstrably benighted views on race by today's lights, then deferring to that position in resolving a contemporary dispute about affirmative action might be seen as relatively impartial.

157. Ely himself, following Alexander Hamilton, emphasized the political insularity of

The payoff of this flexibility is that constitutional authority can exist on the Footnote Four account even if the Framers did not consider the particular issue being addressed—even, in fact, if the original meaning of the text does not fully resolve that issue. In such instances, authority cannot flow from the (nonexistent, or at least inapplicable) superior wisdom of the Framing. But it might flow from the relative impartiality of the adjudicative process.

This fact has obvious advantages for those questions (involving gender or race relations, for example) on which resort to original meaning would not enhance impartiality. Courts can use nonoriginalist constitutional interpretation to resolve these issues relatively impartially and thus authoritatively. But it also bears fruit in cases (involving political participation, federalism, separation of powers, etc.) where originalism seems most appropriate. Because courts, too, are relatively impartial on these questions as compared to ordinary politics, they can use nonoriginalist methodologies to resolve them where originalist methodology—the search for determinate original meaning—fails to do so.

As an example, consider again our legislator Cato's conundrum regarding the due-process rights of suspected terrorists. A Framing-focused Moral Guidance account faces two related obstacles to resolving this question authoritatively. First, there might not be any original meaning that governs the question. Second, even if there is an identifiable, controlling original meaning (as we assumed in assessing the Framing-focused account in Part V.D), there may be no directly on-point judgment of the Framers regarding these facts or

judges. *See* ELY, *supra* note 149, at 101–04; *see also* Hamilton, FEDERALIST NO. 78, *supra* note 83. "Legal Process" theorists of the mid-twentieth century, most prominently Bickel and Herbert Wechsler, emphasized the prominent role of principle in judicial decision-making, as does the more-recent work of Ronald Dworkin. *See* BICKEL, *supra* note 127, at 23–28; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); DWORKIN, FREEDOM'S LAW, *supra* note 130, at 31; DWORKIN, MATTER OF PRINCIPLE, *supra* note 22, at 69–71. I have focused on the requirement of responsiveness in some of my own work. *See* Christopher J. Peters, *Participation, Representation, and Principled Adjudication*, 8 LEG. THEORY 185 (2002); Christopher J. Peters, *Persuasion: A Model of Majoritarianism as Adjudication*, 96 NW. L. REV. 1, 20–21 (2001). Recently Jack Balkin has touched on all of these themes in defending an interpretive approach he calls "living originalism" (or "framework originalism"). *See* JACK M. BALKIN, LIVING ORIGINALISM 129–37 (2011). Of course, most of these theorists do not consider themselves Footnote Four adherents; among them, I probably have come closest to endorsing something like the Footnote Four approach. *See* PETERS, *supra* note 42, at 255–72. I think, however, that many of these theories can be recast in Footnote Four or similar Dispute Resolution terms, as I suggest *infra* Part VI.G.

closely analogous ones. If either of these conditions holds, a Framing-focused account can supply no authoritative constitutional law to govern Cato's case.

Having no authoritative constitutional law to govern a case like this, or many other cases in which original meaning runs out or no on-point original judgment exists, is a real problem for a Framing-focused Moral Guidance account. As I discuss in Part VI.E below, that problem has been exposed by the New Originalist move toward constitutional "construction" to fill the gaps left open by original meaning. But the Footnote Four approach avoids this problem altogether by allowing for authoritative constitutional resolution of these issues through adjudication. Even where the Framing generation did not resolve questions like the due-process rights of terrorism suspects, courts can resolve them in a way that is more impartial than (self-interested) democratic politics and therefore, on the Footnote Four account, can be authoritative.

In this sense, even where originalism is appropriate on the Footnote Four approach, it functions as a starting point, not as the entirety of the interpretive process. And this is true in another sense as well. There may be circumstances—even on topics that seem suitable for originalism—in which an identifiable, on-point original meaning exists, and yet applying it simply would be unacceptable to most of those bound by the Constitution. Suppose, for example, that we determine with reasonable certainty that the original meaning of the First Amendment's protection of freedom of speech prohibited only prior restraints on speech, not after-the-fact punishments. Or suppose we establish that the original meaning of Congress' power "to regulate Commerce among the several States" encompassed only the specific acts of buying, selling, and bartering for the purchase or sale of goods.[158] I think it is quite unlikely that most Americans today would accept these limits on the freedom of speech or the regulatory power of Congress. And yet, jettisoning constitutional standards in these areas altogether would defeat the purpose of constitutional law (on the Footnote Four approach), which is to

158. Justice Clarence Thomas attributes an original meaning of roughly this scope to the Commerce Clause. *See* United States v. Lopez, 514 U.S. 549, 584–87 (1985) (Thomas, J., concurring) ("At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes.").

remove these questions from decision by the self-interested majority. Footnote Four solves the problem by subjecting these issues to resolution by the still-relatively-impartial judicial process.

The Footnote Four approach, unlike the Framing-focused version of Moral Guidance, thus allows constitutional adjudication to supplement, and in some cases perhaps even to supplant, original meaning where the latter is incomplete or just plain unacceptable. It probably is no coincidence that this sort of hybrid approach is a better fit than thoroughgoing originalism with our actual constitutional practice of utilizing "many pathways of change," in Reva Siegel's phrase.[159]

D. The (Relative) Plausibility of Footnote Four

All this is well and good. (Or maybe not so much, if you are a thoroughgoing originalist.) But it's only so much ink if the Footnote Four account turns out to be as flawed as Framing-focused Moral Guidance and the others I have canvassed. I think Footnote Four is a substantial improvement over these rivals as an account of constitutional authority. Which is not to say that it has no weaknesses.

1. The salient defects of the Framing revisited

Recall, first, the weaknesses in the claim that the moral wisdom of the Framing was superior, generally speaking, to that of contemporary democratic politics: the Framing generation made salient moral errors, and the procedures of the Framing were arbitrarily exclusionary. These problems are less serious on the Footnote Four account. What matters to that account is not the supposed moral wisdom of the Framing, but rather the relative impartiality it can provide as compared with contemporary democracy. And the fact that the Framing was exclusionary and in some ways morally benighted need not affect its relative impartiality. As we have seen, the Framers' decisions regarding the scope and allocation of government power are, when applied to today's problems, untainted by self-interest, and this remains true regardless of the Framers' attitudes toward (say) race or their exclusion of (say) women from the constitutional process. Of course, the Framers'

159. Siegel, *supra* note 106, at 1405.

views on race or gender undermine their impartiality with respect to contemporary disputes involving those topics; but this objection can be addressed on the Footnote Four account by simply avoiding originalism in deciding these disputes. Because that account derives constitutional authority from the impartiality, not just of the Framing, but also of subsequent adjudication, defects in the Framing need not call the entirety of constitutional authority into question.

2. The problem of unforeseen circumstances revisited

Second, just as constitutional authority on the Footnote Four account does not depend solely on the Framing, neither does it depend solely on the existence of some relatively concrete judgment of the Framers involving the particular circumstances a decision-maker now faces. The Framing-focused Moral Guidance account is flummoxed by cases the Framers did not anticipate; it offers no reason to obey constitutional rules in such cases. But the Footnote Four account offers a reason for obedience. To obey a rule created by the Framers, even as applied to a case the Framers did not foresee, is (to that extent) to defer to a relatively impartial source of decision in that case.

Consider again Cato's decision whether to obey the Due Process Clause despite his disagreement with its content in his case. As a current holder of political power, Cato is self-interested in the question whether that power can be used to suppress political opposition. By obeying the Due Process Clause—a rule fashioned by eighteenth-century Framers with no stake in contemporary political controversies—Cato can resolve the question impartially, and can be seen as doing so. His decision thus can be accepted by those who disagree with it, in a way in which the opposite decision might not have been.

Obedience to constitutional rules, therefore, can promote impartiality even when the rule-makers did not consider a particular case to which the rule applies. And note that the relevant rule-makers, on the Footnote Four account, are much more numerous than on the Framing-focused Moral Guidance approach. Even if the Framers did not consider a case like Cato's, a subsequent Court might have done so. Cato can resolve his quandary impartially by deferring to an on-point judicial decision even if there is no closely on-point original meaning to follow.

In fact, as I suggested above,[160] the relative impartiality of constitutional adjudication can bring legitimacy absent any on-point decision at all. Suppose Cato's bill becomes law and our hypothetical judge, Gaius, must determine its constitutionality. Even after looking at original meaning and precedent, it might be unclear what the Due Process Clause requires in this case. Whichever answer Gaius reaches, however, his decision can be perceived as more impartial than the self-interested actions of Cato and his fellow legislators in voting for the law. Gaius, as a life-tenured judge who need not worry about political opposition, has less personal stake in the law than do Cato and his cohort. Even if Gaius upholds the law, his comparative impartiality might persuade those who disagree with his decision nonetheless to accept it as authoritative.

In short, the sources of constitutional authority on the Footnote Four account are both multiple and relatively abstract. The absence of a specific decision by the Framers does not frustrate authority on that account, unlike on a Framing-focused Moral Guidance approach, both because there are other relatively impartial decision-makers available—previous Courts, or the Court deciding the issue at hand—and because impartiality might flow from obedience to a general rule established by the Framers or a prior Court even if there is no specific on-point decision.

3. The problem of disagreement revisited

Finally, a person's substantive disagreement with a constitutional command need not undermine the perceived authority of that command on the Footnote Four approach. We can agree that a process is impartial without agreeing with the substantive result that process generates. More to the point, a belief that a result is wrong need not undermine our faith in the impartiality of the process that produced it.

On a Moral Guidance approach, remember, Cato's disagreement with the requirements of the Due Process Clause in his case serves as a reason to question the basis of the Clause's authority, namely the supposedly superior moral wisdom of the process that created the Clause. On the Footnote Four account, in contrast, Cato's disagreement with the Clause need not affect his belief in the

160. *See supra* notes 157–159 and accompanying text.

Clause's authority at all. That authority flows from relative impartiality, not from moral wisdom, and the fact that a process generates a morally disagreeable result is not (necessarily) a reason to question its impartiality. Cato's view that the Clause is (in his case) wrong need not imply that the Framing that created the Clause, or the subsequent Courts that have interpreted it, lacked impartiality.

The same holds true for a judge like Gaius who must decide whether to enforce the Clause—but with a wrinkle. While Cato is a part of the democratic political process, Gaius is himself a part of the constitutional process whose supposed impartiality justifies imposing constitutional law on democratic politics. For Gaius, therefore, there are two aspects to the question of constitutional authority: whether he himself has a duty to obey the Constitution in making his decision, and whether others will perceive a duty to obey his decision once it is made. Like Cato, Gaius can disagree with the substance of the Due Process Clause and still, on a Footnote Four approach, decide to obey the Clause on the ground that it derives from a relatively impartial process. And by demonstrably obeying the Clause in his decision—by convincingly tying that decision to some decision of the Framers or of a predecessor Court, for example—Gaius can advertise his impartiality to others and thus can persuade others to obey the interpretation he renders.

At bottom, then, the Footnote Four account is more plausible than the Framing-focused version of Moral Guidance. Its requirements for constitutional authority, both generally and at the level of particular cases, are less demanding and thus more likely to be satisfied in practice. And it does not undermine itself by making a person's disagreement with the content of the law a reason to question the law's authority.

4. A caveat

All is not entirely rosy with Footnote Four, however. It seems likely that substance—that is, the moral content of constitutional law—will turn out to be relevant at some level on that account. This likelihood resurrects the specter of disagreement and its potential to undermine constitutional authority. But the specter does not seem quite so frightening on the Footnote Four account as on Moral Guidance approaches.

Substance, first of all, might be seen as relevant to impartiality. If constitutional procedures consistently generate one-sided results—

always favoring the government, say—at some point citizens will reasonably question the supposed impartiality of those procedures. So it is possible that a person's disagreement with a constitutional command will serve as evidence, for that person, that the constitutional process is not so impartial after all—and thus that she has no obligation to obey it.

I believe this possibility is less threatening to the Footnote Four account, however, than the analogous possibility is to a Moral Guidance account. On the latter account, one's disagreement with the substance of a command is direct evidence against the moral wisdom of the constitutional process—that is, against its claim to authority. On Footnote Four, though, one's disagreement with the substance of a command is only indirect evidence against the impartiality, and thus the authority, of the process. That a procedure is wrong does not necessarily imply that the procedure is partial. Absent non-substantive evidence of partiality—some salient favoritism in the relevant procedures, for example—it will take a pattern of incorrect results, all in the same direction (for the government, say), to constitute strong evidence of partiality. And remember that the impartiality question is a comparative one: the constitutional process need not be perfectly impartial, just impartial *enough* as compared to ordinary politics to be capable of resolving certain disputes.

It also is possible, though, that substance will matter without regard to impartiality. Even a procedure that is accepted as sufficiently impartial might still be rejected on the ground that it is not sufficiently likely to produce substantively good results. (Consider a coin toss—a perfectly impartial procedure that few would endorse for important decisions, simply because a fifty-percent accuracy rate will not be viewed as high enough.) In other words, we might also care about the *competence* of a dispute-resolution procedure, not just its impartiality.[161] If so, then the specter of substantive disagreement reappears, threatening to undercut the perceived authority of a command someone thinks is substantively wrong.

Again, however, this threat seems less severe than on a Moral-Guidance account, for two related reasons. First, competence is not the primary basis of authority on the Footnote Four approach; it

161. On this point, considered in the context of legal authority generally, see PETERS, *supra* note 42, at 75–78.

operates more as a side constraint, disqualifying suitably impartial procedures that are simply too incompetent to be acceptable. Doubts about a procedure's competence might be overcome by demonstrations of its superior impartiality. On a Moral Guidance account, however, competence—the possession of superior moral wisdom—is the *raison d'être* of constitutional authority. Doubts about the Constitution's superior wisdom go to the very heart of its authority; there is no other factor to outweigh them.

Second, while impartiality is assessed comparatively on the Footnote Four account, competence is not. Constitutional procedures must be considerably more impartial on the relevant questions than the ordinary democratic alternatives. But they need not be considerably more *competent* than those alternatives. Competence, again, is a side constraint; impartiality drives constitutional authority on Footnote Four.

So someone who disagrees with a constitutional command is less likely to reject its authority for that reason, I think, on the Footnote Four account than on a Moral Guidance account. This does not mean the problem of substantive disagreement is trivial or nonexistent on Footnote Four. But it suggests, especially given the other advantages of that approach, that the Footnote Four version of Dispute Resolution is the best account available to justify constitutional authority.

E. "Interpretation" vs. "Construction" Revisited

I argued in Part VI.C above that a Footnote Four account strengthens, or perhaps broadens, the authority of constitutional law by making authority possible in cases where it is missing on the Framing-focused approach: cases where original meaning runs out or where, even if original meaning is determinate, the Framers did not foresee the particular circumstances at hand. This point is independently interesting, because it reveals a significant problem with the New Originalist distinction between constitutional "interpretation" and constitutional "construction" that I discussed in Part III.A.

In New Originalist terminology, remember, "interpretation" is the process of determining the (original) meaning of the Constitution's text and "construction" is the process of resolving a case that is not determinately resolved by this (original) meaning. The distinction is a step in the right direction for originalism, as it acknowledges the need to resolve the (many) constitutional cases in

which the text alone is underdeterminate. But the distinction begs an important question: where does a court's authority to engage in "construction" come from?

We have now canvassed (most of) the accounts of constitutional authority that might be thought to support originalism.[162] What is remarkable is that none of them, with the exception of Footnote Four (which entails only modest, selective originalism), can authorize constitutional construction, even assuming the account itself is valid.

Barnett's Values Imposition account purports to justify the authority of constitutional *interpretation*—identification of original meaning—on the ground that the Framers acted to enshrine the correct principles of natural justice. But courts are not the Framers. There is no guarantee that a court engaging in construction—moving beyond original meaning—will protect natural rights, or even attempt to do so. And so there is no basis for obedience to judicial constructions of the Constitution on Barnett's account. (Unless, that is, Barnett is willing to claim that courts, or at least the Supreme Court, have a special ability and inclination to protect natural rights, which would be a form of Court-focused Moral Guidance account. In any event, Barnett does not make such a claim to my knowledge.)

Similarly, a Consent account holds that "the People" who framed the Constitution have legitimate authority over subsequent generations acting through normal politics. But the Court is not the People; an act of judicial construction of the Constitution is not an act of popular sovereignty. So judicial constructions cannot be authoritative on a Consent approach.

For its part, a Framing-focused Moral Guidance account derives authority from the supposedly superior moral wisdom of the Framing. As we've seen, that authority runs out when the Framers' judgments run out—for instance, when there is no determinate original meaning. But that is precisely where the process of judicial construction is supposed to begin. Where does the authority of that process come from?

The analysis so far suggests there are only two potential sources of authority for judicial construction. One is a Court-focused variety of Moral Guidance—a theory that the superior wisdom of

162. "Most of," because one type of account remains to be addressed: what I call a *Rule of Law* account. *See infra* Part VI.H.

adjudication can pick up the slack where the (even-more-superior) wisdom of the Framing gives out. I am not aware of an originalist who has taken this approach or of a Court-focused Moral Guidance theorist who has endorsed anything like strong originalism. A theory holding that both the Framing *and* the Court are morally wiser than the ordinary democratic process might be too much to take.[163]

The other possibility is a Footnote Four approach. Judges engage in construction because they need to do so to resolve cases, and because it is better to resolve certain cases through (relatively impartial) constitutional procedures then to leave them to be "resolved," with partiality, by ordinary politics. Of course, an acknowledgment that judges can make constitutional law authoritatively, without rigid originalist methodology, would raise the question of just what originalism buys us in the first place. If Footnote Four can justify construction, why can't it justify interpretation too? And if it can justify interpretation, the interpretation it justifies will, as we have seen, be only selectively originalist.

To put the point bluntly: Footnote Four looks like the best available normative grounding for what New Originalists call constitutional *construction*. And this fact calls into question the existence of any other normative grounding for constitutional *interpretation* in the New Originalist sense. It cannot be the case that the best method of constitutional interpretation is entailed by one theory of constitutional authority and the best method of constitutional construction by an entirely different theory. If interpretation and construction are both legitimately authoritative procedures, then we must locate a single plausible theory of authority that is capable of justifying both of them.

F. The Jurisdictional Problem

There is at least one more reason to prefer Footnote Four over Framing-focused Moral Guidance, which appears to be its closest rival. The reason is that Footnote Four can delineate the

163. An adherent of the Cynical Narrative presented in Part II.B might hypothesize that originalists shy away from Court-focused accounts because of the origins of contemporary originalism—as a device to critique liberal rulings of the Warren and early Burger Courts. Extolling the superior moral wisdom of the judicial process would sit uncomfortably alongside claims that the judicial process has produced many unwarranted "activist" results.

jurisdictional boundaries of constitutional law while Framing-focused accounts cannot.

Recall that Framing-focused accounts necessarily attribute to the Framers (or to the Framing process more generally) an extremely broad moral wisdom—broad enough to explain the authority, not just of what the Framers put into the Constitution, but also of what the Framers left out of it.[164] This breadth is problematic, not only because it seems implausible as a descriptive matter, but also because it implies a virtually unlimited scope of potential constitutional authority. The Framers (arguably) did not include rights to education or health care in the Constitution. But had they chosen to include those rights in the document, that choice would have been authoritative—just as their choice *not* to include them is authoritative in fact.

If this is true of the (hypothetical) rights to education and health care, it is true of virtually anything—of any imaginable constitutional rule or command on any imaginable subject. (It is true, at least, of any command on any subject that could have been thought of by the Framers.) The Framers could have included a right to pet ownership in the Constitution, and we would be bound by that right. The Framers could have required members of Congress to wear silly paper hats, and we would be bound by that requirement. (In fact, many people think that some of the provisions the Framers did include in the Constitution—the Electoral College,[165] the natural-born citizenship requirement to be President,[166] equal state representation in the Senate[167]—are nearly this ridiculous.) Thus there is no discernible limit to the content of constitutional law on a Framing-focused account. Put another way, there is no subject to which the Constitution's potential jurisdiction does not extend.

This might not seem like a real problem, given that the content of the Constitution *is* limited; the Framers did not in fact include a requirement that congressmen wear silly hats. But it might become a problem if we take seriously the New Originalists' interpretation/construction distinction. That distinction recognizes the authority of judges to, in essence, create constitutional law

164. *See supra* Part V.D.1.

165. *See* U.S. CONST. art. II, § 1, cls. 2–4; U.S. CONST. amend. XII.

166. *See* U.S. CONST. art. II, § 1, cl. 5.

167. *See* U.S. CONST. art. I, § 3, cl. 1.

beyond the confines of original meaning. And while there are a number of New Originalist theories about how judges should exercise that authority, there is no agreement on the point.[168] So it is conceivable that even an originalist judge, engaging in construction, could go far beyond the content imagined by the Framers and add something unprecedented, even radical, to constitutional law—perhaps not a silly-hats requirement, but maybe a right to, well, education or health care.[169] And while originalists might perhaps devise theories of construction that would prevent this, nothing in the grounding of constitutional authority itself would do so.

Consider also the question of what might legitimately be added to the Constitution, not by judicial construction, but through the formal Article V amendment process. Was it legitimate (albeit unwise) to constitutionalize Prohibition via the Eighteenth Amendment?[170] Would it be legitimate (wise or not) to add an amendment prohibiting flag-burning? An amendment prohibiting (or guaranteeing the right to) same-sex marriage? Moral Guidance accounts have no answers to these questions; they can provide no theory of the proper jurisdiction of constitutional law.

Footnote Four, in contrast, implies a theory of constitutional jurisdiction. On that account, the Constitution's authority is grounded in the relative impartiality of the constitutional process with respect to certain kinds of issues—issues where there is reason to suspect entrenched bias in democratic politics. While there will almost always be room to argue about whether particular issues fall within this set, the set is not infinite, and there are governing principles for deciding what is inside it and what is not. Ely himself, for example, thought that *Roe v. Wade* was illegitimate because it could not be justified as a representation-reinforcing measure.[171] I can't think of a plausible Footnote Four argument justifying the Eighteenth Amendment, or amendments banning flag-burning or same-sex marriage. (I can think of one for an amendment *allowing*

168. *See* Solum, Semantic Originalism, *supra* note 8, at 76–79.

169. Again, Lawrence Sager makes a reasonable argument that these kinds of rights can be implied from the constitutional text. *See* SAGER, *supra* note 129, at 84–92, 129–60.

170. *See* U.S. CONST. amend. XVIII, *repealed* by U.S. Const. amend. XXI.

171. See John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

same-sex marriage—one based on the stigma attached to its denial—though it is hardly a slam-dunk.[172])

Again, there is room for debate on (most of) these issues. But Footnote Four gives us an analytical framework with which to engage in those debates. Moral Guidance requires us to throw up our hands and say "anything goes."

G. Moral Guidance or Dispute Resolution?

So far I have been writing as if the Moral Guidance and Dispute Resolution approaches are mutually contradictory. Of course they are not; one might attempt to justify constitutional law on *both* grounds, although this might seem like overkill. More modestly, a single approach might be understood, in the alternative, as grounded either in Moral Guidance or in Dispute Resolution. And in fact a number of prominent accounts of constitutional law can be read this way.

Consider Hamilton's arguments for the authority of the Constitution generally (the "solemn and authoritative act" that trumps the "momentary inclination[s]" of ordinary politics)[173] and judicial review in particular ("the independence of the judges" that protects rights against occasional "ill humors . . . among the people").[174] These points easily can be recast as asserting, not the superior moral wisdom of the Framing or of the adjudicative process, but rather the comparative *impartiality* of those processes. Hamilton, that is, might reasonably be understood as a nascent Footnote Four theorist, not a Moral Guidance theorist.[175]

We can perform the same shift in perspective to read the "democratic dualism" of Bruce Ackerman as a kind of Footnote Four theory, exalting "higher lawmaking" not for its extraordinary judgment but for its exceptional fairness.[176] Court-focused theories

172. For some thoughts on the jurisdictional limits of constitutional law under a somewhat expanded version of Footnote Four, with particular reference to *Roe* and other "substantive" due process decisions, see PETERS, *supra* note 42, at 267–72.

173. Hamilton, FEDERALIST NO. 78, *supra* note 83, at 440; *see supra* text accompanying note 119.

174. Hamilton, FEDERALIST NO. 78, supra note 83, at 440; *see supra* text accompanying note 126.

175. And not a Consent theorist either, though elements of his rhetoric in *The Federalist* would support a consensualist reading. *See supra* notes 83–84 and accompanying text.

176. In *We the People: Foundations*, Ackerman mentions Ely only twice, and then rather dismissively. *See* ACKERMAN, *supra* note 85, at 7, 9. He extensively analyzes the actual Footnote Four of *Carolene Products* as an example of judicial "synthesis," *see id.* at 119–30, but does not

might be reread in this way as well: the special "capacities for dealing with matters of principle" that Alexander Bickel and others (Eisgruber, Sager, Dworkin) attribute to courts[177] might consist primarily of impartiality rather than wisdom.

This is not to say that any of these theorists would endorse, or would have endorsed, the Footnote Four approach, or that every aspect of each of their theories is consistent with it. But it is to suggest another point in favor of Footnote Four: it is a relatively "Catholic" approach, adaptable to different particular arguments about the nature of the Framing or of adjudication.

H. The Rule of Law

Finally, I need to engage with a sort of Dispute Resolution account that might be thought to support relatively strong originalism. Lawrence Solum cites as a "familiar justification for originalism" the "great value of the rule of law and its associated values, predictability, certainty, and stability of legal rules."[178] This suggests what we might call a *Rule of Law* account of constitutional authority: obedience to the Constitution is required in order to serve these rule-of-law values.

We can understand the Rule of Law account as a type of Dispute Resolution account, one that is very close to the basic Hobbesian narrative. Disagreement about what should be done, including disagreement about what the law is, undermines "predictability, certainty, and stability." Obedience to the Constitution avoids this costly disagreement, and (the suggestion goes) originalist interpretation of the Constitution enhances its capacity for dispute-avoidance.[179]

The Rule of Law account thus emerges as a potential alternative to Footnote Four within the Dispute Resolution spectrum. Note that, as a type of Dispute Resolution account, the Rule of Law shares—perhaps even improves upon—Footnote Four's conceptual advantages as an account of constitutional authority. It provides a

address the potential implications of its framework for the question of constitutional authority. Indeed, Ackerman is noncommittal and difficult to decipher on the question of authority. At bottom, I can find nothing in his arguments that rules out reading them as expressions of a Footnote Four view of authority.

177. BICKEL, *supra* note 127, at 25; *see supra* text accompanying notes 127–130.

178. Solum, Semantic Originalism, *supra* note 8, at 129.

179. For a general Dispute Resolution account of these rule-of-law values, see PETERS, *supra* note 42, at 107–19.

content-independent reason to obey constitutional law, namely the furtherance of predictability, certainty, and stability. It is not vitiated by the salient moral defects of the Framing: so long as the Framing generates predictable, certain, stable legal rules, it is irrelevant (on the Rule of Law account) how those rules were created. It is not frustrated by circumstances the Framers did not foresee: so long as a rule clearly applies to a case, it doesn't matter that the Framers did not anticipate that case. And—an apparent advantage over Footnote Four—the Rule of Law rationale is not undermined in the least by the inevitability of substantive disagreement with the Constitution's commands. Competence is irrelevant to the rule-of-law values; all that matters is clarity.

There are two difficulties with the Rule of Law account as a defense of originalism, however. First and most importantly, the account (by itself) is unpersuasive as a justification of broad constitutional authority. Second, the account does not in fact entail originalism.

1. Hobbes redux

The Rule of Law account shares with the bare Hobbesian approach the view that it is more important that things be decided than that things be decided correctly.[180] With respect to some aspects of constitutional law, this position seems unassailable. We need a foundational set of legal rules to, literally, *constitute* democracy—to specify basics like who makes, enforces, and interprets the laws, and how.[181] These constitutive rules cannot continually be up for debate—otherwise democratic government could not function. It would be like trying to play a baseball game while the teams fight over how many strikes make an out. At the foundational, constitutive level, the "predictability, certainty, and stability of legal rules" is indeed at a premium.

At some point, however, it ceases to be more important to have rules than to have rules that are correct, or at least correctly made. Once basic democratic government is up and running, after all, we

180. On the bare Hobbesian approach, see *supra* notes 143–146 and accompanying text; see also PETERS, *supra* note 42, at 57–61, 119–22.

181. On this point, see EISGRUBER, *supra* note 128, at 12 (citing STEPHEN HOLMES, PASSIONS AND CONSTRAINTS 167–69 (1995)); CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 98 (2001); PETERS, *supra* note 42, at 243–46.

(the participants in that democracy) can make our own rules, democratically, to bring predictability, certainty, and stability to our world. Some additional justification is necessary if we are to continue subjugating our own rule-making authority to some supposedly higher, constitutional power.

To be clear: the point here is not that the rule-of-law values cease to matter once the constitutive elements of working democracy are in place. The point is that those values by themselves become inadequate to justify *constitutional* law once that occurs. Once democracy itself is constituted sufficiently to make its own laws, those (democratically created) laws can begin to fulfill the rule-of-law functions. We need some additional reason to think that (predictable, certain, stable) democratically created laws should be trumped by (predictable, certain, stable) constitutional commands.

The Rule of Law account, by itself, cannot supply a persuasive reason, any more than Hobbes could persuasively explain why an absolutist monarchy was better than a democratic process for making laws. Of course, the greater the extent to which controversial issues are governed by rigid, difficult-to-change constitutional rules, the less democratic fighting there will be about these issues. In this sense, constitutional law might bring more predictability, certainty, and stability than ordinary democracy. But the same is true of Hobbesian absolutism, and yet, following Locke, Jefferson, and many others, we prefer democracy. Once the basic democratic ground rules are in place, it becomes, to us, more important that our laws be made in a way we find acceptable than that they simply exist, regardless of how they are made.

Footnote Four offers a theory of why constitutional law is, on some topics, more acceptable than ordinary democracy. The Rule of Law account offers no such theory. It is unpersuasive as a justification of constitutional law beyond the bare-bones form necessarily to *constitute* democracy in a literal sense.

2. Originalism and underdeterminacy

Even if the Rule of Law account could justify constitutional authority, it would not entail originalism, at least not to a greater extent than the Footnote Four account entails it. This is because, as we have seen numerous times already, originalism is an endemically

underdeterminate methodology.[182] The New Originalist distinction between "interpretation" and "construction" acknowledges that original meaning often, in Solum's phrase, "runs out."[183] When this occurs, the rule-of-law values of predictability, certainty, and stability are threatened. Like Footnote Four, the Rule of Law account suggests that sources of law besides original meaning—principally case-by-case judicial decision-making—will be necessary to fill the resulting gaps in determinacy (on the Rule of Law account) or impartiality (on the Footnote Four account).

Indeed, originalism might be even less determinate than New Originalists acknowledge. The problem is not simply that the Constitution's text frequently is vague or ambiguous,[184] but that it often will be very difficult to identify any reliable original meaning at all. David Strauss 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";[185] "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";[186] 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.[187] 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

182. *See, e.g.*, *supra* Part III.A.; *supra* text accompanying notes 63–72.

183. Solum, Semantic Originalism, *supra* note 8, at 69.

184. A fact readily admitted by New Originalists. *See id.* at 69–74; BARNETT, LOST CONSTITUTION, *supra* note 11, at 118–21; WHITTINGTON, *supra* note 11, at 7, 209–12.

185. David Strauss, *Remarks*, *Panel on Originalism and Precedent*, *in* ORIGINALISM, *supra* note 10, at 199, 218.

186. *Id.*

187. *Id.*

reference to facts as they existed in the late eighteenth or mid-nineteenth centuries—to the very different and unforeseen facts as they exist today. In light of these obstacles, we might think Justice Scalia is understating the matter when he admits that originalist methodology "is always difficult and sometimes inconclusive."[188]

Of course, if the rule-of-law values are behind at least the fundamental constitutive law of our democracy, then we need some relatively determinate methodology for identifying and understanding those rules. So it is no accident that many or most of the basic constitutive rules in our own Constitution are expressed using such determinate language that further interpretation is superfluous or nearly so. The power to make law is "vested in a Congress of the United States, which shall consist of a Senate,"[189] "composed of two Senators from each State"[190] serving terms of "six Years,"[191] "and [a] House of Representatives,"[192] "composed of Members chosen every second Year by the People of the several States"[193] and "apportioned among the several States . . . according to their respective Numbers . . . not [to] exceed one for every thirty Thousand."[194] The power to execute the law is "vested in a President" who "shall hold his Office during the Term of four Years."[195] And so on.

In the end, a Rule of Law account can take us only so far. It can justify bare-bones constitutive rules of democracy but not constitutional law more generally. And it cannot justify anything approaching a thoroughgoing originalism, for the simple reason that originalist interpretation is inadequate to serve the rule-of-law values.

VII. CONCLUSION: ECHOES OF THE CYNICAL NARRATIVE

Let's review. Methodologies of constitutional interpretation beg for theories of constitutional authority. I have argued here, in fact,

188. Scalia, *Lesser Evil*, *supra* note 12, at 864.
189. U.S. CONST. art. I, § 1.
190. U.S. CONST. art. I, § 3, cl. 1.
191. *Id.*
192. U.S. CONST. art. I, § 1.
193. U.S. CONST. art. I, § 2, cl. 1.
194. U.S. CONST. art. I, § 2, cl. 2.
195. U.S. CONST. art. II, § 1, cl. 1.

that methodology presupposes an account of authority. Without an account of why the Constitution binds us, any approach to interpretation is bound to seem opportunistic, even cynical—an attempt to foist political results on the public in the name of constitutional law.

I have argued also that the accounts of authority offered (or, often, assumed) by originalists prove unpersuasive. The pursuit of particular substantive values—"natural rights," for example—is not a justification of authority at all; it is a question-begging sermon that will convert no one but the choir. The ideas that we have consented to an originalist Constitution, or that such a Constitution is an act of "popular sovereignty" that somehow binds us, stretch the concepts of "consent" and "sovereignty" beyond recognition. The notion that the Framing generated special moral wisdom that we cannot now hope to duplicate is both descriptively implausible and conceptually problematic. The rule-of-law values of predictability, certainty, and stability justify skeletal constitutional law at most, and they demand more determinacy than originalist methodology alone can provide.

What is left is the Footnote Four account of constitutional authority—not a flawless account, to be sure, but a substantial improvement over its rivals. The problem for originalists is that Footnote Four can support only a selective, truncated form of originalism. This is not nothing; the idea that originalism is justifiable in any form at all might come as a surprise to some nonoriginalists. But it is not the sort of thoroughgoing originalism that the progenitors of contemporary originalism seem to have had in mind,[196] and it probably is not even the kind of presumptive originalism that New Originalists advocate—an originalism that is always the first resort and that often is sufficient to resolve constitutional cases.

If New Originalists want thicker ice to skate on, they need to do more to develop a convincing account of constitutional authority that also entails the methodology they endorse. I am skeptical that such an account is available, but New Originalist theory has proven remarkably imaginative. Unless and until this happens, originalists might find it difficult to escape the echoes of the Cynical Narrative—the lingering suspicion that their methodology is just a sophisticated cover for controversial political commitments.

196. *See* sources cited *supra* note 10.