VOLUME 110 MAY 1997 NUMBER 7

HARVARD LAW REVIEW

ARTICLE

ON EXTRAJUDICIAL CONSTITUTIONAL INTERPRETATION

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In Cooper v. Aaron, *the Supreme Court asserted that its interpretations of the Constitution bind* all *officials, and that the obligation of nonjudicial officials to obey the Constitution is an obligation to obey the Constitution as interpreted by the Supreme Court. Since* Cooper, *however, a consensus has developed among scholars and officials that* Cooper *cannot be taken at face value, and that nonjudicial officials need not treat Supreme Court opinions as authoritative in order to comply with their obligation to the Constitution.*

In this Article, Professors Alexander and Schauer challenge this consensus, and offer an unqualified defense of Cooper *and the judicial supremacy that it asserted. They argue that settlement of contested issues is a crucial component of constitutionalism, that this goal can be achieved only by having an authoritative interpreter whose interpretations bind all others, and that the Supreme Court can best serve this role. They further argue that constitutionalism entails obeying a constitution even when its directives seem mistaken, and that once we accept the obligation of officials to follow a mistaken constitutional directive, it is only a small step to expect them to follow a court decision that they believe similarly mistaken. Both constitutionalism itself and judicial supremacy embody the goal of providing settlement of issues as to which people disagree, and the coordination function of law in general and constitutionalism in particular yields not only an obligation to obey the law, but also an obligation to obey a single authoritative interpreter of the law.*

A recurrent claim in American constitutional discourse is that judges should not be the exclusive and authoritative interpreters of the Constitution. The Constitution speaks to *all* public officials, it is said, and thus all officials, not just judges, must make their own decisions about what the Constitution commands. To hold otherwise, it is ar-

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gued, is to fail to recognize the constitutional responsibilities of officials who happen not to be judges.

When nonjudicial constitutional interpretation occurs against a background of judicial inaction, no conflict exists between the interpretive acts of nonjudicial officials and those of judges. In such cases, constitutional interpretation by nonjudicial officials is rarely controversial because those officials are not doing anything that the courts have said they may not do. However, when judicial interpretations of constitutional provisions *do* exist and nonjudicial interpretations conflict with them, the officials must decide whether to follow or to disregard the lead of the judiciary. And although it may seem that failure to follow the judiciary strikes of disobedience, most scholars,[1] most officials,[2] and, we suspect, many ordinary citizens believe that even when the Supreme Court has spoken on a constitutional issue, nonjudicial officials have no more obligation to follow its interpretation than the courts have to follow the constitutional interpretations of Congress or the executive. According to what appears to be the dominant view, nonjudicial officials, in exercising their own constitutional responsibilities, are duty-bound to follow the Constitution as *they* see it — they are not obliged to subjugate their constitutional judgments to what they believe are the mistaken constitutional judgments of others.

This argument is not only widely accepted today, but it has also enjoyed a remarkable persistence. The claim of independent interpretive authority was made by Abraham Lincoln in denying that the Supreme Court's *Dred Scott*[3] decision was binding on the President, Congress, or the voters except with respect to the decision about Dred Scott himself,[4] and by Franklin Roosevelt in a proposed speech exhorting Congress to disregard Supreme Court decisions invalidating New Deal legislation.[5] A similar claim gained public notoriety in the

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[1] *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 259–64 (2d ed. 1986); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008 (1965).

[2] "[N]othing in the Constitution has given [the judges] a right to decide for the Executive, more than to the Executive to decide for them." Letter from Thomas Jefferson to Mrs. John Adams (Sept. 11, 1804), *in* 11 THE WRITINGS OF THOMAS JEFFERSON 49, 50 (Andrew A. Lipscomb ed., 1905); *see also* President Jackson's Veto Message to the Senate (July 10, 1832), *in* 2 MESSAGES AND PAPERS OF THE PRESIDENTS 576, 582 (James D. Richardson ed., 1908) ("The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.").

[3] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[4] *See* Abraham Lincoln, Sixth Debate with Stephen A. Douglas, *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 245, 255 (Roy P. Basler ed., 1953); Abraham Lincoln, First Inaugural Address, *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (Roy P. Basler ed., 1953).

[5] *See* Franklin Roosevelt, Draft Speech on the Gold Clause Cases (Feb. 19, 1935) *in* F.D.R.: HIS PERSONAL LETTERS, 1928–1945, at 459–60 (Elliot Roosevelt ed., 1950).

1980s when championed by Attorney General Edwin Meese III,[6] primarily in the guise of an attack on *Cooper v. Aaron*.[7] Most recently, academic proponents of judicial non-exclusivity in constitutional interpretation have been led by Michael Paulsen, who maintains that executive officials should not defer to constitutional decisions of the judiciary they believe mistaken,[8] and Mark Tushnet, who argues that non-exclusivity is the route to a socially desirable "populist" constitutional law.[9]

These arguments strengthen the case for non-deference,[10] and have helped to establish its stature, but even as strengthened the case rests on a proposition that many take as self-evident, so much so that Paulsen reduces it to a brief footnote: officials who have taken an oath to obey the Constitution should not reach constitutional decisions they think wrong.[11] However obviously correct this claim may seem, we believe it mistaken. An important aspect of the Constitution, as of all law, is its authority, and intrinsic to the concept of authority is that it provides content-independent reasons for action. Accordingly, an authoritative constitution has normative force even for an agent who believes its directives to be mistaken. What is rarely noticed, however, is that the same argument applies to authoritative interpreters of the Constitution as applies to the Constitution itself. Just as it is often right for officials to obey constitutional provisions they believe wrong, so too is it often right for officials to obey judicial interpretations they believe wrong.

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[6] *See* Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 983–86 (1987). Contemporaneous commentary is collected in Symposium, *Perspectives on the Authoritativeness of Supreme Court Decisions*, 61 TUL. L. REV. 977 (1987), and in *The Federalist Society Sixth Annual Symposium on Law and Public Policy: The Crisis in Legal Theory and the Revival of Classical Jurisprudence*, 73 CORNELL L. REV. 281 (1988).

[7] 358 U.S. 1 (1958). The *Cooper* claim of judicial interpretive supremacy, *see id.* at 18, is reiterated in *United States v. Nixon*, 418 U.S. 683, 704 (1974), and in *Powell v. McCormack*, 395 U.S. 486, 549 (1969).

[8] *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 343–45 (1994).

[9] *See* Mark V. Tushnet, *The Hardest Question in Constitutional Law*, 81 MINN. L. REV. 1, 25–28 (1996) [hereinafter Tushnet, *The Hardest Question*]; Mark Tushnet, The Constitution Outside the Courts 37–41 (Oct. 1996) (unpublished manuscript, on file with the *Harvard Law Review*).

[10] Paulsen provides citations to the previous literature. *See* Paulsen, *supra* note 8, at 225 n.19.

[11] Paulsen's footnote reads as follows:

> I emphatically reject the view, which sometimes travels under the name of deference, that an interpreter (typically, a judge) should reach a conclusion different from the one produced by her best legal analysis . . . because of the views of another. While an interpreter may be persuaded or influenced in the exercise of her *own* judgment by the views and reasoning of another, any theory that accords decision-altering weight to the views of another, contrary to the interpreter's settled convictions as to the proper interpretation of the provision at issue, is fundamentally illegitimate. I am thus deeply skeptical of doctrines of pseudo-deference such as the political question doctrine and stare decisis.

Paulsen, *supra* note 8, at 336 n.413.

We thus aim to show that the arguments for non-deference, from Lincoln to the present, share a common mistake. Our goal is at the very least ambitious and perhaps heretical. The accepted wisdom is that *Cooper*'s statement of judicial supremacy was an overstatement, politically necessary in its context but indefensible as a general claim of judicial interpretive authority.[12] To the contrary, we defend *Cooper* and its assertion of judicial primacy without qualification,[13] even against those who see adherence to *Cooper* as both an abdication of constitutional responsibility by nonjudicial officials and a democratically undesirable placement of constitutional consciousness solely within the judiciary.

I. THREE UNDERSTANDINGS OF NON-DEFERENCE

We call the position that we are challenging *non-deference*. Non-deference occurs when a nonjudicial official who disagrees with a judicial decision on a constitutional question does not conform her actions to that decision and perhaps even actively contradicts it. The nonjudicial official thus makes decisions according to her own, rather than the court's, constitutional interpretation. Such an approach, although it rejects judicial supremacy, remains consistent with the idea of constitutionalism and with acceptance of the Constitution's supremacy.

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[12] The prevailing view is that *Cooper*, if generally applied according to its expansive terms, would compel the other branches to abdicate their own constitutional responsibilities, and would, in a more diffuse way, impede the process that causes officials to take the Constitution seriously. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3.1–3.4 (2d ed. 1988); Sanford Levinson, *Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071, 1076–77 (1987); Robert F. Nagel, *Name-Calling and the Clear Error Rule*, 88 NW. U. L. REV. 193, 210 (1993); *cf.* David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 119–21 (1993) (rejecting the view that the executive has no more authority to interpret the Constitution than a lower federal court). The extent to which the denigration of *Cooper* has become the accepted wisdom is exemplified by the fact that two contemporaneously published "critiques" of Paulsen's article are hardly critiques at all, and are best seen as friendly amendments. *See* Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 348 (1994); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 373–74 (1994). In response to these non-critical critiques, Paulsen asked rhetorically, "Will nobody defend judicial supremacy anymore?" Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 GEO. L.J. 385, 385 (1994). Of the existing commentary, the scholars most sympathetic to *Cooper* (and thus to judicial supremacy, which we unflinchingly defend) are Daniel A. Farber, *The Supreme Court and the Rule of Law:* Cooper v. Aaron *Revisited*, 1982 U. ILL. L. REV. 387 *passim* and Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991 *passim* (1987). *See also* Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 1010–11 (1994) (arguing that, except in rare cases, only Congress has the constitutional power to suspend the laws).

[13] Although we defend *Cooper* without qualification, we do not contend that the *Cooper* principle is absolute. The principle we defend is universally applicable, albeit overridable. *See infra* section III.A.

Non-deference can be contrasted with deference to judicial authority, but it is important to emphasize that deference need not be absolute. An agent who defers to the decision of another does not necessarily follow it, for what we have a *reason* to do is different from what we should *actually do*, all things considered. A reason to do x can be overridden by an even stronger reason to do not-x.[14] Still, for the sake of clarity, we temporarily set aside the issue of the strength of deference and consider a decisionmaker to have deferred whenever she takes someone else's decision to be a reason for making the same decision. Even though such deference may at times be overridden or outweighed, we are concerned first with the basic posture of deference — with taking someone else's decision, simply because it has been made and not because of its merit, as a reason for conforming one's own decision to it.

To clarify, non-deference means that an agent — in this context, a nonjudicial public official — should not take the decision of someone else as relevant, except insofar as it is persuasive on its own merits, to the agent's own decision. Thus, the claim of non-deference typically arises with respect to the response of executive, administrative, or legislative officials to court decisions with which they disagree.[15] This claim may take several different forms, however, so in order to isolate and clarify our argument, we first need to distinguish three different explanations for the phenomenon of non-deference and then show why only one of these three explanations presents the central normative question that is our focus here: whether a nonjudicial official should obey, or should be made to obey, judicial interpretations of the Constitution that she believes to be mistaken.

A. *Non-Deference as* Realpolitik

Sometimes people do not defer to the decisions of others because they do not want to and no force exists to compel them otherwise. Such people believe that compliance is not in their own interest, or not in the public interest,[16] and will not act against such an interest unless forced to do so. This view sees deference as a question of raw power, and assumes that there is no reason to defer to a decision with which one disagrees unless the first decisionmaker has the power to force one

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[14] *See* A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 7–28 (1979); Barry Loewer & Marvin Belzer, Prima Facie *Obligation: Its Deconstruction and Reconstruction*, *in* JOHN SEARLE AND HIS CRITICS 359, 360 (Ernest LePore & Robert Van Gulick eds., 1991); Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 415 (1993); John Searle, Prima Facie *Obligations*, *in* PRACTICAL REASONING 81, 85–90 (Joseph Raz ed., 1978).

[15] If an official agrees with a court decision, deference is not an issue. The issue of deference arises only when an official contemplates following a decision that she believes erroneous.

[16] We do not argue that officials seek only to maximize their own self-interest. Many officials seek to serve the public good as they see it, but it does not follow that such officials would subjugate their views about the public good to the views of others.

to do so. This first form of non-deference is typically associated with Andrew Jackson's statement upon learning of the Supreme Court's decision in *Worcester v. Georgia*:[17] "John Marshall has made his decision, now let him enforce it."[18] We can suppose that Jackson would have taken the Court's ability to enforce its decision as sufficient reason to follow it, even if he thought the decision was mistaken.

Jackson's alleged comment[19] explains much legislative and executive behavior in the ensuing years. It is true that executive and legislative officials no longer claim the authority to ignore judicial orders directed at *them*.[20] The closest example to that is the quickly-abandoned hint of defiance by Richard Nixon's lawyer, James St. Clair, during the oral argument in *United States v. Nixon*.[21] When asked by Justice Marshall if the President would comply with an adverse ruling, St. Clair hinted that President Nixon might not obey the Supreme Court's order to turn over the subpoenaed documents because "[t]he President . . . has his [own] obligations under the Constitution."[22] The speed with which the suggestion was dropped,[23] however, indicates

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[17] 31 U.S. (6 Pet.) 515 (1832).

[18] LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 745 (1974) (internal quotation marks omitted).

[19] There is some disagreement as to whether Jackson in fact made the statement at all. *See id.*; Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 525 (1969). Leonard Baker says that "if Jackson did not say [it], he certainly meant it." BAKER, *supra* note 18, at 745. R. Kent Newmyer, however, claims that "contrary to most opinion [Jackson] was inclined to" enforce the decision. R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 216 (1985) (citing 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 758–69 (rev. ed. 1926)).

[20] *See* Meese, *supra* note 6, at 983 ("[A] constitutional decision by the Supreme Court . . . binds the parties in a case and also the executive branch for whatever enforcement is necessary."); *see also* Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 711–12 (1985) (noting that allowing many interpreters to exist would produce "a plethora of conflicting, shifting interpretations"); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 72 (1993) (stating that the "executive must faithfully execute final judicial judgments").

[21] 418 U.S. 683 (1974). The Supreme Court rejected the argument, describing itself as the "ultimate interpreter of the Constitution," *id.* at 704 (quoting Baker v. Carr, 369 U.S. 186, 211 (1962)) (internal quotation marks omitted), but that statement would not have bound a President unwilling to accept it.

[22] Transcript of Oral Argument at 500, United States v. Nixon, 418 U.S. 683 (1974) (Nos. 73-1766 & 73-1834), *reprinted in* 3 CONSTITUTIONAL ASPECTS OF WATERGATE: DOCUMENTS & MATERIALS 671 (A. Stephen Boyan, Jr. ed., 1976) (internal quotation marks omitted). The complete exchange was as follows:

> Justice Marshall: Well, do you agree that [the issue of executive privilege] is before this Court, and you are submitting it to this Court for decision?
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> Mr. St. Clair: This is being submitted to this court for its guidance and judgment with respect to the law. The President, on the other hand, has his obligations under the Constitution.

Id.

[23] "[E]ight hours after the Court decision was announced, President Nixon's office issued a statement reporting that he would comply." GERALD GUNTHER, CONSTITUTIONAL LAW 383 n.6 (12th ed. 1991).

that official disregard of a judicial order directed to that same official brings heavy political penalties, and even an official's good-faith disagreement with such a ruling would not, as a political matter, excuse an act of non-compliance.

When the question is not non-compliance with an order addressed directly to a specific official, but rather the propriety of taking action inconsistent with the general resolution of a constitutional question extending beyond the boundaries of a particular case, the politics and incentives are strikingly different.[24] We live in a constitutional world in which legislators are penalized neither legally nor politically for knowingly enacting laws inconsistent with constitutional caselaw, and in which Presidents are similarly not penalized for signing them. Although § 1983[25] and *Bivens*[26] actions are available against police officers and city councilors who knowingly *execute* the laws in contravention of established judicial precedent,[27] such actions are not available against legislators who knowingly *make* laws in contravention of established precedent.[28] Nor are they available against prosecutors,[29] the President,[30] or certain high officials of the executive

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[24] In this regard, consider the recent litigation over the Communications Decency Act of 1996, which restricts indecent communications on the Internet. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133–36 (to be codified at 47 U.S.C. § 223(a)(1)(B)). When faced with the prospect of enacting a patently unconstitutional law, *see* Sable Communications v. FCC, 492 U.S. 115, 126–31 (1989) (holding unconstitutional a ban on the interstate transmission of indecent commercial telephone messages), neither Congress nor the President hesitated, and it was left to three-judge courts in the Second and Third Circuits to do the inevitable, *see* Shea v. Reno, 930 F. Supp. 916, 922–23 (S.D.N.Y. 1996); ACLU v. Reno, 929 F. Supp. 824, 849 (E.D. Pa. 1996). Despite this outcome, it is clear that neither the President nor Congress will suffer any negative legal or political consequences as a result of their actions. Another example is the Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (codified at 18 U.S.C. § 700 (1994)), passed almost immediately after the Supreme Court's decision in *Texas v. Johnson*, 491 U.S. 397 (1989). Again the likelihood that the Act would survive Supreme Court review, in light of *Texas v. Johnson*, was miniscule, and few were surprised by the Act's invalidation in *United States v. Eichman*, 496 U.S. 310 (1990).

[25] 42 U.S.C. § 1983 (1994).

[26] Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

[27] For some of the empirical dimensions of § 1983 actions, see Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 781–82 (1979). Although § 1983 suits against police officers are routinely defended by authorities, and although officers are equally routinely indemnified against adverse judgments, *see id.* at 783, individual defendants in such actions plainly feel at risk, and thus seek to avoid being the target of a § 1983 action, *see* John C. Jeffries, Jr., In Praise of the Eleventh Amendment and Section 1983, at 4–5 (Sept. 1996) (unpublished manuscript, on file with the *Harvard Law Review*).

[28] *See, e.g.*, Supreme Court v. Consumers Union of the United States, Inc., 446 U.S. 719, 731–34 (1980); Eastland v. United States Servicemen's Fund, 421 U.S. 491, 501–11 (1975); Tenney v. Brandhove, 341 U.S. 367, 369–79 (1951). Moreover, unconstitutional legislation may stand simply because it remains unchallenged for reasons of cost, or the impediments to justiciability.

[29] *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409, 417–31 (1976).

[30] *See, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731, 757–58 (1982).

branch.[31] Given the absence of political or legal disincentives to politically popular or otherwise attractive policy decisions, it is no surprise that legislators and high executive officials do not worry about the possible negative consequences of taking actions flatly inconsistent with established precedent. If deference is a question of incentives, the incentives here are all on the side of non-deference.[32]

Although non-deference is often good political strategy, the question of who has the power to do what to whom does not exhaust the socially and philosophically important questions that exist regarding legal obligation, particularly official obligation to constitutional norms.[33] Perhaps we are wrong in thinking that such questions are interesting and important, and perhaps the only worthwhile question is one that focuses on the number of divisions at the Chief Justice's disposal.[34] But we do not believe this to be the case, and so will assume, like our predecessors in addressing this topic, that the proper inquiry is not just about raw power. Rather, the proper inquiry is about legitimacy, and thus about what officials legitimately have the authority to do, rather than just about what they have the power to get away with.

B. Non-Deference and the Separation of Powers

Even if non-deference were not a question of raw power, it could still result from the division of governmental responsibility — separation of powers in the broad sense. Under one view, best represented

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[31] *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 817–19 (1982). For overviews of § 1983 doctrine, including the various immunities, M. DAVID GELFAND, CONSTITUTIONAL LITIGATION UNDER SECTION 1983 (1996); PETER W. LOW & JOHN CALVIN JEFFRIES, JR., CIVIL RIGHTS ACTIONS: SECTION 1983 AND RELATED STATUTES (1988); and SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 (3d ed. 1991) are all good sources. *See also* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 73–81 (1989) (discussing the defense of qualified immunity in particular).

[32] This is slightly oversimplified. Although our analysis of the incentives strikes us as correct in those cases in which public opinion is on the side of the official and not the courts — communications indecency and flag desecration, *see supra* note 24, and anything having to do with crime or criminal procedure are among them — there are cases in which public opinion is unclear or changing. Abortion is one example, and affirmative action is another. We believe that when an official acts in ways contrary to what public opinion turns out to be, even if the official did not know the ultimate public opinion at the time of taking the action, the fact that her politically unpopular action is *also* inconsistent with prevailing judicial rulings increases the political penalty. That is, it is worse, politically, to disobey the courts in the service of a politically unpopular action than it is to take a politically unpopular action on which the courts have not spoken, or on which the courts have reached a similarly unpopular conclusion. If this is so, then a public official acting under conditions of uncertainty about future public opinion will have good reason to act conservatively when there is a judicial ruling inconsistent with the proposed action.

[33] We take up these issues below in Part III.

[34] When told that Pope Pius XII had criticized his actions, Stalin reportedly replied, contemptuously, "And how many divisions has the pope?" George Weigel, *The Pope's Divisions*, WASH. POST, Sept, 22, 1996, Book World, at 1 (internal quotation marks omitted).

by Franklin Roosevelt's proposal to Congress not to worry about potential Supreme Court invalidation of New Deal legislation,[35] Congress should understand its role exclusively in policymaking terms, in which "policy" is sufficiently capacious to include politics, morality, legislative ethics, consequentialist public welfare maximization, and a host of other factors, but not constitutional side constraints on what would otherwise be Congress's best policy judgment. The enforcement of such constraints, Roosevelt argued, was the province of the courts, and Congress should ignore the possibility of unconstitutionality precisely because enforcing the Constitution was someone else's job.[36] Applying the same principle to the executive functions of government (an issue that Roosevelt did not directly address), the argument is *not* that legislative and executive officials should not defer in their constitutional judgments to court decisions. Rather, the issue of deference simply does not arise because executive and legislative officials should do what *they* are assigned to do, and what *they* are assigned to do does not include constitutional interpretation.

Roosevelt's argument sounds like the legislative complement to Ronald Dworkin's argument for judicial review in cases involving rights.[37] In arguing that decisions about rights are for courts and decisions about policy are for legislatures, Dworkin stresses that certain categories of decisions are best suited for some but not other branches of government.[38] Roosevelt's view can be seen as analogous: that legislatures should do only what they do well — policy — leaving courts to make constitutional decisions. Under this view, there is no reason to suppose that legislators, executives, or bureaucrats would be especially adept at constitutional interpretation, or even at interpretation of court decisions,[39] and good reason to suppose that they would be particularly ill-suited to interpret constitutional provisions designed to limit their own powers. Accordingly, it can be argued, nonjudicial officials should leave the task of constitutional interpretation to the courts and stick to making policy as best they can.

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[35] *See* sources cited *supra* note 5.

[36] Roosevelt could have argued that if the division of responsibility is contained in the Constitution itself, then a nonjudicial official who ignores the possibility of unconstitutionality is not ignoring the Constitution. Put differently, if the Constitution itself dictates that nonjudicial officials must ignore questions of constitutionality, then officials who ignore the Constitution are in fact following it.

[37] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 90–149 (1978).

[38] Dworkin's conception of the role of the judiciary in matters of principle and of the legislature in matters of policy is elaborated in RONALD DWORKIN, LAW'S EMPIRE 219–24, 242–44, 310–12 (1986).

[39] Court decisions are, unfortunately, rarely written for the purpose of guiding non-legal decisionmakers. *See* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 807–11 (1982); Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1462–66, 1472–73 (1995).

Like the argument from *realpolitik*, which it can be seen as attempting to support, Roosevelt's argument has the virtue of descriptive accuracy. Occasional rhetoric notwithstanding, there are few examples of Congress subjugating its own policy views to its views about constitutional constraints.[40] One explanation of this phenomenon, which resembles the view we address presently, might be that this coincidence comes about precisely because Congress has its own views about constitutional interpretation, views that conveniently produce outcomes routinely congruent with Congress's own policy views. Another explanation might be that Congress actually behaves as Roosevelt wished it to, albeit with appropriately protective language stressing the importance of respecting constitutional constraints. Congress frequently does appear to mask its Rooseveltian willingness to leave matters constitutional to the courts by framing congressional policy choices in constitutional language. In practice, therefore, congressional avoidance of constitutional decisionmaking is disguised by language in which members of Congress profess to make their own constitutional determinations.[41] Perhaps we are unduly cynical, but the persistent coincidence of substantive and constitutional views suggests that Roosevelt's position may have more adherents than examining congressional discourse alone might indicate. Yet inasmuch as the Rooseveltian view, even if descriptively accurate in explaining legislative behavior, is typically couched in the language of independent nonjudicial responsibility to interpret the Constitution, it appears right to focus directly on the question of that responsibility, and thus on a third possible understanding of non-deference.

C. *Non-Deference as Disobedience of the Courts*

Neither non-deference as *realpolitik* nor non-deference as separation of powers accepts that nonjudicial officials have an obligation to obey the Constitution. The former views questions of obligation sim-

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[40] We do not deny that there might be examples of such a phenomenon, more likely for individual legislators than for legislative bodies. But our inability to come up with any examples, and the fact that nothing in the existing political incentive system would encourage such behavior, leads us to the claim in the text.

[41] A good example is current congressional debate on campaign finance reform, an issue over which First Amendment constraints loom large, *see* Colorado Republican Fed. Campaign Comm. v. FEC, 116 S. Ct. 2309, 2315 (1996); Buckley v. Valeo, 424 U.S. 1, 64 (1976), but where to the best of our knowledge and inquiry no member of Congress has expressed substantive sympathy with campaign finance reform but doubts about its constitutionality, and no member of Congress has expressed the view that campaign finance reform is constitutionally permissible but inadvisable. *See* S. 1219, 104th Cong. (1996); 54 CONG. Q. WKLY. REP. 529, 1741, 1856 (1996). (We believe this true of commentators as well, but, as with the members of Congress, it is hard to cite to a negative, so we rely on our own impressions and fruitless investigations.) Every member who has spoken to the issue has expressed either the view that currently proposed reforms are both desirable and constitutional, or the view that they are undesirable *and* unconstitutional.

ply as questions of force,[42] and the latter views constitutional fidelity as not among the obligations of a nonjudicial official. But the form of non-deference we take most seriously indulges in neither of these evasions. Instead, it accepts that all officials have an obligation to follow the Constitution, indeed to *obey the Constitution*, but does not accept that nonjudicial officials have an obligation to *obey the courts* in determining what must be done in order to obey the Constitution.

We use the word "obey" because of its relative lack of ambiguity. We may at times be guided or persuaded by the decisions of others, but *obedience* is different. To obey is to accept the decision of another as authoritative even when we disagree with its substance.[43] "Obedience" would be an odd word to describe what we ourselves have in fact decided to do, and thus neither of us thinks of ourselves as *obeying* the laws against cannibalism precisely because the prohibited activity is one we would not contemplate even absent the legal prohibition. Obedience becomes relevant only when we contemplate following directives we think mistaken, or directives that would either have us do what we would otherwise not do or refrain from doing what we would otherwise do.

The question on which we focus, therefore, is whether an official who accepts her obligation to follow the Constitution should obey, or should be induced to follow, constitutional decisions of courts that the official believes mistaken. Under what circumstances should an official defer to the courts and obey, in the name of the Constitution, what she believes to be an erroneous interpretation of the Constitution? This question flows from our third conception of non-deference, and will dominate our analysis in the balance of this Article.

II. Law, Authority, and Coordination

Our analysis is neither empirical nor historical. The question of deference, whether to a court or to any other interpreter, is preconstitutional, not in the temporal sense, but in the sense of being logically antecedent to the written constitution. Even a written constitution explicitly specifying its authoritative interpreter would rest on a preconstitutional understanding about who should be the authoritative interpreter of *that* provision.[44] Indeed, when a constitution, like that

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[42] See H.L.A. Hart, The Concept of Law 79–88 (1961), for the standard argument — the distinction between being obliged (the question of force) and having an obligation (the question of systematically accepted legal legitimacy) — against conflating obligation with raw power.

[43] *See* Donald H. Regan, *Reasons, Authority, and the Meaning of "Obey": Further Thoughts on Raz and Obedience to Law*, 3 Can. J.L. & Jurisprudence 3, 4–6 (1990). The concept of obedience, like its converse the concept of authority, is premised on the idea of a *content-independent* reason for action. *See* H.L.A. Hart, Essays on Bentham 243–68 (1982); Joseph Raz, The Morality of Freedom 35–37 (1986).

[44] *See* Frederick Schauer, *Amending the Presuppositions of a Constitution*, *in* Responding to Imperfection: The Theory and Practice of Constitutional Amendment 145, 146–47

of the United States, does not specify an authoritative interpreter, it is even clearer that such a specification is a background decision not dependent on what is specified in the very document whose method of interpretation is at issue. It could, of course, be the case that a society adopted as its *grundnorm*,[45] or ultimate rule of recognition,[46] the principle that all questions about the content of its constitutional rules, including rules about how to interpret the constitution and who should do so, would be decided by recourse to the views of the drafters of the constitution, to the views of major figures of the founding period, or to practices accepted throughout the country's history. But even such a principle of historical reference would owe its political validity and its status as law to current acceptance rather than historical provenance. The present, and not the past, decides whether the past is relevant. Consequently, it is only the present that can constitute a legal order for a population, and the question of what is or is not part of a legal order — what in fact has the status of law, and what should have the status of law — can only be decided non-historically. Moreover, it is hardly clear that a meta-rule about the identity of a primary interpreter — whether a court, legislature, executive, or every official acting as her own constitutional interpreter — is less fundamental than a meta-rule about the type of argument that would suffice to establish the content of any constitutional meta-rule. Accordingly, we take neither original intent nor intervening practice as authoritative, and engage in direct normative inquiry about the desirability of various approaches to determining the identity, if any, of an authoritative interpreter of the Constitution. The normative inquiry, however, and thus the question of which approach to nonjudicial constitutional interpretation is most desirable, can only be answered by inquiring into the nature of law and into the functions it serves.

(Sanford Levinson ed., 1995); *see also* Richard S. Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187, 192–93 (1981).

[45] For explication of Kelsen's idea of the *grundnorm*, the background principle or transcendent understanding that undergirds the ability to make sense of the idea of law in a given society, consult HANS KELSEN, PURE THEORY OF LAW 3–23 (Max Knight trans., 1967). "[A] positive legal order represents a system of . . . a hierarchy of norms, whose highest tier is the constitution, which is grounded as valid by the presupposed basic norm . . . ." Hans Kelsen, *The Function of a Constitution* (Iain Stewart trans.), *in* ESSAYS ON KELSEN 109, 119 (Richard Tur & William Twining eds., 1986).

[46] Hart's ultimate rule of recognition has some affinity with Kelsen's *grundnorm*, each representing the foundational postulate of a legal system. For Hart, however, the ultimate rule of recognition was less a philosophical construct and more a specific and factual pre-legal understanding within a society about what is to count as law. *See* HART, *supra* note 42, at 97–120. For Hart's attempt to distinguish himself from Kelsen, see HART, cited above in note 42, at 245–46.

A. The Settlement Function of Law

What, then, is law for? Innumerable answers have been suggested to this question, but one that recurs is that an important function of law is to settle authoritatively what is to be done. The stock example concerns the case in which there are no substantive arguments to be made one way or another but where it is important that there be some decision, such as the decision whether people should drive on the left side or the right side of the road. Neither is better than the other, but either is better than leaving the decision to individual drivers. By settling authoritatively that driving should be on one side or the other, law serves an important coordination function.[47]

Even when more turns on which alternative is selected, law's settlement function remains important. Unlike deciding whether people should drive on the left or the right, selecting the substantive law of property, contract, or securities regulation is not a matter of tossing a coin; some contract rules are better than others. Nevertheless, contract rules have value independent of their substance, for they have value as rules. The systems of property, contract, and securities trading depend on the existence of settled sets of rules, and although a better set is preferable to a worse one, even a worse one is, within bounds, preferable to none at all.[48]

Law, therefore, provides the benefits of authoritative settlement, as well as the related but still content-independent benefits of inducing socially beneficial cooperative behavior and providing solutions to Prisoner's Dilemmas and other problems of coordination.[49] These considerations not only provide a justification for the existence of law, but also a justification for obeying it, by giving agents reasons to obey laws with which they disagree.[50] Only if law qua law is desirable does the addressee of a law have a (nonconclusive) reason to obey it when she disagrees with its content. If law's ability to provide authoritative settlement of issues over which agents would diverge in the absence of law is a value independent of the content of particular laws, then

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[47] *See* Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165, 183–85 (1982); Donald H. Regan, *Authority and Value: Reflections on Raz's* Morality of Freedom, 62 S.C. L. REV. 995, 1032–39 (1989); Noel B. Reynolds, *Law as Convention*, 2 RATIO JURIS 105, 108 (1989).

[48] The obligatory citation is to Justice Brandeis's dissent in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932), which maintained that "in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Id.* at 406 (Brandeis, J., dissenting).

[49] *See* John Finnis, *The Authority of Law in the Predicament of Contemporary Social Theory*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 115, 135–37 (1984); Postema, *supra* note 47, at 182–86; Joseph Raz, *The Obligation to Obey: Revision and Tradition*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 139, 153–55 (1984).

[50] *See* Finnis, *supra* note 49, at 118; Postema, *supra* note 47, at 188; Regan, *supra* note 47, at 1024–25.

agents have a reason to obey laws with which they disagree, because even mistaken laws serve this settlement function.[51]

B. Constitutionalism and the Settlement Function

1. Stare Decisis and the Virtues of Consistency Across Time. — It is frequently maintained that arguments from coordination, cooperation, or settlement have less relevance to constitutions, and especially to constitutional provisions dealing with issues more morally freighted than the substantive rules of contract and property. In *Payne v. Tennessee*,[52] for example, Chief Justice Rehnquist concluded that arguments for adhering to a rule of stare decisis were stronger in cases involving "property or contract rights" than they were in cases involving "procedural and evidentiary rules," for the former but not the latter implicated "reliance interests."[53] In the same case, Justice Scalia rejected the idea that overruling a precedent required a "special justification," arguing that there was no basis for leaving in place "an important constitutional decision with plainly inadequate rational support . . . for the sole reason that it once attracted five votes."[54] Implicit in these perspectives is the view that constitutions deal with really important stuff, as to which getting the right answer always dominates whatever minimal value settlement for its own sake might have.[55]

Even assuming the original decision erroneous, however, as Justice Scalia believed the pre-*Payne* rule to be, it does not follow that there

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[51] This statement conflates two justifications for law and obedience to law that should be distinguished. One is the *argument from community*. If community is an independent moral good, then law can provide consistency for its own sake when people might come to divergent decisions about important questions without it. Such diversity of opinion is often valuable, but the communitarian finds unity a good in itself and looks for a mechanism to transcend substantive diversity. Insofar as law compresses diversity of opinion into non-diversity for its own sake, then law serves these communitarian functions. The *argument from cooperation*, however, does not rely on communitarian premises. Even from a non-communitarian worldview, cooperative behavior is often advantageous, and cooperation needs a "focal point," *see* THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 92–94, 283–84 (1960); EDNA ULLMANN-MARGALIT, THE EMERGENCE OF NORMS 1–17 (1977), to coordinate what would otherwise be divergent behavior. By providing a focal point, law serves as a vehicle for cooperation, and people who accept that cooperation or coordination are independent goods have reason to obey even laws with which they disagree. *See* Finnis, *supra* note 49, at 118–20; Raz, *supra* note 49, at 154–55; Regan, *supra* note 47, at 1027.

[52] 501 U.S. 808 (1991).

[53] *Id.* at 828.

[54] *Id.* at 834 (Scalia, J., concurring). The Court has subsequently hinted that five-to-four decisions have less weight than opinions with more substantial majorities. *See* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1511 (1996).

[55] In *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), Chief Justice Rehnquist's majority opinion suggested that the difficulty of amending the Constitution justifies a weaker rule of precedent in constitutional cases. *See id.* at 1128. We believe this argument ill-founded, for it overemphasizes getting things right and slights the settlement function, a function no less important in constitutional than in statutory or common law cases.

is no reason to leave in place an erroneous decision that once happened to receive five votes. Even outside the domain of contract and property, reliance is important, and even outside the area in which reliance is important, settlement for its own sake has value.[56] Take the issue of whether race may be used in designing legislative districts, an issue of undoubted substantive valence repeatedly before the Court in recent years.[57] Given that some method of apportionment is necessary for elections to occur, a method that is substantively undesirable will still allow elections to be organized and representation to take place in a predictable and systematic way, whereas frequent changes in apportionment methodology would create such uncertainty about who will represent whom, where elections will be held, and how elections will be organized that the very process of holding elections would be impeded in ways similar to the way in which driving would be impeded, albeit not prevented, by people choosing for themselves the side of the road on which to drive. Similarly, uncertainty about free speech rules may produce excess deterrence of constitutionally protected communication,[58] so that a well-settled suboptimal free speech rule may be preferable to a less settled but superior rule because of the confidence it generates and the speech it thus frees.[59]

2. The Parallel Virtues of Consistency Across Institutions. — Although *Payne* dealt with questions about stare decisis in constitutional adjudication, we note it precisely to highlight the similarity between the question of precedent, which addresses the value of consistency across time, and the question of authoritative interpretation, which addresses the value of consistency across institutions. The value of precedent is apparent only when it counsels a decisionmaker to make a decision she thinks wrong.[60] If previous decisions are consistent with what a decisionmaker now wishes on substantive grounds to do, then the existence of the previous decisions, and any supposed deference that might be given to them, is but makeweight. But when previous decisions differ from what an unconstrained decisionmaker

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[56] There may be other values behind a principle of stare decisis, such as the possible value of depoliticizing an unelected judiciary. We do not claim that the values of stability for its own sake and settlement for its own sake exhaust the reasons for having a rule of stare decisis, although they well may, because our only claim here is that some of the values justifying stare decisis might also justify extrajudicial deference to judicial settlement.

[57] *See, e.g.*, Bush v. Vera, 116 S. Ct. 1941, 1950 (1996); Shaw v. Hunt, 116 S. Ct. 1894, 1899 (1996); Shaw v. Reno, 509 U.S. 630, 633 (1993).

[58] This provides much of the justification for the void-for-vagueness doctrine. *See* Smith v. Goguen, 415 U.S. 566, 572–76 (1974); Zwickler v. Koota, 389 U.S. 241, 249–50 (1967); Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685, 699 (1978); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 115–16 (1960).

[59] *See* City of Ladue v. Gilleo, 512 U.S. 43, 59–60 (1994) (O'Connor, J., concurring).

[60] *See* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 4–5 (1989); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 575 (1987).

would now do, deferring to those decisions in the name of the values thought to be served by precedent makes a difference to the outcome.

So too with the value of law itself. From the perspective of a decisionmaker, laws that merely replicate a decisionmaker's law-independent preferences are again only makeweight. For both of us, the laws against cannibalism, like those against rape, murder, child molestation, sexual harassment, racial discrimination, and insider trading, but unlike laws requiring us to pay our income taxes and refrain from exceeding the speed limit on a clear dry day, have no effect on our behavior. But at times, law requires us to do things that we think morally wrong, or prohibits us from doing things we think morally correct. In such cases, a distinguished tradition denies to law even prima facie moral effect.[61] Why, it is asked, should we subjugate our best moral judgment to the moral judgment of others, even when those to whom we are asked to subjugate our best moral judgment happen to occupy the role of legislator or judge?

The question is not just rhetorical. A long tradition questions the prima facie obligatoriness of law qua law, but a longer tradition, going back at least as far as Socrates in the *Crito*,[62] maintains that we have good reason to take law's emanations as content-independent reasons for action. Some of those reasons — the arguments from fairness (or fair play)[63] and from consent or social contract,[64] for example — have been subject to telling objections.[65] However, another reason to obey the law qua law, and thus to obey the law even when it appears wrong, is because of law's ability to coordinate a multiplicity of substantive views, mutually exclusive interests, and self-defeating individual strategies into the thing we call a state, and into beneficial collective activity. Coordination and the settlement of disagreements — and the individually and socially beneficial goods these goals produce — provide content-independent reasons for the existence of the state, of law, and of the obligation of obedience to the law.[66]

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[61] *See* SIMMONS, *supra* note 14, at 147–52; ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM 8–9 (1970); M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950, 950–52 (1973). A more qualified version is contained in Regan, cited above in note 43, at 1–5.

[62] *See* R.E. ALLEN, SOCRATES AND LEGAL OBLIGATION 104 (1980); PLATO, ON THE TRIAL AND DEATH OF SOCRATES 93 (Lane Cooper trans., 1941); A.D. WOOZLEY, LAW AND OBEDIENCE: THE ARGUMENTS OF PLATO'S *CRITO* 22 (1979).

[63] *See* JOHN RAWLS, A THEORY OF JUSTICE 342–50 (1971); H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 177–82 (1955).

[64] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 269–78 (Peter Laslett ed., Cambridge Univ. Press student ed. 1988) (3d ed. 1698).

[65] *See* SIMMONS, *supra* note 14, at 57–142.

[66] *See* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 8–13, 52–55 (1990); Garrett Hardin, *Political Requirements for Preserving Our Common Heritage*, *in* WILDLIFE AND AMERICA 310, 314 (Howard P. Brokaw ed., 1978); Postema, *supra* note 47, at 182–86. Hobbes first made this argument. *See* THOMAS HOBBES,

Moreover, even if there are no convincing arguments for a moral obligation to obey law qua law, there are good reasons for lawmakers and law interpreters to teach law abidingness and to punish and criticize disobedience to law. As paradoxical as it may seem, there are good arguments for requiring people, and particularly legal officials, on pain of penalty, to follow the law even when they believe they have good reason to disobey and even if they in fact do have good reason to disobey. Perhaps there are even good arguments for teaching that law has practical authority — that it provides content-independent reasons for obedience — even when or if it does not.[67] We will not rehearse arguments we have made elsewhere,[68] but the point is that, even though the addressees of the law may have good moral reasons for not treating law qua law as providing content-independent reasons for action, those who make the law may have equally good moral reasons for trying to minimize the consequences of the moral errors of law's addressees. Whether it be for reasons of confusion,[69] self-interest,[70] or simple evil, some people make morally erroneous decisions. If law's designers have reason to believe that law's addressees will, in exercising their moral independence, make such independent (or autonomous) but morally erroneous decisions, then law's designers have good moral reasons to try to make it painful for those addressees to exercise their expected-to-be-mistaken moral independence.

So even if there is no good reason for officials, from *their* perspective, to follow laws and interpretations they believe mistaken, there may still be good reasons for society to compel such officials to follow laws and interpretations that the officials believe to be mistaken. Just as the isolated perspective of the individual creates rather than solves the problem of strategic behavior, so too focusing only on the perspective of the official fails to address the perspective of the law as a solu-

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LEVIATHAN 227–28, 314–15 (C.B. Macpherson ed., Penguin Books 1985) (1651); THOMAS HOBBES, MAN AND CITIZEN: DE HOMINE AND DE CIVE 273–74 (Bernard Gert ed., 1991) (1658); GREGORY S. KAVKA, HOBBESIAN MORAL AND POLITICAL THEORY 179–82 (1986).

[67] *See* Larry Alexander, *The Gap*, 14 HARV. J.L. & PUB. POL'Y 695, 695–96 (1991); Larry Alexander, *Law and Exclusionary Reasons*, 18 PHIL. TOPICS 5, 6 (1990); Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PA. L. REV. 1191, 1192 (1994); Frederick Schauer, *The Asymmetry of Authority*, *in* PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 128 (1991); Frederick Schauer, *The Questions of Authority*, 81 GEO. L.J. 95, 110–15 (1992).

[68] *See* sources cited *supra* note 67.

[69] Perhaps some people are simply better at moral reasoning than others, a possibility that informs the most plausible forms of rule-utilitarianism. *See* R.M. HARE, MORAL THINKING: ITS LEVELS, METHOD, AND POINT 44–86 (1981). We are agnostic about whether this empirical claim is in fact true, but not agnostic as to the obligation of institutional designers and rulemakers to assess the likelihood that the addressees of their prescriptions will make what the institutional designers and rulemakers perceive to be moral mistakes.

[70] *See* KEN BINMORE, PLAYING FAIR: GAME THEORY AND THE SOCIAL CONTRACT *passim* (1994); DAVID GAUTHIER, MORALS BY AGREEMENT 1–20 (1986) ("Morality . . . is traditionally understood to involve an impartial constraint on the pursuit of individual interest.").

tion to a coordination problem and a vehicle for cooperation. For if those are among the goals of law, then we achieve those goals not by asking only whether officials have an obligation to treat law as authoritative, but also by asking whether political society should instruct and compel officials to behave as if law were authoritative, even if, from their perspective, it is not.

Our goal is not to replay arguments about the settlement and coordination functions of law or the obligations they generate. Yet we connect this line of jurisprudential thinking with the question of constitutional interpretive authority because it is as much a function of a constitution as of law in general to settle authoritatively what ought to be done, and to coordinate for the common good the self-interested and strategic behavior of individual officials. Just as a rule of precedent recognizes the value of settlement for settlement's sake, so too does a constitution exist partly because of the value of uniform decisions on issues as to which people have divergent substantive views and personal agendas.[71] The decision to create a single written constitution, and thus depart from a model of parliamentary supremacy, is based on the possibility of varying views about fundamental questions, and the undesirability of leaving their resolution to shifting political fortunes. Moreover, one reason for being suspicious of shifting political fortunes is that they shift so frequently. Without a written constitution as a stabilizing force, there is a risk that too many issues needing at least intermediate term settlement will remain excessively uncertain.

Stability and coordination are not the only functions that a constitution serves. Were that the case, the Constitution we have would be far more detailed, with a greater number of provisions resembling those setting the age requirements for the Presidency and Congress[72] and specifying with some precision the circumstances that require trial by jury.[73] Yet the presence of such specific provisions reminds us not only that the Constitution can serve the function of authoritatively settling what ought to be done, but also that authoritative settlement is often effective in reducing the range of viable disagreement. Insofar as

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[71] There is a connection between the arguments presented here and those for seeking common ground in a world of disagreement, the most prominent of which is presented in JOHN RAWLS, POLITICAL LIBERALISM (1993).

[72] *See* U.S. CONST. art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3; *id.* art. II, § 1, cl. 5.

[73] *See id.* amend. VII. An interesting contrast with the American approach is the now-functioning interim constitution of the Republic of South Africa, *see* Constitution of the Republic of South Africa, Act No. 200 of 1993, which contains 251 sections as well as an additional seven schedules, and is 113 pages long in both English and the equally authoritative Afrikaans. *See id.* The criminal procedure provisions are especially interesting, for the South African counterpart of the Fourth, Fifth, and Sixth Amendments to the Constitution of the United States resemble a detailed code of criminal procedure, including the specification of the exact number of hours that people may be held, and the method of calculating those hours, prior to being charged and brought before a magistrate. *See id.* § 25(2)(b).

the Constitution is susceptible to divergent views about what it means — for example, whether affirmative action is commanded, permitted, or prohibited;[74] whether hate speech[75] and commercial advertising[76] are protected against government regulation; whether Congress may modify its procedures in light of contemporary political realities;[77] or whether term limits may be imposed for Congress[78] — an important function of the Constitution remains unserved.

Insofar as this function is left unserved by the Constitution, a preconstitutional norm must determine what is to be done. Indeed, it is crucial to distinguish the value of stability, the importance of which is realized diffusely and intertemporally, from the value of deciding what is to be done *now*. When the Constitution is subject to multiple interpretations, a preconstitutional norm must referee among interpretations to decide what is to be done. One such norm is that the Supreme Court's interpretation is authoritative and supreme. This is not the only possible preconstitutional norm. Its chief alternative is the norm that each official decide for herself what the Constitution requires. But the chief alternative's chief weakness is its failure to take seriously the settlement function's ability to explain much of importance about law in general and constitutions in particular.

Thus, an important — perhaps *the* important — function of law is its ability to settle authoritatively what is to be done. That function is performed by all law; but because the Constitution governs all other law, it is especially important for the matters *it* covers to be settled. To the extent that the law is interpreted differently by different interpreters, an overwhelming probability for many socially important issues, it has failed to perform the settlement function.[79] The reasons for having laws and a constitution that is treated as law are accordingly also reasons for establishing one interpreter's interpretation as authoritative. *Cooper v. Aaron* thus reflects the very reason for having a constitution that is regarded as law.[80]

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[74] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995).

[75] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).

[76] *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1515 (1996).

[77] *See, e.g.*, INS v. Chadha, 462 U.S. 919, 959 (1983).

[78] *See, e.g.*, U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1871 (1995).

[79] Obviously, our argument assumes that Supreme Court decisions provide more clarity than the constitutional text alone. *Cooper* would hardly be justifiable if decisions of the Court tended to obfuscate and unsettle rather than clarify and settle. In that sense, our argument is empirical and not merely conceptual. If and only if Supreme Court opinions settle more constitutional issues than they unsettle does our argument succeed, but as long as this is the case, it is no objection that the Court usually falls short of optimal clarity.

[80] Some have argued that although it is desirable to have a norm establishing a particular interpretation as supremely authoritative, that interpretation need not be the Supreme Court's, and might, for example, be the legislature's. *See, e.g.*, Frank I. Michelman, *Judicial Supremacy, the Concept of Law, and the Sanctity of Life*, *in* JUSTICE AND INJUSTICE IN LAW AND LEGAL THEORY 139, 149–53, 160–64 (Austin Sarat & Thomas P. Kearns eds., 1996); Jeremy Waldron,

Some find *Cooper* inconsistent with the supremacy of the Constitution. After all, the *Constitution*, not the ipse dixits of the Supreme Court, is the supreme law of the land.[81] Why should the President or Congress, who are both obliged to follow the Constitution, put aside *their* interpretation of the Constitution in favor of what is, to them, the Court's *erroneous* interpretation? We first note that this "Protestant" view of constitutional interpretation[82] entails not just parity of interpretive authority among the three branches of the federal government; it also entails parity of interpretive authority among the members of each branch;[83] among all officials, state and local as well as

Precommitment and Disagreement, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS (Larry Alexander ed., forthcoming 1997). If this argument succeeds at all, it does so only for a single national legislature, because multiple legislatures could not serve the coordination function. In the context of a single legislature like Congress, the argument is not inconsistent with ours insofar as it admits the need for a single authoritative interpreter to which others must defer. The question, then, is whether that function is best served by a court or by a legislature. On this issue, our preference for a court over a legislature, and indeed over the executive as well, is explained partly by the fact that constitutions are designed to guard against the excesses of the majoritarian forces that influence legislatures and executives more than they influence courts. Further, there is little reason to believe that a legislature or an executive is best situated to determine the contours of the constraints on its own power. Finally, the authoritative settlement function is better served when there is authoritative settlement over time as well as across institutions. The existence of a regime of precedential constraint for courts but for neither legislatures nor the executive, an institutional difference predating judicial review and a deeply entrenched part of the self-understanding of different institutional roles, offers an additional argument for preferring courts to either legislatures or the executive for achieving the goals of authoritative settlement.

Of course, there are some questions of constitutional interpretation that the Supreme Court has declared to be "political questions," that is, questions whose authoritative resolution is committed to one of the other branches of the federal government. *See, e.g.*, Nixon v. United States, 506 U.S. 224, 228–38 (1993); Coleman v. Miller, 307 U.S. 433, 446–56 (1939); Luther v. Borden, 48 U.S. (7 How.) 1, 56–57 (1849). Moreover, there are other constitutional provisions with respect to which the Supreme Court, although claiming final authority regarding their meaning at the most abstract level, defers to other governmental actors' more concrete interpretations and applications, even when those concrete interpretations and applications conflict with the Court's, as long as the interpretations and applications fall within a broad range established by the Court's abstract interpretations. *Compare* Katzenbach v. Morgan, 384 U.S. 641, 648–56 (1966) (upholding the constitutionality of a section of the federal Voting Rights Act of 1965 eliminating certain state literacy tests for voting), *with* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50–53 (1959) (upholding the constitutionality of a state literacy test for voting). Questions under these constitutional provisions might be deemed "quasi-political questions." And, of course, every specific application of the Constitution turns on facts found by lower courts, juries, legislatures, and administrators, facts that, within bounds, the Court will not question. Our argument for supreme constitutional authority in a single body, although generally Supreme Court focused, can accept all of these modifications and complications regarding the identity of that body and its constitutional interpretation.

[81] The best statement of the position is found in John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371, 371 (1988).

[82] The term "Protestant" here derives from Protestantism's rejection of Catholicism's belief in a single authoritative religious interpreter. For the canonical application of this idea to American constitutional law, see SANFORD LEVINSON, CONSTITUTIONAL FAITH 18–53 (1988).

[83] Paulsen, for one, acknowledges this. *See* Paulsen, *supra* note 8, at 241–42. Some branch of government could seek to alleviate this problem by settling on an orderly means of intra-branch decisionmaking, but if there are arguments for the suppression of interpretive diversity in the

federal; and indeed among all citizens.[84] "Protestantism" in constitutional interpretation — interpretive anarchy — produces no settled meaning of the Constitution and thus no settlement of what is to be done with respect to our most important affairs.

Still, why should nonjudicial actors follow what they see as mistaken interpretations of the Constitution rather than the Constitution itself — the Constitution as correctly interpreted? Have we ignored the argument that the Constitution and not the judiciary is the supreme law of the land? Are we not asking nonjudicial actors to disregard supreme law? It is true that in urging nonjudicial actors to treat the Supreme Court's interpretation of the Constitution as authoritative, and in urging society to create political incentives to give nonjudicial actors strong prudential reasons for doing so,[85] we are telling those actors to accept, for purposes of their own actions, constitutional interpretations they believe mistaken. Yet this is less problematic than it seems and is consistent with constitutionalism in general. For although many constitutional norms are substantively desirable, others are not. When we consider the age requirements for various offices, the fact that the citizens of Wyoming are thirty-three times better represented in the Senate than are the citizens of California, the requirement of a jury trial in civil cases involving twenty dollars or more, the fact that the current Secretary of State and Chairman of the Joint Chiefs of Staff are not eligible to serve as President of the United States because they are not "natural born citizens," and the fact that the current level of gun ownership in the United States is likely assisted by the existence of the Second Amendment, it is perfectly clear that we have an imperfect constitution.[86]

Once we accept that we have an imperfect constitution, we can consider how nonjudicial officials should conduct themselves with respect to constitutional provisions they believe immoral or unwise. One possibility is that they might make their own best all-things-considered

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name of order at the intra-branch level, they should also apply at the inter-branch level, which is precisely what we argue here.

[84] Citizens do not take an oath to support the Constitution, but a citizen who felt no obligation to the Constitution would have no reason to interpret the Constitution in the first place. Only a citizen with a felt obligation to the Constitution, *see* LEVINSON, *supra* note 82, at 54–89, would consider the question at all, and thus the presence or absence of the oath is inconsequential.

[85] Who are the addressees of our prescriptions? Perhaps they are nonjudicial officials, because we are urging those officials to treat judicial opinions as authoritative. But at a deeper level, we are speaking to society, as institutional designer. Because nonjudicial officials act significantly, albeit not exclusively, from a sense of personal prudence, their behavior might change if the relevant political incentives changed. If those with the power to impose political penalties — society? the press? — had a different conception of the behavior to be rewarded and punished, and a greater willingness to discipline officials for disobeying the courts in the service of substantively desirable results, we might see a commensurate change in official behavior.

[86] *See* Henry L. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 395–96 (1981); Symposium, *Constitutional Stupidities*, 12 CONST. COMMENTARY 139, 139–41 (1995).

political or moral decisions, without regard to the constraints of the imperfect Constitution. Underage candidates for Congress could file petitions to be on the ballot if *they* felt themselves qualified, and their names would appear on the ballots if local election officials believed underage people should be permitted to serve in Congress. The same could hold true for foreign-born presidential aspirants. Court officers could refuse to convene juries in trials they thought too minor to justify them, even if the amount in controversy exceeded twenty dollars.

This position is not widely held, but we employ this *reductio* to stress that the Constitution is itself an imperfect document, and officials following even its unambiguous commands must at times subjugate their own political and moral judgments to the judgments of long-dead Framers.[87] Consequently, asking those same officials to subjugate their own constitutional interpretations to the mistaken constitutional interpretations of Supreme Court Justices is not asking them to do anything very different from what they are required to do in taking the Constitution itself — warts and all — as a constraint on their political actions and moral judgments. If *Cooper v. Aaron* is wrong in requiring officials to alienate their constitutional judgment to the constitutional judgment of the Supreme Court, then constitutionalism itself is flawed for the same reason.[88] But if *Cooper* is wrong only because the morally imperfect commands of the Constitution have a status different from, and higher than, the morally or constitutionally imperfect rulings of the Supreme Court, then we must inquire into the reasons why the Constitution has the status it does. At that point, we discover that one of the primary reasons for entrenching a constitution as law is to achieve a degree of settlement and stability, and another is to remove a series of transcendent questions from short-term majoritarian control. Both of these justifications, however, also support judicial supremacy, and thus the decision to treat stability, settlement, and counter-majoritarianism as important takes us a long way towards acknowledging the importance of judicial authoritativeness as well.

We do not deny that serious arguments can be made against officials alienating their first-order moral judgments to the second-order

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[87] Indeed, Michael Paulsen believes that official action inconsistent with the text of the Constitution cannot be justified. *See* Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907, 911 (1994) ("It is not sufficient to satisfy the perceived 'spirit' of a constitutional provision. The letter of the law must be observed as well.").

[88] On the relationship between constitutionalism and a constitution's imperfections, consider Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1228–48 (1995). As should be clear, we take the gap between the actual and the ideal to be a central feature of law, including constitutional law.

commands of the positive law of the Constitution.[89] But once we settle those arguments in favor of the authority of the second-order commands of the positive law of the Constitution, then it is of less moral moment than typically supposed to move from the authority of those second-order commands to the authority of the third-order commands of a court in interpreting the second-order commands. The difference between the authority of first-order moral commands and second-order positive law commands is of great importance. In contrast, the difference between second-order positive law commands and third-order judicial commands is an important question of institutional design, but one as to which the moral stakes have already been considerably lowered. Thus, to lack a final interpretive authority for choosing among competing interpretations of the Constitution would deny the Constitution perhaps its chief raison d'etre. If we are going to deprive ourselves of an authoritative resolution of what is to be done, we might as well fight that issue directly on the primary moral and policy grounds rather than on the once-removed, imperfect grounds of interpreting the Framers' resolution of what is to be done.

To draw a parallel between obedience to imperfect law and obedience to imperfect interpretations of imperfect law is not to collapse the difference between the two. Just as the existence of an obligation to obey the law does not entail the impossibility of criticizing that law on moral grounds, neither does the existence of an obligation to follow judicial interpretations of the Constitution entail the impossibility of criticizing those interpretations on the grounds of inconsistency with the Constitution itself. We do not argue for the obligation to follow judicial interpretations because those interpretations are identical to the primary norms they are interpreting. Rather, we argue for the obligation to follow judicial interpretations that can, conceptually as well as practically, diverge from the constitution they are interpreting. We argue, therefore, for an obligation to follow judicial interpretations, not because they are, by definition, correct, but despite the fact that they may be incorrect.[90]

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[89] *See* William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217, 253 (1996); Tushnet, *The Hardest Question*, *supra* note 9, at 21–28.

[90] In acknowledging the space between decisions that officials are obliged to obey and the primary law that those decisions are decisions about, we are open to the charge that this conclusion conflicts with the textual requirement that all legislative, executive, and judicial officers "shall be bound by Oath or Affirmation, to support this Constitution." U.S. CONST. art. VI, cl. 3. But even apart from the fact that this clause must be interpreted in light of some preconstitutional norm, such as the one we defend here, taking "this Constitution" as precluding obligations to follow interpretations of "this Constitution" that the official believes mistaken would eliminate not only the constraint of stare decisis, but also the "vertical" obligations of lower courts to follow the interpretations of higher courts that the lower courts believe mistaken. As long as a federal district judge can be expected to subjugate her own best constitutional judgment to the judgment of the court of appeals in her circuit, and a court of appeals judge can similarly be expected to

III. Problems and Complications

A. *The Challenge of* Dred Scott

What about *Dred Scott*?[91] In urging officials to subjugate their constitutional judgments to those of the Supreme Court, are we saying that Lincoln was wrong to resist *Dred Scott*? In addressing this question, we put back on the table the question of the strength of deference, for all we have said is consistent with the belief that Lincoln had good reason to defer to the decision in *Dred Scott*, but also consistent with the belief that he had even better reason to reject it. That there are occasions for disobedience to the law does not mean that there are not good, albeit overridable, reasons for obedience. *If* it was important for winning the Civil War that Lincoln suspend habeas corpus and infringe on other civil liberties,[92] then the moral importance of winning the war was sufficient to justify his actions. Reaching this conclusion, however, does not mean that suspending habeas corpus was right. It just means that this wrong was outweighed by the greater wrong that would have occurred had the war been lost. Once we see that overridable obligations are still obligations, we need not say that Lincoln should have followed *Dred Scott*, all things considered, just because Lincoln had an overridable obligation to follow *Dred Scott* because of its source.[93]

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subjugate her own best constitutional judgment to the judgment of the Supreme Court, there is nothing more anti-textual about expecting nonjudicial officials to show the same deference.

[91] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[92] Some of the cases dealing with Civil War suspension of civil liberties include *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 103–06 (1869); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 512–15 (1869); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 106–42 (1866); and *Ex parte Merryman*, 17 F. Cas. 144, 144–53 (C.C.D. Md. 1861) (No. 9487).

[93] The Legal Realist might doubt the ability of overridable, presumptive, or prima facie obligations to do real work. There is no difference, the Realist might argue, between the non-existence of an obligation and the existence of a nonconclusive obligation, for in both cases the outcome carries the freight, and the presumption is sufficiently malleable to be claimed either to be overridden or to be dispositive depending on the antecedently desired outcome. Although the Realists themselves never addressed the precise question of presumptions and their kin, the subservience of the presumption to the outcome, rather than the other way around, is consistent with, for example, John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 23–27 (1924), and Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357, 358–62 (1925). Explaining why such skepticism about the possibility that nonconclusive obligations can still be outcome-determinative is mistaken would be an article in itself, but the same argument applies to both raised burdens of proof (clear and convincing evidence and proof beyond a reasonable doubt) and heightened scrutiny in constitutional law. For a Realist view of levels of scrutiny, consider STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 29–35 (1990). If one believes that such nonconclusive but elevated standards can make a difference, as we do, then one can believe that nonconclusive obligations can make a difference over a long enough run of applications. And one of the ways in which these obligations make a difference, even when properly overridden (as in *Dred Scott*) is by generating moral or political residue. Lincoln should have felt badly about suspending habeas corpus even if he believed he did the right thing in doing so, and this bad feeling itself may have produced less suspension of civil liberties in subsequent cases in which the arguments for override were far weaker. So too with

Consider *Dred Scott* from the standpoint of decision theory. At times, executive officials will, *from a morally correct point of view*, wish to disobey court decisions they correctly believe to be morally or constitutionally mistaken, as with *Dred Scott*. But at other times, executive officials will, *from a morally incorrect perspective*, wish to disobey decisions they mistakenly believe to be morally or constitutionally erroneous as, for example, with the views of many public officials in the 1950s and 1960s about school segregation, interposition, and states' rights — the views that prompted *Cooper v. Aaron* itself. Because of the possibilities of erroneous obedience and erroneous disobedience, designing the optimal system for an array of Supreme Court decisions and an array of officials is a decision theory problem that is only distorted by focusing on one case.

Given the inadvisability of designing a decision procedure around one case that might never be repeated, it is better to treat *Dred Scott* as aberrational, recognizing that officials can always override judicial interpretations if necessary, especially if they are willing to suffer the political consequences. To design a system of authority around *Dred Scott* (or Nuremberg), rather than around the views of contemporary politicians about abortion or school prayer, is to make a decision-theoretic choice that is far from obvious. This is not to say that the proper decision theory should ignore both the possibility of another *Dred Scott* and the expected harm from official action that erroneously follows some future variant on *Dred Scott*. It is only to say that the wiser approach considers the full array of decisions and decisionmakers and not just the one member of that array with special historical, moral, and political salience. There are circumstances in which systems should be premised on avoiding the worst case, but it is not clear that this is one of them.

B. The Logic of Deference

Although *Dred Scott* was atypical in the import of the moral questions it presented and the political and institutional alignment it reflected vis-á-vis those moral questions, it nonetheless presented, in another sense, the archetypal case of extrajudicial interpretation of the Constitution. Because Lincoln took actions — for example, issuing the Emancipation Proclamation — that the Supreme Court said he could not take, *Dred Scott* presented a case of *prohibition*. Other cases

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the overridable obligation of officials to follow judicial constitutional interpretations with which they disagree.

Implicit in our argument is the claim that the virtues of deference are largely instrumental and institutional, but that such instrumental and institutional considerations will more often produce a morally preferable array of outcomes than will alternative institutional arrangements. As *Dred Scott* illustrates, however, at times decisionmakers will, and should, conclude that reaching the morally correct result in the instant case is worth weakening the institution that is expected to produce the morally best array of decisions in the long term.

might present the logically different case of *compulsion*, which occurs when an official considers refusing to take an action the courts have said she must. Still, although requiring an official to do something she would otherwise not do involves problems of implementation more difficult than in the case of prohibition,[94] in terms of our account compulsion and prohibition are identical. In each, the critical issue is obedience, and in each, the question is whether officials should follow Supreme Court opinions with which they disagree.

More problematic, however, is *permission*. If our argument from authoritative settlement is sound, then perhaps a legislator, administrator, or executive has good reason to attempt to harmonize her behavior with the applicable judicial decisions, even if non-harmonization — constitutional dissonance we might call it — would not involve a direct or logical conflict. Yet if the argument from authoritative settlement counsels the avoidance of constitutional dissonance, does this mean that a legislator does something improper in going beyond existing judicial decisions in the name of the Constitution? Does a legislator behave wrongly in extending equal protection or free speech rights beyond the limits drawn by the Supreme Court, even if this extension does not involve direct disobedience? Although we originally framed our inquiry in terms aimed exclusively at direct conflict between judicial holdings and proposed official action, accepting the premises of our argument from authoritative settlement may appear to yield the even broader conclusion that nonjudicial officials should aim for harmonization with the courts as an affirmative duty even when failing to do so would create no direct conflict.

Consider *Branzburg v. Hayes*,[95] which held that reporters have no First Amendment right to keep sources confidential in the face of a subpoena.[96] One way of interpreting our argument is that the values of coordination and authoritative settlement would be well served by legislatures taking *Branzburg* as authoritatively settling in the negative the question whether the First Amendment mandates journalistic priv-

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[94] For cases exploring the special difficulties of compelling, as opposed to prohibiting, official actions, see *Missouri v. Jenkins*, 115 S. Ct. 2038, 2048–55 (1995); *Missouri v. Jenkins*, 495 U.S. 33, 50–52 (1990); and *United States v. Yonkers Board of Education*, 946 F.2d 180, 183 (2d Cir. 1991).

[95] 408 U.S. 665 (1972).

[96] *See id.* at 692. *Branzburg* is slightly problematic, because the requisite majority needed the vote of Justice Powell, whose concurring opinion suggested a First Amendment inspired scrutiny into the reasons for the subpoena. For our purposes, we will put this question aside and assume that Justice White's opinion can be taken at face value, a not implausible assumption in light of *Zurcher v. Stanford Daily*, 436 U.S. 547, 563–67 (1978), as well as *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974), which upheld a federal prohibition of most interviews of particular prisoners, *see id.* at 846–50, and *Pell v. Procunier*, 417 U.S. 817 (1974), which upheld a state prohibition of interviews of particular prisoners by the press, *see id.* at 819, 835. These three cases, taken together, arguably support the proposition that the Court has rejected the claim that the First Amendment grants affirmative rights or special immunities to journalists other than those they might enjoy simply as citizens.

ileges. Does this not imply that a legislature should refuse to create such a privilege, even though creating it would not directly conflict with the Supreme Court decision?[97]

Part of our answer to this question is, simply, yes. If there are virtues in settlement for settlement's sake, then a legislature would have good reason to try to cooperate in a process that generated a single conception of what the Constitution required, even if this cooperation produced, in some cases, less of an extension of rights than might otherwise have occurred. In practice, however, we expect the same extension to occur and the same privilege to be granted, albeit couched in the language of policy or the language of creating new (non-constitutional) rights, rather than the language of interpreting the Constitution. Much the same might be said about many other constitutional rights, which for many of their applications could be characterized in policy terms as well as constitutional terms. Yet even if the consequences were similar, there would still be value in couching the extensions in non-constitutional language. Not only would the role of the Supreme Court as the authoritative settler of constitutional meaning remain intact, but the political discussion about the policies behind the extension might be richer precisely for its lack of reliance on ritualistic incantations of constitutional provisions. So our answer to the question posed is in the affirmative, although the consequences are in practice minimal. Still, even though the arguments for harmonization will be weaker when there is no deontic conflict, they will not disappear, and we accept the conclusion that our premises about authoritative settlement also provide arguments against extensions of constitutional principles beyond the limits that the Supreme Court itself is willing to find and enforce.[98]

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[97] More than half of the states have enacted laws creating the privilege that the *Branzburg* Court held was not constitutionally compelled. These statutes are collected in *In re Roche*, 411 N.E.2d 466, 474 n.13 (Mass. 1980).

[98] Relatedly, one might ask whether the settlement function requires lower courts to defer, for the sake of uniformity, to decisions of courts outside their jurisdiction. Although lower courts are expected to obey higher courts within their jurisdiction, *see* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 824–25 (1994), does the value of settlement also require obedience across jurisdictional lines? We think not. Although cross-jurisdictional obedience would increase the degree of coordination, it would do so at too high a price. By allowing a multiplicity of competing lower court interpretations to coexist pending settlement of the issue by the Supreme Court, the lack of a norm of inter-jurisdictional obedience makes the Supreme Court more likely to settle the issue authoritatively sooner rather than later because of the Court's strong desire to settle intercircuit conflicts. *See* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 127–28, 246–52 (1991). Moreover, a multiplicity of interpretations could give the Supreme Court a variety of approaches to evaluate and thus make it more likely that the Court would settle the issue correctly, as well as authoritatively. Finally, denial of a norm of interjurisdictional obedience properly refuses to grant the first court to decide the issue the power to establish a rule for all the others to follow.

C. *The Impetus for Change*

Finally, one might ask how the law would ever change under a system of deference. Indeed, the standard arguments for non-deference highlight this problem and remind us of *Brown v. Board of Education*,[99] a case in which what was once thought settled was changed for the better.[100] If officials could not take actions inconsistent with existing Supreme Court interpretations, how would the Court have the opportunity to correct erroneous interpretations?[101]

The argument has some force, but a force that is easy to overemphasize. In most cases an act of official disobedience is unnecessary to prompt judicial reconsideration. *Brown* itself fits this characterization. Although *Plessy v. Ferguson*[102] was the prevailing law prior to *Brown*, no official needed to disregard *Plessy* for *Brown* to wind up as a Supreme Court case. In the vast majority of cases, it takes only an individual dissatisfied with the existing law to set in action the process that will give the Supreme Court the opportunity to change its mind if it is so inclined.

With respect to cases in which the constitutional norm speaks directly to officials, however, official disobedience *will* be necessary for the Court to reconsider a ruling that a type of statute is unconstitutional. In some cases, an official may feel strongly enough about the issue that she will be willing to engage in an act of disobedience, and defend it as such. In other cases, the state of the law may allow a good faith claim of uncertainty about the law's application. And in still other cases, the age of the prevailing Supreme Court case — or a change in the composition of the Court — will permit a good faith claim that a different result might now be reached. Nothing in our argument prevents these actions, and even widespread acceptance of our position would leave the Supreme Court with sufficient opportunities to reconsider earlier rulings that ought to be reconsidered. What acceptance of our position *would* make more difficult is the kind of direct disregard by officials of Supreme Court opinions that are plainly "good law," in the sense of an overwhelming professional consensus that the same result would be reached again by the Supreme Court. We admit that acceptance of our position would make continuous and futile challenges to recent Supreme Court cases more difficult, and we take that to be not only a strength of our position, but also the main point of taking it in the first place.

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[99] 347 U.S. 483 (1954).

[100] *See, e.g.*, Meese, *supra* note 6, at 983.

[101] *See* Letter from Laurence Tribe to Council Member (Jan. 8, 1984), *in* David Bryden, *Between Two Constitutions: Feminism and Pornography*, 2 CONST. COMMENTARY 147, 180 (1985).

[102] 163 U.S. 537 (1896).

IV. CONCLUSION

"[T]he Constitution is what the [Supreme Court] say[s] it is," Chief Justice Hughes announced,[103] but a central feature of the jurisprudential critique of Legal Realism is that Hughes could not have been right, at least in the context of thinking about the courts from the point of view of judges and other decisionmakers situated within the legal system and presupposing its norms.[104] The critique is plainly correct from one perspective, inasmuch as "your decision is what you say it is" would be tautological nonsense as an argument *to* the Supreme Court. Moreover, the fact of finality does not mean that a critique against a standard external to the decision is impossible, and even final Supreme Court decisions can be subject to criticism from the perspective of whatever the observer believes the proper standards for constitutional decisionmaking to be.

From the perspective of those outside the Supreme Court, however, "the Constitution is what the Supreme Court says it is" is far from nonsense. Indeed, this phrase characterizes the attitude that many people believe lower courts should have regarding Supreme Court decisions.[105] If lower court judges, who like nonjudicial officials take an oath to support and uphold the Constitution, are expected to subjugate their own constitutional judgments to the (from their perspective) erroneous judgments of five out of nine people who happen to sit on a higher court, then it is a matter of decision theory and political institutional design, and not of direct moral compulsion, to ask nonjudicial officials to do the same thing. If we can expect legally and constitutionally trained lower court judges to subjugate their best professional judgment about constitutional interpretation to the judgments of those who happen to sit above them, then expecting the same of nonjudicial officials is an affront neither to morality nor to constititionalism. It is but the recognition that at times good institutional design requires norms that compel decisionmakers to defer to the judgments of others with which they disagree. Some call this positivism. Others call it formalism. We call it law.

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[103] Charles Evans Hughes, Speech at Elmira, New York (May 3, 1907), *quoted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 700 (Emily Morison Beck ed., 15th ed. 1980) ("We are under a Constitution, but the Constitution is what the judges say it is . . . .").

[104] *See* DWORKIN, *supra* note 38, at 36–37; HART, *supra* note 42, at 121–50.

[105] *See* Charles Fried, *Impudence*, 1992 SUP. CT. REV. 155, 189–94.