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What Are Constitutional Rights For? The Case Of The Second Amendment

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WHAT ARE CONSTITUTIONAL RIGHTS FOR? THE CASE OF THE SECOND AMENDMENT

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Abstract

District of Columbia v. Heller—the Supreme Court’s 2008 Second Amendment decision—was the occasion for a momentous national conversation that never happened. Heller sparked heated debates about the Court’s originalist interpretive methodology, but virtually nobody asked what should have been an obvious question: Even if the Court got the meaning of the Second Amendment right, why should we obey that amendment?

This is the curiously underexplored question of the authority of constitutional rights: Why, indeed whether, we have some obligation to respect those rights even when we disagree with them. The Second Amendment brings that question front and center in a way arguably not seen since the demise of the Fugitive Slave Clause 150 years ago. Like that infamous clause, the Second Amendment features relatively specific text—protecting a “right . . . to keep and bear Arms”—that itself is sufficient to provoke controversy, regardless of precisely how that text is interpreted. Americans who disagree with a “right” to abortion can take some comfort

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in the belief that the Supreme Court, in construing the Due Process Clauses, got the meaning of “liberty” wrong. But Americans who disagree with a “right . . . to keep and bear Arms” have no one to blame but the Constitution itself.

Should these Americans nonetheless treat the Second Amendment as authoritative, and if so, why? In seeking to answer that question, the analysis in this Article suggests some important truths about constitutional rights more generally. It suggests, first of all, that justifying the authority of constitutional rights is not as easy as is often assumed. Most accounts of constitutional authority are substantive in nature: they tell us to obey the Constitution because of what the Constitution commands. The author contends that none of these substantive accounts are plausible. The authority of the Constitution must be justified procedurally—based not on what it commands, but on how it commands us—or not at all.

Most interpretations of the Second Amendment, however, do not comport with a procedural understanding of constitutional authority. A procedural account does not justify Heller’s individual-self-defense reading of the Amendment or the various “anti-tyranny” readings common in popular discourse. Only the “structural federalism” interpretation advanced by the dissenters in Heller is arguably consistent with a procedural account of constitutional authority.

The implications of this conclusion extend well beyond the Second Amendment itself. They imply a jurisdictional principle of constitutional law, according to which other constitutional provisions and doctrines—including, the author suggests, the abortion right and other aspects of “substantive” due process—might lack a valid claim to constitutional authority. They also suggest a principle of constitutional interpretation: all else being equal, the Court should interpret a constitutional provision in the way that best justifies its authority over us.

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*I. Introduction: The Second Amendment
and the Question of Constitutional Authority*

District of Columbia v. Heller was the occasion for a momentous national conversation that never happened. In that 2008 decision, the Supreme Court held for the first time that the Second Amendment protects an individual right to possess handguns for self-defense.¹ *Heller* sparked heated debates over the propriety of the Court’s originalist interpretive methodology² and the accuracy with which that methodology was applied.³

1. 554 U.S. 570 (2008).

2. Critiques of originalism, focusing on *Heller*, include Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 626 (2008) (“Scalia’s decision demonstrates that . . . originalism is . . . a lawyer’s version of a magician’s parlor trick”); Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 610 (2008) (arguing that *Heller* demonstrates that “the new originalism cannot deliver on its promises” to remove judicial discretion from judging); and Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC (Aug. 27, 2008), <http://www.newrepublic.com/article/books/defense-looseness> (arguing that “[t]rue originalism licenses loose construction” as opposed to *Heller*’s “narrow” methodology). Defenses of originalism focusing on *Heller* include Joyce Lee Malcolm, *The Supreme Court and the Uses of History: District of Columbia v. Heller*, 56 UCLA L. REV. 1377, 1378 (2009) (calling Justice Scalia’s *Heller* opinion “carefully reasoned and scholarly”); Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13, <http://www.wsj.com/articles/SB121452412614009067> (“Justice Scalia’s opinion is exemplary [It] is the finest example of . . . ‘original public meaning’ jurisprudence ever adopted by the Supreme Court.”).

3. Many observers who do not themselves endorse originalism have asserted that the *Heller* majority opinion was more consistent with evolving popular views than with the

But virtually no one asked what should have been an obvious question: Even if the *Heller* Court got the meaning of the Second Amendment right, why should we obey that decision? Why, that is, should we obey the Second Amendment?

That question should have been obvious because the Second Amendment, unlike most rights-conferring provisions of our Constitution, is controversial on its face. Most rights provisions engender dispute, not because of what their text reveals, but because of what it hides. There is nothing controversial, for instance, about the merits of protecting “life, liberty, or property,” as the text of the Due Process Clauses clearly does.⁴ In the abstract, everybody likes those values, and that is how they are expressed in the text: in the abstract. Just about everyone similarly approves (in the abstract) of “the freedom of speech” and “the free exercise” of “religion” that are protected by the First Amendment,⁵ and of “the equal protection of the laws” that is guaranteed by the Fourteenth.⁶ The disagreement about these provisions centers not on what they clearly *say*, but on how the Court has interpreted and applied them to particular issues—on whether “liberty” includes a right to choose an abortion, for example, or whether “the freedom of speech” prohibits regulation of corporate-funded “issue ads” during an election.

The Second Amendment is different. The text of that Amendment reads, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”⁷ Whatever the import of the so-called “prefatory clause” invoking a “Militia,”⁸ or the precise meaning of the term “the people,” the Amendment

original understanding. See, e.g., Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008); Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551 (2009). Some pro-originalist commentators shared this basic critique. See Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009). Others accused *Heller* of getting the history wrong, see David C. Williams, *Death to Tyrants: District of Columbia v. Heller and the Uses of Guns*, 69 OHIO ST. L.J. 641 (2008), or of mangling the Second Amendment’s text, see Posner, *supra* note 2. But some prominent figures of the so-called “New Originalism” movement vigorously defended *Heller*’s methodology. See, e.g., Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 940 (2009); Barnett, *supra* note 2.

4. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

5. *Id.* amend. I.

6. *Id.* amend. XIV, § 1.

7. *Id.* amend. II.

8. This is what Justice Scalia, writing for the Court, called it in *Heller*. 554 U.S. at 595.

clearly protects *some* instances of weapons possession from government interference; it clearly limits *in some way* the government's ability to regulate firearms. A significant number of Americans, however, disagrees, as a matter of policy or political morality, with the wisdom of protecting *any* right to possess guns.⁹

The relative specificity of the right protected by the Second Amendment thus renders the amendment almost innately controversial, regardless of how it is interpreted. By way of analogy, imagine a constitutional provision explicitly protecting “a woman’s right to abort a fetus she carries.” Surely there would be interpretive controversy over the precise meaning and application of the provision—whether it protects late-term abortions, for example. But the controversy would not disappear if the Court somehow magically struck upon the one true meaning of the text. Whatever the “right to abort a fetus” means, it must mean at least that some fetuses can be aborted without government interference. And that idea by itself would be enough to anger a great many Americans.

Or consider a real-world (though now thankfully defunct) analogy: the Fugitive Slave Clause, which gave to slave owners (parties to whom “Service or Labour may be due”) a right to have escaped slaves (“Person[s] held to Service or Labour”) “delivered up” upon the slave owner’s

9. Just how many Americans appears to be a difficult question to answer. Public-opinion surveys typically ask, not about objections to gun possession in the abstract, but about support for particular gun regulations or, more generally, attitudes toward relatively amorphous concepts like “gun control.” See, e.g., *Growing Public Support for Gun Rights*, PEW RESEARCH CTR. (Dec. 10, 2014), <http://www.people-press.org/2014/12/10/growing-public-support-for-gun-rights/> (reporting results of survey asking, inter alia, whether respondents think “it is more important . . . to protect the right of Americans to own guns, [or] to control gun ownership”); see also Margie Omero et al., *What the Public Really Thinks About Guns*, CTR. FOR AM. PROGRESS (Mar. 27, 2013), <https://cdn.americanprogress.org/wp-content/uploads/2013/03/GunPolling-5.pdf> (reporting overall trends in recent attitudes on gun-related issues). Pre-*Heller* polls often asked about respondents’ understanding of the Second Amendment, which of course is not the same thing as asking about their underlying moral views. See, e.g., *Guns: CNN/Opinion Research Corp. Poll June 4-5, 2008*, POLLINGREPORT.COM, <http://www.pollingreport.com/guns2.htm> (last visited Jan. 12, 2016) (asking whether respondents think the Amendment “guarantee[s] each person the right to own a gun, or [rather] protect[s] the right of citizens to form a militia without implying that each individual has the right to own a gun”); *Guns: USA Today/Gallup Poll Feb. 8-10, 2008*, POLLINGREPORT.COM, <http://www.pollingreport.com/guns2.htm> (last visited Jan. 12, 2016) (asking whether respondents “believe the Second Amendment . . . guarantees the rights of Americans to own guns, or . . . only guarantees members of state militias such as National Guard units the right to own guns”).

“Claim.”¹⁰ The proper interpretation of the clause was a matter of contention, to be sure.¹¹ But it would have been difficult to read the clause in a way that did not require “delivering up” at least *some* fugitive slaves—and that in itself was sufficient to convince many Americans that the Fugitive Slave Clause (perhaps even the Constitution as a whole) was wicked.¹²

The Second Amendment thus brings front and center the question, not merely of how the Court should interpret constitutional rights, but of why—indeed whether—those rights ought to bind us at all. It is a strangely underexplored question in American constitutional discourse. The debate over the “countermajoritarian difficulty” of judicial review is so familiar as to be wearisome;¹³ but that debate almost invariably focuses on the courts’ role in deciding constitutional issues, not on the question of why democratically enacted policies ought to be trumped by centuries-old constitutional provisions, however the courts may interpret them.¹⁴

The questions of whether, and why, constitutional rights bind us—of whether (and why) we, the democratic majority, ought to obey them—are questions about the *authority* of the Constitution. Authority is a nuanced concept, as I explain in Part II, but its basic gist is this: if a command (say, a constitutional provision) possesses authority, we are obligated to obey it

10. U.S. CONST. art. IV, § 2, cl. 3.

11. For example, in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), the Court interpreted the Fugitive Slave Clause broadly to override state requirements of judicial process before alleged escaped slaves could be privately seized. The decision provoked considerable resistance in the North, including new state laws like that in Massachusetts, which barred the use of state employees or facilities to assist in “recapturing” alleged fugitives. See 1 MELVIN I. UROFSKY & PAUL FINKELMAN, *A MARCH OF LIBERTY* 395 (3d ed. 2011).

12. Abolitionists such as William Lloyd Garrison and Wendell Phillips “condemned the Constitution as a proslavery compact, which they called a ‘covenant with death’ and ‘an agreement in Hell.’” UROFSKY & FINKELMAN, *supra* note 11, at 385.

13. For more on this point, see Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153 (2002).

14. This, for instance, was the exclusive focus of the book by Alexander Bickel that inducted the phrase “the countermajoritarian difficulty” into the lexicon. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986). Bickel set the terms of the debate in which American constitutional theorists have been engaged ever since, and many of the most significant subsequent entries in that debate also have attended to judicial review in particular rather than constitutionalism more generally. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 1-38 (1996).

even if we disagree with it, and without regard to the possibility of punishment for disobedience. If the command lacks authority, however, we have no obligation to obey it; obedience to a nonauthoritative command is a moral mistake. If the Second Amendment lacks legitimate authority, it cannot bind Americans who disagree with its content.

And note that such a failure of authority would be problematic even if a majority of America *agrees* with a given constitutional provision, as is probably the case with the Second Amendment at the time of this writing.¹⁵ Constitutional disobedience need not be national in scope. A state or municipality, for example, whose majority disapproves of a “right . . . to keep and bear Arms”¹⁶ could enact laws infringing that right, in essence thumbing its collective nose at the Second Amendment. A judge who disapproves of the right could refuse to enjoin one of these state or local laws. A relatively small group of congressmen opposed to the right could block a federal legislative remedy against recalcitrant states and localities. And so on.

The authority of constitutional provisions like the Second Amendment therefore is an issue of considerable importance. The sources and merits of the Constitution’s claim to authority, however, turn out to be remarkably unclear. This Article uses the Second Amendment as a framework for exploring the foundations of constitutional authority. Building on earlier work, I examine the range of reasonable accounts of that authority, finding most of them unconvincing. Most accounts of constitutional authority are what I call *substantive* in nature: they require obedience to the Constitution because of *what* the Constitution commands. I contend that the only plausible justification of constitutional authority is not substantive in this sense, but rather *procedural*: it requires obedience to the Constitution, not because of what it commands, but because of *how* it commands us—that is, because of the process by which constitutional commands are generated.

I then measure the Second Amendment against this procedural account of constitutional authority. There are a number of ways to interpret the Amendment that are reasonable in light of our interpretive traditions, but most of these interpretations rest on one or more implausible substantive theories of authority. This includes both the *Heller* “individual self-defense” reading and the “anti-tyranny” reading that is common in popular

15. See, e.g., Omer et al., *supra* note 9, at 2 (“There is an emerging consensus on guns among the American public. Most Americans agree that handguns should not be banned, that more needs to be done to keep guns away from dangerous people, and that military-style weapons don’t belong on the streets.”) (emphasis omitted).

16. U.S. CONST. amend. II.

discourse.¹⁷ I argue that if these interpretations are correct, the Second Amendment lacks authority over us; we have no moral obligation to obey it. As an alternative to these problematic readings of the amendment, I point to the interpretation advanced by Justice Stevens in his dissent in *Heller*, which has at least a credible claim to consistency with a procedural account of constitutional authority.¹⁸

My analysis, while hopefully interesting to participants in the *Heller* debate, has significance well beyond the Second Amendment. First, it provides markers that can be used to spot other problematic constitutional provisions or interpretations and to avoid adding such provisions to our Constitution in the future. For instance, the analysis suggests that the Court's "substantive due process" decisions—including its recognition of an abortion right—rest on weak authoritative foundations. The Article thus points toward a sort of jurisdictional principle of constitutionalism, justifying constitutional rules that serve procedural functions but not those that simply impose controversial substantive values on an otherwise democratic process.

Second, the analysis suggests that considerations of constitutional authority ought to play a role in constitutional interpretation—not just in the development of general interpretive methodologies, as I've argued elsewhere,¹⁹ but also in the interpretation of particular constitutional provisions. A reasonable interpretation that makes sense of constitutional authority—one that gives us a reason to obey the provision being interpreted—is better than one that fails to do so, all else being equal.

II. What Is Constitutional Authority (and Why Should We Care)?

Constitutional authority is the central concept in this Article, and in this part, I explain what it is and why it matters. I begin in Section A by discussing the features of legal authority generally. In Section B, I describe the need for a theory to explain whether, and how, legitimate authority can exist. In Section C, I note the special dynamics of legal authority in the context of constitutional law, and in Section D I suggest that these dynamics make it particularly difficult to justify constitutional authority.

17. See *infra* note 140.

18. 554 U.S. 570, 636-78 (2008).

19. I have taken a position elsewhere about which of these purposes can justify general legal authority. See Christopher J. Peters, *What Lies Beneath: Interpretive Methodology, Constitutional Authority, and the Case of Originalism*, 2013 BYU L. REV. 1251 [hereinafter Peters, *What Lies Beneath*].

A. *The Concept of Legal Authority*

Law purports to have amazing powers. It purports to tell its subjects how to behave, even when those subjects disagree with what the law commands—indeed, as I’ll explain, even when the law is *wrong*—and even when disobedience is unlikely to be detected. And of course it claims the right to punish subjects whose disobedience *is* detected.

Law, in other words, claims *authority*. “Authority is the right to command,” writes Robert Paul Wolff, “and correlatively, the right to be obeyed.”²⁰ Wolff himself argues that such a right does not exist,²¹ but let us suppose for present purposes that it does. Assuming it exists, what does this “right to be obeyed” entail?

(1) *Normativity*. First, it entails a right to be obeyed even in cases where punishment for disobedience is unlikely. Consider the substance of most legal commands: they purport to apply to everyone within their purview, not just those who fear being punished for disobeying them. The obligation to report one’s full income on one’s tax return, for example, applies to every person required to file a return, not just to citizens likely to be tagged for an IRS audit. Speed-limit signs on the highway do not read “65 mph (except when no cops are around).” Clearly the authors of these laws intend them to apply in all cases, including those many cases in which coercive enforcement is unlikely.

This understanding about legal commands is not limited to lawmakers or other legal officials; it is shared by those subject to law as well. As H.L.A. Hart famously made clear, people who are subject to law typically perceive an obligation to obey the law that does not depend on coercion.²² Hart observed that our typical moral intuitions about legal commands differ from our intuitions about orders backed up only by threats of force; while we might feel “obliged” to hand over our money to an armed robber, we would not think ourselves “under an obligation” to do so.²³ In contrast, we have an “obligation” to send money to the IRS by April 15. While the necessity of obeying the gunman disappears as soon as the gunman (or the gun) is gone,

20. ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM 4 (rev. ed. 1998); *see also* Scott J. Shapiro, *Authority*, in THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 382, 385-87 (Jules Coleman & Scott Shapiro eds., 2002) (describing Wolff’s views).

21. WOLFF, *supra* note 20.

22. *See* H.L.A. HART, THE CONCEPT OF LAW 82-91 (2d ed. 1994). Hart’s analytical conclusion is supported by empirical research. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 62-68 (2006) (reporting results of an empirical study suggesting that people often obey the law because of “normative” beliefs in the law’s legitimacy).

23. HART, *supra* note 22, at 82-83.

our obligation to pay our taxes exists, and persists, even if we are unlikely to suffer punishment for failing to pay them. Our fortuitous evasion of an audit, or our intentional fleeing of the jurisdiction to avoid payment, might escape the coercion, but it does not erase the obligation.²⁴

I will refer to this property of authority—its capacity to require obedience even absent coercion—as *normativity*. In claiming a right to be obeyed, law and other supposed authorities claim a normative power, the power to create a certain kind of reason for action: a reason why one *ought* to act in a certain way, regardless of whether one is being physically coerced into doing so.

This is not to say that there is no relationship between legal authority and coercion. It seems likely that the right to coerce obedience follows from the existence of legal authority. As Larry Alexander and Emily Sherwin point out, “[I]ndividuals will sometimes err in their [moral] calculations and disobey [a legal] rule . . . when they believe that its prescription is wrong for the circumstances in which they find themselves.”²⁵ Coerced obedience may be necessary to prevent people from acting on these moral miscalculations. It may also be necessary to prevent people from unjustifiably disobeying the law, not due to moral miscalculation, but simply out of bad faith. In other words, if law imposes an obligation of obedience, it may be appropriate to enforce that obligation by coercion.

But it is the obligation that licenses the coercion, not the coercion that creates the obligation. If the power to coerce obedience were sufficient to generate normativity—to create a moral obligation to obey—then there would be no meaningful moral difference between the tax laws and the demands of an armed robber. Evading taxes would then be the moral equivalent of escaping a robbery. To the contrary, even when we cheat the government we acknowledge that there is some moral cost in doing so. That is the significance of the language of “cheating”—that we are doing something at least a little wrong when we evade a command. As Wolff puts it, “[W]ho would speak of ‘cheating’ a thief?”²⁶

(2) *Content-independence*. An authority’s right to be obeyed also exists regardless of the moral content of what the authority is commanding. Authorities do not say “Obey this command provided it is the right thing to do”; they say, simply, “Obey this command.” Authoritative commands thus differ from arguments, which invite the audience to decide for themselves

24. *Id.* at 83-84.

25. LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, & THE DILEMMAS OF LAW* 54 (2001).

26. WOLFF, *supra* note 20, at 4.

how best to act, with the argument as a prod or a guide. “[Arguments] attempt to convince the person that they ought to act in certain ways Commands, on the other hand, are not designed to convince their addressees of the wisdom of their contents.”²⁷ Commands demand obedience, not moral contemplation. “To obey a command is to perform the act commanded *for the reason that it was commanded*.”²⁸

To obey a command “for the reason that it was commanded” is necessarily to obey that command without regard to its moral content.²⁹ Driving no faster than sixty-five miles per hour might be the correct thing to do in a particular circumstance, morally speaking, or it might be incorrect. Morality, properly considered, might permit driving as fast as (say) seventy-five in a given circumstance, despite the existence of a sixty-five-miles-per-hour speed limit. But the driver who obeys the speed limit does not stop to consider this question before doing so. If she decides to drive sixty-five because she thinks that is the morally best speed, all things considered, then she is not really *obeying* the speed-limit law; she is obeying the dictates of morality, which happen in this case to coincide with the law’s command (or so she believes). And if she decides to drive seventy-five because she thinks that is the morally proper speed, then clearly she is not obeying the law even in a superficial sense.

True obedience precludes an all-things-considered moral judgment. And so our reason to obey the law or some other authoritative command must be something other than the command’s consistency with morality. Legal philosophers refer to this requirement as one of *content-independence*: the duty to obey an authority must be independent of the moral content of the authority’s commands.³⁰

In fact this requirement is simply an entailment of the property of normativity discussed above. In order for a command to impose a moral reason for action, it must change the calculus of moral reasons that would exist without the command; it must introduce to that calculus a *new* reason for action. The fact that a command is consistent with what morality already requires is not a *new* reason; people already have sufficient reason to do what morality requires. Normativity entails some additional reason to obey a command, independent of its consistency with the demands of morality.

27. Shapiro, *supra* note 20, at 386.

28. *Id.* (emphasis added).

29. *See id.*

30. *See* H.L.A. HART, *Commands and Authoritative Legal Reasons*, in *ESSAYS ON BENTHAM* 253-55 (1982); Shapiro, *supra* note 20, at 389.

(3) *Special moral force or moral status.* Finally, the right to be obeyed entails that the content-independent moral reason or reasons for obedience be stronger than, or have a superior status to, ordinary reasons for action. This property is inherent in the notion of a *right* to be obeyed, and in the correlative notion of a *duty* or *obligation* to obey. A duty or obligation is greater than a mere reason to act.

Compare law in this respect to other examples of actions taken in response to someone's "order" or request. It is common to speak of "doctor's orders," for example, so suppose a doctor counsels her patient to avoid high-cholesterol foods. The patient might be strongly inclined to follow the doctor's advice, since the doctor is, relative to the patient, an expert (an "authority") on matters of health. Except in unusual circumstances, however, the patient wouldn't consider himself morally *obligated* to follow the doctor's advice. Instead, the patient would treat that advice as simply another reason—albeit perhaps an especially weighty one—for taking a certain action. Sometimes that reason might be outweighed by countervailing reasons, as when the patient, celebrating his wedding anniversary at an expensive restaurant, decides that the occasion warrants ordering the filet mignon rather than the salad.

A legal command differs in this sense from the "order" (really the advice) of a doctor. A command is not presented by the person issuing it, or understood by those subject to it, as simply one among many reasons for action, to be weighed against competing reasons. Of course commands—legal rules, for example—may have exceptions, but those exceptions are themselves products of commands (e.g., the legal rule recognizing self-defense as an exception to the legal rule prohibiting murder). Where no legal exception applies, legal officials expect obedience to the law, not just due consideration of whether to obey as part of an all-things-considered judgment about what to do.

The question of what exactly is morally distinctive about an authoritative rule or command is controversial among legal philosophers. Some argue that authoritative commands take on a special *status* in our moral reasoning: they preempt or supplant other moral reasons for action, requiring us to act based on the command rather than on the full panoply of otherwise relevant reasons.³¹ Others contend that authoritative commands exert special *force* in our moral reasoning—creating a moral presumption, perhaps, that might be

31. See, e.g., ALEXANDER & SHERWIN, *supra* note 25, at 4, 11-17, 26-34, 55-61; JOSEPH RAZ, *THE MORALITY OF FREEDOM* 57-62 (1986). See generally Shapiro, *supra* note 20, at 404-05.

overcome by countervailing factors.³² We can remain agnostic about these debates for purposes of this Article. The important thing to note is that the concept of authority presupposes more than just an everyday reason for obedience. It supposes a reason on the order of an obligation or duty, one that cannot simply be weighted on an equal basis with other moral reasons for action.

At the same time, it is important to acknowledge the limits of a “right to be obeyed” and a corresponding obligation to obey. It is implausible that the right and the corresponding obligation are absolute. The right and the obligation must be *defeasible*; they must be capable of being outweighed by competing considerations in certain circumstances, even if those circumstances are rare. Otherwise there would be no such thing as justified disobedience to valid law. We recognize that disobedience sometimes is justified, even when the law being disobeyed is valid. Exceeding the posted speed limit, for example, might be the right thing to do, morally speaking, if the driver is rushing a severely injured person to the hospital. This does not mean the speed-limit law is invalid; it means only that there are circumstances in which morality permits (perhaps even requires) disobedience to the law despite its validity.

We should keep this point in mind in discussing constitutional authority: even a constitutional provision that is validly authoritative might on occasion be subject to justified disobedience. This, in essence, was Abraham Lincoln’s position in defense of his unilateral suspension of habeas corpus in the early days of the Civil War.³³ Lincoln told Congress not that the Suspension Clause lacked authority under those circumstances, but rather that disobeying it was justified despite its authority, lest “all the laws[,] but one[,] go unexecuted.”³⁴

B. Legitimate Authority

Authority—the right to be obeyed—therefore is the conjunction of the properties of normativity, content-independence, and special (but not absolute) moral force or status. In shorthand, *a command possesses*

32. See, e.g., FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 202-05 (1991); Stephen R. Perry, *Second-Order Reasons, Uncertainty and Legal Theory*, 62 S. CAL. L. REV. 913, 966 (1989); Donald H. Regan, *Authority and Value: Reflections on Raz’s Morality of Freedom*, 62 S. CAL. L. REV. 995, 1003-13 (1989).

33. See UROFSKY & FINKELMAN, *supra* note 11, at 459-63.

34. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 594, 601 (Roy P. Basler ed., 1946).

authority if it imposes a defeasible content-independent moral obligation to act as the command directs.

Of course, a person or institution might claim authority for its commands but do so unjustifiably: its commands might not in fact impose a defeasible content-independent moral obligation to act. This is possible even if those subject to the commands generally believe they are authoritative. *De facto* authority might exist without legitimate, or *de jure*, authority.³⁵ Where this is the case, those subject to the supposed authority are committing a moral error, perhaps a quite serious one: they are obeying another's commands without justification for doing so.

Some have argued that there is no such thing as *de jure*, or legitimate, authority.³⁶ Others have argued, somewhat more modestly, that *law* cannot possess legitimate authority, at least not in a general sense.³⁷ To defeat these arguments, it would be necessary to articulate an account of legal authority that justifies law's typical imposition of the kind of duty described in the previous section. An account of legitimate legal authority requires a justification of a general content-independent moral obligation (albeit only a defeasible one) to obey legal commands.³⁸

An account of *constitutional* authority—the subject of this Article—need not be quite so ambitious, although it may prove at least as difficult. Such an account need only justify the capacity of constitutional law (not law generally) to impose a defeasible content-independent moral obligation to act. If such an account is successful, then it can mark out the terms on which constitutional authority is legitimate—the circumstances in which those subject to a constitution have a duty to obey it, and in which they may be punished for failing to do so. If an account of constitutional authority is not successful, then obedience to a constitution according to the terms of that account, and enforcement of that obedience, are unjustified. And if no plausible account of constitutional authority is available, then constitutional obedience and constitutional enforcement are unjustified, full stop. Without constitutional authority, our practice of obeying the Constitution's commands would be a moral mistake.

35. See WOLFF, *supra* note 20, at 10; see also Shapiro, *supra* note 20, at 386.

36. See, e.g., WOLFF, *supra* note 20, at 10.

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

38. I have attempted such an account elsewhere. See generally CHRISTOPHER J. PETERS, *A MATTER OF DISPUTE: MORALITY, LAW, AND DEMOCRACY* (2011) [hereinafter PETERS, *MATTER OF DISPUTE*].

C. *The Particular Dynamics of Constitutional Authority*

That mistake, moreover, would be a serious one indeed, because it would entail the unjustified impairment of the democratic process. In most instances, those subject to the supposed authority of the United States Constitution are government decision makers, not private actors.³⁹ Constitutional law tells government officials what they must, may, and may not do; it applies to legislators, executive-branch officials, judges, and other government agents acting in their capacity as officials of government. Constitutional law also applies to individual citizens *qua* citizens: by limiting what their government may do, it limits what citizens can accomplish with their votes and political expression. Most of American constitutional law does *not*, however, apply to persons in their capacities as private actors. To put things in Hartian terms, constitutional law consists mostly of “*secondary* rules,” rules that are “*about*” the primary rules of conduct in the system—about how to create the primary rules, how to change them, and what their content can be.⁴⁰

Constitutional commands therefore demand the obedience of participants in the everyday democratic process. For those commands to possess legitimate authority, they must be capable of imposing a defeasible content-independent obligation upon the democratic majority and its political representatives—capable, that is, of constraining ordinary democracy.

D. *The Special Problematics of Constitutional Authority*

In his provocative book *On Constitutional Disobedience*, Louis Michael Seidman argues that the United States Constitution lacks legitimate authority.⁴¹ The Constitution, Seidman contends, is a “deeply flawed, eighteenth-century document[.]”⁴² Yet it purports to limit what “We the People” (“the actual people of the here and now,” in the words of another constitutional theorist, Alexander Bickel⁴³) can decide through democratic

39. The current exceptions are the first clause of Section 3 of Article III, which defines the crime of treason, and the first clause of Article III, Section 3, and Section 1 of the Thirteenth Amendment, which prohibits “slavery or involuntary servitude” even when practiced by private actors. U.S. CONST. amend. XIII, § 1. The historical exception was the Eighteenth Amendment, which prohibited “the manufacture, sale, or transportation of intoxicating liquors” regardless of who was doing the manufacturing, selling, or transporting. *Id.* amend. XVIII, § 1 (repealed 1933).

40. HART, *supra* note 22, at 94.

41. LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* (2012).

42. *Id.* at 4.

43. BICKEL, *supra* note 14, at 17.

processes. “[W]ho in their right mind” would accept such a limitation? Seidman asks.⁴⁴ Seidman addresses and rejects a litany of arguments in favor of constitutional authority, including the contention that “anarchy or tyranny” would result from constitutional disobedience.⁴⁵ “Other successful, nonanarchic, and nontyrannical countries like the United Kingdom and New Zealand seem to do just fine without a written Constitution,” he points out.⁴⁶

Seidman’s argument might sound radical, but in fact it is just a recent volley in a long-running skirmish over the legitimacy of constitutional authority. For as long as American courts have been declaring government actions “unconstitutional,” people have argued that the supposed authority behind these acts of judicial review does not really exist.⁴⁷ Typically these objections have been directed at the practice of judicial review (courts’ invalidation of political decisions, or refusal to enforce them, on constitutional grounds),⁴⁸ although some recent critiques have focused more broadly on constitutional law itself, or on particularly salient aspects of constitutional law such as bills of rights.⁴⁹ Like Seidman, these historical critics typically have lamented the supposedly “countermajoritarian” (that is, antidemocratic) impact of constitutional law.⁵⁰ In advocating disobedience to the Constitution rather than (say) mere curtailment of

44. SEIDMAN, *supra* note 41, at 7.

45. *Id.* at 18 (emphasis omitted).

46. *Id.*

47. *See* Friedman, *supra* note 13, at 172-215.

48. *See, e.g.*, LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES (1958); James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). *But see* RONALD DWORKIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 1-38, 332-47 (defending judicial review against many of these critiques); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (same); BICKEL, *supra* note 14 (same).

49. *See, e.g.*, JAMES ALLAN, THE VANTAGE OF LAW: ITS ROLE IN THINKING ABOUT LAW, JUDGING AND BILLS OF RIGHTS (2011); JEREMY WALDRON, LAW AND DISAGREEMENT 211-312 (1999) [hereinafter WALDRON, LAW AND DISAGREEMENT]; Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1380-82 (2006) [hereinafter Waldron, *Against Judicial Review*]. Despite the title of Waldron’s article, it is in fact at least as much an attack on codified constitutional rights as on judicial review as a method of interpreting and enforcing them.

50. Alexander Bickel coined the term “The Counter-Majoritarian Difficulty” to describe the tension between judicially enforced constitutional norms and the principles of democracy. *See* BICKEL, *supra* note 14, at 16. The term has since become commonplace, though it usually is rendered without Bickel’s hyphen. *See, e.g.*, Friedman, *supra* note 13, at 13.

judicial review, Seidman has simply pushed these critiques to their logical conclusion.

Seidman also makes explicit what has typically been an unstated premise of these critiques: that ordinary democratic processes are fully capable of performing most or all of the functions of law without the need for a judicially enforceable constitution.⁵¹ We can imagine a number of purposes that might justify law in general, such as inducing morally correct action, resolving costly disputes, and solving coordination problems. In essence, Seidman and these other critics ask why we can't just rely on everyday democratic lawmaking to serve these aims. As Seidman points out, it seems unlikely that anarchy or tyranny would immediately result if we stopped obeying the Constitution; subconstitutional law could simply pick up the slack.⁵² This, after all, is what happens in liberal democracies without written constitutions, like Great Britain.

These critics thus question the *benefits* of constitutional law. And, on the other side of the equation, they emphasize its rather troubling *costs* in the coin of democracy. When the "eighteenth-century" Constitution was ratified, "No women, African Americans, or Indians and few individuals without property were allowed to cast votes."⁵³ Worse, "[N]o one alive today had anything to do with the ratification process. As Thomas Jefferson famously insisted, the world belongs to the living."⁵⁴ Constraining the capacity for self-government of today's democratic majority, as constitutional law clearly does, thus seems deeply contrary to democratic principles. There had better be significant benefits to outweigh these costs.

Seidman's critique therefore underscores the special challenges that a defense of constitutional authority must overcome. It is not enough to develop a compelling account of why law in general ought to compel obedience. Defenders of constitutional authority must go further; they must explain why democratically enacted law should be subject to the supposedly superior authority of an eighteenth- and nineteenth-century Constitution.

51. Jeremy Waldron also has endorsed this premise explicitly, and indeed has defended it at length. See WALDRON, *LAW AND DISAGREEMENT*, *supra* note 49, at 21-146; Waldron, *Against Judicial Review*, *supra* note 49, at 1361-62.

52. SEIDMAN, *supra* note 41, at 18.

53. *Id.* at 6-7. Seidman is not quite correct about this; some free African Americans, and a few women, could vote at the time the Constitution was adopted. See *infra* note 62 and accompanying text.

54. SEIDMAN, *supra* note 41, at 7.

III. Accounts of Constitutional Authority

Can the challenge of justifying constitutional authority be met? Drawing on my previous work,⁵⁵ in this part I examine five competing accounts of constitutional authority, each of which has prominent contemporary or historical adherents. Four of these accounts, I argue, are implausible. The lone plausible account follows the lines sketched by the Court in *Carolene Products* Footnote Four and subsequently shaded in by John Hart Ely. In Part IV, I superimpose this account on the Second Amendment, suggesting that it can justify neither *Heller* nor most other reasonable interpretations of the “right . . . to keep and bear Arms.”⁵⁶

A. Authority by Consent

A common way to justify the authority of the Constitution is to claim we have consented to obey it.⁵⁷ These “Consensualist” accounts make intuitive sense: individuals sometimes consent to do something they otherwise would not be required to do (babysit a friend’s child, donate money to charity, submit renovation plans to a homeowners’ association board), and that consent might give them a powerful moral reason (maybe even an obligation) to do the thing to which they have consented. If individuals can create obligations through consent—including obligations to obey an authority (think of the homeowners’ association example)—perhaps societies can too. Contractarian theories of political obligation, from Locke to Rawls, are built on this basic premise,⁵⁸ as are contemporary “popular sovereignty” accounts of constitutional law.⁵⁹

55. The previous scholarship is PETERS, MATTER OF DISPUTE, *supra* note 38; Peters, *What Lies Beneath*, *supra* note 19; and Christopher J. Peters, *Originalism, Stare Decisis, and Constitutional Authority*, in PRECEDENT IN THE UNITED STATES SUPREME COURT 189 (Christopher J. Peters ed., 2014) [hereinafter Peters, *Originalism*].

56. U.S. CONST. amend. II.

57. See, e.g., THE FEDERALIST NO. 78, at 395 (Alexander Hamilton) (Ian Shapiro ed., 2009) (ascribing constitutional authority to a “solemn and authoritative act” by “the people”); Edwin Meese III, The Law of the Constitution (Oct. 21, 1986) (speech at Tulane University), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 99, 102 (Steven G. Calbresi ed., 2007) (describing the Constitution as “the instrument by which the consent of the governed—the fundamental requirement of any legitimate government—is transformed into a government”).

58. See JOHN LOCKE, *Second Treatise*, in TWO TREATISES OF GOVERNMENT 388-94 (Peter Laslett ed., Cambridge Univ. Press 1960) (1689); JOHN RAWLS, A THEORY OF JUSTICE 11-17 (1971). There are of course complexities here, many arising from the fact that Rawls’s theory (explicitly) and Locke’s theory (implicitly) rely, not on actual consent, but on hypothetical or constructive consent. It is far from clear that constructive-consent theories

Consent conceivably might generate the three aspects of authority discussed in Section II.A: normativity, content-independence, and special moral force or status. The fact that we have consented to do something might supply a reason for us to do that thing quite apart from the threat of punishment for not doing it. The fact of our consent also clearly is a content-independent reason for us to act. However distasteful we might now find the requirements of, say, the Second Amendment, our consent to obey the amendment—if in fact we have given it—provides us with a reason to obey its command. It seems possible, moreover, that this reason would have special force or status: it might rise to the level of an obligation or duty, not just an ordinary reason for action.

While consent might justify the authority of some imaginable constitution, however, it cannot justify the authority of *our* Constitution. One cannot consent to something if one has not been given the opportunity to say “no,”⁶⁰ and one cannot be deemed to have consented if one has been given the opportunity to say “no” and has in fact done so. The conjunction of these facts raises two insurmountable obstacles for Consensualist theories of American constitutional authority.

The first obstacle is that consent to our Constitution was far from unanimous even at the time the relevant provisions were adopted.⁶¹ As Seidman points out, a great many Americans at the time of the original Framing—women, people of African descent, many who did not own property—were excluded from the process of ratifying those provisions.⁶²

can find traction in the normative mechanics of actual consent. See PETERS, MATTER OF DISPUTE, *supra* note 38, at 52-57. Yet it is the intuitive and experiential force of actual consent that lends appeal to these constructive-consent theories.

59. *E.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 127-52 (1999); Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1444-53 (2007).

60. See RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 16 (2004) (“Just as I can say, ‘I consent,’ there must also be a way to say, ‘I do not consent.’”).

61. See *id.* at 20 (“The Constitution was not approved by a unanimous vote, nor even by a majority of all persons living in the country at the time. . . . How can a small minority of inhabitants presuming to call themselves ‘We the People’ consensually bind anyone but themselves?”).

62. Women were not allowed to vote in any state at the time of the Framing, with the minor exception of New Jersey, which “apparently did allow a few propertied widows to vote.” AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 19 (2005). Slaves could not vote in any state at that time, see *id.*, and free blacks could not vote in Georgia, South Carolina, and Virginia, see ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED

These Americans were not even given the opportunity to consent (or to withhold consent) to the Constitution by which they subsequently were bound. The same is true, albeit to a somewhat lesser extent, of the framing of the Reconstruction Amendments.⁶³ Moreover, many of those who were included in these processes actually opposed ratification.⁶⁴ It is difficult to see how these excluded or dissenting Americans somehow “consented” to be bound by the Constitution’s provisions.

Even if this problem of contemporaneous nonconsent could be overcome, Consensualist accounts face a second fatal obstacle: the Americans of today are *not* the Americans of the Framing generations.⁶⁵ No one alive today was alive when the original Constitution, the Bill of Rights, or the Reconstruction Amendments were adopted, meaning that no American alive today actually consented to the ratification of those provisions. And while it is true that some Americans alive today *have* consented to obey the Constitution—naturalized citizens have done so,⁶⁶ as have government officials⁶⁷—this is a small minority of the citizenry. Because the American voting public is the ultimate subject of constitutional constraint, all of us who are members of that voting public would have to

HISTORY OF DEMOCRACY IN THE UNITED STATES 328-29 tbl.A.1 (2000). Eleven of the thirteen states required ownership of property in order to vote at the time they ratified the Constitution. *See id.* Akhil Amar notes, however, that eight of these states suspended or liberalized their property requirements for purposes of electing delegates to their ratifying conventions. *See AMAR, supra*, at 7.

63. Racial restrictions on the franchise actually tightened between the Founding and the Civil War, such that in 1868, when the Fourteenth Amendment was ratified, free blacks could vote in only eight of the thirty-three states. *See KEYSSAR, supra* note 62, at 53-60, 87-89. Most property requirements had disappeared by the Civil War, *see id.* at 352-56 tbl.A.9 (showing only three states with property requirements as of 1855), but women still could not vote in any state at that time, *see id.* at 172-83.

64. *See UROFSKY & FINKELMAN, supra* note 11, at 121-28 (describing the contentious process of ratifying the original Constitution); *id.* at 47-76 (describing ratification of the Thirteenth Amendment by provisional Reconstruction legislatures in the South); *id.* at 502-04 (noting that ratification of the Fourteenth Amendment was in effect coerced by requiring it for readmission to the Union).

65. *See BARNETT, supra* note 60, at 20 (“[A]ssuming [those who voted for the Constitution] could somehow bind everyone then alive, how could they bind, by their consent, their posterity?”).

66. *See* 8 U.S.C. § 1448(a) (2012) (“A person who has applied for naturalization shall, in order to be . . . admitted to citizenship, take in a public ceremony before the Attorney General or a court with jurisdiction . . . an oath . . . to support the Constitution of the United States . . .”).

67. *See* U.S. CONST. art. VI, cl. 3 (requiring that all federal and state legislators, judges, and officials “be bound by Oath or Affirmation, to support this Constitution”).

have given our consent to be bound in order for a Consensualist account to justify constitutional authority. Relatively few of us have done so.

Consensualist accounts of constitutional authority are rhetorically appealing, drawing as they do on strong intuitions and a tradition of statesmanship that includes figures like Abraham Lincoln.⁶⁸ And, if all Americans unanimously and freely consented to be bound by the Constitution tomorrow, consent might work to justify its authority over us—until the next generation of Americans, not having consented, assumed their roles as citizens. But such an act of unanimous, contemporaneous consent has never occurred in our country and almost certainly never will. It is a chimera in any large, diverse society, and without it the moral power of consent cannot justify constitutional authority.

B. Authority by Substance, Part I: Moral Content

Some theorists, most prominently Randy Barnett,⁶⁹ have been convinced by the failure of Consensualist theories to adopt what I will call a “Moral Content” account of constitutional authority.⁷⁰ On a Moral Content account, the Constitution is authoritative because its provisions are, in essence, substantively good ones;⁷¹ our obligation to obey the Second Amendment (or any other constitutional provision) stems simply from the fact that the provision tells us the right thing to do. On this view, morality or justice requires us to respect the right to keep and bear arms, and for that reason we should obey the amendment’s command to that effect.

Moral Content accounts fail as accounts of constitutional authority for a straightforward reason: they vitiate the element of content-independence that is a necessary ingredient of authority. On a Moral Content account, our supposed reason to obey a constitutional command is that it is a substantively *good* command. But this makes our supposed obligation to

68. Abraham Lincoln, The Repeal of the Missouri Compromise and the Propriety of Its Restoration: Speech at Peoria, Illinois, in Reply to Senator Douglas (Oct. 15, 1854), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS, *supra* note 34, at 283, 304 (identifying “the sheet anchor of American republicanism” as the principle “that no man is good enough to govern another man, *without that other’s consent*”).

69. See BARNETT, *supra* note 60, at 4, 32-86 (outlining a theory of constitutional “legitimacy” according to which, “if a constitution contains adequate procedures to protect . . . natural rights, it can be legitimate even if it was not consented to by everyone”). For a more extensive analysis and critique of Barnett’s account of constitutional authority, see Peters, *What Lies Beneath*, *supra* note 19, at 1266-73.

70. Elsewhere, for reasons evident from the context, I have referred to this as a “Values Imposition” account. See Peters, *What Lies Beneath*, *supra* note 19, at 1272.

71. See BARNETT, *supra* note 60, at 4.

obey contingent entirely on the moral status of what the law requires. If respecting the right to keep and bear arms is the morally correct thing to do, then our obligation to do that thing flows entirely from the commands of morality and not at all from the Second Amendment; the legal command embodied in the amendment is superfluous. On the other hand, if respecting the right to keep and bear arms is *not* the morally correct thing to do, then we have no obligation to do it, despite the fact that the Second Amendment commands us to; the legal command embodied in the amendment is impotent.⁷²

Of course, the requirements of morality are not transparent, and so we can never know for certain whether, in any given circumstance, morality or justice requires us to respect the right to keep and bear arms. We might then decide to obey the Second Amendment as a way to dispel our uncertainty or resolve our disagreement about what to do. Note, however, that if we obey the Constitution as a way to resolve uncertainty or disagreement, we are not obeying it because its commands are good or correct; we are obeying it precisely because we do not *know* whether its commands are good or correct. This is an altogether different sort of reason to obey the Constitution—an example either of the “Moral Guidance” rationales that I discuss in the next section or of the procedural accounts that I examine in Section III.D.

As a practical matter, the content-dependence of Moral Content accounts bares its teeth whenever we *disagree* with—or about—the substance of what the Constitution commands. If we believe that morality or justice requires us, in a given circumstance, to *deny* the right to keep and bear arms, a Moral Content account gives us no reason to obey the Second Amendment. On these accounts, the only reason to obey the Constitution is that it is correct, morally speaking, and if we deny that the Constitution is morally correct, we perceive no reason to obey it. Perhaps worse, if some of us believe the Constitution is morally correct and others deny this, then we will disagree, not just about morality, but about legal authority—about whether the law is worthy of our obedience. Law must be capable of quieting disagreements; it must operate, in Jeremy Waldron’s words, as “a decision-procedure whose operation will settle, not reignite, the controversies whose existence called for a decision-procedure in the first

72. Cf. Shapiro, *supra* note 20, at 383 (describing the “challenge posed” by those who deny the existence of legitimate authority: “when authorities are wrong, they cannot have the power to obligate others—when they are right, their power to obligate is meaningless. . . . [T]he institution of authority is either pernicious or otiose.”).

place.”⁷³ Law cannot serve this function if its perceived authority extends only so far as the perceived moral content of its commands.

What explains the appeal of Moral Content accounts if they are so saliently deficient as accounts of legal authority? I suspect that, as with Consensualist accounts, untested intuition is the culprit. As I discussed in Section II.A.3, law cannot legitimately force us to do the morally wrong thing; our ultimate obligation is to morality. And yet we speak and act in terms of an “obligation” to “obey” the law. These two senses of “obligation” seem to tug in opposite directions, and the easy way to reconcile them is to equate them, by imagining that we are obligated to obey the law *because* (and thus only to the extent that) it is consistent with morality.

This intuitive equation rests on two fallacies. The first is an assumption that a legal obligation must be morally absolute. If the existence of a legal obligation implies an absolute moral duty, then law’s content cannot be inconsistent with morality. As I discussed in Section II.A.3, however, it is highly implausible that legal obligations are morally absolute. When we speak of a legal “obligation,” we use the language of obligation to connote the normativity and special moral force or status of law: our reasons to obey the law exist independently of the threat of force, and they are stronger than (or different in kind from) ordinary reasons for action. But the language of legal obligation leaves open the possibility that, in any given case, the demands of morality will outweigh those of authoritative law. Once we recognize this possibility, the logical necessity that law be coextensive with morality disappears.

The second fallacy is the failure to distinguish between the demands of morality and our fallible human beliefs about those demands. Law cannot give us a reason to act in a way that is inconsistent with the demands of morality. But it *can* give us a reason to act in a way that *we believe* is inconsistent with the demands of morality. One way to understand accounts of legal authority is to see them as attempts to explain the nature of this reason. Moral Content accounts necessarily fail at this attempt, because they do not even make the attempt. They simply equate a duty of obedience with the demands of morality, ignoring altogether our inherent uncertainty about what the demands of morality really are.

Despite their intuitive appeal, then, Moral Content accounts cannot justify an obligation actually to *obey* constitutional law (that is,

73. Waldron, *Against Judicial Review*, *supra* note 51, at 1371.

constitutional authority). All they can do is transplant our uncertainty and disagreement from the realm of morality to the realm of constitutional law.

C. Authority by Substance, Part II: Moral Guidance

Still, the intuitive pull of authority-by-substance persists. What can justify legal authority, if not the idea that we will do better, morally speaking, to obey the law than to disobey it? This insistent notion gives rise to a family of more-sophisticated versions of a substantive account, which I have called “Moral Guidance” accounts of legal authority.⁷⁴

According to a Moral Guidance account, the authority of constitutional (and other types of) law rests, not directly on the content of that law as on Moral Content accounts, but rather on the moral judgment of the lawmakers. As applied to constitutional law, a Moral Guidance account holds that there is something special about the process of framing or applying a constitution, something that makes the results of that process more likely, on the whole, to be good or just than the results of ordinary democratic politics. We therefore should obey constitutional law, on this account, not because its provisions are sound in every instance, but rather because its provisions are more likely to be sound than the alternatives we could produce using ordinary politics. Even if we think the Second Amendment is pernicious, we still have a strong reason to obey it on the Moral Guidance account—namely that we are likely to be wrong that it is pernicious, while the Framers were likely to be correct that it is not.

Note that Moral Guidance accounts seem to avoid the content-dependence problem that dooms straight-up Moral Content accounts. Our reason to obey the Constitution (on these accounts) is not that the Constitution is substantively just. Our reason, rather, is that the Constitution is *more likely to be* substantively just than the alternatives. Moral Content accounts ignore the fact of our uncertainty about what morality requires, but Moral Guidance accounts leverage that fact. They tell us that in the face of our moral uncertainty, we will do better, morally speaking, to obey the Constitution than to follow our own fallible moral judgments. As such, they offer us a content-independent reason to obey the Constitution even when we disagree with it, which is something Moral Content accounts cannot offer.

74. See Peters, *What Lies Beneath*, *supra* note 19, at 1297-1313; see also PETERS, MATTER OF DISPUTE, *supra* note 38, at 39-48 (describing and critiquing such an account—using the term “Epistemic-Guidance account”—as applied to legal authority generally).

As general theories of legal authority, Moral Guidance accounts go back at least to Plato⁷⁵ and find their best-developed contemporary expression in the work of Joseph Raz.⁷⁶ In American constitutional theory, they appear in a variety of forms in the writings of Alexander Hamilton,⁷⁷ Alexander Bickel,⁷⁸ and Bruce Ackerman,⁷⁹ among others.⁸⁰ But they suffer from three important types of flaws—contingent, conceptual, and functional—which in combination doom them.

The *contingent* flaw is that Moral Guidance accounts, as applied to the American Constitution, depend on a premise of relative moral wisdom that is exceedingly vulnerable, to say the least. The crux of these accounts, again, is that we ought to obey the Constitution even when we disagree with its commands, because the process of generating those commands was morally wiser than we are. But it is implausible that the actual Framing processes were morally wiser than we are to the extent required to validate the account.

The Framings were arbitrarily exclusionary, as we've seen,⁸¹ which gives us double reason to question their moral wisdom. Substantively speaking, excluding women, people of color, and those without property from the ratification process was a clear moral error. Procedurally speaking, their exclusion compromises the deliberative and participatory qualities that

75. See PLATO, *THE REPUBLIC & THE STATESMAN* 129-60 (Henry Davis trans., M. Walter Dunne 1901) (proposing a state ruled by wise and virtuous “guardians”).

76. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 21-105 (1986); see also Shapiro, *supra* note 20, at 402-08 (describing Raz’s theory of legal authority).

77. See *THE FEDERALIST* NO. 78, *supra* note 57, at 395 (Alexander Hamilton) (distinguishing the “solemn and authoritative act” of constitutional framing from the “ill humors” and “momentary inclination[s]” of ordinary politics); see also Peters, *What Lies Beneath*, *supra* note 19, at 1299 (interpreting Federalist No. 78 in Moral Guidance terms).

78. See BICKEL, *supra* note 14, at 23-28 (suggesting that judicial review might be justified because “courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess”); see also Peters, *What Lies Beneath*, *supra* note 19, at 1302 (interpreting Bickel’s theory as a type of Moral Guidance account).

79. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 3-162 (1991); see also Peters, *What Lies Beneath*, *supra* note 19, at 1299-1300 (interpreting Ackerman’s theory as a type of Moral Guidance account).

80. See, e.g., John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693 (2010); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803 (2009); see also Peters, *What Lies Beneath*, *supra* note 19, at 1300-01 (describing the McGinnis/Rappaport theory and classifying it as a type of Moral Guidance account).

81. See *supra* notes 62-63 and accompanying text.

otherwise might justify trust in the results of the process. The fact that those results themselves included at least one salient and grave injustice—the preservation of slavery⁸²—underscores the unlikelihood that the Framing (the original one at least) can live up to the demands imposed upon it by a Moral Guidance account.

The Second Amendment is illustrative in this regard. Gun policy is a morass of competing costs, benefits, values, and interests, many of them dependent on empirical analysis. Why should we think a collection of propertied white men in 1791 were better suited to decide these issues than we (the majority of the American people, acting through the democratic process) are today? Here I want to put aside for the moment the obvious fact that society has changed vastly and unpredictably in the ensuing two-and-a-quarter centuries; I will discuss that point below. Even without that factor, it is implausible that the eighteenth-century Framing process, with all its warts, was so much more morally reliable than today's democratic process, with all its warts, that the latter ought to reflexively defer to the former's judgments on gun policy.

This flaw is *contingent* because it is not an inevitable feature of every constitutional system. One can imagine a constitutional process that is so good, an ordinary democratic process that is so bad, or a sufficient combination of both that it would be rational for democracy always to defer to the superior wisdom of constitution making. Indeed, if Americans were to convene a broadly inclusive, meaningfully participatory, deeply deliberative constitutional convention tomorrow, the result might be worthy of our deference on Moral Guidance grounds. But would those results justify obedience by Americans twenty-five, fifty, or a hundred years from now? I am not so sure, and the answer from a believer in moral progress almost certainly would be no.

This last point hints at what I think is an even more critical flaw in Moral Guidance accounts—a *conceptual* flaw that gets worse as a constitution gets older. The premise of superior moral expertise is an “all else being equal” premise: it weakens with every obvious procedural disadvantage of the framing as compared to contemporary democracy. And one such

82. By means of the Three-Fifths Clause, U.S. CONST. art. I, § 2, cl. 3, *repealed by id.* amend. XIV, § 2, which counted slaves as three-fifths of a person for purposes of congressional representation and direct taxation, thus giving the slave states additional undeserved power in Congress; the Slave Trade Clause, *id.* art. I, § 9, cl. 1, which prohibited Congress from banning the importation of slaves until 1808; and the Fugitive Slave Clause, *id.* art. IV, § 2, cl. 3, *superseded by id.* amend. XIII, which required authorities in free states to return escaped slaves to their owners on demand.

procedural disadvantage, an inevitable one, is that contemporary democracy will have a contextual understanding of constitutional problems that the framers did not have.

The Framers of the Second Amendment surely grasped (for example) the existence of a basic tension between the dangers to public safety posed by guns and the dangers prevented by them. But they could not have understood—could not even have imagined—the particular dynamics of that tension in the context of twenty-first-century America, with its semiautomatic weapons and high-capacity magazines, its powerful gun industry, its NRA, its Brady Campaign, its drug wars, its recent and ongoing history of mass killings, its deeply entrenched two-party system, and so on. Americans today have a much better contextual view of these contemporary dynamics than the eighteenth-century Framers could have had; in a very real sense, the issue of whether and how to regulate guns is a different issue now than it was in 1791 or in 1868. The same point could be made about almost any constitutional provision: the Free Speech Clause⁸³ in the age of the Internet, the Fourth Amendment’s⁸⁴ prohibition on “unreasonable searches and seizures” in an era of imaging technology and digital-search algorithms, the Due Process Clauses⁸⁵ in a world beset by international terrorism, and so on.

So even if we buy the premise of the Framing generation’s superior moral expertise as a general matter, the Framers never brought that expertise to bear on many of the actual issues to which their general rules apply today. This was a problem familiar to Aristotle, who noted that

all law is universal but about some things it is not possible to make a universal statement which shall be correct. . . . [T]he error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start.⁸⁶

The Framers could not have considered every possible circumstance to which their (very) general rules would apply in the future. Even if they had, they hardly could have crafted general rules (“universal statements”)

83. *Id.* art. I.

84. *Id.* amend. IV.

85. *Id.* amends. IV, XIV.

86. ARISTOTLE, *Nicomachean Ethics*, in *THE BASIC WORKS OF ARISTOTLE* 935, bk. V, at 1020 (Richard McKeon ed., W.D. Ross trans., 1941). For a contemporary description of the problem, see ALEXANDER & SHERWIN, *supra* note 25, at 34-36.

capable of accounting for every such circumstance.⁸⁷ A constitution pitched at this level of detail “would partake of the prolixity of a legal code” (to say the least) “and could scarcely be embraced by the human mind.”⁸⁸

As our contemporary problems grow more distant from those the Framers could have contemplated, the force of whatever moral wisdom the Framers possessed gradually fades. It is one thing to trust the eighteenth-century Framers’ judgment regarding private possession of front-loading muskets as a safeguard against French invasion, Indian raids, and the threat of federal troops also carrying front-loading muskets. It is another thing entirely to imagine that the Framers’ judgment extended to the private possession of Glockes as a safeguard against criminals carrying Uzis or federal troops driving tanks, flying planes, and wearing body armor. The Framers simply *made* no judgment on these modern questions. A Moral Guidance account therefore gives us no reason to defer to their (nonexistent) judgments about them.

Note here that this conceptual flaw is *not* contingent on the nature of the framing process or even on the existence of considerable chronological distance from the framing, although it is aggravated by the latter. As Aristotle pointed out, “[T]he error is . . . in the nature of the thing”: no rule maker will be able to anticipate and account for every instance in which its rule may apply.⁸⁹ A constitution framed tomorrow would confront unforeseen circumstances beginning the day after tomorrow. If the reason to obey constitutional rules is that they embody superior wisdom about the circumstances to which they apply, that reason begins to dissipate as soon as the rules are established.

Finally, Moral Guidance accounts suffer from a *functional* or practical flaw: substantive disagreement with a constitutional provision is a reason, on a Moral Guidance account, to question the authority of that provision. Suppose a majority of Americans comes to believe the Second Amendment is pernicious. On a Moral Guidance account, our reason to obey the amendment anyway is that its Framers were more likely to be correct (about the utility or justice of a right to keep and bear arms) than we are. But our substantive disagreement with the amendment would undermine our faith in the superior moral judgment of the people or process that framed it. As with

87. See ALEXANDER & SHERWIN, *supra* note 25, at 54 (“Lacking omniscience, [the legislator] cannot anticipate all future problems that will meet the concrete conditions stated in the rule; and if he could do this, the rule would be far too complex for practical application.”).

88. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

89. ARISTOTLE, *supra* note 86, at 1020.

a Moral Content account, then (though less directly), our perceived reason to obey the amendment would dwindle as our disagreement with its content grows. As a result, the perceived content-independence of the amendment's authority would be compromised: our disagreement with its content would weaken our belief in its authority. The amendment (or any other constitutional provision) would be least effective when it is needed most—namely, when a majority of Americans disagrees with its substance.

In combination, these three flaws spell big trouble for Moral Guidance accounts. In order for those accounts to work, it must be the case that (a) the moral judgment of the framing process was credibly superior to that of ordinary democracy with respect to a particular constitutional issue; (b) the framing process actually rendered a judgment on the particular issue in question—an increasing rarity given the pace of change in society, culture, politics, technology, and so on; and (c) those who are subject to constitutional law, but who disagree with the constitution on the substance of an issue, nonetheless continue to accept the superior moral capacity of the framing. The conjunction of these three conditions in the context of modern constitutional law is likely to be quite rare indeed. Moral Guidance accounts thus cannot bear the considerable weight necessary to justify general constitutional authority.

D. Authority Through Procedure, Part I: Footnote Four

A Consensualist account can justify authority in theory, but it cannot justify the authority of our Constitution in actual practice. A Moral Content account cannot justify authority even in theory, because it fails the test of content-independence. A Moral Guidance account suffers from both theoretical and practical flaws. These latter two accounts stumble in part because of their substantive nature: they bear the nearly impossible burden of convincing people who disagree with the law to obey it nonetheless, on the ground that the law is right and they are wrong.

The failure of these substantive accounts hints at an alternative way to ground authority—not in the substance of what the law commands, but in the process of how the law commands it. Such a “procedural” account attributes authority to the Constitution, not because we have consented to it, and not because it is a “good” constitution or because its Framers had superior wisdom, but because something about the procedures of constitutional law makes its results acceptable even by those who disagree with them. Elsewhere I have referred to procedural accounts as “dispute resolution” accounts, because it is the prospect of resolving or avoiding costly disputes, according to these accounts, that might lead us to accept

constitutional law despite our disagreement with its content.⁹⁰ On procedural or dispute-resolution accounts, we have an obligation to obey constitutional commands because, and to the extent that, doing so will resolve, mitigate, or avoid some costly substantive disagreement.

(1) *Ely/Footnote Four*. The best-developed procedural account of constitutional authority is John Hart Ely's elucidation of the famous "Footnote Four" in the Supreme Court's *Carolene Products* decision.⁹¹ *Carolene Products* deployed the now-standard "rational basis" approach to rubber-stamp an arguably protectionist piece of economic regulation under the Due Process Clause.⁹² In the fourth footnote of his opinion for the Court, however, Justice Stone suggested that more-aggressive judicial review might be appropriate in at least two kinds of circumstance: (1) those where "legislation . . . restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation"; and (2) those where government action may be motivated by "prejudice against discrete and insular minorities"⁹³

Ely subsequently expanded Footnote Four into a full-blown justification of judicial review, which he saw as grounded in the relative political insularity of federal courts.⁹⁴ Because they are not beholden to the political majority or to other branches of government, Ely argued, federal courts can identify and resist attempts by the majority to entrench its own power—to "chok[e] off the channels of political change to ensure that they will stay in and the outs will stay out"⁹⁵—or to systematically disadvantage minorities disfavored for irrational reasons like religion or race.⁹⁶

We can understand Ely's theory as an account of the *authority* of judicial review. Ely provides a reason to think that constitutional decisions by the judiciary impose a moral obligation of obedience upon us (the democratic

90. See PETERS, MATTER OF DISPUTE, *supra* note 38, at 57-61; Peters, *What Lies Beneath*, *supra* note 19, at 1313-38; Peters, *Originalism*, *supra* note 55, at 219.

91. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); ELY, *supra* note 14.

92. See 304 U.S. at 148-54. For a description of the Filled Milk Act (the statute upheld in *Carolene Products*) as the product of special-interest rent-seeking, see Geoffrey Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397, 400-15.

93. *Carolene Products*, 304 U.S. at 152 n.4. The *Carolene Products* Court added a third circumstance, not relevant to the analysis here: "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." *Id.*

94. See generally ELY, *supra* note 14.

95. *Id.* at 103. See generally *id.* at 105-34.

96. See generally *id.* at 135-79.

majority) and our representatives in government. That reason is not that federal judges generally are wiser than the rest of us on the kinds of issues that are covered by constitutional law (a type of Moral Guidance rationale).⁹⁷ It is, rather, that the federal judiciary can be more *impartial* with respect to these issues than the self-interested or irrationally biased democratic majority could be. If we accept this basic premise of comparative impartiality (a big “if,” to be sure), then we have reason to obey the judiciary’s interpretations of constitutional commands, even when we disagree with those interpretations. The reason is that those interpretations are (relatively) *impartial*—and thus more likely to be widely accepted than the (relatively) *less* impartial interpretations that the democratic process could produce. Ely thus argues, in effect, that we should accept judicial review because doing so brings settlement to issues that otherwise would be politically contested, perhaps in a very costly way.

And in fact Ely’s Footnote Four-inspired theory forms the basis of a procedural account, not just of judicial authority, but of constitutional authority more generally. (For ease of reference, I will refer to this account of constitutional authority as the “Footnote Four” account.) If life-tenured federal judges are relatively immune to democratic pathologies, then life-tenured federal judges *interpreting rules laid down by long-ago generations* enjoy even greater immunity to these dysfunctions. The eighteenth- and nineteenth-century Framers of the major constitutional provisions had their self-interests, to be sure, but their self-interests were not *our* self-interests; they had no inherent desire to entrench the power of *our* early-twenty-first-century democratic majority. Nor were their irrationalities (religious, racial, gender-based) necessarily our irrationalities (although here the case for comparative impartiality is at its weakest).⁹⁸ If we submit certain kinds of disputes to the judicially interpreted Framers—disputes involving questions of contemporary power entrenchment or irrational majority bias—we are consigning those disputes to a process that is more impartial, with respect to those questions, than we ourselves (the contemporary democratic majority) can be. The results of that process, therefore, are more likely to be widely accepted, even by those who disagree with them, than are the results of ordinary majoritarian politics. And our reason for obeying those results is precisely that they are likely to be widely accepted—and thus that our

97. Ely rejects this rationale. *Id.* at 56-60.

98. On this point, see Peters, *What Lies Beneath*, *supra* note 19, at 1318-20; *see also infra* note 103.

obedience will contribute to the settlement of social disputes that otherwise might be quite costly indeed.

As a brief example, consider the paradigmatic constitutional provision on the Footnote Four account: the First Amendment's Free Speech Clause.⁹⁹ Suppose Congress enacts a statute prohibiting corporate-funded political advertisements that directly refer to a candidate for federal office and run within sixty days of a general election.¹⁰⁰ The harms caused by these ads may outweigh their contributions to political discourse, or they may not. But there is good reason to deny to Congress the ultimate power to decide this question, given all that its members have to gain or lose by the decision. Allowing Congress to conclusively resolve issues involving the extent of its own power is likely, over the long term, to yield the "long train of abuses" that Jefferson and Locke thought might justify revolution.¹⁰¹ At the very least it will undermine the minority's confidence that its interests and viewpoints are being taken seriously, thus sowing the seeds of social unrest.

This, on the Footnote Four account, is where constitutional law comes in. By constitutionalizing a presumptive protection for political speech, the First Amendment shifts final jurisdiction over these questions from the (blatantly self-interested) political process to the (significantly less self-interested) constitutional process, where it will be decided by politically insular judges interpreting rules enacted by long-dead Framers. Our reason for abiding by the results of this process is not that we have consented to the process, or that its results are good ones, or that the process is wiser than we are. Our reason, rather, is that the process can be generally accepted as a comparatively fair one, capable of bringing relative quietude to disputes that otherwise might boil over into costly social strife.

99. Ely discusses the Free Speech Clause at length. See ELY, *supra* note 14, at 105-16.

100. This was one effect of section 203 of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, 91 (2002). The scope of section 203 was substantially restricted in *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 463-64 (2007), and the provision was ultimately held invalid in *Citizens United v. FEC*, 558 U.S. 310, 311-12 (2010).

101. In his *Second Treatise*, Locke noted that when "a long train of Abuses, . . . all tending the same way"—that is, toward the benefit of those in power—becomes "visible to the People, . . . 'tis not to be wonder'd, that they should then rouse themselves . . ." LOCKE, *supra* note 58, § 225, at 463. Jefferson cribbed the imagery for the Declaration of Independence: "[W]hen a long train of abuses and usurpations, pursuing invariably the same Object[,] evinces a design to reduce [the People] under absolute Despotism, it is [the People's] right, it is their duty, to throw off such Government . . ." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

(2) *The plausibility of Footnote Four.* The Footnote Four account is not a perfect account of constitutional authority.¹⁰² It does, however, avoid the fatal flaws of the substantive accounts canvassed above.

Unlike a Consensualist account, the Footnote Four approach does not depend on the fiction that modern-day Americans have consented to the Constitution. Our reason to obey a constitutional command with which we disagree is not that we supposedly have, at some earlier time, agreed to be bound by that command. Our reason is that the process that generated the command is more impartial than the alternative—ordinary politics—and thus accepting its results now can bring relatively stable settlement to an otherwise dangerously contentious issue.

Unlike a Moral Content or Moral Guidance account, the Footnote Four approach is not undermined by the inevitable fact of substantive disagreement with the Constitution's commands. Recall that Moral Content accounts make the substantive correctness of a command a necessary criterion of its authority, and so a person who thinks a command is incorrect perceives no reason to obey it. Moral Guidance accounts have the same problem, albeit in attenuated form: a person's disagreement with a command provides a reason for her to question the basis of the command's authority, namely the supposedly superior wisdom of the process that produced it. On the Footnote Four approach, however, disagreement (by itself) does not serve as a reason to question constitutional authority, because that authority is not contingent on the fact or likelihood that the Constitution is correct. Indeed, actual or potential disagreement strengthens the case for constitutional authority on the Footnote Four account, because it underscores the need for an acceptably impartial procedure to resolve that disagreement.

Finally, the Footnote Four account, unlike Moral Guidance accounts, does not depend on the implausible notion that the Framers were extraordinarily more morally capable than we are, or on the impossible condition that the Framers considered how the Constitution would apply to a host of unforeseen modern problems. For the account to work, Americans need only see constitutional law as a relatively impartial way to resolve certain issues; they need not believe that it is something close to infallible. And it is at least plausible that applying general rules established by past generations and interpreted by life-tenured judges is a less-partial way to

102. For discussions of the weaknesses of the Footnote Four account, see PETERS, MATTER OF DISPUTE, *supra* note 38, at 69-78 (discussing a more-general version of the account, called there a "Dispute Resolution" account); Peters, *What Lies Beneath*, *supra* note 19, at 1326-28.

decide issues of power entrenchment than leaving them to ordinary politics.¹⁰³ Perfect impartiality is not necessary; the process need only be sufficiently *more* impartial than ordinary politics to justify deference to it.

Footnote Four's procedural account of constitutional authority, therefore, is more plausible than its substantive rivals. It is at least conceivable that the Footnote Four account can justify the authority of the Constitution. But Footnote Four is not the only possible type of procedural account.

E. Authority Through Process, Part II: Bare Hobbesian Dispute Resolution

It might be argued that we ought to obey constitutional law simply because doing so will foreclose otherwise costly disputes—even if there is no reason to think ordinary democratic procedures cannot manage those disputes fairly. This is a form of what I have called a “bare Hobbesian” account of authority. It holds that the goal of avoiding costly disputes is so important that we ought to obey virtually *any* legal command, regardless of the process by which that command was produced.¹⁰⁴

A bare Hobbesian approach is a true procedural account, because it does not depend on the substantive qualities of the Constitution or of the process that generated it. As such, it preserves the content-independence necessary for legal authority: one's reason to obey the law (on this account) is unrelated to its content and thus undistorted by whether one agrees with that content.

As the Enlightenment rejection of Hobbesian authoritarianism amply demonstrates,¹⁰⁵ however, a bare Hobbesian account is saliently unpersuasive. The account proves both too little and too much.

It proves too little in that it fails to justify the authority of constitutional law beyond the bare-bones constitutive rules necessary to get government institutions up and running. As H.L.A. Hart pointed out, *some* secondary rules are necessary in order for a society (and certainly for a democratic political community) to operate at all.¹⁰⁶ We need to know whether primary legal rules are valid, who may interpret and enforce them, what to do if we dispute their meaning or application, and how to change them. We also

103. It is less clear that deferring to the Framers' judgments on issues involving the danger of irrational prejudice will generate greater impartiality. The Framing generations probably were at least as irrational as we are on questions of race, gender, religion, and ethnicity, not to mention sexual orientation. For discussion of this point, see Peters, *What Lies Beneath*, *supra* note 19, at 1318-20.

104. *See id.* at 1314-15; PETERS, MATTER OF DISPUTE, *supra* note 38, at 57-61, 119-22.

105. *See* PETERS, MATTER OF DISPUTE, *supra* note 38, at 119-22.

106. *See* HART, *supra* note 22, at 91-99.

need the secondary rules that answer these questions to be relatively stable. Constitutional law can perform this literally *constitutive* function, as indeed many provisions of the American Constitution do. Widespread disobedience to these provisions would risk chaos, and avoiding chaos—the Hobbesian mantra¹⁰⁷—might itself be a good enough reason to obey constitutive constitutional rules.

But avoiding chaos is not necessarily a good enough reason to obey constitutional rules that protect individual *rights*, or even structural constitutional rules beyond some very basic constitutive components. Once the bare bones of democratic government are in place, that government becomes fully capable of generating its own decisions on socially disputed questions, and those democratically generated decisions can then be obeyed as a means of avoiding the costs of unresolved disputes. The constitutive function cannot justify constitutional rules that limit the outcomes of the democratic process (except insofar as those outcomes undermine the basic constitutive rules). The most prominent rights-conferring provisions in our Constitution—those in the Bill of Rights and the Thirteenth and Fourteenth Amendments—go well beyond what is necessary to constitute a functioning democratic government.¹⁰⁸ Americans could strike these provisions from the Constitution tomorrow without stepping down the slippery Hobbesian slope toward anarchy. A bare Hobbesian account thus might justify government and law at some level, but not most constitutional rights, and certainly not constitutional law to the extent it exists in the American system. In this respect the account proves too little.

It also proves too much, in that it would justify constitutive rules of *any* content or provenance whatsoever. Hobbes himself used it, unconvincingly, to defend absolutist monarchy.¹⁰⁹ If avoiding disputes takes priority over all

107. See PETERS, MATTER OF DISPUTE, *supra* note 38, at 57-59 (describing Hobbes's normative theory of legal authority).

108. The same probably can be said for the "thicker" structural provisions of the Constitution, such as those allocating power between the state and federal governments (e.g., the enumerated powers of Congress in Article I, Section 8). Once the basic mechanisms of the federal government are in place, that government could decide the extent of its own power vis-à-vis that of the states. Of course, the risk of power-entrenchment would be high, justifying the existence of constitutional power-allocation rules on a Footnote Four approach. But the bare Hobbesian account could not justify such rules, as they would not be strictly necessary in order for government to operate.

109. See THOMAS HOBBS, LEVIATHAN 241-47 (C.B. Macpherson ed., Penguin Books 1968) (1651). This defense later was eviscerated by Locke with the observation that an absolutist monarch's subjects, after "a long train of abuses" by the ruler, eventually would rebel against the monarch's self-serving commands, thus defeating Hobbes's overriding goal

other goods, then Americans have an obligation to obey any legal command with respect to a controversial issue, no matter what it says and no matter who generated it. Americans are unlikely to accept law (constitutional or otherwise) on those terms, particularly since more-palatable alternatives are available.

IV. The Second Amendment and Footnote Four

I believe that the five general accounts of constitutional authority canvassed in Part III exhaust the field of reasonably plausible candidates. For a variety of reasons, four of those accounts turn out not to be plausible after all. A fifth, the Footnote Four version of a procedural account, seems plausible—more so in any event than its rivals. The question for this part, then, becomes: Can the Footnote Four account justify the Second Amendment?

The answer, I argue here, depends on what the Second Amendment is understood to mean. In this part, I consider three different reasonable interpretations of the amendment: the “individual self-defense” reading endorsed by the *Heller* majority; an “anti-tyranny” reading (really a family of subtly different readings) hinted at in *Heller* and common in popular discourse; and the “structural federalism” reading offered by the dissenters in *Heller*. I contend that neither the *Heller* majority’s interpretation nor the various anti-tyranny readings of the amendment can be reconciled with the Footnote Four justification of constitutional authority. I suggest, however, that the federalism-promoting interpretation advocated by the *Heller* dissenters is at least potentially consistent with the Footnote Four account.

A. Heller and Footnote Four

In *District of Columbia v. Heller*,¹¹⁰ a five-justice majority of the Supreme Court, in an opinion written by Antonin Scalia, held that the Second Amendment protects, against federal government interference, an individual right to keep and bear an operative handgun in the home for purposes of self-defense.¹¹¹ In *McDonald v. City of Chicago*,¹¹² the same majority, in an opinion by Samuel Alito, held that this right is “fundamental . . . to our system of ordered liberty” and thus is applicable

of conflict-avoidance. See LOCKE, *supra* note 58, § 13, at 316-17; *id.* §§ 90-94, at 369-74; *id.* § 225, at 463; see also PETERS, MATTER OF DISPUTE, *supra* note 38, at 119-22 (describing Locke’s critique of Hobbesian absolutism).

110. 554 U.S. 570, 635-36 (2008).

111. *See id.*

112. 561 U.S. 742 (2010).

against the state governments through the Due Process Clause of the Fourteenth Amendment.¹¹³

Is the *Heller* interpretation consistent with the only plausible account of constitutional authority available, namely a procedural account similar to that of Footnote Four? To put the question another way: Does *Heller's* Second Amendment possess valid authority on the Footnote Four approach? I argue here that the answer is no.

The Footnote Four approach holds that the participants in everyday democracy ought to defer to constitutional commands when the constitutional process can be accepted as significantly more impartial than ordinary democratic politics. As I discussed in Section III.D, Ely and Footnote Four identified two basic circumstances in which this might plausibly be the case.

First, constitutional law might serve an *anti-entrenchment* function: it might be comparatively impartial in determining whether measures that risk power entrenchment by the majority, or by government officials, are in fact justified. The First Amendment's Speech, Press, Petition, and Assembly Clauses¹¹⁴ obviously serve this function, as do most of the Constitution's criminal-procedure provisions¹¹⁵ and its various protections of the right to vote.¹¹⁶

113. See *id.* at 767-78. Justice Clarence Thomas, the fifth vote necessary to form the majority in *McDonald*, wrote a separate opinion in which he reached the same result as Justice Alito but used the Privileges or Immunities Clause of the Fourteenth Amendment, not the Due Process Clause, to do so. *Id.* at 805-06 (Thomas, J., concurring in the result).

114. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

115. See *id.* art. I, § 9 (prohibiting suspension of *habeas corpus* except "in Cases of Rebellion or Invasion," and prohibiting bills of attainder and ex post facto laws); *id.* art. III, § 3 (requiring two witnesses or a confession for a treason conviction and prohibiting "corruption of blood" as punishment for treason); *id.* amend. IV (prohibiting "unreasonable searches and seizures" and prescribing requirements for warrants); *id.* amend. V (requiring grand jury indictment for "capital[] or otherwise infamous crime[s]," prohibiting double jeopardy and compelled self-incrimination, and requiring due process for deprivations of life, liberty, or property); *id.* amend. VI (providing for "a speedy and public trial" by an impartial local jury, requiring that the accused be informed about the accusation against him, and providing rights to confrontation, compulsory process, and defense counsel); *id.* amend. VIII (prohibiting "excessive" bail or fines and "cruel and unusual punishments").

116. See *id.* amend. XIV, § 2 (reducing the congressional representation of a state that denies the right to vote to adult male citizens); *id.* amend. XV (prohibiting denial or abridgment of the right to vote "on account of race, color, or previous condition of servitude"); *id.* amend. XIX (prohibiting denial or abridgment of the right to vote "on

Second, constitutional law might serve an *anti-bias* function: it might be relatively impartial in deciding whether laws that disadvantage “discrete and insular minorities”¹¹⁷ reflect or perpetuate irrational prejudice. The Religion¹¹⁸ and Equal Protection Clauses¹¹⁹ (for instance) easily can be understood in this light.

To these circumstances we might add a third: constitutional law can serve the literally *constitutive* function discussed in Section III.E above, establishing the basic ground rules by which government can operate.¹²⁰ Ordinary democratic politics cannot decide issues (impartially or otherwise) if a democratic system does not yet exist. Relatively stable rules are needed to establish the basic governmental institutions and procedures necessary for a democracy to come into, and remain in, existence. Many provisions of Articles I through III of our Constitution qualify as constitutive rules in this sense.¹²¹

As interpreted in *Heller*, however, the Second Amendment serves none of these functions.

(1) *Heller and the constitutive function.* First of all, the Second Amendment as interpreted in *Heller* clearly is not the sort of foundational constitutive rule that is necessary for democratic government to operate. Americans can tell who makes, enforces, and interprets the laws that govern them, and how those laws are made, enforced, and interpreted, without having to know anything about gun possession for purposes of self-defense.

(2) *Heller and the anti-entrenchment function.* Nor does the *Heller* version of the Second Amendment further an anti-entrenchment objective. Empowered officials or majorities have no self-interest in preventing citizens from defending themselves against private aggressors, and therefore there is no reason not to trust the democratic process to resolve

account of sex”); *id.* amend. XXIII (apportioning presidential electors to the District of Columbia); *id.* amend. XXIV (prohibiting denial of the right to vote “by reason of failure to pay any poll tax or other tax”); *id.* amend. XXVI (prohibiting denial of the right to vote to citizens age eighteen or older “on account of age”).

117. *See* *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . .”).

118. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

119. *Id.* amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

120. *See* PETERS, MATTER OF DISPUTE, *supra* note 38, at 243-46.

121. *But see supra* note 108.

disputes about the scope of a “right” or privilege of armed self-defense. As I explain in Section IV.B below, the “right . . . to keep and bear Arms” might guard against self-interested power-entrenchment if it is construed to protect an individual right to defend, not against *private* aggression, but rather against *government* tyranny. But despite a few hints in Justice Scalia’s majority opinion,¹²² this is not the construction given the Amendment by the *Heller* majority.

Let me be clear on this point: there is plenty of reason to worry that the ordinary political process will generate *bad* decisions on the question of whether to allow armed self-defense. I personally believe that so-called “stand-your-ground” laws¹²³ are horrible public policy and that NRA and gun-industry financial clout is largely to blame for them.¹²⁴ Pro-gun advocates probably have similar distaste for relatively strict registration and possession laws in jurisdictions that have them. But poor public policy, influenced by special-interest lobbying and campaign expenditures, is pretty much an across-the-board risk in our democracy. That risk alone cannot justify constitutionalizing every policy issue that is subject to it; otherwise there would be no space left for ordinary democracy.

On the Footnote Four approach, constitutional law comes into play when there is a systemic danger, not just of bad policy or even of policy that serves special interests, but rather of *self-interested power-entrenchment* by the democratic majority or by officials in government.¹²⁵ And there is no

122. See *infra* note 141 and accompanying text.

123. Such as the laws on the books in Florida, FLA. STAT. § 776.032 (2014), and Alabama, ALA. CODE § 13A-3-23 (2014).

124. See P. Luevonda Ross, *The Transmogrification of Self-Defense by National-Rifle-Association-Inspired Statutes: From the Doctrine of Retreat to the Right to Stand Your Ground*, 35 S. U. L. REV. 1, 25-28 (2007) (asserting that NRA lobbying was behind many such laws). The article cites material from the NRA website that unfortunately can no longer be found there.

125. I have suggested elsewhere that the basic Footnote Four approach might be expanded to include special-interest rent-seeking among the systemic dysfunctions in democracy that justify constitutional law. See PETERS, MATTER OF DISPUTE, *supra* note 38, at 261-63. This might justify heightened constitutional scrutiny of legislation in circumstances that suggest rent-seeking, but it cannot justify the *Heller* reading of the Second Amendment. See generally *District of Columbia v. Heller*, 554 U.S. 570 (2008). For one thing, there is no reason to think that the subject of gun regulation is *especially* prone to rent-seeking, enough so to justify its own constitutional provision; surely the Due Process and Equal Protection Clauses, properly interpreted, can police rent-seeking in that context as they do in many others. And even if gun regulation is a special enough hotbed of rent-seeking to warrant its own constitutional rule, the relevant rent-seekers are the gun industry, which *benefits* from the Second Amendment as interpreted in *Heller*. An anti-rent-seeking Second Amendment

good reason to think that the issue of whether and how to regulate armed self-defense against *private* aggression poses this sort of risk. Private aggression run amok, without the threat of law-abiding gun possession to stop it, would hardly strengthen the majority's existing hold on power. (Again, I am putting aside until the next section the possibility, not formally endorsed by *Heller*, that the Second Amendment serves the "anti-tyranny" function of protecting against unjustified aggression by the government itself.)

(3) *Heller and the anti-bias function*. Interestingly, the most appealing Footnote Four-based argument in favor of *Heller*'s Second Amendment is an anti-bias argument. Justice Alito suggested such an argument in his opinion for the Court in *McDonald*, writing in passing that "the Second Amendment . . . protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials."¹²⁶ But this point, assuming it is true, proves too much. Many needs of "minorities and other residents of high-crime areas . . . are not being met by elected public officials,"¹²⁷ including the needs for education, housing, and health care. Does this justify constitutional rights to these goods on the Footnote Four approach?

The answer is no. The anti-bias rationale does not warrant a constitutional remedy in every case of failed public policy, even when "discrete and insular minorities"¹²⁸ are disproportionately victimized by these failures.¹²⁹ The rationale applies, rather, only in cases where systemic

would not protect gun *rights* against government regulation; it would protect gun *regulation* from industry rent-seeking.

126. *McDonald v. City of Chicago*, 561 U.S. 742, 790 (2010). Justice Alito was responding to Justice Breyer's argument in dissent that the *Heller* reading of the Amendment was not justified by Footnote Four concerns. *See id.* at 912, 921 (Breyer, J., dissenting). In a similar vein, one might cite efforts to disarm (or prevent the arming of) African-Americans after the Civil War as evidence that a right to bear arms is necessary to protect racial minorities from bias-motivated violence. Both the *Heller* majority and the *McDonald* plurality alluded to this history. *See Heller*, 554 U.S. at 609, 614-16; *McDonald*, 561 U.S. at 770-78; *see also McDonald*, 561 U.S. at 805, 835-37 (Thomas, J., concurring in the judgment); *cf.* Nicholas J. Johnson, *Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy*, 45 CONN. L. REV. 1491 (2013) (contending that mainstream African-American support for stringent gun-control laws is inconsistent with the historical and continuing failure of government to protect African-Americans from private violence).

127. *McDonald*, 561 U.S. at 790.

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

129. Note that one may argue against stringent gun control as a matter of policy—on the ground (say) that government has failed to protect against private violence—without arguing

majority bias against minorities prevents those minorities from participating fairly and fully in the democratic process. The Framers, wisely in my view, codified only one type of circumstance so prone to this dysfunction that it always triggers heightened constitutional scrutiny: legislation targeting religion.¹³⁰ Because religion, then as now, was an obvious and recurring ground of majority bias, the Religion Clauses allocate to the constitutional process—not to ordinary politics—the ultimate authority to decide whether the “free exercise” of religion has been unjustifiably impaired or an “establishment of religion” has occurred.¹³¹

But the primary anti-bias provision in the Constitution—the Equal Protection Clause¹³²—does not itself single out any particular type or ground of legislation as especially prone to irrational prejudice. While that clause was inspired by the plight of recently freed slaves, its Framers (again wisely in my view) did not draft it as the “Protection of Freed Slaves Clause” or the “Protection Against Racial Prejudice Clause.” Instead they left its language open-ended, capable of being applied against whatever instances of democracy-crippling prejudice, on whatever basis, should emerge in the future. The Supreme Court, appropriately, has given structure

for a *constitutional right* against stringent gun control. Nicholas Johnson, for example, makes a thoughtful and provocative case that strict gun laws do not benefit many African-American communities, which tend to suffer disproportionately from continuing “state failure and impotence” to police private violence. *See* Johnson, *supra* note 126, at 1496, 1532-53. Even assuming this is a decisive argument against stringent gun-control policies, it does not entail that constitutional limitations on such policies are legitimate. As interpreted in *Heller*, the Second Amendment makes these policy debates largely irrelevant; there simply *is* a right to armed self-defense, whether that is good policy or not. 554 U.S. at 635-36 (holding that the right to have a handgun in the home for self-defense cannot be infringed). And of course that right is not limited to citizens or communities that have disproportionately been victimized by government incompetence, or for that matter by government hostility.

130. *E.g.*, *Larson v. Valenta*, 456 U.S. 228, 244-47 (1982) (applying Establishment Clause strict scrutiny to a state law that granted a preference for some religious denomination over others); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (requiring that a law be invalidated under the Establishment Clause if it lacks a secular purpose, has a principal effect of advancing or inhibiting religion, or fosters excessive government entanglement with religion); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531-32 (1993) (applying Free Exercise Clause strict scrutiny to a local ordinance that intentionally burdened the practices of a particular religion).

131. *See* U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”); *id.* art. VI, cl. 3 (Religious Test Clause) (prohibiting any “religious Test . . . as a Qualification to any Office or public Trust under the United States”).

132. *See id.* amend. XIV, § 1.

to the clause by applying heightened scrutiny to legislation targeted at characteristics that, like race, have proven particularly susceptible to irrational majority bias.¹³³

If systemic prejudice is responsible for disadvantaging racial minorities in “high-crime areas,” then the most obvious constitutional remedy lies with the Equal Protection Clause.¹³⁴ It is much less obvious, to say the least, that an across-the-board private right to gun possession can be justified as a way to overcome the effects of government neglect of racial minorities. Gun possession is not like religion; there is no persistent historical trend of irrational majority bias against gun owners. Gun owners are not a “discrete and insular minority”¹³⁵ in contemporary American society and probably never have been. Anti-gun legislation that is truly irrational—born of a “bare . . . desire to harm” gun owners as a class—would be a violation of the Equal Protection Clause and could be invalidated on that basis.¹³⁶ If the

133. *See generally, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996) (intermediate scrutiny of laws classifying by gender); *Loving v. Virginia*, 388 U.S. 1 (1967) (strict scrutiny of laws classifying by race).

134. U.S. CONST. amend. XIV, § 1. It is true—and of debatable wisdom—that the Court has limited heightened scrutiny under the Clause to cases of “intentional” discrimination based on race or other suspect criteria. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 239–43 (1976). It also is true that our Constitution, generally speaking, stops short of protecting “affirmative” rights to government benefits (like education or health care), as opposed to “negative” rights against impairment of certain interests or discrimination in the allocation of benefits. But these principles are largely the function of Supreme Court interpretations, rather than immutable features of the Constitution itself. *See* LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 84–128 (2004) (contending that some “affirmative” rights, such as a right to a minimum level of welfare, are protected in principle by the Constitution but underprotected in practice thanks to considerations of institutional competence). The Court could redress the problem at which Justice Alito hints—government failure to address basic needs of minority populations—by (for instance) applying heightened equal-protection scrutiny to policies that create a disparate racial impact and are caused, not by an active intent to discriminate, but by neglect born of persistent racial stereotypes and power imbalances. *See McDonald v. City of Chicago*, 561 U.S. 742, 790 (2010). This would seem a more apt response than interpreting the Second Amendment to protect private gun possession.

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

136. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (employing equal protection and substantive due process to invalidate a federal statute that denied recognition of same-sex marriages, on the ground that the statute “seeks to injure” same-sex couples); *Romer v. Evans*, 517 U.S. 620, 634 (1996) (employing equal protection to invalidate a state constitutional amendment denying antidiscrimination protection to homosexuals, on the ground that the amendment “is born of animosity toward” homosexuals); *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (employing equal protection to invalidate a ban on the use of food stamps by “unrelated persons” in eligible households, on the ground that the ban

worry is majority prejudice, *Heller*'s interpretation of the Second Amendment is overkill.¹³⁷

(4) *Heller's substantive Second Amendment*. There is, then, no persuasive case to be made that the Footnote Four approach justifies the authority of the Second Amendment as interpreted by the *Heller* majority.¹³⁸ On the *Heller* reading, the amendment commands the democratic majority to honor the individual right to bear arms for self-defense.¹³⁹ That command is not justified on Footnote Four's version of a procedural account: it is not necessary to preserve some aspect of fair democratic governance. It is, rather, a substantive command—an extrinsic limit on what fair democratic government may do. Such a substantive constraint might be consistent with a Consensualist, Moral Content, or Moral Guidance account of constitutional authority. But those substantive approaches, as I've argued, are implausible.

B. Footnote Four and an Anti-“Tyranny” Second Amendment

Gun-rights advocates often speak of the right to bear arms as a hedge against “tyranny.”¹⁴⁰ Indeed, Justice Scalia's majority opinion in *Heller* referenced such a view, although ultimately it was not the view embodied in the decision.¹⁴¹ Typically, however, this rhetoric does not carefully

derived from “a bare ... desire to harm a politically unpopular group,” namely “hippies” living communally).

137. See generally *District of Columbia v. Heller*, 554 U.S. 570 (2008) (holding that the right to have a handgun in the home for self-defense cannot be infringed).

138. *Id.*

139. *Id.*

140. A quick Google search returns page after page of examples. Here are just a couple: Joe Otto, *Second Amendment: Last Line of Defense Against Tyranny*, CONSERVATIVE DAILY (Feb. 15, 2014), <http://conservative-daily.com/2014/02/15/second-amendment-last-line-of-defense-against-tyranny/>; Bob Owens, *Facing Tyranny, Embracing the Second Amendment*, BEARING ARMS (Feb. 16, 2014, 12:26 PM), <http://bearingarms.com/facing-tyranny-embracing-the-second-amendment/>. But see Mark Nuckols, *Why the “Citizen Militia” Theory Is the Worst Pro-Gun Argument Ever*, ATLANTIC (Jan. 31, 2013), <http://www.theatlantic.com/national/archive/2013/01/why-the-citizen-militia-theory-is-the-worst-pro-gun-argument-ever/272734/> (citing January 2013 poll showing “65 percent of Americans see gun rights as a protection against tyranny” and quoting Senator Tom Coburn to that effect). See generally Williams, *supra* note 3 (presenting an academic version of the anti-tyranny argument).

141. To be precise: Justice Scalia asserted that the “ab[ility] to resist tyranny” was among the Framers' reasons for *codifying* the “right to keep and bear Arms” in the Second Amendment. See *District of Columbia v. Heller*, 554 U.S. 570, 597-600 (2008) (quoted language at p. 598). But the right that was thus codified, according to Justice Scalia, was the right to keep and bear arms *for purposes of self-defense*. See *id.* at 599-600. See generally *id.* at 579-95 (explaining that the “right . . . to keep and bear Arms” was understood at the time

distinguish between two different ways in which government action might be “tyrannical.”

First, a government might take actions that are valid according to the standards of its legal system but nonetheless unjust. American state and federal laws preserving and implementing slavery prior to the Civil War are (now) a fairly noncontroversial example.¹⁴² The problem with government actions like these is a moral one, not a legal one: they are unjust, but they are legally valid.

Or, second, a government might take actions that are both unjust *and* invalid: actions that violate principles of political morality *and* are enacted or enforced contrary to the formal requirements of the legal system in question. Southern “massive resistance” to school desegregation after *Brown v. Board of Education*¹⁴³ is a case in point.¹⁴⁴ The problem with such government actions is twofold: they are both illegal and unjust.

Both these types of government conduct might be encompassed within the general concept of “tyranny.” And the Second Amendment might be seen as a hedge against both of them: by protecting the right of citizens to arm themselves, the amendment makes it more difficult for the government to enforce its unjust and/or illegal policies. In assessing whether the amendment is authoritative, however, it matters which variety of “tyranny” is at issue.

(1) *A right to resist lawful but unjust government conduct.* Imagine, then, the following interpretation of the Second Amendment: it protects a right to bear arms for the purpose of resisting government conduct that is lawful but unjust. On its surface, this interpretation appears consistent with a

of the Founding primarily as a right of individual self-defense). And it was this “central component” of the right—not the right to bear arms for other purposes, such as resisting tyranny or hunting—that the Court held was violated by the District of Columbia ordinances at issue in *Heller*. *See id.* at 599 (describing “self-defense” as “the central component of the right [to bear arms] itself”); *see also id.* at 628 (“the inherent right of self-defense has been central to the Second Amendment right”); *id.* at 635 (“In sum, we hold that the District’s ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.”).

142. Such as the federal Fugitive Slave Acts of 1793, ch. 7, 1 Stat. 302, and 1850, ch. 50, 9 Stat. 452, which were valid as implementations of the Constitution’s Fugitive Slave Clause, U.S. CONST. art. IV, § 2, cl. 3.

143. 347 U.S. 483 (1954).

144. For an efficient overview of Southern resistance and other reactions to *Brown*, see 2 MELVIN I. UROFSKY & PAUL FINKELMAN, *A MARCH OF LIBERTY* 862-70 (3d ed. 2011) (and see p. 872 for a list of sources).

procedural account of authority along Footnote Four lines. Surely the government itself—perhaps even the electoral majority supposedly represented by the government—cannot be trusted to fairly resolve the question of whether government conduct is “just.” The temptation of power-entrenchment would be too salient. By constitutionalizing the right to resist unjust government action, the Second Amendment (thus interpreted) removes that question from majoritarian hands and assigns it to politically insular constitutional processes—a classic Footnote Four rationale.

There are two conceptual flaws, however, with this version of the anti-tyranny interpretation. The first flaw is that the argument posits a (legal) right to resist (legal) injustice—that is, a legal right to disobey the law. Such a right would be logically incoherent—a contradiction in terms. If one has a legal right to disobey a law, then the supposed “law” being disobeyed is not really valid law at all. If the law to be disobeyed is valid law, then one cannot have a legal right to disobey it, and legal authorities would be legally justified in punishing disobedience. If legal authorities are legally justified in punishing disobedience, then disobedience cannot be a legal right.

Note that to deny the coherence of a legal right to disobey (valid) law is not to deny the existence of a *moral* right to do so. As I discussed in Section II.A.3, above, the moral duty to obey even legitimately authoritative law cannot be absolute: sometimes disobedience will be the (morally) correct thing to do.¹⁴⁵ The point here is simply that a right of disobedience, when and if it exists, cannot be a *legal* right. It is incoherent to assert a (valid) legal right to disobey a (valid) law. And so it cannot be a valid interpretation of the Second Amendment to read that provision as codifying a *legal* right of disobedience to valid law.

Is this problem solved by noting that the supposed legal right to disobey is constitutional in stature, while presumably most or all unjust laws against which the right would be wielded will be subconstitutional? (There is, after all, nothing logically incoherent about asserting that (superior) constitutional law trumps (inferior) subconstitutional law.) The answer is no, because conflict with the Constitution renders a subconstitutional law *invalid*, not valid but subject to lawful disobedience.¹⁴⁶ Constitutional law is

145. On this point, see also ALEXANDER & SHERWIN, *supra* note 25, at 53-95 (discussing what the authors believe is an ineliminable “moral gap” between the correctness of enacting general laws and the (occasional) correctness of disobeying them).

146. See U.S. CONST. art. 6, cl. 2.

power-conferring in the sense meant by H.L.A. Hart:¹⁴⁷ consistency with the Constitution is a necessary condition for the validity of subconstitutional law. It is one thing to assert that an ordinary statute conflicts with some provision of the Constitution and is therefore invalid. It is another thing entirely to assert that an ordinary statute, while valid as law, nonetheless is unjust and thus subject to a constitutional right of armed resistance. The former proposition subjects ordinary law to a constitutional test of validity. The latter proposition supposes that two valid laws can be mutually inconsistent—a logical impossibility.¹⁴⁸

The second conceptual flaw with a right to resist valid but unjust laws is that such a right would vitiate the fundamental understanding of law that is reflected in a procedural account. A procedural account (such as Footnote Four) holds that constitutional authority is justified by the need to peacefully avoid, mitigate, or resolve disputes. As I have explained elsewhere, this approach reflects a more general account of legal authority by which the core function of law as a whole is peaceful dispute resolution.¹⁴⁹ The basic notion—traceable at least as far back as Hobbes¹⁵⁰—is that dispute resolution left in private hands inevitably invites violent conflict, and so the law must assert a monopoly on coercive dispute resolution in order to prevent private parties from “resolving” disagreements through violence.

To recognize a “right” to violently resist “unjust” laws, however, is to transfer the power of coercive dispute resolution back into private hands. Surely people of good faith can disagree about whether almost any given law is in fact unjust. Law’s solution to this is to channel that disagreement through acceptable lawmaking, law-interpreting, and law-enforcing procedures. A right of armed resistance would, in effect, allow any citizen to defect from this solution if she disagrees with the results of the legal process. As Gregory Magarian writes, “[A]ny agitated individual or

147. In rejecting an Austinian model of law as merely orders backed by threats, Hart pointed out that many legal rules do not fit the model: they make it possible for private individuals or government officials to do something (that is, they confer powers) rather than forbidding or requiring them to do something (that is, imposing duties). *See* HART, *supra* note 22, at 26-42.

148. Or at least a violation of a seemingly fundamental principle of valid law, namely that it not command the impossible. *See* LON FULLER, *THE MORALITY OF LAW* 36-37, 38-39, 65-79 (rev. ed. 1969) (citing, among other tenets of the “internal morality of law,” the principles that law not be self-contradictory and that it not demand the impossible).

149. *See generally* PETERS, *MATTER OF DISPUTE*, *supra* note 38.

150. *See generally* HOBBS, *supra* note 109; *see also* PETERS, *MATTER OF DISPUTE*, *supra* note 38, at 57-59 (situating Hobbes’s theory within a dispute-resolution context).

aggrieved group may decide what types and number of arms to stockpile in order to deter tyranny and, ultimately, when to resort to violence.”¹⁵¹ And there is no way to limit this “right to defect” to cases of “truly” unjust laws, because what is “truly” unjust is precisely what people will disagree about.¹⁵² The result would be the dissolution of law itself: anyone who felt strongly enough about the “injustice” of a particular law would effectively be authorized to resist that law by force of arms. The endgame is a Hobbesian state of nature, a war of all against all—precisely the disaster that law, on a procedural account, exists to avoid.

However rhetorically appealing a Second Amendment “right to resist unjust laws” might be, then, such a reading would be inconsistent with the fundamental justification of legal authority assumed by the proceduralist position.¹⁵³

151. Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 94 (2012); see also Carl T. Bogus, *Heller and Insurrectionism*, 59 SYRACUSE L. REV. 253, 257 (2008) (“The fundamental problem with legitimizing insurrectionism as an acceptable last resort is that there are always people who believe that governmental tyranny is not merely a future prospect, but a present reality.”); Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 320 (2000) (stating that Shay’s Rebellion and the Whiskey Rebellion “demonstrated in the founding era what acts by the likes of Timothy McVeigh have demonstrated in our own time: that placing a right to rebel against tyranny in the hands of individuals risks violence by every would-be Spartacus”).

152. See Bogus, *supra* note 151, at 265.

It does not solve the problem to say that the militia or the people may only take up arms against the government “if necessary” or “as a last resort.” Tyranny, like beauty, can be in the eye of the holder. When he leapt to the stage after murdering Abraham Lincoln, John Wilkes Booth shouted: “*Sic semper tyrannis*” (thus always to tyrants).

Id.

153. Gregory Magarian argues convincingly that an anti-tyranny (or “insurrectionist”) reading of the Second Amendment is deeply at odds with the doctrine of free speech that has developed under the First Amendment. Magarian, *supra* note 151, at 92-98. The Supreme Court has interpreted the Free Speech Clause quite robustly, to allow vigorous expressions of political dissent that advocate violence, even insurrection, so long as they do not incite imminent violence. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). As Magarian points out, the resulting principle is inconsistent with the notion of a right of armed resistance to tyranny. Magarian, *supra* note 151, at 92-98. Free speech doctrine embodies a commitment to political change through advocacy, which necessarily is a collective, indeed majoritarian process. *Id.* at 94. Advocacy “requires communication and persuasion,” and it allows “the government, and whatever individuals and groups . . . support the government, the same opportunities as would-be revolutionaries to speak and persuade, to listen and adjust.” *Id.* But a right of armed resistance is a “very different proces[s]”; it licenses any “agitated individual or aggrieved group” unilaterally to defect from the democratic process and

(2) *A right to resist illegal and unjust government conduct.* Suppose, however, that we give the Second Amendment a slightly but crucially different anti-tyranny reading. The amendment might be understood to confer a right to resist government conduct that is both unjust (morally speaking) *and* invalid (legally speaking). This reading also seems at least superficially consistent with the Footnote Four version of a procedural account. If the government or the political majority cannot be trusted to decide whether its actions are unjust, it certainly cannot be trusted to decide whether its actions are both unjust and illegal. Constitutionalizing a right to resist unjust and illegal actions thus removes that decision from the saliently self-interested political branches.

Note that this modified anti-tyranny interpretation avoids the first conceptual flaw I identified in the prior version, namely logical incoherence.¹⁵⁴ There is nothing incoherent about recognizing a legal right to resist *illegal* government actions—any more than it is incoherent to give officials a legal right to punish illegal private actions. Recognizing such a right does not suppose that the same conduct can be both legally authorized and legally forbidden.

The second conceptual problem, however, remains in this revised version of the anti-tyranny interpretation. Conferring a legal right to resist unjust and illegal government actions would, in effect, transfer the function of coercive dispute resolution from public hands to private ones. People often will disagree about whether a given government action is unjust, illegal, or both. Law's solution to this problem of disagreement is, again, to resolve it through agreeable processes of lawmaking, law-interpreting, and law enforcement. A right to resist "unjust" and "illegal" conduct is, in essence, a right to take the law into one's own hands—to reject the results of these democratic processes in favor of individual violence. There is no principled way to halt the inevitable slide down the slippery slope towards Hobbesian chaos if such a "right" is acknowledged.¹⁵⁵

Again, I am not claiming that resistance (even violent resistance) to government tyranny is never justified, morally speaking.¹⁵⁶ I am claiming

impose violence on the rest of the citizenry. *Id.* See generally Christopher J. Peters, *Persuasion: A Model of Majoritarianism as Adjudication*, 96 NW. U. L. REV. 1 (2001) (discussing the importance of persuasion to democratic legitimacy).

154. See *supra* Section IV.B.1 (discussing the logical impossibility of a legal right to disobey a valid law).

155. See generally HOBBS, *supra* note 109.

156. See *supra* Section II.A.3 (discussing the defeasibility of the obligation to obey the law).

only that such resistance cannot be *legally* justified. No doubt circumstances will arise—certainly they have arisen historically—in which the correct thing to do, morally speaking, is to resist the law, valid or invalid. Members of the Civil Rights movement, for example, called attention to the injustice of Jim Crow laws by resisting those laws.¹⁵⁷ By carefully calibrating their resistance only to particular laws they deemed unjust, however, and by accepting legal punishment for their actions, these practitioners of civil disobedience made their point while still respecting the general authority of the law.¹⁵⁸

To resist valid laws on grounds of injustice, however, while then resisting legal punishment for doing so is to reject the rule of law entirely. This kind of resistance declares that law's dispute-resolution function no longer outweighs the imperative of substantive justice. It is plausible that the wholesale rejection of legality—as a last resort, until a reasonably just system can be established—is morally permissible. But the notion of a *legal* right to reject legality is nonsensical, at least if one accepts a procedural account of legal authority.

So anti-“tyranny” interpretations of the Second Amendment’s “right ... to keep and bear Arms,” despite their popularity and their tangential endorsement by the majority in *Heller*, are not in fact consistent with a procedural account of constitutional authority, which I’ve argued is the only plausible type of account available.¹⁵⁹ If the chief function of constitutional law is to avoid, mitigate, or resolve costly disputes, we should not read the Second Amendment to frustrate that purpose—at least not if a better reading is available.

(3) *Decoupling a right to keep and bear arms from a right to resist.* My arguments in the previous two sections depend on the notion that a right to *keep and bear arms* for the purpose of *preventing* tyranny necessarily

157. See, e.g., Martin Luther King Jr., Letter from a Birmingham Jail (Apr. 1, 1963) (original manuscript), http://okra.stanford.edu/transcription/document_images/undecided/630416-019.pdf.

158. This was Martin Luther King’s insight when he wrote the following in his *Letter from a Birmingham Jail*:

In no sense do I advocate evading or defying the law as the rabid segregationist would do. This would lead to anarchy. One who breaks an unjust law must do it *openly, lovingly, . . .* and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for the law.

Id.

159. See *supra* Section II.D.

implies a right to *use* those arms to *resist* tyranny. On this assumption, an anti-tyranny reading of the Second Amendment protects a legal right to armed resistance against a tyrannical government. It is this concept of a legal “right” to armed resistance that I reject as logically incoherent, inconsistent with the premises of a procedural account, or both.

It is not obvious, however, that my assumption holds. That is, it seems conceptually possible that the Second Amendment could protect a right to keep and bear arms for the purpose of preventing tyranny without also protecting a right to actually use those arms to resist (purportedly) tyrannical conduct. Perhaps protecting the right of citizens to keep and bear arms, even without acknowledging a right to use those arms, will deter the government from acting tyrannically for fear of meeting armed (albeit illegal) resistance. The closest analogy that comes to mind involves nuclear deterrence: we might say that a nation has a right to keep nuclear weapons as a deterrent against nuclear attacks by other nations, even if we would not say the nation has the right to actually *use* those weapons if attacked.¹⁶⁰

If it is possible to decouple the two supposed rights in this way, my prior objections seem to dissolve. The right to keep and bear arms would not entail a legal “right” to resist valid law, and thus it would not be logically incoherent. Nor would it necessarily entail a legal “right” to defect from lawful settlements of disputed issues by resisting laws deemed “tyrannical,” so it would not vitiate the very purpose of law on a procedural account.

I am not convinced, however, that it is in fact possible to decouple the right to possess arms (for purposes of preventing tyranny) from the right to use those arms to resist conduct thought to be tyrannical. True, it is conceptually possible to decouple a possession right from a use right. In saying I have a legal right to possess item X, I have not logically committed myself to the further proposition that I have a legal right to *use* item X. For example, we might recognize the legal right of a pharmacist to possess a dangerous drug in her inventory without also recognizing her legal right actually to use that drug herself.

But whether it makes sense to decouple possession rights from use rights depends entirely on the context. In particular, it depends on our *purpose* or rationale for recognizing the right to possession. The question to ask is not whether the right to keep and bear arms *ever* implies a right to use those arms. The question is whether the right to keep and bear arms *for a*

160. I am grateful to David Jaros, Colin Starger, and Maxwell Stearns for suggesting the possibility of decoupling the right to bear arms from the right to armed resistance. The nuclear deterrence analogy did not in fact just “come to mind”; it was posed by Colin Starger.

particular purpose—the prevention of tyranny—implies a right to use those arms for that purpose.

Consider again the pharmacist analogy. Our purpose for allowing the pharmacist to possess dangerous drugs is so she can lawfully sell them to others who have a prescription for them (i.e., a lawful right to use them). Given this purpose, it makes sense to allow the pharmacist to possess the drugs but not to use them herself. The purpose of allowing her to possess them is so she can sell them to someone else who has a right to use them.

Under anti-tyranny rationales, however, our purpose for allowing citizens to possess arms is *not* that those citizens can then provide the arms to someone else who has a right to use them. Our purpose, rather, is to deter the government from engaging in tyranny out of fear of armed resistance. That purpose depends on the possibility that the government actually will fear armed resistance—that is, that the government will believe citizens might actually use the arms in their possession, despite the absence of a legal right to use them. The right to possess arms thus depends on the existence of a realistic possibility that those arms will be used illegally.

It seems to me that to endorse a realistic threat of illegal activity is conceptually indistinguishable from endorsing the illegal activity itself. Or, if the two are conceptually distinguishable, the distinction is too thin to have normative significance. Free-speech law might be instructive on this point. In addition to punishing violent acts, government, consistently with the First Amendment, may punish “true threats” of violent action: “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”¹⁶¹ In a strict sense, speech threatening violence is conceptually distinct from actual violence. But the government’s strong interest in preventing the latter justifies its punishment of the former; the threat is subsumed within the activity being threatened. In condemning the threat, the government is effectively condemning the activity being threatened. So too, the Second Amendment’s *endorsement* of the threat (of armed resistance) would effectively be an endorsement of the activity being threatened (armed resistance).

If this analysis is correct, then both of the conceptual problems with anti-tyranny rationales reemerge. The Second Amendment, while not actually licensing illegal activity, would endorse that activity, which seems a distinction without a difference. It also would endorse individual defection

161. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

from the law's settlement of social disputes, which would vitiate the dispute-resolution purpose of law on procedural accounts.

I think the nuclear deterrence analogy mentioned above actually supports this conclusion. In fact there *is* no internationally recognized right to possess nuclear weapons—quite the contrary: the Treaty on the Non-Proliferation of Nuclear Weapons, to which 190 nations are parties, actually prohibits the provision of nuclear weapons to nations that do not already have them.¹⁶² Once a nation possesses nuclear weapons, of course, it makes sense to deny it the right to use those weapons. But this does not mean we can decouple possession from use in deciding whether to allow a right to possession in the first place. To recognize a right to possession of weapons in the interest of deterring their use by others is to implicitly endorse their use by the possessor in appropriate circumstances. Otherwise, the intended deterrent effect would vanish.

So I am skeptical that anti-tyranny rationales can be made more coherent or palatable by formally decoupling the right to possess arms from the right to use them.¹⁶³ It seems to me that someone committed to an anti-tyranny reading of the Second Amendment necessarily is committed to at least the possibility of armed resistance to the government. And that possibility, when supposedly backed by the force of law, creates conceptual and normative trouble for the reasons discussed above.

C. Footnote Four and a Structural Second Amendment

I have argued so far that the Second Amendment lacks authority on both *Heller*'s self-defense rationale and the widely endorsed anti-tyranny readings of that amendment. What plausible interpretations are left?

In his dissenting opinion in *Heller*, Justice John Paul Stevens agreed with the majority that the Second Amendment protects a right that can be

162. See Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

163. There are practical and interpretive objections to this maneuver as well. Practically speaking, it's far from clear that anything short of a private right to possess large numbers of very sophisticated and dangerous weapons would actually serve as a deterrent to government tyranny. (The government, after all, has an army.) As a matter of interpretation, the language of the Second Amendment—protecting not just a right “to keep” arms, but a right “to keep and bear” them—suggests that not merely possession, but some form of use (if only the “carrying” of arms, which is how the *Heller* majority interpreted “to bear,” 554 U.S. 570, 584-91 (2008)), is allowed. This seems to further blur the possession/resistance line that must be drawn to sustain the decoupling maneuver.

enforced by individuals.¹⁶⁴ But he denied that the right in question is a right to keep and bear arms for self-defense.¹⁶⁵ He concluded, rather, that the Amendment protects “a right to use and possess arms in conjunction with service in a well-regulated militia.”¹⁶⁶ His interpretation rested primarily on the presence and language of what the majority called the Amendment’s “prefatory clause”¹⁶⁷—“[a] well regulated Militia, being necessary to the security of a free State”¹⁶⁸—and on the drafting and enactment history of the amendment.¹⁶⁹ Justice Stevens determined that the Framers intended (and the contemporaneous public understood) the amendment to prevent the new federal government from disarming the citizens’ militias within the states (which were important safeguards against insurrection and invasion in the late eighteenth century), thereby preserving the fragile federal-state balance of power in the newly formed nation.¹⁷⁰

Justice Stevens thus interpreted the Second Amendment in essentially structural terms—as “a federalism provision,” as he later described it in his *McDonald* dissent,¹⁷¹ one similar in function to the Tenth Amendment¹⁷² or to judicially defined limits on Congress’ Commerce power.¹⁷³ The point of the amendment was not to protect individuals against private aggression, but rather to preserve a sphere of inviolable state power against federal encroachment.¹⁷⁴ Thus the scope of the amendment extended only to the

164. 554 U.S. at 636 (Stevens, J., dissenting) (“Surely [the Second Amendment] protects a right that can be enforced by individuals.”).

165. *See id.* at 637 (“[T]here is no indication that the Framers of the [Second] Amendment intended to enshrine the common-law right of self-defense in the Constitution.”).

166. *Id.* at 651.

167. *Id.* at 577, 595-600 (majority opinion).

168. *See id.* at 640-44 (Stevens, J., dissenting).

169. *See id.* at 652-62.

170. *See id.* at 661-62.

171. *McDonald v. City of Chicago*, 561 U.S. 742, 897 (2010) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring in judgment)).

172. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

173. *See, e.g., Nat’l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2584-93 (2012) (limiting the Commerce power to the regulation of economic “activity” rather than inactivity); *United States v. Lopez*, 514 U.S. 549, 560-67 (1995) (holding that the Commerce power does not allow regulation of “noneconomic” activities that are not interstate or foreign commerce); *see also* U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).

174. *See* *District of Columbia v. Heller*, 554 U.S. 570, 643, 661-62 (2008).

possession and use of arms in the context of service in an organized state militia (which today probably would mean service in a state National Guard).

(1) *Structure and Footnote Four.* Justice Stevens's structural reading of the Second Amendment easily can be understood in Footnote Four terms. Constitutionalizing protection for state militias against federal encroachment most likely goes beyond the bare-bones level of constitutive ground rules necessary for government to function, although one might reasonably argue otherwise. But it certainly accords with the Footnote Four worry about self-interested majorities and power entrenchment. Surely the federal government itself cannot be trusted to uphold state autonomy or police the boundaries of its own powers vis-à-vis those of the states. By (partially) insulating from political control what was, in the late-eighteenth century, a prominent source of sovereign power—armed citizens' militias—the Second Amendment thus solved a potential power-entrenchment problem. Our reason to obey the Amendment today, so understood, is to preserve this relatively fair and impartial resolution of one aspect of the federal-state power struggle.

(2) *Anti-tyranny redux?* But does this structural-federalism interpretation fall victim to the critique of the anti-tyranny reading I advanced in Section IV.B, above?¹⁷⁵ I suggested there that there is no meaningful distinction between a legal right to possess arms for the purpose of deterring tyranny and a legal right to use those arms to resist tyranny. And a legal right to armed resistance of supposedly tyrannical government, I argued, is incoherent, inconsistent with the dispute-resolution premises of the Footnote Four account, or both.

The *Heller* dissenters read the Second Amendment to protect the states' right to maintain armed, organized militias as a hedge against federal overreaching.¹⁷⁶ Is this simply an anti-tyranny argument in federalism's clothing? What would be the purpose of preserving state-controlled militias if not to allow the states to engage in armed resistance against federal tyranny? If that is the amendment's purpose, then it is, as I've argued, incoherent: there cannot be a legal right to violate the law. Such a purpose also would be at odds with the notion of lawful dispute resolution that underlies the Footnote Four approach.

However, while in some sense the structural-federalism reading is an "anti-tyranny" reading, it differs from the interpretations discussed in

175. Thanks to Colin Starger for noting this potential objection.

176. 554 U.S. at 661-62.

Section IV.B because it does not depend on the threat of illegal armed resistance to lawful authority. Ensuring the states' access to armed militias can be understood as simply a way of reducing the states' reliance on the federal government. According to this reading, armed state militias can keep the peace, suppress insurrections, and repel invasions, all without having to call immediately on Washington (and its standing army) for assistance. These functions preserve state autonomy without licensing actual state resistance against the federal government. In doing so, the Second Amendment guards against tyranny in the same indirect way that the structural Constitution in general does: by preventing the concentration of power in a single unit of government.

On this relatively modest structural-federalism reading, the Second Amendment serves roughly the same function as the constitutional reservation to the states of the general police power. A general police power, like the power to control an armed citizens' militia, risks misuse by the state governments. But the risk of misuse is not the reason for reserving the power. The reason for reserving to the states the power embodied in armed citizens' militias is (on this view) the preservation of some degree of state autonomy, even when the use of armed force is required. That the states need not call Washington every time armed troops would be helpful does not mean that the states are licensed to deploy those troops against the federal government.

(3) *An authoritative Second Amendment?* Justice Stevens's structural federalism reading therefore can be understood as consistent with Footnote Four's procedural account of constitutional authority. I acknowledge that by distinguishing Justice Stevens's reading from problematic anti-tyranny interpretations, I am giving that reading the benefit of the doubt. And of course it is reasonably possible to disagree with Justice Stevens's reading, either at the level of interpretive methodology or at the level of application of methodology. It is possible, in other words, that the structural federalism reading is an incorrect interpretation of the Second Amendment.

But we do not know the "correct" meaning of the Second Amendment or the proper methodology for identifying that meaning. On these questions, we humans are unavoidably fallible, and thus uncertain, and thus prone to inevitable disagreement. The best we can do is ask whether Justice Stevens's interpretation is *reasonable* when measured against the only thing that can matter given our fallibility: the conventions of constitutional interpretation within the American tradition. And while the fact that four justices endorsed Justice Stevens's reading may not be conclusive evidence

of its reasonableness, it should at least shift the burden of proof to anyone seeking to argue otherwise.¹⁷⁷

In any event, I will assume for present purposes that both Justice Scalia's interpretation for the majority and Justice Stevens's for the dissent are reasonable ones. Putting aside variations in minor details, I believe those two readings of the Second Amendment, plus the anti-tyranny readings canvassed above, are the only reasonable interpretations of the amendment that can be advanced. Of these, only Justice Stevens's structural-federalism reading is potentially consistent with a plausible account of constitutional authority.

*V. Conclusion: The Second Amendment and the Function
of Constitutional Rights*

I have argued here that the authority of constitutional law must be justified, if it can be justified, on procedural grounds—on the basis of how the Constitution commands us rather than what the Constitution commands. As the case of the Second Amendment suggests, this conclusion has particular significance for constitutional rights.

It is easy to understand many or most of our Constitution's *structural* provisions in procedural terms. Separation of powers, bicameralism, federalism, and other structural components arising from the Constitution typically can be seen as necessary constitutive elements of our democratic government, or as ways to distribute and divide sovereign power so as to solve power-entrenchment problems. But the procedural case for constitutional *rights* is not so straightforward. Constitutional rights are content-limiting, not merely constitutive: they determine which results a fully constituted and functioning democratic government is permitted to reach. It is tempting, then, to imagine that many or most constitutional rights can be justified only on substantive terms—as means of protecting certain sacrosanct moral values from democratic encroachment.

This temptation often is indulged by the commonplace observation that the Framers, products of their time, shared a general belief in prepolitical “natural rights.”¹⁷⁸ From a proceduralist point of view, however, it is interesting to note that the Framers included very few rights-conferring provisions in the original Constitution, believing that its structural

177. See *Heller*, 554 U.S. at 636. Justice Stevens was joined in dissent by Justice Souter, Justice Ginsburg, and Justice Breyer.

178. E.g., BARNETT, *supra* note 60, at 53-86; CHESTER J. ANTIEAU, *RIGHTS OF OUR FATHERS* 172-92 (1968).

safeguards alone would provide ample “security . . . to the rights of the people.”¹⁷⁹ The effect of this forbearance, whether intended or not, was to leave most disputes about rights—about their content, their application, even their existence—to be worked out in the everyday democratic process, and to constitutionalize only a set of structural ground rules for deciding these issues fairly. The Framers may have believed in natural rights, but their first instinct was to subject issues of rights to resolution by democratic government, not to impose their own views about those issues on future generations of Americans. In this sense, the 1787 Constitution was a strikingly proceduralist document.

Of course, the Framers soon added the Bill of Rights to that document, in part thanks to antifederalist worries that natural rights otherwise would not be sufficiently protected.¹⁸⁰ As Ely has shown, however, most provisions of the Bill of Rights serve anti-entrenchment or anti-bias functions.¹⁸¹ The same can be said for the rights-conferring provisions of the Thirteenth and Fourteenth Amendments.¹⁸² The Fifteenth Amendment¹⁸³ and the

179. THE FEDERALIST NO. 51, *supra* note 57, at 265 (James Madison); *see* THE FEDERALIST NO. 84, *supra* note 57, at 433, 435 (Alexander Hamilton).

[A] minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns. . . .

I go further, and affirm that bills of rights . . . are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. . . .

. . . .
 . . . The truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.

Id.

180. *See* UROFSKY & FINKELMAN, *supra* note 11, at 135-41 (describing the debates leading to ratification of the Bill of Rights).

181. *See* ELY, *supra* note 14, at 93-98.

182. *See id.* at 98. Ely does concede that the Thirteenth Amendment “surely . . . embodies a substantive judgment” against slavery, *id.*, but of course any anti-bias provision must embody a “substantive judgment” in this sense—that is, as a means of distinguishing between biases that are irrational or otherwise unjustifiable and those that are not.

183. U.S. CONST. amend. XV (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude . . .”).

subsequent voting-rights amendments¹⁸⁴ serve all three purposes identified by the Footnote Four account: anti-entrenchment, anti-bias, and constitutive.¹⁸⁵

The Second Amendment, however, is not so easily squared with Footnote Four. On most plausible interpretations, the amendment does nothing more than impose a controversial substantive value—the right of the people to keep and bear Arms—on the American public, depriving us of our capacity to resolve that controversy through democratic means. Only Justice Stevens’s structural-federalism reading of the amendment—understood charitably, perhaps—can claim any grounding in the Footnote Four account. And the Footnote Four account is the only justification of constitutional authority that can assert any claim to plausibility.

In other words, on most readings, the Second Amendment lacks authority. Does this fact license disobedience to the amendment—or at least to *Heller*’s interpretation of the Amendment—by (say) states or localities seeking to implement strict gun-control measures? Not necessarily; the idea of piecemeal disobedience of the Constitution poses its own serious difficulties on a procedural approach. But that is a topic for another day. Here I want to conclude by suggesting two implications we might draw about constitutional rights, and about constitutional law more generally, from the case of the Second Amendment.

A. Footnote Four as Jurisdictional Principle

First, the fate of *Heller*’s Second Amendment on a Footnote Four account suggests a principle of constitutional *jurisdiction*—a meaningful boundary line between those subjects that legitimately can be constitutionalized and those that cannot. Some issues (involving the basic structure of government, the political rights of democratic minorities, the fair treatment of historically victimized groups) cannot be resolved by everyday democracy without raising serious constitutive, entrenchment, or bias problems. These issues are properly resolved, at least at last resort,

184. *See id.* amend. XXVI (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”); *id.* amend. XXIV (“The right of citizens of the United States to vote in any [federal election] shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.”); *id.* amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”).

185. Ely discusses these franchise-enlarging amendments at ELY, *supra* note 14, at 98-99.

through extra-democratic constitutional processes. That is, they are appropriate subjects of constitutional law.

But most politically contested issues do not fit this description. The issue of whether and how to allow individual gun possession for self-defense, for example, is perfectly susceptible of fair resolution through the majoritarian democratic process. Of course, many Americans will not like the outcome of that resolution, but this is an inevitable feature of any dispute-resolution process. The same holds for other purely substantive topics of dispute, such as (for example) whether it is bad or wrong or harmful to consume alcoholic beverages. Footnote Four thus explains the now-commonplace notion that the Eighteenth Amendment¹⁸⁶ was not just a bad idea but affirmatively unsuitable for inclusion in the Constitution—that is, outside the Constitution’s proper jurisdiction.¹⁸⁷

This jurisdictional principle also might be used to critique other provisions of our Constitution or particular interpretations of those provisions. Consider the right to choose an abortion first declared in *Roe v. Wade*¹⁸⁸ and upheld in truncated form in *Planned Parenthood v. Casey*.¹⁸⁹ As the *Roe* Court understood the right, it embodied a pregnant woman’s strong personal interests in liberty and autonomy,¹⁹⁰ interests that were powerful enough to outweigh the uncertain, inchoate interest of the state in preserving the life of the fetus before viability. *Roe* thus exemplifies the doctrine of “substantive” due process, which limits the authority of the government to infringe certain “fundamental” personal liberty interests.

So understood, the abortion right, and other manifestations of substantive due process, do not fit Footnote Four.¹⁹¹ As with *Heller*’s substantive right of armed self-defense,¹⁹² the right to abortion clearly is not a constitutive rule of the type necessary to create basic institutions and procedures of democratic government. Nor is it an anti-entrenchment rule: unlike restrictions on voting or political expression, restrictions on abortion do not

186. U.S. CONST. amend. XVIII (repealed 1933) (prohibiting “the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States”).

187. See, e.g., ELY, *supra* note 14, at 99 (describing the Eighteenth Amendment as an “attempt[] to freeze substantive values” that “do[es] not belong in a constitution”).

188. 410 U.S. 113, 166 (1973).

189. 505 U.S. 833, 845-46 (1992).

190. See *Roe*, 410 U.S. at 153 (“The detriment that the State would impose upon the pregnant woman by denying this choice [to terminate a pregnancy] altogether is apparent.”).

191. Ely himself thought *Roe* was wrongly decided. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

192. See discussion *supra* Section IV.A.

make it more difficult to unseat government officials or the current political majority.

There is, I think, a nearly irrefutable argument that abortion restrictions unfairly limit the ability of women to participate fully in social, economic, and political life, and a plausible argument that such restrictions often are motivated by gender or religious bias. An abortion right thus might be understood to fulfill the anti-bias function of constitutional law on the Footnote Four approach: abortion restrictions tend to handicap women's participation in the democratic process, and the political majority cannot be trusted to determine whether and when this is so because of persistent gender and religious prejudice.

The trouble is that *Roe* was not written as an anti-bias decision, and substantive due process doctrine more generally is not animated by anti-bias concerns. *Roe* grounds the right it upholds, not in the danger of systemic bias against the regulated class—essentially an equal-protection concern—but rather in the notion that the interests of persons in that class are too important to be regulated by the majority. This is the essence of substantive due process: the premise that there are certain substantive outcomes the democratic process is not entitled to reach. *Heller* shares that premise. The premise might make sense if we have consented to place those outcomes off-limits, or if the Constitution or its Framers could identify off-limits outcomes better than we can. But none of these contentions are plausible, as I've argued.

So the critique of *Heller* also applies to the doctrine of substantive due process. That said, I suspect many manifestations of substantive due process, including the abortion right, can be justified on alternative Footnote Four grounds,¹⁹³ just as the Second Amendment might be. The

193. Several prominent scholars have suggested that a better grounding for the *Roe* result would have been equal protection—specifically the need to protect women from the political, social, and economic disabilities imposed by unwanted pregnancies. See, e.g., Jack M. Balkin, *Jack M. Balkin (judgment of the Court)*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 31, 42-45 (Jack M. Balkin, ed., 2005); Reva B. Siegel, *Reva B. Siegel (concurring)*, in *WHAT ROE V. WADE SHOULD HAVE SAID*, *supra*, at 63, 63-82. The plurality in *Casey* hinted at such a grounding for the abortion right. See 505 U.S. at 835 (“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”). Similarly, substantive due process decisions protecting homosexual conduct, such as *Lawrence v. Texas*, 539 U.S. 558 (2003), might be understood in Footnote Four terms, as safeguards against irrational majority bias directed at homosexuals. (Justice O’Connor’s concurrence in *Lawrence*, which relied on equal protection rather than substantive due process, would have taken essentially this approach. See 539 U.S. at 579.)

most important lesson of *Heller* therefore might be one of flexibility in constitutional interpretation. I have more to say on that point below.

Footnote Four's implicit jurisdictional principle also can be deployed to evaluate the suitability of proposed constitutional amendments. Consider recent proposals to amend the Constitution to prohibit desecration of the national flag¹⁹⁴ or to ban recognition of same-sex marriage.¹⁹⁵ I happen to think both of these measures would be very bad policy, but the Footnote Four critique of *Heller* suggests a more categorical reason to oppose them: neither could be justified on procedural grounds. No conceivable constitutive, anti-entrenchment, or anti-bias purpose would be served by banning flag desecration (as opposed to *protecting* it, as the Free Speech Clause now does),¹⁹⁶ or by prohibiting same-sex marriage (as opposed to *allowing* it, as the Equal Protection and Due Process Clauses now do).¹⁹⁷ To adopt these amendments would simply be an attempt to bind future democratic majorities to the current majority's preferred substantive values.

It is worth noting that *substantive* accounts of authority cannot yield a jurisdictional principle of this sort. Consensualist and Moral Guidance accounts offer no basis for identifying appropriate subjects of constitutional amendment; so long as an amendment achieves sufficient consent or is adopted by a comparatively wise framing process, anything goes. (Ironically, these substantive accounts provide no substantive criteria for deciding what should go into a constitution.) Moral Content accounts, in contrast, turn entirely on substance (if it is morally good or just, it gets in) and thus reduce the question of constitutional jurisdiction to the inherently contentious question of substantive merit.

B. Authoritativeness as Interpretive Principle

An authority-based analysis of the Second Amendment implies an *interpretive* principle as well as a jurisdictional one. *Heller's* Second Amendment lacks authority, but the *Heller* dissenters' Second Amendment arguably possesses it. We have no duty to obey a constitutional command

194. See, e.g., *Flag-burning Amendment Fails by One Vote*, CNN (June 28, 2006), <http://www.cnn.com/2006/POLITICS/06/27/flag.burning/index.html>.

195. See, e.g., Laurie Kellman, *Gay Marriage Ban Falls Short of Majority*, WASH. POST (June 7, 2006, 2:42 PM), http://www.washingtonpost.com/wp-dyn/content/article/2006/06/07/AR2006060700929_pf.html.

196. See *Texas v. Johnson*, 491 U.S. 397 (1989).

197. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (invalidating state laws restricting marriage to different-sex couples on substantive due process and equal protection grounds); *United States v. Windsor*, 133 S. Ct. 2675 (2013) (invalidating federal statute prohibiting recognition of same-sex marriages on substantive due process and equal protection grounds).

that lacks authority, as I explained in Part II. All else being equal, the Court should interpret constitutional provisions in the way that best justifies our duty to obey them. And so (all else being equal) we ought to prefer the *Heller* dissenters' reading of the Second Amendment to the majority's, because the dissenters' reading better justifies the amendment's authority.

This conclusion might be generalized roughly as follows: as between two or more reasonable interpretations of a constitutional provision, all else being equal, a court should choose the one that better accords with a plausible account of constitutional authority. This principle, of course, would require that courts and other interpreters consciously take the question of constitutional authority into account in deciding what the Constitution means.

Elsewhere, I have argued for this proposition at the level of general theories or methodologies of constitutional interpretation.¹⁹⁸ The question of interpretive methodology is in essence a question about the appropriate source of constitutional norms—about where those norms may be found. May an interpreter derive constitutional norms from somewhere other than the text (given endemic textual underdeterminacy, the answer has to be yes), and if so, from where? Must the norms be derived from some fact about the world as it existed when the text was created or ratified (the authors' intentions, the public's understanding of the text's meaning)—an originalist premise? Or may the norms come from somewhere else: evolving traditions, perhaps, or even the dictates of justice or good policy as argued by the litigants or determined by the court? May nontextually derived constitutional norms ever override the norms clearly communicated by the text? When we debate interpretive methodology, these are the kinds of questions we are asking.

I have argued in prior work that these questions about the source of constitutional norms should be answered in the way that best makes sense of constitutional authority.¹⁹⁹ The sources to which we look to identify norms ought to reflect the reasons why we think those norms are authoritative. Because the best account of constitutional authority is a procedural account along Footnote Four lines, I have contended that interpreters should look for sources of constitutional norms that can fulfill the constitutive, anti-entrenchment, or anti-bias functions of constitutional law on such an account. The text is one such source, since the text by itself

198. See Peters, *Originalism*, *supra* note 55, at 189; Peters, *What Lies Beneath*, *supra* note 19.

199. See generally Peters, *What Lies Beneath*, *supra* note 19.

is capable of communicating constitutive rules and (as an inanimate object) feels no irrational bias or temptation to entrench its own power. Original intent or meaning can be another such source; long-dead Framers have no interest in entrenching the power of current majorities or government officials. The considered moral and political judgments of life-tenured judges, narrowed and informed by the adversarial adjudicative process, can be yet another source of relative impartiality on issues involving the potential for entrenchment or irrational bias.

I thus have suggested that the Footnote Four account leads to a relatively flexible, capacious approach to constitutional interpretation. Of course, such an approach often will leave open the possibility of multiple alternative interpretations of any given constitutional provision in any given case. In fact, even methodologies that are more dogmatic frequently will underdetermine the meaning and application of a particular constitutional provision. “New Originalist” theorists like Randy Barnett and Larry Solum, for example, acknowledge that their “original meaning” approach often leaves considerable room for judicial “construction” of constitutional meaning when the original meaning of a constitutional provision runs out.²⁰⁰

A commitment to a methodology of interpretation, then, frequently will not determine the result of a particular constitutional case. Zones of indeterminate meaning will appear with regularity under most or all plausible interpretive approaches. And the analysis in this Article implies that within these zones of indeterminacy, the interpreter’s decision about what a particular constitutional provision means should be influenced, perhaps even driven, by considerations of authority. If the provision would possess authority on one possible meaning and would lack it on another, then the interpreter—barring some extrinsic reason to the contrary—ought to choose the meaning that confers authority. Just as no provision of the Constitution should be presumed to be without effect,²⁰¹ so no provision should be presumed to lack authority.

The underlying difficulty, of course, may well be that judges (and other Americans) fundamentally disagree about why the Constitution has authority over us. But we shouldn’t accept this disagreement as a given.

200. See, e.g., BARNETT, *supra* note 60, at 118-30; Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010); Lawrence B. Solum, *Semantic Originalism* 67-87 (U. Ill. C. L., Pub. L. & Legal Theory Res. Paper Series No. 07-24) (Nov. 22, 2008), <http://ssrn.com/abstract=1120244>.

201. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect . . .”).

Unlike interpretive methodology or the meaning of particular provisions, the problem of constitutional authority is woefully underexplored in our jurisprudence, so much so that it is rarely clear whether or on what basis people disagree about it. How we interpret and apply the Constitution ought to depend on *why* we are doing so—on why we think the Constitution binds us in the first place. *Heller's* troubling Second Amendment should prompt us to take that fundamental question seriously.