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AGAINST INTERPRETIVE OBLIGATION (TO THE SUPREME COURT)

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I.

In a forthcoming book—*Against Obligation: A Theory of Permeable Sovereignty*—I try to tie together arguments for—and against—both political and interpretive obligation—focusing on citizens' duty to obey the law and on government officials' duty to follow what the U.S. Supreme Court says the Constituuion means. The arguments for even a prima facie moral duty to obey the law don't work, separately or together. These arguments include consent in its various iterations, fair play, political participation, a natural duty to obey just institutions, associative obligation, and consequentialist arguments from settlement, coordination, and the like. Some of these arguments ground limited duties to obey the law, but none can buttress a more general duty. The arguments for an official duty to follow what the Court says the Constitution means—what I call "interpretive obligation"—track some of the arguments for political obligation. Consider in this regard Larry Alexander and Fred Schauer's focus on how just as we step back from our judgments of morality and political justice, deferring to the second-order judgments of law and the Constitution, so should officials view their constitutional interpretations as preempted by the interpretations of the Court. In each setting we appropriately preempt certain reasons or considerations in the service of stability, coordination, and settlement.[1] But, I will maintain, these arguments are no more able to ground a general, prima facie duty for officials to follow what the Court says the Constitution means than they are able to ground a general, prima facie duty to obey the law.[2]

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1. *See* Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 Const. Comment. 455 (2000) [hereinafter Alexander & Schauer, *A Reply*]; Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv. L. Rev. 1359 (1997) [hereinafter Alexander & Schauer, *Extrajudicial*]; Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 Cal. L. Rev. 1045 (2004).

2. I also believe we need not interpret the Constitution as falling short of what political justice requires. This is a harder argument to make, though, because of the widely accepted view that we do not have a perfect Constitution, i.e., that as a factual matter we have adopted a Constitution with a limited domain. In another place, I have suggested some reasons to think this is not so, i.e., that we may read our Constitution aspirationally, as matching what political justice would require. *See* Abner S. Greene, *Can We Be Legal Positivists Without*

What we're left with, I contend in the book, is a claim of authority—by law and by the law's supreme interpreter—without a corresponding duty to follow authority. As Joseph Raz puts it, although law claims authority, it rarely, if ever, has the authority it claims.[3] I turn then to a mission of repair—if not ultimately putting back together the case for either political or interpretive obligation, I try to show how a combination of exit and voice can provide an approximation or trope of the grounds for obligation that are otherwise lacking. As for exit, I argue for legislative accommodations and judicial exemptions for people who wish to live by their own moral or religious norms. Sovereignty can't be defended as plenary; instead we should see sovereignty as permeable.

Regarding voice, I argue for a plural, dialogic working out of the Constitution's meaning. And that's what I'll say more about in this essay. One note up front: Interpretive obligation could be about obligation to a higher interpretive authority—a supreme court—or about obligation to a prior authority—the intentions (at some level of generality) of the writers or ratifiers of the relevant text. Some argue that legal interpretation must be intentionalist.[4] The intentionalist view says nothing, per se, about obligation to a higher interpretive authority, for both government officials and a supreme court could (or could not) adopt an intentionalist view of interpretation. There is an argument, though, that the case for official deference to Supreme Court precedent is buttressed by the comparative advantage courts have in doing archival recovery of framers' intentions.

Being Constitutional Positivists?, 73 Fordham L. Rev. 1401 (2005). But I will not otherwise be advancing this view here.

3. *See* Joseph Raz, The Morality of Freedom 78 (1986). Alexander and Schauer elide the distinction between claiming and having authority when they write that the possible wrongness of a Court constitutional interpretation "should not call into question its authority, for it is inherent in all legal settlements of what ought to be done that such settlements claim authority even if those subject to them believe the settlements to be morally and legally mistaken." *See* Alexander & Schauer, *A Reply*, *supra* note 1, at 457. This sentence moves from an assertion about "authority" to one about "claim[ing] authority," but the two are not the same. Having authority requires some justification beyond claiming it. Later in the piece, Alexander and Schauer make a related, but different point, by arguing that there is "always a gap between the concept of what the authority is right to command and what the subject is right to do," calling this the "asymmetric nature of authority." *Id.* at 472 n.50; *see also* Larry Alexander, *Can Law Survive the Asymmetry of Authority?*, 19 Quinnipiac L. Rev. 463, 467, 481 (2000); Frederick Schauer, *The Questions of Authority*, 81 Geo. L.J. 95, 110 (1992). In the book, I argue both that citizens have no prima facie moral duty to obey the law and that government (even in a liberal democracy) is not justified in claiming plenary sovereignty over the lives of its citizens. My point is the same for the relationship between the Supreme Court and government officials who must decide whether to follow Court precedent. Additionally, Alexander and Schauer's argument for the authority of Court constitutional interpretation moves back and forth between a (highly contestable) empirical observation that we have accepted a strong role for Court precedent and a normative argument that we should do so. *See, e.g.*, Alexander & Schauer, *A Reply*, *supra* note 1, at 464-66, 474; *cf. id.* at 455, 469, 471, 475.

4. *See, e.g.*, Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 San Diego L. Rev. 967 (2004); Stanley Fish, *There Is No Textualist Position*, 42 San Diego L. Rev. 629 (2005).

Eventually one would have to weigh in on either that point, or on the relevance and weight of framers' intentions, or both.

II.

The debate about the proper response of government officials to Supreme Court constitutional rulings is long-standing. In today's scholarly world, the poles are represented by Mike Paulsen and by Larry Alexander, Fred Schauer, and Larry Solum. Paulsen argues that Supreme Court rulings lack binding effect even in the case at bar; i.e., that every government official has, in every case at every instant, an independent constitutional duty to do what she thinks is right by the Constitution.[5] Alexander, Schauer, and Solum argue that government officials have a prima facie duty (of an undetermined strength, but fairly strong) not only to follow the Court in the case at bar but also, and more importantly (since this is where the action really is, pace Paulsen), to follow what the Court says the Constitution means as precedent, in other cases or circumstances that arise.[6] Given my general arguments against obligation, you might expect me to be in Paulsen's camp, but I'm not; I'm actually in the middle, and I'll explain how I get there.

There are three basic arguments for interpretive obligation (by which I mean, here, a prima facie duty for government officials to follow what the Court says the Constitution means). First, Article VI of the Constitution says that the Constitution is the supreme law of the land,[7] but the Constitution doesn't interpret itself. Article III says there shall be a Supreme Court and it shall have jurisdiction over cases arising under the Constitution;[8] thus, what the Court says the Constitution means has authority over what others might think the Constitution means. This is not exactly the same as saying that what the Court says the Constitution means is on par with the Constitution itself (which is not a plausible claim), but it does much the same work. Second, as Hamilton argued in *Federalist No. 78*,[9] we need the check of an independent judiciary over the political branches. We can combine this with *Carolene Products* footnote 4,[10] which argues (inter alia) for stepped-up judicial review of the political branches when their actions threaten to entrench politics against citizens' ability—through speech, press, petition, and voting—to check those very

5. *See, e.g.*, Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 Mich. L. Rev. 2706 (2003).

6. *See* Alexander & Schauer, *A Reply*, *supra* note 1; Alexander & Schauer, *Extrajudicial*, *supra* note 1; Schauer, *supra* note 2; Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 Harv. L. Rev. 1594 (2005) (reviewing Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004)).

7. U.S. Const. art. VI, cl. 2.

8. *Id.* art. III, § 1, § 2, cl. 1.

9. The Federalist No. 78 (Alexander Hamilton).

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

branches.[11] Third, the principal argument of Alexander, Schauer, and Solum trumpets the virtues of settlement. There are two ways of understanding their position: (1) Just as the law and the Constitution are limited domains—morality and political justice are the unlimited domains—so is the adjudicated Constitution a limited domain. And just as we preempt our reasoning about morality and political justice and follow the law and the Constitution instead, so should government officials preempt their reasoning about the Constitution and follow what the Court says the Constitution means. (2) Just as there's an anarchy concern if people don't, as a prima facie matter, obey the law, so is there an anarchy concern if government officials don't, as a prima facie matter, follow what the Court says the Constitution means.

III.

None of these arguments makes a persuasive case for even a prima facie duty for government officials to follow what the Court says the Constitution means. I have four principal points. First, the duty government officials owe is to the Constitution.[12] All government officials—federal and state, legislative, executive, and judicial—must take an oath to support the Constitution, not to support another branch's interpretation of the Constitution.[13] Moreover, our constitutional structure is, at the core, about dividing power, about warding off the concentration of power; it's about establishing multiple repositories of power.[14] That's key to the separation of powers, to federalism, to many of the individual rights, and to judicial review. The existence of judicial review—of the power of an independent judiciary to check the political branches—is indeed an important aspect of the multiple repositories of power. And judicial review must be final and binding in the case at bar for it to constitute such a check.[15] But this

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11. *See* Schauer, *supra* note 1, at 1057-58, 1060; *see also* Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 Cal. L. Rev. 1013, 1013, 1016 (2004).

12. And perhaps they owe this duty more generally to political justice writ large. *See* Greene, *supra* note 2.

13. *See* U.S. Const. art. VI, cl. 3 (giving the option of oath or affirmation); *id.* U.S. Const. art. II, § 1, cl. 8 (directing that one make a presidential oath or affirmation before taking office).

14. *See* Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. Chi. L. Rev. 123, 132, 147, 149, 156 (1994); Abner S. Greene, *Civil Society and Multiple Repositories of Power*, 75 Chi.-Kent. L. Rev. 477 (2000); Abner S. Greene, *Constitutional Reductionism, Rawls, and the Religion Clauses*, 72 Fordham L. Rev. 2089, 2103 (2004); Abner S. Greene, *Government of the Good*, 53 Vand. L. Rev. 1, 7-8, 10, 27, 60 (2000); Abner S. Greene, Kiryas Joel *and Two Mistakes About Equality*, 96 Colum. L. Rev. 1, 8, 14, 16-17, 36, 52, 54, 56, 86 (1996); Abner S. Greene, *Uncommon Ground—A Review of* Political Liberalism *by John Rawls and* Life's Dominion *by Ronald Dworkin*, 62 Geo. Wash. L. Rev. 646, 671-73 (1994); Abner S. Greene, *Why Vouchers Are Unconstitutional and Why They're Not*, 13 Notre Dame J. L. Ethics & Pub. Pol'y 397, 406-08 (1999).

15. *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995); Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. Rev. 123 (1999); Robert Post

checking function need not extend to a broader conception of precedential bindingness, even prima facie. Furthermore, the multiple repositories of power argument applies to courts as well as to other governmental actors—for the Court's view of the Constitution to bind other government officials would threaten a concentration of interpretive power in the Court.

Second, we can flesh out the observation that binding government officials to Court interpretations of the Constitution would threaten to concentrate power in the judiciary, by focusing on the virtues of interbranch dialogue.[16] Viewing constitutional interpretation as a dialogical process among all government officials is the perfect mirror of the multiple repositories of power. For why should interpretive power be any less plural and multiple?[17] Granted, in individual cases someone must have the final say, and the Supreme Court is the place in our constitutional order. But when it comes to elaboration of constitutional principle[18] more generally, an ongoing exchange between elected officials with their comparative advantages (closer to the people and the problems at hand) and disadvantages (the same, one might say), and the unelected judiciary, fits well with the cardinal antimonopoly principle. Dialogue also has a long

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& Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 Cal. L. Rev. 1027, 1034 (2004).

16. Scholars supporting a dialogical view of constitutional interpretation include the following: Alexander M. Bickel, The Morality of Consent 100-10 (1975); Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 Va. L. Rev. 83, 91 (1998); Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 Sup. Ct. Rev. 61, 63 (2000); Barry Friedman, *Dialogue and Judicial Review*, 91 Mich. L. Rev. 577, 580-81, 653-57 (1993); John Rawls, *The Justification of Civil Disobedience*, *in* The Duty to Obey the Law: Selected Philosophical Readings 49, 61-62 (William A. Edmundson ed., 1999). *But see* Mark Tushnet, Taking the Constitution Away from the Courts 196 n.29 (1999) ("One could construct an account of judicial review as dialogue, in which the justices serve as discussion leaders of this sort. Chapter 6 assesses such accounts, and concludes that the justices' contributions to the dialogue are smaller than one might think. The notion of judicial supremacy impedes our coming to understand the Court's work in such terms.").

17. *See* Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review 106, 109, 127 (2004) [hereinafter Kramer, *The People Themselves*]; Mark A. Graber, *The Law Professor as Populist*, 34 U. Rich. L. Rev. 373, 394 (2000); Larry D. Kramer, *Foreword: We the Court*, 115 Harv. L. Rev. 4, 84 (2001) [hereinafter Kramer, *We the Court*]; Gary Lawson, *Interpretive Equality as a Structural Imperative (or "Pucker Up and Settle* This*!")*, 20 Const. Comment. 379 (2003); Paulsen, *supra* note 5; Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *in* Who Speaks for the Constitution? The Debate over Interpretive Authority 41, 41 (Federalist Soc'y eds., 1992), Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), *in* Who Speaks for the Constitution? The Debate over Interpretive Authority 43, 43-44; Letter by James Madison (1834), *in* Who Speaks for the Constitution? The Debate over Interpretive Authority, *supra*, at 45, 45-46.

18. One might view the elaboration of constitutional principle as a common-law-like process that occurs over time and across citizens and officials. As Bickel put it, "Enactment and enforcement of law are sometimes only episodes, even if the single most important and influential ones, in a long and varied process by which society, working through a number of institutions, manages to realize a given purpose." Bickel, *supra* note 16, at 106; *see also* Keith E. Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning, at ix, 1, 5-6 (1999); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996).

pedigree in philosophy as a means to truth—consider Plato and Hegel.[19] Consider also, in our own constitutional tradition, the free speech opinions of Justice Holmes[20] and the roots in John Stuart Mill.[21] One has to be alert to the prospect of a never-ending dialogue, of real chaos. But my argument requires government officials to pay attention to this problem and asks the Court to attend to it as well.

Understanding constitutional interpretation as a plural, dialogical exercise rather than a single-vectored one makes sense for an additional reason. Since it is the Constitution, and not the Court, that is the supreme law of the land, it is important to have mechanisms to challenge Court interpretations, for they might be wrong. That the Court's interpretation is final in any given case cannot mean that the Court's interpretation is necessarily correct. If we viewed constitutional interpretation as single-vectored—always ending with what the Court says—then the only ways to correct erroneous Court interpretations would be through constitutional amendment or the Court's overruling itself. The former is notoriously difficult to accomplish, via Article V's cumbersome processes,[22] and the latter would be hard to come by if the other participants in the process of constitutional adjudication did not feel free to challenge Court interpretations. That is, if overruling could happen only on the Court's own initiative, Court rulings would become concretized in a way that would suggest an equation of the Court and the Constitution, which would be an improper alienation of agent from principal. By deeming it appropriate for government officials to challenge the Court, we open many avenues for reconsideration and correction.[23]

Third, the first way of understanding the settlement argument, as advanced by Alexander and Schauer, would exaggerate the way in which decisions from within the more limited domains affect reasoning in the broader domains. Law indeed may be a limited domain—it need not overlap morality. One way of understanding this is as buttressing a kind of separation of powers: For institutional reasons (about enforceability, the proper role of government, keeping some norms more alive through not instantiating them in law), the people police some norms through law and others outside of law. The same is true for the gap between the adjudicated Constitution and the Constitution—for institutional reasons that Larry

19. *See, e.g.*, G.W.F. Hegel, Phenomenology of Spirit (A.V. Miller trans., 1977); The Collected Dialogues of Plato (Edith Hamilton & Huntington Cairns eds., Lane Cooper et al. trans., Oxford Univ. Press 1978) (n.d.).

20. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting).

21. *See* John Stuart Mill, On Liberty (Elizabeth Rapaport ed., 1978) (1859).

22. *See* U.S. Const. art. V.

23. *See* Bickel, *supra* note 16, at 101-02; Friedman, *supra* note 16, at 647; Hartnett, *supra* note 15, at 150; Kramer, *We the Court*, *supra* note 17, at 15.

Sager[24] (and others) have set forth, the courts under-enforce the Constitution. The gap between the adjudicated Constitution and the Constitution, on this view, is about allocating decision making. It is not about ensuring that constitutional meaning is settled in the more limited adjudicative domain.

There is another way of showing how Alexander and Schauer's first argument for settlement is mistaken when viewed as an argument for decisions within the limited domains preempting reasoning within the broader domains. Consider the following three gaps: (a) between law and morality, (b) between the Constitution and political justice, and (c) between the adjudicated Constitution and the Constitution. In each pair, the first mentioned item is the limited domain, where we resist a set of considerations that are properly within the jurisdiction of the second mentioned item, the broader domain. Thus, law leaves some decisions unregulated, left to persons to work through within the broader domain of morality. Similarly, the Constitution leaves some matters ungoverned, left to citizens to work through within the broader domain of political justice.[25] Likewise, the adjudicated Constitution leaves some constitutional matters under-enforced and under-interpreted, left to the political branches (and citizens) to work through within the broader domain of the Constitution. We treat law, the Constitution, and the adjudicated Constitution as limited domains, restraining the intrusion of a broader set of considerations in our reasoning. But we do not insist that the restricted set of considerations in the limited domains dominate the broader domains. We limit the domain of law, of the Constitution, and of the adjudicated Constitution, so that much work can be done in the broader domains of morality, political justice, and the Constitution. In short, we settle matters for, or within, each limited domain, but we do not settle matters from the limited domain for the broader one.

To be sure, the limited domain side of each pairing exerts some force, imposes some limits, on what can be done in the broader domain. Law and the Constitution take certain matters off the table, rendering certain moral arguments (and resulting action) or certain arguments from political justice (and resulting action) untenable within the relevant legal system. Can we say the same about the relationship of the adjudicated Constitution to the Constitution? There are two arguments that we can. First, we want to avoid anarchy from multiple interpreters; I'll address this in the next paragraph. Second, we want to restrain political actors from engaging in certain conduct, and we believe we need an independent judiciary to do so. This is true, but the question is whether the restraint should be as a matter of precedent as well as a matter of following court orders in one's case.

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24. *See* Lawrence G. Sager, Justice in Plainclothes: A Theory of American Constitutional Practice 84-128 (2004); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978).

25. *But see supra* note 2.

Much of my argument in this essay suggests that a strongly deferential official posture toward Court precedent is unjustified.

Fourth, the best, and final, argument for interpretive obligation of government officials to the Court is the argument against anarchy.[26] But as with similar arguments for political obligation, this argument is overblown. (1) It assumes that the alternative to a prima facie duty to follow the Court is a free-for-all. But as I'll suggest in a moment, there are many factors government officials should take into account—in exercising their primary constitutional duties—in determining whether to follow what the Court says the Constitution means. One might argue that we should accept the argument against anarchy as supporting a prima facie duty to follow the Court, but view it as a weak duty, and build in all those factors in determining whether and when to override the prima facie duty. There are two responses. First, my analytic argument is that our constitutional structure is best understood as not giving any branch prima facie authority to interpret the Constitution. Second, the burden makes a difference. The burden will be either on the Court to justify its claims of authority or on government officials to justify their failure to defer to Court precedent on constitutional meaning. It should be on the former, because that will enhance multiple repositories of (interpretive) power. (2) Arguments for coordination are stronger in some settings than in others, and officials should account for these distinctions in deciding whether and when to follow Court precedent.[27] (2) The argument improperly assumes that anarchy will follow from rejecting prima facie obligation, rather than assuming that citizens (or government officials) will carefully consider the factors they should take into account. Anarchy arguments are also speculative regarding contagion—there's an assumption that because one government official goes her own way, all will, all the time.[28] But in fact what we see in our constitutional culture is a more nuanced history—some important examples (good and bad, from one's substantive perspective) of official rejection of Court precedent.[29]

IV.

As I've mentioned, government officials should consider various factors in determining whether and when to follow Court precedent. The Court should also consider various factors in determining how to respond to official departure from the Court's precedent.[30] Here is a sketch of factors

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26. *See supra* note 6.

27. *See* Alexander & Solum, *supra* note 6, at 1634.

28. *See* Richard E. Flathman, Political Obligation 53, 62, 268-74 (1972).

29. *See, e.g.*, Devins & Fisher, *supra* note 16; Louis Fisher, *Constitutional Law Writ Large*, 49 St. Louis U. L.J. 633 (2005); Hartnett, *supra* note 15, at 154 n.177.

30. Similarly, in the book I argue that citizens must take various factors into account in deciding whether to disobey law—either as a public matter of civil disobedience or a more private matter of wanting to be left alone to live by extralegal norms—and that government should also account for various factors in determining how to respond to disobedience.

officials should consider in deciding whether to defer to constitutional interpretation by the Court:

- how recent is the precedent, specifically, is it from the current generation;
- strong majority and strongly accepted versus weak majority and socially contested;
- distinguishability;
- specific positional questions that might vary among executives, legislators, and judges, and among national, state, and local governments;
- one's view of how well reasoned the precedent is.

I want to say a bit more about why it should matter that a precedent is from the current generation.[31] Consent is the truest and best source of obligation. In the adjudicative setting, participation in a particular case is a close approximation to consent. It gives the parties involved direct voice. We can add to this the argument that if people didn't obey court judgments in their own cases, the anarchy concern would be quite high.[32] At this end of the spectrum the arguments for interpretive (and political) obligation are strongest—both from voice approximating consent and from the most serious scenario for anarchy. Paulsen might be right that even in response to court orders, government officials have an independent duty to interpret the Constitution; but such a duty is always outweighed by the ability to participate and by the anarchy danger—or at least the case for a prima facie duty to follow the Court seems strong here. These arguments for obeying court orders in one's case do not, however, extend to Court opinions as precedent.[33] The voice argument doesn't apply (one didn't participate in a case invoked as precedent); and I've talked already about why the anarchy danger is overblown in the setting of precedent. Nonetheless, whether a constitutional issue has been thoroughly litigated during the current generation should be a weighty factor for a government official in deciding whether to defer to Court precedent. Generational vetting gives current officials a kind of virtual representation, a trope of direct voice. This would be insufficient to ground obligation based on voice-as-consent. But because I'm now referring to factors for government officials to weigh in determining when to follow the Court's constitutional interpretation, the

31. The roots of this idea are loosely based on Thomas Jefferson's argument that no generation of persons in a polity should bind future generations. *See, e.g.*, Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* Basic Writings of Thomas Jefferson 588-92 (Philip S. Foner ed., 1944). For a critique of Jefferson's argument as it might apply to constitutionalism, see David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 Yale L.J. 1717 (2003).

32. This is the best justification for the collateral bar rule. *See* Walker v. City of Birmingham, 388 U.S. 307 (1967).

33. *See* Hartnett, *supra* note 15.

closer we are to the model of a judgment in one's case, where one has been able to participate, the stronger the argument for deference to the Court. Also, it should be somewhat easier to argue for suspension of one's constitutional interpretive judgment as an official (out of deference to the Court's interpretation) than for suspension of one's moral judgments as a citizen (out of deference to law), because the former involves a more limited domain.

V.

Finally, a word about the internal perspective, which is the overarching theme of this Symposium. By internal perspective here I mean a person inside the system accepting the relevant authority. It's a mistake to argue that the internal perspective is necessary conceptually for a legal system to exist. Assume we have the Hartian basics—institutionality (as shown through persistence and continuity), official acceptance (in some meaningful sense) of secondary rules, and enough actual citizen compliance to show a working system.[34] Whether citizens in addition accept the primary rules as binding in some moral sense, as guiding, as doing more than setting costs for noncompliance, is better understood as a way of describing how a particular legal system operates than as a sine qua non for whether something is a legal system. We should see officials' attitudes toward Supreme Court opinions in the same way. Officials need not view Court precedent as having moral or guiding force, either as a matter of interpretive obligation or as a way to ensure that a system of judicial review exists. They merely need to see Court opinions as relevant (often weighty) factors to consider in doing their own official jobs, which include interpreting the Constitution.[35]

34. *See* Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, *in* Hart's Postscript: Essays on the Postscript to *The Concept of Law* 108-11 (Jules Coleman ed., 2001); H.L.A. Hart, The Concept of Law 51-66, 111-16 (2d ed. 1994).

35. *See supra* note 17.