AGAINST OBLIGATION

The Multiple Sources of Authority in a Liberal Democracy

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INTRODUCTION

The Case against Fidelity to Law, for Citizens and for Officials

Do you have a moral duty to obey the law? You might think the answer depends on the content of the law, or the circumstances. Murder, rape, robbery—those acts are immoral as well as illegal. But do you have a moral duty to obey a law that prohibits you from helping a suffering, dying relative end her life in peace? And although we might believe there's a moral duty to obey laws against using controlled substances, might we have a different view if the use is part of an age-old religious ritual, engaged in solely by consenting adults, harming no one outside the group? When we consider the variety of laws on the books, is it correct to say we have a moral duty to obey the law simply because it's the law, regardless of its content, or the circumstances of its application?

Here's a related question: May the government legitimately demand that we obey all laws all of the time? What about our other sources of norms, or values? That is, what about those of us whose religion, or philosophy, or family/clan/tribal rules, dictate other ways of behaving? Is it okay for government to say to each of us, "Put those other norms aside, and follow only the state's laws"?

Now, let's suppose you're a government official, maybe the mayor of a small town. You're trying to figure out whether it's constitutional to insist that racial minorities be given a certain percentage of government contract business. Or, perhaps, you're uncertain whether it's constitutional to deny a same-sex couple a marriage license. Or . . . well, the possible questions are endless. Must you follow what the Constitution's framers would have thought about the issues? Must you adhere to what the Constitution's text meant to the people at the time it was ratified? Must you follow the Supreme Court's precedents, developed over time? Or what the Court today thinks the Constitution means (or what you believe it would say if

asked)? In other words, do you have an obligation, as a government official, to follow what someone else thinks the Constitution means? Is it wrong to do otherwise?

The first set of questions refers to matters of political obligation—is there a moral duty to obey the law simply because it's the law?—and political legitimacy—is the government justified in demanding that we obey the law? (Although some would separate these questions of obligation and legitimacy, I treat them together, in part relying on a thick conception of political legitimacy.) The second set refers to what I call matters of "interpretive obligation"—in the constitutional setting, whether we have a duty to follow prior or higher sources of constitutional meaning. Throughout the book, I draw connections between political and interpretive obligation. The word often used to characterize an interpreter's obligations—fidelity—aptly represents a citizen's obligation to obey the law. Just as a citizen must be faithful to law, so must interpreters be faithful to sources of meaning. Many people believe both types of obligation exist. Their arguments are sometimes about warding off chaos, or anarchy, that they believe would result otherwise. Sometimes their arguments are about the proper role of a citizen or official in a liberal democracy, or about duties that citizens or officials have taken upon themselves by word or deed. I think all of these arguments are wrong, and in this book, I try to show why.

One of my goals is to show that citizens and constitutional interpreters should take values of fidelity into account without being bound by them. Thus, I resist the view that the citizen or interpreter bears a burden of displacing a default position of fidelity to purportedly authoritative laws or sources of interpretive understanding. Accordingly, I argue that there is no successful general case for a presumptive (or "prima facie") moral duty to obey the law, although such a duty may exist for some laws entirely and for some applications of other laws. Arguments for prima facie obligation to prior or higher authority in constitutional interpretation also fall short.

My case isn't, though, just "against" obligation. I also defend a conception that I call "permeable sovereignty." Many of us adhere to norms other than those of the state's laws. There's no good reason, I argue, to treat such other norms—religious, philosophical, family/clan/tribal, etc.—as subservient to the law. We should see all of our sources of value, of how to live, as at least presumptively on par with each other, as equal, even though in some circumstances we'll have to let our separate norms go and adhere to the law. In other words, we should see sovereignty as permeable through to

our plural sources of obligation, rather than as absolute in the state and its laws. I make my case against political obligation and for permeable sovereignty together; one of the reasons we should reject a moral duty to obey the law and the state's claim that it is justified in demanding we obey the law is that we shouldn't understand the law as having pride of place over other sources of norms. (By linking these arguments, I distinguish my case from a more thoroughgoing libertarian idea.) Seeing all sources of norms as on equal footing requires the state, when it can, to accommodate ways of living different from those dictated by law. In the chapters on interpretive obligation, I also defend an alternative view, of multiple or plural interpretive authority, at the same time that I critique the more standard notion that interpreting the Constitution requires putting aside one's views of constitutional meaning and deferring to other supposedly authoritative readers.

Permeable sovereignty, for citizens, and multiple or plural interpretive authority, for those interpreting the Constitution, are related concepts. My arguments are based both in a distrust of standard views of political and interpretive obligation and in the virtues of seeing things differently. Sometimes putting oneself in the hands of another makes sense—we do so all the time with doctors, civil engineers, and the like. But matters of governance, of law, only sometimes require such deference. Other times, the issues are sharply contestable, and even as we seek to settle matters, we should be alert to how settlement risks alienating power from its true source—the people, as citizens. This is true whether we're talking about the settlement function of law or of purportedly authoritative constitutional understandings. Moreover, by understanding norms as plural—both the state's laws and other sources—and by understanding prior and higher sources of constitutional meaning as worth our attention but not our deference, we increase our chances of being active, rather than passive, citizens, and of holding purported authorities to a burden of justifying their laws and constitutional readings.

This is an argument from political and interpretive theory, but it is also an argument internal to constitutional law in the United States of America. Our constitutional order is one of multiple repositories of power. Distrust of concentrated power, and the need to fracture power and provide multiple and overlapping checking mechanisms, is at the heart of U.S. constitutionalism. The case for this view is strong historically, structurally, and normatively, and is carried out through judicial review, separation of

powers, and federalism, as well as via the political rights of speech, press, petition, and voting, plus other rights such as the free exercise of religion, freedom of association, and substantive due process. This core commitment to multiple repositories of power supports my claim in the interpretive obligation discussion for viewing constitutional interpretation as plural, extending to each citizen and official. Understanding multiple repositories of power as the primary mechanism for preserving citizen sovereignty supports the political obligation discussion, as well. For just as prior or higher interpretive authority presents itself as definitive but should yield to plural interpreters to combat concentrated power, so should the state's law be understood as just one source of the norms that properly govern people's lives.

A Roadmap and Some Baselines for Discussion

A Roadmap

After this roadmap, the Introduction continues by setting up the argument. I begin by establishing some baselines. First, if law necessarily were coextensive with morality, then the political obligation question would be moot—we would have a moral duty to obey the law without further argument. Instead, I assume a baseline of legal positivism, in this sense—a system need not perfectly replicate morality for it to be a legal system. Second, coercion requires justification, including the state's coercion by law. Third, we should seek a ground (or grounds) for political and interpretive obligation at a quite general level, i.e., that would permit legal authority to insist on compliance of all citizens in all cases without attention to the content of the norm or interpretation at hand. I explain why I am not taking a less general approach to these questions. Fourth, I am exploring whether there is a prima facie (i.e., overrideable, not absolute) duty for citizens to obey the law and for interpreters to follow prior or higher sources of constitutional meaning. Fifth, my approach shifts the burden from those challenging purported authority (of law or law's interpretation) to those defending it. Sixth, my argument does not reject obligations across the board (as if that were possible), just general, prima facie political and (constitutional) interpretive obligation.

Next, the Introduction shows how I use permeable sovereignty[1] as a baseline, as a way of critiquing conceptions of obligation, and as grounding the case for exemptions. In so doing, I establish a connection to theories of pluralism. I also explain that although the argument against political obligation could possibly ground a broader libertarian case, this book is con-

cerned only with competing norms and sources of obligation, and not with liberty per se. (A pause regarding terminology: In some of the case law and literature, "accommodation" is used to describe a legislative carve-out, "exemption" for a judicial one. Although I will sometimes use both terms, to distinguish between legislatures and courts, generally I will use "exemption" to refer to any government action creating an exception from law.)

Finally, the Introduction endorses a principle of correlativity, arguing that the state's political legitimacy and a citizen's moral duty to obey the law go hand in hand. Before reaching this conclusion, I explain that if we view political legitimacy in certain narrow ways, then correlativity does not hold. But if we operate from a conception of political legitimacy that includes justifiable coercion, then we are led straight to the question of political obligation. The book's answer to these linked questions—even in a liberal democracy not only do citizens not have a moral duty to obey the law but also the constitutional order is not politically legitimate in the sense of justified coercion, as a wholesale matter—may seem frightening (are we living in a state of nature? should we be taking up arms against this illegitimate force?). My argument, however, is one of neither philosophical nor political anarchism, for we do better living under the rule of a government in a liberal democracy than we would otherwise. But the state (or the government, as I use these terms interchangeably) must work hard to justify its use of coercion—sometimes it will meet this demand for a given law in all of its applications; sometimes it will have to meet the demand on an application by application basis. We can properly say government has acted legitimately—i.e., with sufficient justification—in these instances, and accordingly we have a moral duty to comply. One of the key points in my defense of correlativity is that systemic stability arguments matter to determining both whether a system is politically legitimate and whether subjects have a moral duty to obey the law. The argument against correlativity seems to turn on a different view of the matter—accepting a systemic stability argument to support the (legitimate) existence of the state and its coercive demands, but deeming such an argument insufficient for the subject's political obligation. I also address a related argument for the "asymmetry" of authority or a "gap" between authority's and subjects' reasons, offered by Frederick Schauer and Larry Alexander. Finally, even if one disagrees with my argument for the correlativity of political obligation and legitimacy, one could still accept the bulk of my case against political obligation and for permeable sovereignty.

Chapter 1 canvasses and rejects arguments for a moral duty to obey the law, i.e., for political obligation.[2] I examine different approaches both separately and combined, for some of the most attractive candidates for a successful theory of political obligation are mixed ones. I do not begin with a view of what sort of grounds are needed for a successful theory of political obligation. For example, I do not insist that some version of consent be present to ground a moral duty to obey the law. Nonetheless, despite being open to mixed theories and not insisting on a particular type of argument to ground political obligation, I conclude there is no successful argument or set of arguments for a moral duty to obey the law, and therefore, correlatively, that government is not justified in demanding we do so.

There are three sorts of argument for political obligation: agent-centered, status-based, and state-centered. Agent-centered arguments look to acts by a state's subjects that may qualify as grounding a moral duty to obey the law. The first and most classic such position is that if one has consented to another's authority, then the other's exercise of authority is legitimate and concomitantly one has a moral duty to obey that authority. I discuss the assumptions underlying consent theory and the (notorious) problems with seeking to ground political obligation in consent. Express consent could ground political obligation but is unlikely to exist in a broad enough way; tacit consent—primarily understood as residence plus benefits—does exist broadly, but fails conceptually.

Residence plus benefits doesn't constitute consent to be bound by law, but perhaps it points to a different mode of agent-centered argument. Thus, the duty of fair play argument looks not to an act of agreeing or consenting to government's authority, but rather to what we owe our fellow citizens through what we gain from coexisting in a cooperative scheme. It is a type of residence plus benefits argument, for it too focuses on living in a certain physical territory and receiving the benefits a group of persons produces. Fair play theory is problematic, however, either as a version of consent theory or as a separate theory primarily concerned with combating free-riding. Where it is powerful it is narrow and the obligations it generates not robust enough to undergird a general duty to obey the law.

Perhaps, though, consent and fair play fail as theories of political obligation because they fail to focus on the political aspect of citizenship. Thus, I introduce participation in the political and legal process as a possible agent-centered predicate for legitimate governmental demands. Although such participation may well be necessary for political obligation, it is insufficient.

I explore arguments made by Frank Michelman and Louis Michael Seidman, connecting voice to legitimation, and perhaps obligation. I also discuss Jack Balkin's theory of constitutional faith and redemption. I then show that the law of judgments reveals one area in which participation is sufficient to ground justifiable legal obligation. If one is party to a case or at least has had the opportunity to present evidence and arguments, then the orders of the court hearing the case are deserving of obedience. I reject less deferential views regarding obedience to court orders, offered by Michael Stokes Paulsen and Robert Cover.

I then turn to status-based arguments for political obligation. I call these arguments status-based because they focus on a particular role or position one has and not on either a specific act by the subject or systemic stability concerns. First I evaluate the claim that we have a natural duty to obey just institutions. The term status-based fits somewhat uneasily here, but it will suffice for sorting purposes; the status is "subject of a generally just regime"; the argument does not depend on any specific act by the subject; and although systemic stability is relevant here, it is not the focus. The natural duty argument fails in part because it, like fair play, is too weak to ground a general duty to obey the law. Moreover, John Rawls' natural duty theory relies on an understanding similar to that of his theory of political liberalism, i.e., the way to overcome societal disagreement is for those holding reasonable comprehensive views to reach agreement via public reason and an overlapping consensus. The natural duty and political liberalism arguments wish away the problem of disagreement; they trade off of a comprehensive liberal understanding of what is just and reasonable, and thus neither gives appropriate equal concern to religious and philosophical world views that abjure Enlightenment rationalism.

Next I discuss another status-based argument for political obligation, sometimes called "associative obligation": we have a moral duty to obey the law because of what we owe our fellow citizens. The fair play argument is also about what we owe our fellow citizens, but that is agent-centered because it focuses on taking and using goods or services and owing something in return. Associative obligation arguments are based not on specific acts, but rather (primarily) on a constitutive claim about what it means to be a citizen (at least in a liberal democracy). This position starts from an intuitively appealing sense of what we owe family and friends and extends—figuratively and improperly, I claim—to what we owe fellow citizens we don't know and will never meet. Those who feel loyalty to their

fellow citizens may owe a duty to obey the law. And there may be good reasons for each of us to accept the laws of a just institution, perhaps as part of what we owe our fellow citizens. But unless there is an obligation to feel loyalty to fellow citizens as many of us think there is to family and friends, and unless there is an obligation for citizens to accept the laws of a just institution, these arguments must remain in the realm of the supererogatory rather than the obligatory. I discuss associative obligation theories generally and critique specifically views of Ronald Dworkin, Philip Soper, and Margaret Gilbert. I also examine some matters of legal theory, exploring what we mean by "acceptance" here, the relationship between citizen acceptance and the status of a system as a legal one, and whether citizen acceptance entails political obligation.

Finally, I discuss and reject a set of state-centered, consequentialist arguments for political obligation. These arguments are about the stability of the system of governance. Having a stable, secure political society is a good, and this good can be attained, the argument goes, only through adherence to a strong norm of obedience to law. As I explained in summarizing my support for correlativity, these consequentialist concerns are properly seen as part of the case for both the state's political legitimacy and a subject's moral duty to obey the law. The systemic stability arguments are familiar, and forcefully advanced. For example, society could choose from several governance rules, but it is often more important that rules be settled than settled correctly (or perfectly). Similarly, because rules often intersect, centralized coordination is necessary. Often these claims for settlement and coordination are linked to an empirical (and perhaps normative) proposition: following rules that develop and concretize through tradition and practice aids in stabilizing society. Additionally, there is the argument that the risk of self-dealing, of a descent into a kind of state of nature with each person seeking what is optimal for himself or herself, is a threat to societal stability, and only by following norms of fealty to law can we ward off self-dealing and its costs. It would be foolish to claim these systemic stability concerns are unimportant. Rather, I argue that they obscure more than they help and that their role is properly played by becoming factors in self-conscious, present, nondeferential moral reasoning about whether to obey law and in determining whether certain laws or applications of law are justified.

I first consider and reject the argument from self-dealing. The cost/benefit calculus from disobedience varies too widely for an act utilitarian

argument to provide a sufficiently general grounding for political obligation. Moreover, the oft-mentioned contagion concern—my disobedience will trigger yours (or will undermine my own ability to be law-abiding)—is speculative. The rule utilitarian argument, though general in form, also fails to account for the fact that costs and benefits from going one's own way vary depending upon the type of rule and circumstance. Furthermore, the most general rule utilitarian claim here—across the board of all laws and circumstances it is a net plus for all of us to toe the line—is question-begging; it states a solution to the political obligation conundrum under discussion. After offering a reminder that citizens should account for systemic costs in considering whether to disobey the law, and noting that error costs stem from too much obedience as well as from too much disobedience, I conclude by suggesting that mine is a version of rule-sensitive particularism, and offer some rejoinders to Schauer's case to the contrary.

Next I turn to the argument from settlement. Deference to supposedly settled law obscures the structure of authority that created it and our connection to it. The point is similar to Marx's point about mystification and fetishism of power, and is an attempt at demystification, defetishizing, keeping transparent the link between the true principals—we, the People—and our agents—those who claim fealty. For if we fail to keep the proper linkage clear, we risk a concentration of power in the lawmakers, and such monopolization of power is antithetical to the genius of American constitutionalism, which is to insist on multiple repositories of power, which exist in part to ward off the alienation of authority from the sovereigns (us) to our agents. By keeping this true line of authority clear, by making obedience to law something the state must earn, rather than assume—by, that is, requiring our various agents to compete for our allegiance by making arguments rather than insisting on deference—we remain true to the cardinal U.S. constitutional principle of citizen sovereignty. I also explore how voice wards off the dulling edge of settlement. The section closes with a rejection of Burkean arguments for the settlement value of law (about which I say more in the later discussion of precedent in constitutional interpretation).

I conclude Chapter 1 by examining Joseph Raz's service conception of authority, which holds that we should defer to another, and forgo our judgments about what action to take, when we will do better by deferring. Even if one accepts Raz's service conception in theory, the conditions for it are unlikely to hold broadly enough in practice to work as a general theory of

political obligation, as even Raz admits. Furthermore, even within the theory itself, one cannot fully exclude normative judgment; Raz admits one must be alert to whether the authority has proper jurisdiction, and jurisdictional questions necessarily bleed into substantive ones. The same critique holds for Frederick Schauer's theory of presumptive positivism. Thus, I end Chapter 1 with this argument: Not only does deference to what is settled obscure the true lines of authority and risk alienation of citizen sovereignty, but it also masks the current work we do when we confront a law (or the law confronts us). Even those who offer consequentialist arguments for norms of citizen obedience recognize (for the most part) that such arguments are overrideable. Although it may seem that override is rare and occurs only in hard cases under difficult circumstances, opening the door to override means we will always be peeking, consciously or not, at possible exigencies. Such peeking significantly diminishes the purported settlement value of political obligation.

We are left with what one might consider a depressing moral and political situation: we don't have a moral duty to obey the law, and government lacks sufficient justification to demand our general legal compliance. Rather than give up, though, and view our officeholders as powerful people who got ahold of uniforms and badges, I argue in Chapter 2 that we can establish (and have, to some degree, established) a system in which sovereignty is viewed as permeable rather than plenary; we can do this through representations of exit as a (partial) remedy for the legitimation crisis that otherwise exists. Exemptions—allowing people to live by sources of normative authority other than that of the state—can help ameliorate the otherwise harsh and unjustified governmental insistence that we always obey the law. If one disagrees with my argument for the correlativity of political obligation and legitimacy, but accepts that the case for political obligation fails, then permeable sovereignty, while not remedying a legitimation crisis, would still help lessen the burden on the conscience of those who are otherwise forced to choose between violating the state's laws and transgressing other normative dictates.

After summarizing the obligation/legitimation problem and the permeable sovereignty remedy, I develop the case for "Exiting from the Law." Although emigration is the truest form of exit, its tremendous costs render it insufficient as a way of solving the problem. We must look to representations of exit. People may stay within the nation's borders but through various mechanisms be relieved of the full scope of legal duties. I explain that

my focus is on conscientious objection rather than civil disobedience, and then defend the case for exemptions against challenges from different quarters: from Brian Barry, who rejects them outright for first-order reasons; from Justice Stevens, who rejects them because of administrability concerns; and from Christopher Eisgruber and Lawrence Sager, who defend them but in a way that doesn't properly account for the underlying liberty interests at stake. I also consider how we might balance a citizen's claim for an exemption from law against the state's interest in uniform application.

Although my argument for permeable sovereignty includes both religious and secular sources of norms that compete with those of the state, "Permeable Sovereignty and the Religion Clauses" focuses on issues (primarily of U.S. constitutional law) involving citizens who wish to live by their religious norms rather than under law. I show that the Court has generally permitted legislative accommodation of religious practice, once we understand accommodation as alleviating burdens otherwise imposed by law, and not as enhancing the dominant religion's ability to advance its practice through law. I also discuss the *Kiryas Joel* case, which allows us to think more about how and when to accommodate groups that want to live not only by their own norms, but also in their own place. Next, I maintain that the Establishment Clause should be construed to invalidate legislation based in express, predominantly religious justification; this (partial) gag rule renders illegitimate the state's hold on religious citizens; and therefore courts should be required to award Free Exercise Clause exemptions for religious practice as a counterbalance. One could accept or reject this "political balance of the religion clauses" argument independently of accepting or rejecting my broader, non-religion-specific case for permeable sovereignty. Finally, "The Problem of Illiberal Groups" discusses concerns raised by granting accommodations or exemptions to groups that have internal practices many of us would consider in violation of proper equality norms.

Having canvassed and rejected arguments for political obligation (and correlated political legitimacy), and explored the possibility of accommodations and exemptions as a device for recognizing permeable sovereignty, I turn to interpretive obligation. I confront arguments that in the U.S. constitutional order we have a duty to follow the constitutional interpretations of prior (precedent and original meaning or understanding) and higher (the views of the U.S. Supreme Court) authorities. Although the arguments for following precedent are about following Supreme Court precedent,

I separate the argument for interpretive obligation to constitutional doctrine as it develops over time (the section on precedent) from the argument for interpretive obligation to a "supreme" court at any moment in time.

Chapter 3 discusses and rejects arguments for interpretive obligation to past sources of constitutional meaning. The (often interrelated) arguments to which I respond are: democratic legitimacy (the principal argument supporting adherence to original meaning or understanding); Jed Rubenfeld's argument for becoming free through commitments over time; David Strauss' and Gerald Postema's arguments for finding common ground through diachronic coherence of legal principle; three types of argument for following constitutional precedent (stability, integrity/equality, and Burkean-epistemic); and anchor theory (the need for a check against supposedly untethered judgments of constitutional meaning). Although my discussion here is primarily a critique of diachronic theories of interpretive obligation, I add a section supporting the alternative view—the primacy of justification over fit. Fitting current interpretations with ones from the past often makes sense, though, even if it should not be thought obligatory; thus, I discuss how there is room for fit. Finally, I explain why my Jeffersonian, anti-diachronic commitment position isn't anti-law or anti-constitutionalism.

Chapter 4 discusses and rejects arguments for interpretive obligation to the Supreme Court (at any moment in time) as constitutional interpreter. Although I accept interpretive (and political) obligation to court judgments in individual cases, this conception of adjudicative bindingness is narrow, and does not require government officials (or citizens) to defer to how they believe the Court would rule (a determination often based on how the Court has ruled) on any given constitutional question. First I consider and reject agent-centered and status-based arguments, i.e., legitimacy arguments grounded in what We the People or officials have purportedly agreed to and arguments about official role and the role of the Court in our structure of government. We should consider interpretive authority no less multiple than other authority in our constitutionalism; sometimes called "departmentalism," this approach enhances dialogue among constitutional actors, opening the Court to appropriate challenge. Second I canvass consequentialist arguments based in the settlement and coordination functions, and in the need to check self-dealing. As with similar arguments in the political obligation section, I respond that deference dulls official responsibility, risking concentration of power and alien-