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## BOOK REVIEW

### NEVER MIND THE CONSTITUTION

ON CONSTITUTIONAL DISOBEDIENCE. By Louis Michael Seidman.  
New York, N.Y.: Oxford University Press. 2012. Pp. 162. \$21.95.

*Reviewed by Jeremy Waldron\**

The dust jacket of Louis Michael Seidman's new book consists of a sepia facsimile of the 1787 manuscript version of the Constitution of the United States, with a red cross-out scrawled all over it and the word "NOT" interpolated in red at the top somewhere near the end of the preamble. These visuals set up the book's title, which appears in stark white on a black smear of crayon across the middle of the original text.

*On Constitutional Disobedience* appears in a series published by Oxford University Press. The series is called "Inalienable Rights," and it includes, among other works, Laurence Tribe's *The Invisible Constitution*, David Strauss's *The Living Constitution*, Michael Klarman's *Unfinished Business: Racial Equality in American History*, Richard Posner's *Not a Suicide Pact: The Constitution in a Time of National Emergency*, and Richard Epstein's *Supreme Neglect: How to Revive Constitutional Protection for Private Property*.<sup>1</sup> It is a series of books mostly devoted to various ways in which the Constitution might be interpreted, and various problems in constitutional law that, in the authors' opinions, deserve greater attention. Some of these works are more abstract than others, some of them are devoted more to theory than to doctrine, but it is fair to say that they are all focused on the distinctive problems and possibilities of *American* constitutional law. They accept the constitutional framework — the 1787 document and the 1791 and 1865–68 Amendments — and their questions are mostly about how we should read all that and what we should do with it.

Professor Seidman's book is also (mostly) about American constitutional law. He is the Carmack Waterhouse Professor of Constitutional Law at Georgetown University Law Center, and he is the author of *Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review* and *Constitutional Law: Equal Protection of the*

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<sup>1</sup> RICHARD A. EPSTEIN, *SUPREME NEGLECT* (2008); MICHAEL J. KLARMAN, *UNFINISHED BUSINESS* (2007); RICHARD A. POSNER, *NOT A SUICIDE PACT* (2006); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010); LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* (2008).

*Laws*.<sup>2</sup> But in this new book, Seidman emphatically refuses to assume the framework that the other books in the series assume. As Geoffrey Stone, the series editor, says in a preliminary “Editor’s Note”: “Mike Seidman’s *On Constitutional Disobedience* asks a very different question: Why should we care at all what the Constitution says?” (p. xii). Seidman proposes that the Constitution should be treated with less reverence, and that its dictates and principles should be obeyed less often, particularly when there is reason to believe that we now know much better than the Framers from 1787 how to deal with the problems we face.

But the practical upshot of Seidman’s dissatisfaction with constitutional authority is not always clear. Sometimes he proposes that we should ignore the Constitution “systematically” (p. 5). He seems to think we should put the document aside as a guide to action, stop quarrelling over its interpretation, stop using it as a distraction from real-world politics, and treat it, at best, the way we treat the Declaration of Independence — as an inspiring piece of rhetoric, but one whose poetic appeal belies its historic distance from the quandaries we have to deal with. Sometimes — in a less incendiary tone — he suggests we should simply stop feeling guilty about the many areas in which we already ignore the Constitution’s commands and in which we have already abandoned our quarrels about its meaning. We should be more candid about this than we are, and less anxious about how the world would look if the Constitution were taken less seriously.<sup>3</sup>

Seidman’s recommendations are, in the first instance, recommendations for Americans, who pride themselves — perversely, in his opinion — on having the oldest constitution currently in force in the world (p. 11). But the case he presents is also a case against constitutionalism in general, and it might apply as much to the South African Constitution of 1996 and to the constitutions with which we are so anxious to endow new democracies created in our image. This general implication of Seidman’s argument is not something he dwells on, but it peeps out occasionally in various reassurances scattered throughout this short and provocative book — reassurances that we have little to fear from abandoning the U.S. Constitution when we consider how well

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<sup>2</sup> LOUIS MICHAEL SEIDMAN, *CONSTITUTIONAL LAW* (2002); LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION* (2001).

<sup>3</sup> The issue of candor is one that I will come back to in Part II of the Review. To anticipate briefly: if Seidman thinks scholars and lawyers are simply using the Constitution as a hook on which to hang the political arguments that they want to make anyway, then surely he must concede that their assertions of deference to constitutional authority are disingenuous or superficial. In appearing to defer to constitutional authority, lawyers and scholars may just be taking advantage of a commonly accepted frame of argument. *See also infra* pp. 1150–51.

countries like New Zealand and the United Kingdom do without anything remotely like our formal constitutional arrangements.

I shall talk about these universalistic implications in Part III of the Review. There I shall try to show that Seidman's case as a whole looks less convincing when taken in this broader context. But first, in Parts I and II of the Review, I want to set out Seidman's argument so far as American constitutional law is concerned. For it is certainly there that the book will have its greatest impact, even if the impact is just that of a provocateur or gadfly. In Part I, I shall set out Seidman's critique of American constitutionalism, and in Part II, I will see what can be gleaned so far as Seidman's normative prescriptions are concerned. I hasten to add that the case I shall describe in Part I does not stand or fall on the success of the prescriptions described in Part II. Evaluation is different from prescription; and the case that Seidman brings against American constitutionalism might succeed in making us uneasy with various practices we have been wedded to even though, at this stage, there is nothing much to be done about them. Seidman, I think, would be disappointed (and rightly so) if people inferred from the inadequacy of his prescriptive argument that his evaluation of our constitutional practice must be flawed. We might, however, get a better grip on what is wrong with Seidman's argument as a whole by paying attention to constitution-making at the front end rather than by dwelling on the impossibility of kicking our own long-established constitutionalist habit. And that is what I shall consider in Part III.

### I. SEIDMAN'S CRITIQUE

*On Constitutional Disobedience* is a short book — not much more than 50,000 words — and it is refreshingly unencumbered with any apparatus of footnotes.<sup>4</sup> The gist of its argument is brutally straightforward. Seidman teaches constitutional law at Georgetown University Law Center, but he believes we should stop deferring to the Constitution and bickering about what it requires when we confront issues like affirmative action, presidential powers, or civil liberties in an emergency. We should confront such issues on the merits as they appear to us now, and we should not allow ourselves to be browbeaten by accusations that the things that seem right or appropriate for us to do are forbidden by “an old and archaic text” (p. 11) or by “dry words written by dead people” (p. 143). Arguing about what the Constitution requires, he says, “is no way to engage in serious and authentic dialogue about the issues that divide us” (p. 9). He continues:

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<sup>4</sup> There are no footnotes or citations in this book, just a modest list of sources for each chapter at the end (pp. 149–57).

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We should give up on the pernicious myth that we are bound in conscience to obey the commands of people who died several hundred years ago. Rather than insisting on tendentious interpretations of the Constitution designed to force the defeat of our adversaries, we ought to talk about the merits of their proposals and ours. (p. 9)

Seidman knows of course that the American people revere the Constitution. “[M]any Americans accept the requirement of constitutional obedience as [a] basic axiom of our system” (p. 21). But there is, he implies, something humiliating about this — about allowing ourselves to be distracted by constitutional argument from the merits of the issues we face. Of course we disagree about what we should do on the merits; we are a highly opinionated, quarrelsome people. But we should focus our quarrelsomeness on the issues where it belongs. A free people, even a free people divided, should not be trying to persuade each other to defer to tendentious readings of antiquated authority. “It is,” says Seidman, “deeply authoritarian to try to end an argument by insisting on the sanctity of a particular text” (p. 28). And that is what constitutional argument tries to do.

Notice already that Professor Seidman’s scorn has two targets. First, he derides our practice of using the Constitution as a framing device for our political arguments. Of course, we do not agree what it means, but that does not stop us from using it as a frame of reference to the exclusion of a steady concentration on the contemporary merits of the issues we face. And secondly, he derides our acceptance of the major premise of constitutional authority: if only we could find out or agree what the Constitution means, then that is what we should do, and the Constitution should trump any determination about what we should do that is not oriented toward the constitutional text. In other words, the second issue is about authority, and like all authority, constitutional authority is supposed to undermine our own independent determinations:

The test for constitutional obligation arises when one thinks that, all-things-considered, the right thing to do is X, but the Constitution tells us to do not-X. It is only in this situation that constitutional obligation really has bite. It is only then that if we obey the Constitution, we are doing so for the sole reason that we are bound to obey. But who in their right mind would do this? If we are convinced after taking everything into account that one course of action is right, why should we take another course of action just because of words written down on a piece of paper more than two hundred years ago? (p. 7)

The two prongs of Seidman’s argument are not altogether consistent. If lawyers and scholars are simply manipulating — or, as Seidman puts it, “twist[ing]” — the language of the Constitution to ad-

vance their own agendas (p. 28), then they are not really deferring to its authority.<sup>5</sup> Perhaps Seidman's view is that they are taking advantage of the fact that others defer to the Constitution. But if the "others" are supposed to be their colleagues and if those colleagues in turn are professing constitutional fidelity only to advance *their* own agendas, then the whole thing is a bit of a shell game. Maybe the others are ordinary citizens, detached from professional engagement with the Constitution. In that case, an even more disturbing prospect looms: the authority of the Constitution would represent the lower tier of a sort of "Government House morality,"<sup>6</sup> with an elite understanding constitutional fidelity in a relaxed sense while promoting a much tighter version of it for public consumption. Probably the better reading is not that Seidman thinks constitutional scholars are manipulating ordinary people in this way, but that they have somehow convinced themselves that the Constitution requires what their political agenda proposes. Certainly most of the American scholars I know — of every political stripe — seem to believe passionately that the political agenda they associate with the Constitution really is what the Constitution demands. And they think this even though they know their ideological opponents believe the same about a completely different agenda. As observers we might be skeptical about whether the Constitution is really in the driving seat. But it may still appear to the participants that it is.

And that will limit what they can say and what they can propose. So long as they accept at least the *appearance* of constitutional constraint, their political proposals will be limited by the terms of the constitutional text. For there will be certain things they can say and certain things they cannot say in the constitutional frame. Certain proposals would be so patently at odds with what the Constitution says that they could not be presented as interpretations without giving the game away. To that extent, then, those who play the constitutional game are bound by something like constitutional authority whether they think they are in control (that is, whether they think they are just manipulating the meaning of the text) or not. So we do have to ask why Seidman thinks this deference is such a bad thing, why it is such a misfortune for American governance that proposals for change have to be presented in this frame.

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<sup>5</sup> See *supra* note 3.

<sup>6</sup> See BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 108 (1985). Williams refers to "Government House utilitarianism" as an objectionable form of morality that allowed the enlightened few (for example, colonial administrators) to work with a relatively sophisticated morality with fewer rules and constraints, while promoting a much simpler and more rule-bound morality for the "natives" or for the public generally. *Id.*

The problem, says Seidman, is not so much that the Constitution is wrongheaded. His book is not like Sanford Levinson's *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)*,<sup>7</sup> which Seidman describes as identifying specific flaws that are "resistant to reinterpretation, and . . . saddle us with results that few contemporary Americans would defend on their merits" (p. 12). In an op-ed piece published last year in the *New York Times*, Seidman spoke of the Constitution's "archaic, idiosyncratic and downright evil provisions."<sup>8</sup> That sort of rhetoric is absent from the book under review, though if anyone is interested, Seidman can point to problems like "the grotesquely malapportioned Senate" or "providing no congressional representation for residents of the District of Columbia" (p. 12). He has his collection of constitutional idiocies to match anyone's, like the Article I requirement that seems to require the Vice President to preside over his own impeachment (p. 64),<sup>9</sup> and his own list of constitutional outrages, like the Fugitive Slave Clause (p. 97). But he does not dwell on the mistakes. "The framers were very wise men, but they were not perfect, and it was, after all, a very long, hot summer in Philadelphia" (p. 64). Any such document is bound to have its flaws and eccentricities.

The real issue for Seidman is time. The very longevity that Americans value in their Constitution undermines any claim that we are bound to it by the conditions of its production and ratification: "[N]o one alive today had anything to do with the ratification process" (p. 7), and Seidman figures that no plausible theory of political obligation can bind us to something we played no part in endorsing.

Nor would it be wise or prudent to act *as though* we had committed ourselves to this document. For, as Seidman insists again and again, the passage of time makes the Constitution singularly inapt as a guide to modern action: "[P]recisely because constitutional framers cannot know how the language they write will intersect with a future world, there is no guarantee that their rules will produce good results for future societies" (p. 51). They can only have contemplated the in-

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<sup>7</sup> SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2008).

<sup>8</sup> Louis Michael Seidman, *Let's Give Up on the Constitution*, N.Y. TIMES, Dec. 31, 2012, at A19.

<sup>9</sup> For what it is worth, I think Seidman might be mistaken in perceiving a constitutional flaw in this case. Article I, Section 3 provides that "[t]he Vice President of the United States shall be President of the Senate . . . . The Senate shall have the sole Power to try all Impeachments. . . . When the President of the United States is tried, the Chief Justice shall preside." U.S. CONST. art. I, § 3. Seidman says: "This language pretty clearly means that the vice president should preside over his own impeachment" (p. 64). But it seems pretty clear to me that a further provision in Section 3, permitting the Senate to "chuse . . . a President pro tempore, in the Absence of the Vice President," more or less takes care of this issue. U.S. CONST. art. I, § 3.

tersection of their words with conditions they could see or imagine. But most of the conditions that frame today's politics were unforeseeable, indeed unimaginable, to them. They were a bunch of white-supremacist revolutionaries on the edge of a largely unexplored continent reeling from the task of establishing a creditworthy polity in the aftermath of an eighteenth-century war. We inhabit a radically diverse federation, one or two orders of magnitude larger than the federal republic they envisaged, the world's sole superpower, nuclear armed and vulnerable to asymmetric warfare, confronting the politics of race, identity, immigration, and postindustrial decline. Seidman has no particular patience with the mysticism of "constitutional moments" (p. 54): circumstances that occasionally enable constitutional framers or amenders to see far into the future.<sup>10</sup> The Framers were as farsighted as we are, no doubt, though Seidman is at pains to stress their preoccupation with their own interests and circumstances and the rather close time horizon that for all practical purposes attended their efforts (pp. 20–21). They were not gods, as they would have to have been to come up with formulations in 1787 or 1868 that could helpfully address Guantanamo Bay or national health care or the modern regulatory state in ways that were sufficiently insightful to preempt our own best thought and experience on these matters.

But even if it is not wise, maybe our commitment to the Constitution is identity defining: maybe it makes us or "We the People" who we are. Seidman considers the argument of Jed Rubenfeld that constitutional commitment unites us as a political community over time, and that it is worth accepting a degree of constitutional stupidity for the sake of that unifying commitment.<sup>11</sup> I say Seidman considers this, but he is really quite impatient with its metaphysics: "There were . . . real individual people in Philadelphia in 1787, and all of those real people are now really dead. There are, today, real people who are alive and who must decide how to solve real, modern problems" (p. 59). His considered response, though, is more thoughtful. The community Rubenfeld refers to, the community we have concocted, is partly a function of how we — together and in conflict — have thought and spoken about our constitutional commitments. We might have constituted ourselves differently, with a different set of constitutional attitudes, more open to change, less obsessed with interpretation — and then *that* would have been our identity. Or we might have emphasized to one another the moments of real constitutional disobedience in our shared heritage as it is, beginning with the Framers' own defiance of

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<sup>10</sup> Cf. 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1988).

<sup>11</sup> See JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* (2001).

the terms of reference that were given to them. We might have embraced “a narrative that emphasizes struggle and dissension” (p. 61):

On this view, the defining characteristic of our political order is precisely that the political order is never finally defined. For someone who organizes our history in this fashion, Americans are always straining against prior commitments rather than placidly embracing them. On this view, constitutional disobedience is not only permissible; it is built into the fabric of our country. (p. 61)

It is a refreshing feature of Seidman’s book that much of what he writes about is the structural constitution — the allocation of powers among the branches, the limitation of the powers of the national legislature, and so on. He does not neglect the role of the Constitution and its amendments in protecting freedoms. But he makes the obvious point that the legacy of the Constitution is not unalloyed in this regard. A number of provisions in the 1787 document protected slavery and the rights of slave owners, and there was nothing in the Constitution that enabled the Supreme Court of the United States ever to lift a finger against slavery while it existed. Like everyone else, Seidman cites the *Dred Scott v. Sandford*<sup>12</sup> case as an example of what he has in mind (p. 98); he might also have cited the earlier decision *Prigg v. Pennsylvania*<sup>13</sup> in which the Court struck down state legislation prohibiting slave catching in Pennsylvania. But once again, it is less the oppressive content of the provision than the general tendency of constitutional authority that angers Seidman.

Of course, the Constitution protects religious freedom, freedom of speech, and so on. But Seidman argues that it does so on terms and in formulations laid down for us by the dead hand of the past, rather than enabling each generation to make its own judgments about the extent and character of the protection to be accorded to civil liberties. For liberty is never given absolute protection: some liberties matter more than others, and every liberty that matters is defined and qualified in a way that enables it to take its place in an overall vision of a well-ordered society that respects the freedom of everyone. In a free republic, people might value not just the negative liberty that a particular constitutional amendment provides for them, but also the positive liberty to make decisions about these matters collectively among themselves on a basis that reflects *their* judgments and *their* estimations of

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<sup>12</sup> 60 U.S. (19 How.) 393 (1857) (denying that African Americans could be U.S. citizens, whether they were slaves or free).

<sup>13</sup> 41 U.S. (16 Pet.) 539 (1842) (reversing the conviction of Edward Prigg under an 1826 Pennsylvania statute for using “force and violence [to] take and carry away . . . any negro or mulatto, from any part or parts of this commonwealth, to any other place or places whatsoever, out of this commonwealth, with a design and intention . . . of causing to be kept and detained, such negro or mulatto, as a slave or servant for life,” *id.* at 550, 625–26).

a proper balance between various kinds of interests and various kinds of liberty in various kinds of circumstances.<sup>14</sup>

For example, Seidman cites the case of campaign finance laws (pp. 100–01). A civic republican might well believe that the integrity of our electoral arrangements matters more than the liberal commitment to free speech, which the First Amendment upholds.<sup>15</sup> Or she might believe in a version of free speech that treats it as “the right to engage in public self-government” (p. 100) on an equal basis and therefore dovetails with the idea of restrictions on campaign contributions by the wealthy (pp. 100–01). Or perhaps she might believe that what matters above all is that the fraught issue of campaign finance be settled freely among the citizenry now, by their own decisions, rather than that it be settled for them by some constitutional authority. Indeed, Seidman suggests that “[w]hat true civil liberties amount to is the embrace of unpredictable, uncontrollable, and unprogrammed argument, debate, and dissent” on matters like these (p. 116). “Obedience and obligation” — even constitutional obedience and constitutional obligation — “are the natural enemies of this sort of freedom” (p. 116).

When one hears language like this, one might expect it to be directed at the Supreme Court and perhaps at the practice of judicial review.<sup>16</sup> It was the Court after all that decided *Citizens United v. Federal Election Commission*<sup>17</sup> (by a majority) and held that our collective efforts to settle this matter legislatively, as becomes a free people, had to be struck down. It would seem to be the Court then that exercises the constitutional authority that Seidman objects to. In a sense that is true, but Seidman is definitely not interested in this book in the controversy about judicial review. He makes short work of Alexander Bickel’s characterization of judicial power as a “countermajoritarian difficulty” (p. 32).<sup>18</sup> The Court’s decisions, Seidman says, are probably not as much or as frequently at odds with majority opinion as Bickel’s label supposes (pp. 33–35). And anyway, the real countermajoritarian villain is not the Court but the Constitution itself:

The key point that Bickel missed was that judicial review is merely a technique for enforcing the commands of the Constitution. The *Constitu-*

<sup>14</sup> For the distinction between positive and negative liberty, see ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 122–34 (1969).

<sup>15</sup> For an overview of republicanism (pp. 99–102), see PHILIP PETTIT, *REPUBLICANISM* 4–12 (1997).

<sup>16</sup> This is the way I would have understood it, before reading Seidman’s book: see Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346 (2006); and Jeremy Waldron, *Judicial Power and Popular Sovereignty*, in *MARBURY VERSUS MADISON: DOCUMENTS AND COMMENTARY* 181 (Mark A. Graber & Michael Perhac eds., 2002).

<sup>17</sup> 130 S. Ct. 876 (2010) (striking down federal legislation that restricted independent political expenditures by corporate entities).

<sup>18</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1986).

tion is countermajoritarian, at least in a certain sense. If we obey its commands, then we substitute eighteenth-century decisions for decisions made by contemporary majorities. But this countermajoritarian problem would exist whether or not judges were the enforcement method we relied upon. After all, if judges did not enforce the Constitution, and if we in fact prized constitutional obedience, then its commands would have to be enforced by someone else. So long as constitutional commands are taken seriously, that enforcer would have to act against the will of popular majorities. (pp. 35–36)

Seidman's former Georgetown colleague, Mark Tushnet, has argued in favor of "popular constitutionalism" in his book *Taking the Constitution Away from the Courts*.<sup>19</sup> But that would not improve matters in Seidman's view. For even if popular constitutionalism differed from judicial constitutionalism, as Tushnet has suggested, in form as well as content, it would still represent the polity's acceptance in some shape or form of the authority of an eighteenth-century document over twenty-first-century decisionmaking. It would still represent some agency in the republic declining to do what seemed right and appropriate in dealing with current issues on the ground that people 230 years ago thought differently.

So this is not an argument about judicial supremacy or about *Cooper v. Aaron*.<sup>20</sup> It is not a court-focused argument. Instead, it is an argument about the mind-set that pervades our political system and insists that authority has to be accorded, somehow, to the constitutional text. Who acts as the enforcer of that authority — whether it is the Supreme Court or the people themselves or their representatives at the state or national level — is much less of an issue than the lack of any justification for the authority itself.

Seidman does not of course forget the possibility that the enforcer — particularly if it is a court — might develop an interpretive methodology that mitigates the underlying problem that he sees. For we might think that Seidman's challenge is sharpest when it is applied against constitutional originalism. Originalists seem to make a virtue of exactly that feature of modern constitutionalism that causes Seidman most anguish: they want our current disputes about minority liberties and governmental powers to be settled on exactly the terms that were laid down all those hundreds of years ago, and they want those constitutional provisions to be understood now just as the eighteenth-century

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<sup>19</sup> See generally MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (arguing for a "populist constitutional law . . . oriented to realizing the principles of the Declaration of Independence and the Constitution's Preamble" through active self-governance on the part of the citizenry, *id.* at 181 (footnote omitted)). See also LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

<sup>20</sup> 358 U.S. 1 (1958).

Framers understood them. Seidman has plenty to say about originalism (pp. 38–40, 65–66), most of it negative. But he does not seem to regard those who talk of a “living” constitution as having anything better to contribute. According to Seidman, such theorists say that “judicial power is justifiable if judges interpret vague constitutional language in light of contemporary realities and what they see as the most attractive understanding of our prior legal decisions” (p. 31). But Seidman presents the living constitutionalists with a dilemma. Either they believe that the issues that exercise us — like abortion, affirmative action, gun control, same-sex marriage, and voting rights — should be settled on a basis that responds in a common-sense, pragmatic way to values that are held now and applications of those values to current conditions — in which case they have abandoned constitutional authority altogether. Or they believe we should be constrained in these matters by the organic growth of values and principles laid down in the Constitution, even if that growth takes us in directions we would not necessarily go in the absence of our particular constitutional heritage. If that is in fact the approach, then the question of constitutional authority just recurs: why not use our own values and principles, articulated and applied to contemporary circumstances in ways that make sense to us (pp. 12–13)?

Some will say it is not an either/or proposition. Maybe we don’t really have a good sense of “our values” and “our principles,” which would enable us to orient ourselves in this decisionmaking without the assistance of constitutional provisions like the First and the Fourteenth Amendments. Values and principles do not come out of nowhere, and maybe the constitutional text gives us the best articulations of those that we have. Seidman is prepared to accept this argument, up to a point. The Constitution operates poetically as a sort of storehouse of value, and there is “much to be said for organizing political discourse around these ideals” that it contains (p. 135). But even if a citizen learns her values from an antique source, as a free person she should not enslave herself to that source or parrot its formulations. Instead, she should take the values on board herself: to adapt the words of Archbishop Thomas Cranmer, she should read, mark, learn, and inwardly digest them;<sup>21</sup> she should ponder them; and she should recognize that what she makes of them will not necessarily be what others

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<sup>21</sup> Compare the approach to scripture intimated in Thomas Cranmer’s collect for the second Sunday in Advent:

Blessed Lord, which hast caused all holy Scriptures to be written for our learning; grant us that we may in such wise hear them, read, mark, learn, and inwardly digest them; that . . . we may embrace, and ever hold fast the blessed hope of everlasting life, which thou hast given us in our Savior Jesus Christ.

THE COLLECTS OF THOMAS CRANMER 4 (C. Frederick Barbee & Paul F.M. Zahl eds., 1999).

make of them. Constitutional values on this account become a discourse of contestation, not obligation. As Seidman puts it, “[a] poetic constitution does not compel anyone” (p. 25); it “does not force anyone to do anything” (p. 135). The poetic approach — which is more or less how we treat other founding documents, like the Declaration of Independence — helps dispel “the kind of trickery and mystification” that, as things stand, is associated in our politics with constitutional authority (p. 136).

Seidman thinks this more thoughtful debate would be an immeasurable improvement on what we currently do with the constitutional text. What we do in current politics is bicker about the proper meaning, each side advancing a meaning that suits its political agenda, and denouncing the other side’s interpretation: we conduct “a tendentious and ultimately beside-the-point argument about the meaning of the Constitution, with each side endorsing a reading of the text that just happens to support its political position” (p. 28). The bickering is facilitated of course precisely because there is no easy mapping of eighteenth-century concerns onto twenty-first-century issues. And the result is both humiliating, as each side evinces a willingness to bow down before this antiquated calligraphy, and embarrassing: “If nothing else, it is embarrassing to watch political participants on both the Left and Right twist constitutional language to meet their policy objectives” (p. 28).

It is embarrassing too because the upshot of all this contestation is that people who revere the Constitution are convinced that about half the time we are getting it wrong. Whenever her opponents win an interpretive debate, the good citizen is convinced that the republic is acting unconstitutionally. And so there is a sort of dissonance between people’s acceptance of constitutional obligation and their conviction that others (including judges of whom they disapprove) are committing us to flout and violate the authority of the founding document:

True, many Americans revere the Constitution, but this reverence cohabits uneasily with a deep skepticism produced by the obviously partisan nature of constitutional argument. . . . There is an obvious tension between public infatuation with the idea of the Constitution and public cynicism about the Constitution as it actually functions in ordinary political struggle. (pp. 140–41)

Not only do some citizens say this about the decisions of some Justices, but the Justices say it about each other.

[M]any of the justices themselves seem to believe that important Supreme Court decisions amount to serious constitutional violations. . . . [E]ven if we cannot know *which* cases involve violations, we can be certain that *some* of them do. Because the Court’s various interpretive methods are irreconcilable, some of the results generated by some of the methods must be wrong. (p. 67)

Of course, nobody acknowledges that they are violating the Constitution,<sup>22</sup> but the combination of the document's antiquated irrelevance and the vicious interpretive contestation that necessarily accompanies any attempt to apply it to modern issues results in an unseemly display of mutual recrimination, "a shouting match deeply destructive of comity and respect" (p. 138). And all of these antics take up space that could be better devoted to a straightforward debate about how to make our country better.

## II. NORMATIVE PRESCRIPTIONS

What then is Seidman recommending that we do? He says "some readers will find the proposal I advance here utopian at best and just plain crazy at worst" (p. 139). But it is not at all clear what "the proposal" is. At the beginning of the book, Seidman says that "[a] proposal that we systematically ignore the Constitution will strike many as stupid, evil, dangerous, or all three" (p. 5). Is that what he is urging — that we systematically ignore the Constitution?<sup>23</sup> And who is the "we" here? Is he urging this proposal on judges, lawyers, and politicians, as well as ordinary citizens? Is he urging it on his Georgetown students? Since he is not expecting this proposal to convince all of us (p. 139), is he urging the "systematically ignore the Constitution" strategy on those few who are convinced by his arguments regardless of whether others adopt this attitude to the Constitution?

What would "systematically ignoring the Constitution" amount to? When X challenges Y's decisions in court on constitutional grounds and Y is a convert of Seidman's arguments, should Y refrain from mounting a constitutional defense? If Z is a convert of Seidman's arguments, should Z refrain from putting forward any constitutional challenges of her own? Or if the practice of judicial review remains in place — for, remember, Seidman said that judicial review was not the issue (pp. 35–36)<sup>24</sup> — should Z be willing to impugn legislation in court on grounds that are no longer tied to this document, urging

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<sup>22</sup> For an example, Seidman cites the Court's inconsistent Tenth Amendment jurisprudence in which the Court engaged in multiple jurisprudential course corrections in a sixteen-year span (p. 69). Despite these departures from precedent, Seidman notes that the Court's decisions in this area "involve good-faith departures from constitutional requirements, not outright defiance" (p. 69).

<sup>23</sup> It is just not clear how radical Seidman wants to be. At one point he retreats from the language of "systematically ignoring the constitution" to say: "There is simply no good reason for why we cannot continue to abide by constitutional provisions that now seem sensible to us while jettisoning those that do not" (p. 46). But even here it is not clear how the "jettisoning" is supposed to work.

<sup>24</sup> See *supra* p. 1155. In addition, see Seidman's ambivalent comments about judicial review later in the book: "There is something to be said for such a check, but of course there is also much to be said against it" (p. 129).

judges to pronounce statutes unenforceable on nonconstitutional grounds? And should a judge who is convinced by Seidman's arguments be willing to entertain such challenges? The possibility is not fanciful. Judge Richard Posner has long urged that judges should take a more pragmatic attitude to challenges of this kind: "The pragmatic judge does not throw up his hands and say 'sorry, no law to apply' when confronted with outrageous conduct that the framers of the Constitution neglected to foresee and make specific provision for."<sup>25</sup> Is the normative upshot of Seidman's critique a sort of constitutional pragmatism?

There is not nearly enough on this issue in the book. As I indicated at the beginning, I am not one of those who think that a negative evaluation of a set of existing practices is discredited simply because it is not accompanied by a credible set of normative recommendations. Evaluation is not the same as prescription. It may just be that we are in a mess with our sense of constitutional obligation, and the depth and idiocy of that mess is not redeemed by the fact that no one can figure out how to extricate ourselves from it. The critique that I have described in Part I still stands even if I have not been able to find very much to fill out Part II of this Review. Still, it would be good to know what Seidman is recommending.

Sometimes he seems to be recommending a sort of constitutional quiescence. He says that we are already faced with innumerable constitutional violations that seem to be accepted and that we should just not make a fuss about them. In a chapter called "The Banality of Constitutional Violation," he says that: "As things stand now, government officials, high and low, routinely violate the Constitution, and no one does anything about it" (pp. 63–64). When someone claims that something is unconstitutional, he argues, "each of us should answer with a perfectly straightforward, but deeply subversive, two-word question: 'So what?'"<sup>26</sup> We should, as our parents used to say, stop making a federal case out of these allegations. And indeed this seems to be the accepted attitude toward a great many "[u]nremedied constitutional violations by lower level officials" (p. 73):

Most legal issues do not reach the Supreme Court, and the Court has promulgated a web of doctrine that ensures that some issues cannot be decided by any court. Rules as diverse as the political question doctrine, the mootness, ripeness, and standing requirements, the state secrets privilege, and various forms of sovereign and official immunity prevent courts from

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<sup>25</sup> RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 258 (1999).

<sup>26</sup> Alexander C. Kafka, *The Constitution: Who Needs It?*, CHRON. HIGHER EDUC. (Dec. 10, 2012), <http://chronicle.com/article/The-Constitution-Who-Needs/136147> (quoting Louis Seidman) (internal quotation marks omitted).

adjudicating many important constitutional questions. These doctrines have the effect of giving political actors authority to obey or disobey the Constitution as they choose. (p. 73)

Seidman makes this point perhaps more as reassurance than as recommendation. The world would not fall apart if the Constitution were taken less seriously and constitutional violations pursued less obsessively:

[W]e do not need to speculate about a world with widespread constitutional violation because this is the world in which we already live. . . . Yet the last time I looked, things seemed pretty normal. I did not notice fighting in the streets, rampant lawlessness, or a return to a state of nature. (pp. 63–64)

I think he also believes as a normative matter that people should just calm down about the Constitution. It is not the be-all and end-all, and perhaps when they are pursuing their own political campaigns to make the society we live in better, more orderly, more equal, or more free, they should do it by ordinary political means rather than by devising strategies that inevitably entangle the issues that they care about in a morass of interpretive controversy. Years ago, Mark Tushnet argued against those who were trying to bring welfare entitlements within the ambit of the Constitution. Responding to a claim by Judge Posner in *Jackson v. City of Joliet*<sup>27</sup> that the American constitutional scheme “is a charter of negative rather than positive liberties,”<sup>28</sup> Tushnet said:

We could of course have a different Constitution. Or, as some prefer, we need not accept this as a description of the “true” Constitution. . . . One can argue that the party of humanity ought to struggle to reformulate the rhetoric of rights so that Judge Posner’s description would no longer seem natural and perhaps would even seem strained. I cannot pretend to have an argument against that course and would not want to weaken my comrades’ efforts to build a society that guarantees positive as well as negative rights. But there do seem to be substantial pragmatic reasons to think that abandoning the rhetoric of rights would be the better course to pursue for now. People need food and shelter right now, and demanding that those needs be satisfied — whether or not satisfying them can today persuasively be characterized as enforcing a right — strikes me as more likely to succeed than claiming that existing rights to food and shelter must be enforced.<sup>29</sup>

And by this he meant not that attorneys should go into court equipped only with claims about the needs of their clients, but that they should stay away from constitutional litigation altogether and pursue the issue

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<sup>27</sup> 715 F.2d 1200 (7th Cir. 1983).

<sup>28</sup> *Id.* at 1203.

<sup>29</sup> Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1393–94 (1984).

of social need in a legislative campaign.<sup>30</sup> I think Seidman would endorse this approach, though he does not mention it specifically. In a more recent controversy, he might say that if one has a choice between promoting state legislation to enable same-sex marriage and embarking upon litigation to show that states are not constitutionally permitted to deny same-sex marriage,<sup>31</sup> one should pursue the former strategy, not the latter. That sounds sensible, though one might balk at accepting the correlative recommendation that Seidman converts should not use the Constitution even defensively in such a campaign, for example by litigating to strike down the misuse of federal power in the Defense of Marriage Act.<sup>32</sup>

I should emphasize, though, that all of this is speculative: I am extrapolating — to be frank, I am constructing — normative recommendations from Seidman’s evaluative critique. None of this discussion corresponds to anything he explicitly says. What he does say explicitly is more a matter of gentle admonition: “Before there can be political change, there must be a cultural shift . . .” (pp. 139–40). In response to the question “What produces cultural change of this sort?” he answers: “At the simplest, granular level, it is produced by ordinary individuals who challenge conventional wisdom supporting the status quo” (p. 140). That is where the “Unconstitutional? So what?” posture that I mentioned a moment ago stems from.<sup>33</sup> He says, “We need a national conversation that responds to this simple query, and a national conversation begins with a host of individual conversations” (p. 140). There is some rhetoric about “[i]ndividual acts of subversion” so far as constitutional obligation is concerned (p. 140), but beyond what I have said, I have no idea what those are supposed to amount to or what an example would be.

Much of the time, what Seidman is trying to do is something different from normative recommendation. He is asking us to use our imaginations, to *picture* a United States without our constitutional obsession: what would our polity and its politics have been like had we not gone down this path? This strategy of lament does not purport to offer any advice about how to get there from here. But it is salutary nonetheless.

[T]he entire argument for constitutional obedience can be conceptualized as [a] giant chicken game. . . . [M]odern constitutionalists want to confront us with a stark choice: Either we accept wholesale enforcement of the

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<sup>30</sup> For further discussion of the relationship between the language of rights and the language of needs, see Jeremy Waldron, *Rights and Needs: The Myth of Disjunction*, in LEGAL RIGHTS 87, 88 (Austin Sarat & Thomas R. Kearns eds., 1996).

<sup>31</sup> But note that Seidman says nothing about state constitutions.

<sup>32</sup> See *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>33</sup> See *supra* p. 1160.

Constitution, complete with all of its silly or pernicious provisions, or we will have a head-on collision in the form of a war of all against all, chaos, and an end to our civil liberties. (p. 46)

“Surely,” says Seidman, “we should think twice before giving in to this sort of bullying” (p. 46). After all, “many societies, including on occasion our own, manage to survive and prosper without resorting to constitutions to resolve their disagreements” (p. 138). Other countries keep the peace, maintain order, protect liberty, and provide good government without our constitutional apparatus. Why couldn’t that have happened here?

### III. CONSTITUTIONS IN GENERAL

I said at the beginning that although a large portion of Seidman’s argument is concerned purely with the situation in the United States, part of what he does in the book is draw lessons from other constitutional settings where he thinks written constitutional authority is not as prominent. In imagining that we might set aside (or take no notice of) the Constitution of the United States, Seidman asks us to take comfort from the fact that there are countries in the world — indeed a handful of advanced democracies — that do not have anything comparable to our constitutional arrangements: “Other successful, nonanarchic, and nontyrannical countries like the United Kingdom and New Zealand seem to do just fine without a written Constitution” (p. 18).

Now, one has to be careful with these cases — more careful, I think, than Seidman is.<sup>34</sup> Though some of their constitutional norms are customary (like the norm in the United Kingdom that no bill becomes law without the Queen’s assent and the accompanying norm that the royal assent may in no circumstances be refused),<sup>35</sup> the two countries he mentions — New Zealand and the United Kingdom (UK) — actually do have a lot of written constitutional law. In New Zealand, there is the Constitution Act of 1986, the New Zealand Bill of Rights Act of 1990, and the Electoral Act of 1993. In the UK, the written constitution includes the Act of Union 1707 (uniting England with Scotland), the Parliament Acts of 1911 and 1949 (regulating the authority of the House of Lords), the European Communities Act of 1972, the Human Rights Act of 1998, and the various Representation of the People Acts from 1918 to 2000.

<sup>34</sup> Some parts of this paragraph and the next are adapted from Jeremy Waldron, *Constitutionalism — A Skeptical View*, in *CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY* 267, 268–70 (Thomas Christiano & John Christman eds., 2009).

<sup>35</sup> See Jeremy Waldron, *Are Constitutional Norms Legal Norms?*, 75 *FORDHAM L. REV.* 1697, 1702–09 (2006).

Notice that in calling these materials *constitutional* materials, I am using the term to refer to a function rather than any particular type of legal text. The constitution of a country is just the set of rules and principles that organize the fundamentals of that country's political system, constitute and empower the most important institutions, and structure what various government agencies may or may not do. I am proceeding on the understanding that this function can be performed in any number of ways and that the rules and principles that discharge this function can be expressed in different legal media. So, for example, an "unwritten constitution" is not an oxymoron if what it means is that constitutional functions can be discharged by customary rules or by rules inferred from a set of precedents. And equally, I am saying that the function of a constitution can be discharged in a set of scattered written texts, including legislative texts. Maybe legal materials can be constitutional only if people think about them in that light: perhaps a country has a constitution only if the basis of its system of government can be identified and reflected on as such, and treated as something under the control of its people in some suitably vague sense. But that can be true of a scattered array of legislative materials, it can be true of a body of case law, and it can even be true of customary constitutional law.

There are three main differences between constitutional arrangements in the United States, on the one hand, and in the other countries that Seidman discusses, the UK and New Zealand, on the other. The first difference concerns codification. The main factor distinguishing the United States is not that there is a written source of constitutional law in this one country but not in the others, but rather that the written constitutional law is codified in a single document in the United States whereas it remains scattered in the other two countries.

The second difference concerns judicial review. In the United States, the courts have the right to refuse to enforce state or federal legislation that conflicts with constitutional law, whereas courts in the UK and New Zealand have much weaker powers of judicial review.<sup>36</sup> Justice Marshall said in *Marbury v. Madison*<sup>37</sup> that all nations that "have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution . . ."<sup>38</sup> But he was wrong about that. Neither the UK's Human Rights Act nor the New Zealand Bill

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<sup>36</sup> See generally STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM (2013).

<sup>37</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>38</sup> *Id.* at 177.

of Rights Act envisages anything of the sort, though they are both pieces of written constitutional law. The converse is not true either: judicial review of legislation can be thought legitimate even where the relevant provision of higher law is unwritten; or at least that was the position of Sir Edward Coke in *Dr. Bonham's Case*,<sup>39</sup> which many American constitutionalists take seriously even if most English lawyers have never heard of it.

A third difference is entrenchment. The written sources of constitutional law that I have mentioned for the UK and New Zealand are parliamentary statutes, which in principle might be amended by ordinary legislation, whereas in the United States the main written source of constitutional law is elevated above ordinary legislative amendment and subject to much more rigorous and difficult amendment procedures. True, as a matter of politics, it is more difficult to amend, say, the UK's Act of Union 1707 than any ordinary statute (though it will have to be amended if the people of Scotland vote for independence in the next couple of years). For the time being, however, its provisions settle the terms of the basic structure of the country. And it has constitutional authority, affecting succession to the throne, the bijural legal system of the UK (Scots law and English law), respect for the rights of the Scottish Church, and so on.

Now, whatever his view on the first two differences, I am not sure that Seidman regards the difference between the well-established statutory basis of constitutional law in the UK and the higher-law basis of constitutional law in the United States as significant. For in chapter five of his book, he appears to take the position that the arguments he has developed about constitutional obligation might apply *mutatis mutandis* to well-established ordinary statutes as well. He recognizes this potential objection to his proposed approach, but rejects its force, stating, "I would . . . not be terribly concerned if the decay of constitutional obedience led to a more general skepticism about an obligation to obey the law" (p. 119). For example, people cite the Judiciary Act of 1789, and they contest the meaning of the Alien Tort Statute, and I think he would regard this bickering as counterproductive and distracting from the real issues of the day just as he regards bickering over the Constitution. Some of his argument is simply at odds with the general authoritarianism that law as such involves, and he recognizes this. Seidman is really a sort of "philosophical anarchis[t]" (p. 119). He asks why we should ever deviate from our own best judgment just because of what the text of some law requires. Now, he

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<sup>39</sup> (1610) 77 Eng. Rep. 646 (C.P.); 8 Co. Rep. 113 b ("And it appears . . . that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void . . . ." *Id.* at 652.).

pulls back a little bit from this, saying that “[s]tates cannot function without laws, but they can function without constitutions” (p. 122). But his confusion about written constitutions leaves it unclear whether he thinks the UK can function without its constitutional statutes or New Zealand without the Constitution Act of 1986.

Seidman imagines that some of his readers will panic at the thought of an abandonment of constitutional structure. How will we know how often to hold elections or who is eligible for what office? Surely we need established constitutional rules about that at least. It may seem pedantic to quibble with the following statement that Seidman offers as reassurance in this regard:

It would not be a good state of affairs if we had an argument about the length of a president’s term every four years. But there is no reason to think that constitutional obligation is necessary to settle matters like this. The widespread sense that there is a need for closure provides motivation enough. In the United Kingdom, there is no written constitutional agreement that requires fresh parliamentary elections every five years, but the length of parliamentary sessions is nonetheless not a subject for debate. (pp. 24–25)

But quibble one must. For actually there *is* written constitutional law in the United Kingdom that requires fresh parliamentary elections every five years: this was laid down originally in the Parliament Act of 1911, which repealed the older Septennial statute, and the present requirement is set out in section 1 (2)–(3) of the Fixed-term Parliaments Act 2011:

The polling day for the next parliamentary general election after the passing of this Act is to be 7 May 2015. . . . The polling day for each subsequent parliamentary general election is to be the first Thursday in May in the fifth calendar year following that in which the polling day for the previous parliamentary general election fell.<sup>40</sup>

This is evidently written constitutional law; it just happens to be in the form of a statute. In other words, the life of a parliament in the UK is not a matter that is regulated by custom or implicit conventional understanding. Seidman is also wrong when he reassures his readers that in the UK “the length of parliamentary sessions is . . . not a subject for debate” (p. 25). In 2010, a proposal that the life of a parliament should be four years rather than five was defeated in the House of Commons 242 votes to 315.<sup>41</sup>

I am not saying Seidman should be embarrassed by the existence of such an unsettling debate in a country he regards as constitutionally stable. He might actually welcome the possibility that is open to the

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<sup>40</sup> Fixed-term Parliaments Act, 2011, c. 14, § 1(2)–(3).

<sup>41</sup> *Four-Year Fixed Term Parliament Bid Defeated*, BBC NEWS (Nov. 16, 2010), <http://www.bbc.co.uk/news/uk-politics-11771309>.

British public and their representatives to raise and re-raise these matters in a potentially unsettling way. And raise and re-raise them they do: in recent years the British public and its representatives have debated or passed legislation to reform the basis of succession to the throne;<sup>42</sup> to reform the House of Lords (expelling hundreds of hereditary peers);<sup>43</sup> to set up an independent Supreme Court;<sup>44</sup> to institute regional legislative assemblies in Cardiff, Edinburgh, and Belfast;<sup>45</sup> to provide for a referendum on Scottish independence;<sup>46</sup> to provide for a referendum on the UK's continued membership in the European Union;<sup>47</sup> and to investigate possible withdrawal from the Council of Europe's European Convention on Human Rights.<sup>48</sup> Unsettling what appear to be secure constitutional settlements has been something Seidman has favored ever since the publication of his book *Our Unsettled Constitution* twelve years ago.<sup>49</sup> What is happening presently in the United Kingdom seems to be exactly what he would like to see happening in the United States. The point, however, is that its happening in the United Kingdom does not depend on the absence of written constitutional law. Indeed it is arguable that these debates require written constitutional law to provide clear default positions to which the various reform proposals can orient themselves. Very occasionally, the British get themselves into a tangle where status quo and default positions are not clear, being defined by "convention" rather than by written law.<sup>50</sup> But that is not the case with any of the constitutional reforms being considered at the moment, and it would be wrong to suggest that constitutional flexibility in the United Kingdom depends on some sort of "implicit" rather than written constitution.

What makes such debates possible is that written constitutional law in the United Kingdom is much less entrenched than the codified

<sup>42</sup> *Girls Equal in British Throne Succession*, BBC NEWS (Oct. 28, 2011), <http://www.bbc.co.uk/news/uk-15492607>.

<sup>43</sup> Editorial, *Lords Reform: Step by Step*, THE GUARDIAN (Aug. 1, 2013), <http://www.theguardian.com/commentisfree/2013/aug/01/lords-reform-step-by-step-editorial>.

<sup>44</sup> *New Supreme Court Opens with Media Barred*, THE TELEGRAPH (Oct. 1, 2009), <http://www.telegraph.co.uk/news/uknews/law-and-order/6251272/New-Supreme-Court-opens-with-media-barred.html>.

<sup>45</sup> *Devolution: A Beginner's Guide*, BBC NEWS (Apr. 29, 2010), [http://news.bbc.co.uk/2/hi/uk\\_news/politics/election\\_2010/first\\_time\\_voter/8589835.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/election_2010/first_time_voter/8589835.stm).

<sup>46</sup> *Timeline: Scottish Independence Referendum*, BBC NEWS (Oct. 14, 2012), <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-19907675>.

<sup>47</sup> *David Cameron Challenges Nick Clegg over EU Referendum*, THE GUARDIAN (June 30, 2013), <http://www.theguardian.com/politics/2013/jun/30/david-cameron-nick-clegg-eu-referendum>.

<sup>48</sup> *UK Pullout from European Rights Convention Would Be 'Total Disaster'*, THE GUARDIAN (June 4, 2013), <http://www.theguardian.com/law/2013/jun/04/uk-european-human-rights-convention>.

<sup>49</sup> See generally LOUIS MICHAEL SEIDMAN, *supra* note 2.

<sup>50</sup> For an example, see the debate about the propriety of the Queen's choice of Prime Minister following the resignation of Harold Macmillan in 1963. There is a good account (if I say so myself) in JEREMY WALDRON, *THE LAW* 56-87 (1990).

Constitution is in the United States. As I pointed out earlier, some of it is politically entrenched. But much of it is vulnerable in fact as well as in theory to ordinary legislative change. Seidman says a little bit about the process of constitutional amendment in the United States, but not much. Early on he says that “the American Constitution is more difficult to amend than any other national constitution in the world” and that therefore “amendment is often not an effective alternative to disobedience” (p. 17). Because amendment is so difficult, maybe all the energy that would otherwise go into serious and open-ended debate about desirable changes in our constitutional structure ends up taking an interpretive form. The Justices of the Supreme Court can in effect amend the Constitution, or at least they can change the way that its text is understood to lead to substantially different results. But they cannot do so in response to an argument that the Constitution should be changed; they can do so only in response to interpretive arguments that publicly assume the text is sacrosanct. I wish Seidman had put his case this way, for it goes a long way toward explaining some of the infantilism and bad faith of American constitutional jurisprudence.

Instead, Seidman insists on saying that the *existence* of the Constitution is the problem and that, considering how things are done in other countries, we would be (or we would have been) better off without it. And that is not a satisfactory position. For the fact is that all modern countries, certainly all modern democracies, have written constitutional law in one form or another. In all of them, the people seem to have authority to establish and vary their systems of good government on the basis of reflection and choice; in the words of *The Federalist*, none of them seem “destined to depend for their political constitutions on accident and force.”<sup>51</sup> Everywhere political systems are framed and defined by written constitutional law. And we consider it an important part of the rule of law that politicians and citizens take these provisions seriously and that, until they are repealed or amended, they have an obligation to modify their behavior accordingly.

Can it possibly be that Seidman thinks that this practice in itself is systematically a bad thing? Consider the spate of recent constitution-making. Over the past thirty or forty years, a number of new democracies have come into existence and, as far as I know, all of them have embarked on the task of defining their political system with a body of written law, often codified in a document called “the Constitution” of South Africa, or Poland, or East Timor,<sup>52</sup> Now

<sup>51</sup> THE FEDERALIST NO. 1, at 27 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>52</sup> After the end of apartheid, South Africa established an interim constitution in 1993 and a new Constitution of South Africa in 1996. After the fall of communism, Poland adopted interim constitutional measures in 1992 and a completely new Constitution of Poland in 1997. After the

the arrangements they have made are more or less flexible, easier or more difficult to amend. But while they last, their provisions define the parameters of political activity in the country concerned. Moreover, they seldom consist of truisms and tautologies. Constitutional provisions are usually controversial; they could be imagined to be different, and they often attract proposals for emendation. These proposals are sometimes put forward in good faith by people who have no interest other than the abstract improvement of the constitution itself. But often they are put forward for strategic reasons or because the content of the constitutional provision in question is more or less congenial to the ideology of one of the parties or factions whose conflict and competition define the politics of the country. This means that, at any given time, obedience to a given constitutional requirement may seem inappropriate to one or more of those factions or parties. Someone formally obligated by such a requirement may therefore have to ask himself the question that Seidman repeatedly asks:

Why should I do this thing that I think is inappropriate for me (or anyone in my position) to do — which is, after all, why I think this provision should be changed — just because it is required by this piece of paper?

The answer is bound to be: because the constitution cannot do any of the work it is supposed to do in framing and defining a political system unless people are prepared to accept it, for the time being, as authoritative. The work that it has to do is to make politics possible among a people who disagree, often quite radically, about values, principles, rights, justice, and the common good. Even in the midst of their disagreements they need rules that can define a politics — a system of decisions and systems of debate and deliberation that can house the various parties and factions in their confrontations with one another. It seems to me that unless Seidman wishes to say that this work, done by constitutional arrangements, is unnecessary or unimportant, he cannot make a wholesale case against constitutional obedience.

The logic, I think, is irrefutable.<sup>53</sup> Politics needs framing: there needs to be a defined political system, so at any given time there are rules constituting and regulating political interactions, rules that are accepted even by people whose political positions lead them to disagree with the content of the rules. In that sense the rules must have constitutional authority.

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expulsion of Indonesian forces in 1992, East Timor set up a new Constitution of East Timor, which took effect in 2002. Examples could be multiplied.

<sup>53</sup> There is a good account of it in STEPHEN HOLMES, *PASSIONS AND CONSTRAINT* 163–64 (1995). For a critical discussion, see JEREMY WALDRON, *LAW AND DISAGREEMENT* 275–79 (1999) (distinguishing between the “facilitating and enabling character of constitutive rules of procedure,” *id.* at 277, and the precommitment effect of constitutional constraints).

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It does not follow that the rules must be unchangeable or that they must be entrenched against ordinary legislative revision — provided that the spirit that leads people to make proposals for their emendation does not also lead them to violate the rules while they are in force. That is what the British example shows: written law can have constitutional authority even while it is open to revision.

Nor does it follow that the rules must be enforced by courts with powers of strong judicial review. The rules may have a normative presence coordinating action and competition among a population of political actors without an enforcement mechanism, a presence that consists mainly in these actors' recognition of each other's readiness to submit to the authority of the rules. But rules there must be, and they must be identifiable in ways that allow citizens and politicians who hold different values and different ideologies nevertheless to share an understanding of them.

I think Seidman sees this. He discusses the recent work of Professor Daryl Levinson, which explains in game-theoretic and rational-choice terms why self-interested people are willing to submit themselves and their interests to norms with which they do not necessarily agree (pp. 105–07).<sup>54</sup> Seidman says he does not contest the existence of the mechanisms (coordination, tit-for-tat, and feedback loops) that Levinson describes, but he goes on to say this:

Where Levinson goes wrong, I think, is in his claim that these factors lead to *constitutional* compliance. Although he is not as clear about the point as he might be, Levinson seems to think that these are the mechanisms that make constitutions possible. Actually, though, they are the mechanisms that make constitutions unnecessary. What Levinson has really demonstrated is that even in circumstances where people are acting in their self-interest and do not feel a moral obligation to obey a constitution, they can nonetheless generate relatively stable arrangements. (p. 106)

Now I cannot speak for Levinson, but I think this is confused. It is true that the mechanisms Levinson describes can operate in all sorts of areas that have nothing to do with the constitution of a country's politics. They can operate to define elementary traffic laws, for example, or property rights.<sup>55</sup> But that is not Seidman's point. Seidman seems to think that the mechanisms Levinson describes can operate to constitute a country's politics without a constitution. If he means without written constitutional law, I suppose that is possible: the coordination that Levinson imagines could settle around certain implicit practices

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<sup>54</sup> See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657 (2011).

<sup>55</sup> Cf. DAVID HUME, A TREATISE OF HUMAN NATURE 489–91 (L.A. Selby-Bigge ed., Oxford 1888) (1739).

(e.g., majority-decision is taken for granted, the most senior figure always speaks first, and so on); provided that some shared know-how identifies the relevant practices and parties can credibly commit themselves in each other's eyes and rely on each other's commitments. This is what people imagine the British constitution is like but, as we have seen, that is largely a myth. Tacit arrangements may work reasonably well in a very small and simple polity whose members are relatively transparent to one another. In a large and complex polity, however, where members are diverse, it may be doubtful whether stable political practices can be identified just by implicit know-how. In those circumstances, written norms seem necessary; formality has to take the place of tacit or clubbish understanding, and constitutional formulations themselves have to serve as a focus of unity in an otherwise pluralistic community.<sup>56</sup> Now is this what Seidman is denying? Is this where he diverges from Levinson? I am not sure. The divergence may be narrower — just denying that the Levinson logic, even for a modern society, requires anything as lapidary and entrenched as the Constitution of the United States. But that is perfectly compatible with Levinson's argument requiring written constitutional law.

The wisdom of modern constitutionalism, such as it is, is that, in one form or another, societies need authoritative norms of constitutional structure and most of those norms need to take the form of written law. Seidman may say, if he likes, that “for several millennia, constitutions were the exception rather than the rule” (p. 121), but most emerging and transitional democracies do not want to take the risks attendant upon reversion to that archaic model. So we see the setting up of the Polish Constitution, the South African Constitution, and the Constitution of East Timor. These constitutions, with their written provisions, make authoritative demands on their citizens as a way of constituting a politics for them.

How does Seidman think Poles, South Africans, and East Timorese should respond to these demands? I cannot believe that he thinks these citizens should systematically ignore their constitutional law or take every opportunity to subvert it. So what is the difference between their constitutional obligations and ours? It must come back to this issue of time: a constitution may be a good thing in the establishment of a polity, but not if it lasts too long. But even if we set them up so they are amendable, constitutions are necessarily designed to endure, designed indeed to outlast their framers and the politics that elicited them. And there is the paradox. If they do endure, they will start to look increasingly obsolete and we will wonder (subversively or

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<sup>56</sup> See WALDRON, *supra* note 53, at 73–82 (discussing the role of written text in political deliberations); cf. JAN-WERNER MÜLLER, *CONSTITUTIONAL PATRIOTISM* (2007).

rebelliously) why we are being bound by eighteenth-century formulations. Equally, though, if they do endure, they will create conditions of political stability that we seem to be able to take for granted: we can take risks with our Constitution now, because it has already successfully conditioned the reflexes with which we will confront such risks. But if we put forward our counsel of constitutional disobedience in circumstances that are less secure than this, then we may well be doing our audience a grave disservice. Constitutions need to establish themselves; they need obligation and they need authority. This is particularly true for new constitutions.

I wish there were more discussion of all this in *On Constitutional Disobedience*. For I do not think it is possible to make the delicate judgments that these considerations involve without a clearer sense than Seidman gives us of the sources of political stability in countries other than his own.

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At the end of his book, Seidman writes ruefully that he is unlikely to have brought about any wide-ranging change: "I harbor no illusions that the Supreme Court will stop declaring laws unconstitutional in the immediate future or that the constitutional law classes I regularly teach will soon be dropped from the law school curriculum" (p. 142). But, he says, "even if we cannot completely and immediately kick our constitutional law addiction, we can soften the force of constitutional obligation" (p. 142). We can get people to ask the "So-what?" question from time to time, and we can try to accustom them to phrase their political disagreements, even their fundamental ones, in terms that do not involve the interpretation of eighteenth-century text. I think he is right to discern a sort of pathology in modern politics that arises out of our conflicted attitudes toward the Constitution. No doubt there are all sorts of reasons for the incivility that currently afflicts American politics, but I suspect Seidman is right that the prevalence and the high stakes of the constitutional game contribute to that incivility as each faction tries to show that its opponents are unworthy of being regarded as true Americans (p. 138). Where he is wrong, I think, is in his conviction that this is due to the Constitution as such, qua constitution, and that we would be better off without anything of that sort. A more modest position might have wished for constitutional practices of a different character rather than the abandonment of constitutional law altogether.