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# The End of Constitutional Law?

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## Book Reviews

### THE END OF CONSTITUTIONAL LAW?

**ON CONSTITUTIONAL DISOBEDIENCE.** By Louis Michael Seidman.<sup>1</sup> New York, N.Y.: Oxford University Press. 2013. Pp. xii + 162. \$21.95.

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#### I. INTRODUCTION

Displeasure with constitutional law has been a fixture in American constitutional scholarship probably for as long as constitutional law has been around. Yet in the main, scholars have worked within the confines of the enterprise itself, trying to show how particular judicial decisions were unwise, rested on faulty logic, or were unsupported given the writer's preferred mode of interpretive methodology. Mainstream constitutional theory also accepted the premises of constitutionalism. Foundational works did not question the desirability of having a constitution or dispute the courts' power of judicial review of legislation, but rather sought to justify it. Different as they are, Bickel's *The Least Dangerous Branch*,<sup>3</sup> Ely's *Democracy and Distrust*,<sup>4</sup> Tribe's *American Constitutional Law*,<sup>5</sup> or Ackerman's *We the People*,<sup>6</sup> broadly stand for the idea that although constitutionalism and judicial review may seem problematic from a democratic standpoint, they can nevertheless be vindicated in one way or another. And moreover, that the

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3. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

4. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

5. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978).

6. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

American constitutional project, as it has developed over the years, is one worth preserving.

In recent decades, however, this approach has begun to unravel. Armed with the political insights of American legal realism and critical legal studies, the internal critique of Supreme Court decisions, while still the bread and butter of constitutional scholarship, has been supplemented by new avenues of constitutional theorizing. The problem for the new wave of constitutional scholarship did not (or not always) lie with faulty judicial reasoning, internal contradictions, or morally troublesome court decisions, but with a deep skepticism about the constitutional project as a whole. Weary of deploying the usual moves against decisions they believed to be mistaken, scholars went after the institutions that produced them, namely, the Supreme Court. The calls to end or reform judicial review grew out of an exasperation over the way constitutional law was made, the institutions in charge of its development, and what scholars believed was the harmful effect of judicial review on the political branches and on the political culture.<sup>7</sup>

The most important intellectual movement to emerge from this, Popular Constitutionalism, spearheaded the call to “Take the Constitution away from the Courts,” or to significantly cut back on the power of judicial review. Popular and progressive constitutionalists, under various stripes, sought to shift the task of constitutional interpretation from the Supreme Court to Congress, to the Executive, to states, to lower courts, to social movements, and to the people at large.<sup>8</sup> Instead of focusing exclusively on the first order level of desirable or undesirable decisions, popular constitutionalists turned to interrogate the second order level of the political institutions that generate those decisions.

Despite their break with earlier constitutional theorists, popular constitutionalists still claimed adherence to the Constitution, as they sought to reclaim it from courts and return it to the “people.” The problem, they maintained, was that courts have monopolized constitutional interpretation. This

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7. See, e.g., MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

8. See, e.g., ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* (1994); Ori Aronson, *Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts*, 43 U. MICH. J.L. REFORM 971 (2010); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027 (2004); David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047 (2010).

“judicial overhang” leads legislators to abdicate their constitutional responsibility; having non-elected judges decide constitutional issues, when those involve subjects of deep societal conflict, strips the people of their capacity for self-government. Of course, some of these arguments were not new, but they did crystallize into a more coherent movement that deployed a shared rhetoric and reasoning.

Popular constitutionalists were not alone. Others, such as Sanford Levinson and Larry Sabato, called to take stock not just of judicial review, but of the constitutional design itself. Shifting the focus from the provisions that spark continued legal and popular interest to the “hardwired” institutional arrangements that structure politics, they argued that the Constitution has democratic deficits, produced unfair results, and generated political gridlock and a dysfunctional Congress. They urged, separately, to revise the Constitution in numerous ways, so as to make it more democratic and responsive to popular will.<sup>9</sup>

In their own way, however, both popular constitutionalists and constitutional revisionists belong to the camp of constitutional fidelity. Neither questions the need for a constitution. They remain constitutionalists, although they would like to see the Constitution or the practice that attends it transformed. In this sense, the new wave of constitutional theory is still very much connected to the scholarship that preceded it, for neither challenges the basic idea of constitutionalism.

On the heels of this debate comes Louis Michael Seidman’s important and provocative new book, *On Constitutional Disobedience*. Unlike other constitutional theorists, Seidman is not concerned with how best to interpret the Constitution or the role of the judge. He does not want to revise the Constitution. Instead, he wants us to ignore it. His two overarching arguments are, first, that if an all things considered judgment counsels us to prefer a particular policy, the fact that the Constitution tells us otherwise should not matter. Second, that by invoking the Constitution we use language that gets in the way of all things considered decisions. Thus not only do we not have a political obligation to obey the Constitution, but constitutional discourse harms our political conversations by excluding merit-based considerations.

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9. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006); LARRY J. SABATO, *A MORE PERFECT CONSTITUTION: WHY THE CONSTITUTION MUST BE REVISED: IDEAS TO INSPIRE A NEW GENERATION* (2008).

In the pages that follow I will present and evaluate Seidman's arguments in favor of constitutional disobedience. While I believe that his core argument about the absence of a political obligation is sound, I will offer a skeptical rejoinder to his vision of political life without a constitution. My main argument is that any political program that wants to do away with constitutionalism must engage in careful comparative institutional analysis. In the end, Seidman may be right, but for his claim to succeed more needs to be said about what constitutions do and how countries that do not operate under written constitutions operate.

## II. THE CORE OF THE ARGUMENT

The puzzle of constitutional obligation, as Seidman puts it, is as follows: If we decide on a course of action, why should the fact that a contrary action is required by an old document have any power over us? If the right way goes against the Constitution, should we not choose what is right over what is written? Seidman's worry is not only that we are making bad decisions because of constitutional obedience, but that when arguments are phrased in constitutional language they unnecessarily raise the stakes of the argument by excluding other arguments that are not traceable to the Constitution. This, Seidman claims, has "poisoned" political discourse.

Seidman's solution is not to take sides in the prevailing constitutional debates, which he believes are impossible to resolve, but to cut the Gordian knot altogether. Only by putting the Constitution aside, by considering it abstractly, as "a work of art, designed to evoke a mood or emotion, rather than as a legal document commanding specific outcomes," he argues, can we talk about the merits of policy choices without being encumbered by the Constitution (p. 8).

Of course, in order for us to get to that place, we need to disarm ourselves of the mistaken notion that we are bound by the Constitution. Before we get to that, however, Seidman draws our attention to an overlooked feature of modern debates in constitutional theory. Those revolve around two issues. The first is who should interpret the Constitution. This challenge can be traced to Bickel's countermajoritarian difficulty,<sup>10</sup> and even before that, to Thayer's insistence that courts should refrain

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10. BICKEL, *supra* note 3, at 15–16.

from invalidating laws unless in cases of clear mistakes by Congress.<sup>11</sup> The second issue, one which follows from the first, is how the authoritative interpreter should interpret the Constitution. These debates, however, bypass the real question: Why is constitutional obedience warranted in the first place (p. 32)? Everyone assumes that the Constitution is binding and the only question is who should interpret it and how. But the problem goes much deeper. Constitutionalism itself is countermajoritarian. Judicial review is merely a technique for assuring constitutional obedience, but legislators can act out of constitutional obedience and flout the will of their constituents just like judges can ignore majoritarian processes (p. 36). The problem, then, is with constitutionalism and not the particular devices put in place to carry out its commands.<sup>12</sup>

To substantiate his claim for the absence of an obligation of constitutional obedience, Seidman examines the prevailing justifications grounding such an obligation. These can be divided into three types: arguments from precommitment, time-based arguments, and arguments from stability. The first two are theoretical, the third is empirical. While most of the book is devoted to debunking these justifications, for reasons of space I will discuss them relatively briefly.

#### A. REJECTING PRECOMMITMENT

Precommitment strategists argue that constitutions are desirable because they protect democratic processes from future potential violations due to misjudgments or human excesses. As Cass Sunstein argues, precommitment devices are not in tension with democracy, but rather compatible with democratic self-government.<sup>13</sup> For example, free speech and voting rights guarantee that minorities will be heard in the face of hostile majorities. Similarly, constitutionally entrenching a separation of powers scheme reduces the likelihood of future power grabs, while limiting political power.<sup>14</sup> A constitution removes controversial issues that are likely to get in the way of reasoned decisionmaking because of their potential to create factionalism,

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11. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

12. For a description of these devices see Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997).

13. Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 637 (1991).

14. *Id.* at 638.

instability, collective action problems, or strategic behavior.<sup>15</sup> Precommitment mechanisms, then, although they constrain political choices, purport to strengthen democracy by taking certain options off the table and free up resources that can be channeled into democratic decisionmaking.<sup>16</sup> Now, if constitutionally entrenched precommitment strategies facilitate a functioning government that guarantees individual rights, we may be obligated to obey such a constitution.

This view of precommitment, however, may rest on a faulty analogy. While one can view it as a means to facilitate democratic decisionmaking, Seidman argues it is no more than an intergenerational power grab (p. 40). Obeying a constitution in virtue of it being a constitution means allowing the considered judgments at time one to immunize the constitution against the considered judgment of future generations (p. 52). Consider the classic metaphor to justify precommitment, that of Ulysses tying himself to the mast so he can later enjoy the singing of the Sirens without being drawn to the coast where they would kill him. The problem is that it was Ulysses who decided to precommit himself. His decision was made by him and for him. But the precommitment argument for constitutionalism is different because those who precommit are not the ones who are later constrained. These are people from the past who assert power on people living today. Perhaps there is a way in which we can tell ourselves a story that the Framers are actually us; that there is a single, collective, national identity over time that links us and them in ways that make their decisions our own. But, as will be explained below, such a story is simply that, a story (p. 42).

To be sure, it is possible that those erstwhile decisions enhance our freedom. But Seidman finds this argument lacking. Precommitment works only if the right kinds of decisions have been made. Not every precommitment mechanism necessarily enhances freedom, and by entrenching a particular mechanism we make it more difficult to change if we come to the conclusion that our freedom is unduly constrained. More importantly, we have no *a priori* reason to believe that the precommitment decision in time one was indeed the correct one. It may very well be that our decision then was an “all things considered” judgment, but it was a different generation’s all considered

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15. *Id.* at 642.

16. For a classic statement of precommitment as enhancing freedom, see JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1984).

judgment, and it is not clear why past preferences are more respect worthy than present preferences, especially when those were “revealed” by people who had no idea what modern life would look like (p. 49). It is true that we tend to idealize the Founding generation, but it is a mistake to believe that they were not susceptible to biases and prejudices that are similar to, if not more severe than, our own.<sup>17</sup>

Of course, we may happen to agree with the decisions made by the Framers, but in that case our deference to the past is not the result of obligation, but because we are persuaded by the content of their decisions (p. 48). Remember that the test for a duty of constitutional obedience is that we would comply even if our “all things considered” judgment would have us go the other way. In cases of substantive policy agreement we are not motivated by our duty of constitutional obedience, but by our substantive agreement with their decisions. Thus we would be free to follow the constitutional arrangements we agree with, but we would also have the power to modify those that are no longer working for us.

Supporters of the precommitment rationale claim that taking certain options off the table stabilizes society and helps avert disaster. For example, by protecting questions of religion from resolution by democratic processes, we cabin an explosive issue that would continually be divisive.<sup>18</sup> But as Seidman correctly points out, whether disaster will occur is an empirical question. People who act out of self-interest often (though not always) converge on compromises all sides can live with. A constitution may reflect those compromises, but the compromises are antecedent to a constitution in that those compromises could have been reached regardless. The choice between constitutionalism and disaster is therefore a false one (p. 46). To wit, countries that do not have a written constitution that constitutes a higher law, for example Britain or New Zealand, do not explode because they lack disaster

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17. In addition to the familiar gender and race based objections to the ratification process, much historical evidence suggests that the Founding was a period of interest group politics and that the Founders were partly driven by their desire to secure private property, political power, and social status. *See, e.g.*, CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (2d ed. 1935); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 (1969). For a discussion of the myths surrounding the Founding, see Michael J. Klarman, *The Founding Revisited*, 125 HARV. L. REV. 544 (2011).

18. Sunstein, *supra* note 13, at 639.



aversion precommitment mechanisms in the form of a written constitution.<sup>19</sup>

### B. REJECTING TIME-BASED ARGUMENTS

Arguments for constitutional obligation sometimes rest on the respect we owe the past. For example, one argument for constitutional obligation is grounded in the supermajorities that ratified it.<sup>20</sup> But, as Seidman argues, in order for supermajorities to get support from other constituencies they often have to water down their principles. This may result either in constitutions that entrench minority interests or, more commonly, in constitutional provisions that are so vague that everyone can agree on them (pp. 50–51). Both situations are problematic for a position that embraces constitutional obedience. Under the first scenario, it is not clear why we would be obligated to obey a document that entrenches minoritarian interests. Under the second scenario, if everyone can find support for their preferred position, the Constitution is not doing any work that is independent from antecedent preferences.

A different time-based argument suggests that constitutional obligation can be derived from what is referred to as “constitutional moments,” for example those that characterize periods such as the Founding, Reconstruction, or the New Deal settlement. As Bruce Ackerman argues, during constitutional moments the people speak and reveal their true preferences. These are the times when the people are engaged in constitutional creation, expressing their permanent convictions while suspending self-interest. Respecting the decisions that emanate from those moments is thus truly adhering to the “real” popular will.<sup>21</sup> Accepting this argument also dissolves the tension between constitutionalism and democracy, for the Constitution merely reflects the settlements arrived at during constitutional moments, and, again, those were moments of popular political engagement, so enforcing the Constitution is simply enforcing the people’s will.

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19. It is a misnomer to suggest that commonwealth countries do not have a constitution. These countries have organic acts and conventions that function like a constitution. When Seidman uses the term constitution, I take him to mean a written constitution, identified as such, that constitutes a higher law, more difficult to change, which legally constrains ordinary politics.

20. Of course, the ratification process excluded most groups, such as women, blacks, and non-propertied whites. This in itself significantly weakens the Constitution’s democratic provenance.

21. ACKERMAN, *supra* note 6.

Ackerman's theory has been criticized extensively,<sup>22</sup> but for Seidman's purposes it suffices that many provisions in the Constitution were not the result of constitutional moments. More importantly, constitutional moments are never pure self-reflective moments where politics and rent-seeking are suspended.<sup>23</sup> Idealizing these moments is therefore mistaken. Similar to his argument against precommitment, if the decisions generated by constitutional moments do not seem wise to us today on all things considered judgments, it is hard to understand the pull that a constitutional moment purports to exert (p. 57).

Finally, Seidman dismantles the argument that the Framers are us. Psychologically it might make sense to give an account that connects us to the Founding or to later periods of constitutional creation, because we need to justify what makes us a unique political community.<sup>24</sup> But even if this story makes sense as a metaphysical abstraction, even if we somehow see the United States as one ongoing entity, it does not follow that what happens in the past binds us today. Of course, we can make a choice to honor our past commitments, but that is a choice, not a necessity (p. 58).

### C. ARGUMENTS FROM STABILITY

Arguments in favor of an obligation to obey the Constitution may be grounded in the Constitution's capacity to settle disputes. Without an authoritative document that coordinates political activity we run the risk of anarchy.<sup>25</sup> Underlying this argument is necessarily the assumption that constitutionalism imposes order, for if we have a constitution, and yet constitutional violations occur on a routine basis, it would be hard to make the argument that the Constitution imposes settlement. At bottom this is an empirical debate, but in

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22. See, e.g., Don Herzog, *Democratic Credentials*, 104 ETHICS 467 (1994); Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759 (1992); Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918 (1992).

23. Klarman, *supra* note 22, at 781–85 (demonstrating that the Founding was rife with self-interested behavior).

24. For such an account see JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* (2001) (arguing that self-government is meaningful only if it adheres to our enduring political commitments arrived over time).

25. Larry Alexander & Fredrick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Larry Alexander & Fredrick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455 (2000).

order to evaluate the validity of such claims we need to have criteria for assessing constitutional compliance and non-compliance. Here is where things get tricky, Seidman argues, because we do not, in fact, have a clear idea of what counts as a constitutional violation.

Given the methodological disagreement over constitutional interpretation, someone who ascribes to a particular approach will always accuse the other of violating the Constitution. If we think that there is a right answer in principle, then someone, for example a judge, is often violating the Constitution according to judges who do not agree with his methodology. Even when there is methodological agreement, there will be disagreements over application. The fact of interpretive disagreement, then, is evidence that someone is almost always violating the Constitution according to another approach and yet the Constitution endures. We live with purported constitutional violations on a daily basis in central areas of our life, because someone, some of the time, is accused of violating the Constitution, deliberately or not (p. 64).<sup>26</sup> The point, however, is that despite constitutional violations the overarching political framework remains intact.

Finally, Seidman disputes (as many others have) the oft-made claim that constitutionalism better protects freedom. Drawing on Madison's image of a constitution as a "parchment barrier,"<sup>27</sup> he argues that freedom is protected only in the presence of a political culture committed to liberty, one that values disagreement over obedience. Constitutions may have freedom protecting provisions, but their ability to deliver is an empirical matter, because the extent of protection depends on the particular content of the particular constitution and the way in which it is interpreted and implemented (p. 97).<sup>28</sup> Moreover, having a system of judicial review does not necessarily improve rights protection. Courts may wrongly invalidate or uphold statutes, thus weakening rights, and systems of judicial review affect the ways in which other political institutions and society address rights issues, sometimes strengthening the overall level

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26. For intentional violations, see Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 FLA. ST. U. L. REV. 601 (2013).

27. THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

28. For an empirical examination of the gap between constitutional text and practice, see David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CALIF. L. REV. 863 (2013).

of rights protection, while at other times weakening it.<sup>29</sup> Underlying the empirical difficulty of measurement is the conceptually prior question of what counts as “freedom enhancing.” Freedom is an essentially contested concept, and one would be hard pressed to show why a particular conception adopted by a court would obligate a person who holds a different conception.<sup>30</sup> Conversely, if one agrees that a court’s interpretation promotes freedom, one is not following the court, but his own conviction that he happens to share with the court. It is the antecedent commitment to freedom that gives rise to the obligation, not its constitutional inclusion (p. 101).

#### D. POLITICAL OBLIGATION TO ORDINARY LAWS

In one sense, there is nothing novel about Seidman’s thesis. Whether there is a general moral obligation to obey the law is a question that has generated a voluminous literature.<sup>31</sup> If there is no moral obligation to obey the law as such,<sup>32</sup> it follows there is no moral obligation to obey the Constitution, for it is just a particular legal instrument. Seidman indeed concedes the point, but maintains that one can forgo constitutional obligation without giving up on legal obligation to statutes (p. 118).

Seidman’s path is similar to the one taken by Joseph Raz.<sup>33</sup> Although there may not be a moral *obligation* to obey the law, there are *reasons* to obey. Laws serve important coordinative functions, most of them are not unjust, and there are often strong prudential reasons to comply (p. 119). Seidman’s contribution is by distinguishing obedience to statutes from

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29. For the development of both these claims see Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 OXFORD J. LEGAL STUD. 275 (2002).

30. For the claim that rights are subject to reasonable disagreements, see Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006). To demonstrate the claim, think of free speech. On one view, permitting hate speech is in line with the constitutional free speech guarantee. Yet others believe that hate speech works to silence the freedom of the groups it is directed against and should therefore be denied constitutional protection.

31. See, e.g., ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* (2012); A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* (1979); J.L. Mackie, *Obligations to Obey the Law*, 67 VA. L. REV. 143 (1981); M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950 (1973).

32. With important exceptions, this seems to be the consensus in the literature. For exceptions see H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175 (1955); John Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3 (Sidney Hook ed., 1964). Rawls’ and Hart’s position has been thoroughly undermined. See Smith, *supra* note 31, at 955–60.

33. JOSEPH RAZ, *THE AUTHORITY OF LAW* 233 (2d ed. 2009).

obedience to the Constitution. The reasons that exist for obedience to statutes do not, he claims, apply to the Constitution. His argument boils down to this: there are good reasons to obey the law, because in exchange for compliance we receive benefits from living in an organized society with a legal system. But it is not clear, he thinks, that we receive any benefits from having a constitution. Countries with a constitution or a system of judicial review are not necessarily better at protecting individual rights. Similarly, even if obedience to law is desirable because it preserves the state, it does not follow that the state will go to pieces without a constitution. His argument that the United States Constitution is routinely violated makes that point. His conclusion, then, is that while no state can function without laws and a legal system, states can and do function without a constitution (p. 122).

#### E. WHAT ARE THE STAKES?

Why should we relinquish the notion that we are obligated to obey the Constitution? Obviously, it is strange to continue believing such an obligation exists if it cannot be defended. But Seidman is driving at something deeper, because he believes fidelity to the Constitution has a destructive impact on political discourse (p. 120). We can debate policy when we talk for or against statutes, but once we bring in the Constitution, the conversation moves to constitutional argument, methods of constitutional interpretation, and legal doctrine. This limits our political discourse, because the Constitution adds an unnecessary layer of language that cloaks the real issues in a way that is not helpful to resolve the particular question. For example, if we are considering adopting universal healthcare, we should examine how such a system might function, engage in a cost-benefit analysis, and consider arguments about distributive justice. But instead of doing that, we end up discussing whether Congress has power under the Commerce Clause to enact such a scheme or whether mandating that people buy health insurance counts as regulating interstate economic activity or can be considered a tax under Congress's spending power.<sup>34</sup> These questions, however, have very little to do with whether having universal healthcare is a good idea.

The problem, Seidman argues, goes beyond constitutional language. Constitutional foundationalism, the idea that the

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34. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

Constitution definitively resolves political debates, shuts down arguments. “When arguments are put in constitutional terms, they become absolutist and exclusionary” (p. 141), all the while excusing constitutionalists from “the obligation to give reasons for their constitutionalism” (p. 136). If the Constitution is treated as a source of binding political obligation, it becomes an axiom rather than a contestable principle among many.

What, then, should we do instead? Seidman’s argument is that we should embrace the “thin constitution,” the idea that the Constitution is a site for contestation. The Constitution should serve as a document enumerating certain general principles, but those should be understood abstractly, not legally. Presumably, courts will also stay out of constitutional interpretation and the Constitution should revert to, for example, the status of the Declaration of Independence. Although Seidman refrains from saying so explicitly, his frequent invocation of Britain, New Zealand, Australia (which has a Constitution but no bill of rights), and even Israel, as role models for genuine political discourse, indicate that his preferred model of government is a parliamentary system, or at the very least a system that rejects constitutionalism, because it is constitutionalism that stands in the way of policy-based arguments and all things considered political decisions.

### III. IS CONSTITUTIONALISM THE PROBLEM?

Seidman advances two major claims. The first is that there is no political obligation to obey the Constitution. The second is that constitutional obedience results in harms to our political discourse in a way that prevents us from addressing issues based on all things considered judgments.

I believe that Seidman’s first argument is sound, though I do not believe it is particularly novel, even if his treatment probes deeper than most.<sup>35</sup> If a constitution is understood as a legal instrument, the obligation to obey it is no different from that of any other law. The fact that it was enacted by supermajorities, that it may have salutary benefits, or that it somehow connects us with our forebears, cannot give rise to a moral *obligation* to obey. As was suggested earlier, there appears to be a near

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35. For iterations expressing similar concerns about constitutional obligation, see John Ferejohn, Jack N. Rakove, Jonathan Riley, *Editors’ Introduction*, in *CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE* 1, 26 (John Ferejohn et al. eds., 2001). For a comprehensive treatment arriving at a similar conclusion see GREENE, *supra* note 31.

consensus that there is no *prima facie* moral obligation to obey the law as such.<sup>36</sup> To be sure, some laws do contain moral obligations, but those exist independently from their legal entrenchment. Killing is wrong regardless of whether there is a legal prohibition, and the prohibition adds nothing to the moral duty not to kill. Similarly, a constitution can contain provisions that generate a moral obligation to obey, but the obligation arises because of the content of the norm, not its inclusion in a written text. Of course, there may be good *reasons* to obey a constitution, but at bottom this is an empirical question that depends on the particular constitutional provision, and the likely consequences of disobedience.<sup>37</sup>

Seidman's second claim, however, is much more complicated to substantiate. The argument that constitutional discourse is exclusionary, absolutist, and prevents a genuine merit-based debate is an assertion made throughout the book, without being comprehensively defended. The rest of this essay, therefore, will try to unpack the argument that constitutional law is destructive for political debate and for a robust democracy, and prevents all things considered decisionmaking. My conclusion is that Seidman casually inserts empirical assumptions about the workings of non-constitutionalist regimes that are not necessarily borne out by data. Because his is an empirical argument, much of it rests on contingent circumstances, but those play out differently in different contexts. Sometimes a constitution might have the pernicious effects Seidman warns us against, but other times a constitution might achieve the opposite result. Future research should therefore focus on identifying the conditions that make constitutionalism more or less conducive to political decisionmaking. My argument will proceed in three parts. Firstly, I will briefly discuss the constitutionalism impulse around the globe as a possible foil for Seidman's argument that we should ignore the Constitution. Secondly, I will consider whether non-constitutionalist regimes do, in fact, facilitate all things considered political decisions. Finally, I will examine whether constitutions always negatively impact political discourse.

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36. This consensus applies only to the question whether individuals have an obligation to obey the law. A separate question is whether public officials, judges included, have such a moral obligation. See JEFFREY BRAND-BALLARD, *LIMITS OF LEGALITY: THE ETHICS OF LAWLESS JUDGING* (2010); STEVE SHEPPARD, *I DO SOLEMNLY SWEAR: THE MORAL OBLIGATIONS OF LEGAL OFFICIALS* (2009).

37. See Steven Shavell, *When Is Compliance with the Law Socially Desirable?*, 41 J. LEGAL STUD. 1 (2012).

A. IF NON-CONSTITUTIONALIST REGIMES ARE SO GREAT,  
WHY ARE COUNTRIES GETTING RID OF THEM?

Seidman rejects the idea of constitutional constraints on ordinary politics, arguing that by ignoring the Constitution we will arrive at better informed, all things considered, policy decisions. In making this argument, Seidman frequently references parliamentary regimes that do not have a written constitution that imposes legal constraints on politics. But Seidman gives short shrift to the constitutionalist trend that has been taking place outside the United States. Indeed, he overlooks the fact that more and more countries have been discarding their pure parliamentary and non-constitutionalist regimes in favor of constitutions and judicial review.<sup>38</sup> As Alec Stone Sweet and Cristina Andersen show in a study from 2008, 190 countries have written constitutions, of which 183 have a bill of rights. Importantly, of the 114 constitutions written since 1985 (not all of them still in use), at least 106 of them contain a bill of rights and 101 provide for judicial review of legislation. The only country to leave out a bill of rights was the 1983 apartheid-era South African Constitution, hardly a ringing endorsement.<sup>39</sup>

Most famously, classical Westminster parliamentary systems, such as Canada, Britain, New Zealand, and Israel, have incorporated constitutional elements into their political institutions. Canada passed a Charter of Rights and Freedoms in 1982, which also significantly expanded judicial review of legislation. Britain passed the Human Rights Act in 1998, giving effect to rights contained in the European Convention of Human Rights, while also enabling “weak form” judicial review of laws that are incompatible with those rights. New Zealand, though maintaining its parliamentary system, has passed a bill of rights law that instructs courts to interpret legislation consistently with the rights enumerated there. And Israel transformed itself from a pure parliamentary system to a country with a set of basic laws that are superior to ordinary legislation, which can now be struck down through judicial review.<sup>40</sup>

This trend is important because it attests to a dissatisfaction with parliamentary and non-constitutionalist regimes. At the very

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38. See, e.g., Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997).

39. Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 84 n.27 (2008).

40. For elaboration, see STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* (2013).



least it should give Seidman pause and lead him to ask what is going on. If constitutions obstruct political discourse and democratic decisionmaking, why are so many countries opting to transition to such systems? To be sure, many scholars have offered explanations, ranging from a commitment to human rights, signaling to other developed countries that they belong in the same camp, or to attempts by embattled hegemonies to preserve political power that they believe will be lost.<sup>41</sup> Some of these explanations could fit with Seidman's argument against constitutionalism, but the book does not explore this question at all. Thus we remain with an assertion about the evils of constitutionalism without examining why alternative regimes, including those favored by Seidman, are in the process of being phased out all over the world. Of course, all these countries could be wrong. But Seidman should at least explain why they are wrong, and why his proposed solution (ignoring the Constitution) would function better in the U.S. than in the countries that have tried and experimented with non-constitutionalist frameworks.

This brings up a related point. Throughout the book, Seidman treats constitutionalism as a monolithic entity. The main idea is that we have to get rid of the "legal" (as opposed to the "poetic") Constitution, or, when the Constitution does not suit our policy judgments, simply ignore it. But it is not clear why the choice is presented so starkly, as a dichotomy. Not only have other countries adopted forms of constitutionalism that are different than the American version, but various forms of constitutionalism exist inside the United States.<sup>42</sup> Part of the problem with the federal Constitution no doubt lies with the hurdles imposed by Article V. The difficulty of amending the Constitution preserves dysfunctional governance structures and, as a result, shifts the focus to constitutional interpretation and the courts. But would relaxing the amendment procedure respond to Seidman's concerns? Constitutions that are easy to amend might facilitate better decisionmaking because they are less likely to create the absolutist discourse Seidman warns against, but they may also generate frequent political crises that make governance difficult.<sup>43</sup>

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41. See, e.g., RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004); Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83 (2002).

42. See, e.g., JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* (2006); SANFORD LEVINSON, *FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012).

43. In the United States alone, there have been nearly 150 state constitutions that have been amended roughly 12,000 times, with several constitutions being amended

Thus, the real question should not be whether to embrace the Constitution or to ignore it, but rather whether this particular constitution, with the particular institutional structures it establishes, serves us well. Are there better constitutional arrangements that we might consider, or are all constitutional arrangements, by their nature, so harmful that only a non-constitutionalist system can generate good decisionmaking that meets Seidman's standards? To be clear, my point is not that amending Article V (or any other structural change) will put Seidman's concerns to rest, nor is it that a different institutional configuration will then give rise to an obligation to obey, as opposed to providing a good reason. Seidman may be right in the end, but his conclusion should be the result of careful consideration of institutional alternatives, not an unsubstantiated assertion. In the sections that follow, I begin to explore some of these considerations.

#### B. DO NON-CONSTITUTIONALIST REGIMES FACILITATE ALL THINGS CONSIDERED POLITICAL DECISIONS?

In his discussion of alternative political arrangements, Seidman often invokes parliamentary systems that operate without a written constitution (or without a constitutional bill of rights) as examples for countries where political decisions are not encumbered by constitutional constraints that in turn drive out merit-based decisions. If we did not have a constitution, we could address the issues themselves without being distracted and without each side claiming monopoly on their position by invoking the Constitution. While this claim may seem non-falsifiable, I believe that there are ways to approach this question. In this section I propose we examine the quality of political debates in parliamentary systems and some of the structural problems such systems might generate. A different strategy, one which will be taken in the next section, tries to gauge the quality of political debate in the U.S. in areas where the Constitution is relatively silent.

There have been very few attempts to measure discourse quality in politics,<sup>44</sup> and those have been limited to very small

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hundreds of times. See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 2 (2000); THE NBER/MARYLAND ST. CONST. PROJECT, <http://www.stateconstitutions.umd.edu/index.aspx>.

44. Marco R. Steenbergen et al., *Measuring Political Deliberation: A Discourse Quality Index*, 1 COMP. EUR. POL. 21 (2003).

case studies that are difficult to generalize.<sup>45</sup> What counts as quality is controversial,<sup>46</sup> and there is no consensus that deliberative quality and just outcomes are related. One insight revealed by studies that examine parliamentary debates is that although discourse quality may make some difference in political institutions, power politics dominate most contexts. In representative democracies, the mechanisms to select representatives determine, indirectly, which issues will be raised and how. Improving discursive quality and mitigating instances of power politics is thus partly a matter of institutional design, for example, through constitutional devices.<sup>47</sup>

Other studies have sought to compare deliberative quality among different types of legislatures.<sup>48</sup> One study concludes that presidentialist systems are likely to outperform parliamentary systems. In the former, the executive is not dependent on legislative confidence, creating a situation of mutual independence where legislators have more leeway to act without undermining governmental stability, whereas in parliamentary systems government controls parliament and thus needs strong party discipline.<sup>49</sup> In presidentialist systems legislators might have more ability to transcend party boundaries and be open to discursive change.<sup>50</sup> On the other hand, the need for reelection

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45. See, e.g., André Bächtiger et al., *Patterns of Parliamentary Discourse: How 'Deliberative' are German Legislative Debates?*, 17 *GERMAN POL.* 270 (2008); Peter Nugus, *Rhetorical Strategies of Political Parties and Organized Movements: Deliberative Democracy and the Australian Monarchy—Republican Debate*, 45 *J. SOC.* 307 (2009).

46. Most of the studies I examine use the “deliberative quality index” modeled after Habermas’ theory of discourse ethics. See Steenbergen, *supra* note 44. The criteria are: 1) participation, 2) level of justification, the reasons speakers give and the sophistication, 3) content of the justification (phrased as the common good or narrow interests), 4) respect toward the group, 5) respect toward demand, 6) respect toward counterarguments, and 7) is the political process constructive, do speakers submit alternative proposals or seek mediation. See André Bächtiger & Marco R. Steenbergen, *The Real World of Deliberation: A Comparative Study of Its Favorable Conditions in Legislatures*, EUI Working Paper SPS No. 2004/17, at 12, available at <http://cadmus.eui.eu/bitstream/handle/1814/2634/sps2004-17.pdf>.

47. Markus Spörndli, *Discourse Quality and Political Decisions: An Empirical Analysis of Debates in the German Conference Committee* (Univ. of Bern, Discussion Paper No. SP IV 2003-101, 2003), available at <http://www.bids.unibe.ch/unibe/rechtswissenschaft/oefre/bids/content/e3446/e3501/iv03-101.pdf>.

48. The subsequent discussion assumes that political decisions are affected by institutional design and that the distinction between parliamentary and presidential systems matters. This does not mean that parliamentary systems cannot sometimes operate like presidential systems and vice versa. My discussion presents both systems as ideal types. See Richard Albert, *The Fusion of Presidentialism and Parliamentarism*, 57 *AM. J. COMP. L.* 531 (2009).

49. Bächtiger & Steenbergen, *supra* note 46, at 8.

50. *Id.*

may undercut this deliberative freedom, bringing it closer to that of parliamentary systems, since representatives are dependent on party support for future campaigns. Of course, the quality of deliberation also depends on the particular issue. Polarizing issues, the ones Seidman may be referring to, are likely to generate deliberation of lesser quality, whereas low polarization issues are likely to facilitate better deliberation.<sup>51</sup> An empirical examination taking these considerations into account, comparing the U.S. presidentialist system to the United Kingdom's and Germany's parliamentary system revealed, for example, that legislators in the U.S. display more respect toward the opposition, though parliaments offer more sophisticated justifications for their policies.<sup>52</sup> The usage of constitutional language, however, was not clear. The little data we have suggests that Seidman's empirical argument is difficult to evaluate.

Parliamentary systems also differ from other political systems in the way government exercises power. In parliamentary systems one party (or a coalition of parties) controls both the legislature and the executive. The executive controls the legislative process, and in fact has a de facto monopoly over the introduction of legislation. This may make parliamentary systems more efficient,<sup>53</sup> but the upshot is that the majority has an easier time ignoring the opposition and will consequently be less likely to search for common solutions or genuine consensus. Respect and persuasion will likely also be lower compared with a system with more veto points.<sup>54</sup> Higher levels of discourse are more likely to occur when the government needs at least some support from the opposition. It is to be expected, then, that in these situations there will be less appeal to "absolutist, exclusionary" language. Indeed, why would all things considered decisions be made if one's majority is already guaranteed? True, inclusive political discussion can take place in other venues, for example in the press, the street and in academia, but then can we really say that such discourse does

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51. *Id.* at 9.

52. *Id.* at 17. The research looked at debates in the 1980s and 1990s. It is possible the political culture was less toxic then, which strengthens my argument that the constitutional design plays a limited role.

53. *But see* Albert, *supra* note 48, at 564–73 (discussing unstable minority and coalition governments).

54. On the importance of veto players in political systems see George Tsebelis, *Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism*, 25 BRIT. J. POL. SCI. 289 (1995).

not take place, and at just as high a level, in countries that have a constitution?

Non-constitutionalist parliamentary systems introduce other problems that are less likely to occur in systems of divided political power with constitutional judicial review. In multiparty parliamentary systems, the largest party will often not have exclusive control of parliament. It will need to build coalitions with other parties. In exchange for joining what will usually be the largest party, the smaller parties will exact a price. This may lead to situations where certain issues are not debated at all because they are off the table. Crucially, having an enforceable constitution may alleviate some of the blockages in political discourse.

To illustrate, consider two examples from Israel, a country with a parliamentary system that until relatively recently was not considered to have a constitution.<sup>55</sup> The first example is military service for ultraorthodox Jews. Israel has mandatory conscription for its Jewish population, but since its founding ultraorthodox Jews have been exempt. Initially the number of exemptions was small, but over time it grew to levels that were believed to be unsustainable, but more importantly, unfair, by the majority population that did serve. The problem was that ultraorthodox parties figured into almost all government coalitions. As a condition for their support, they insisted on maintaining the status quo. No matter how much the Israeli public was disgruntled, the political channels were blocked. Consequently, individuals turned to litigation to try and force the government to address the matter. After several failed attempts, petitioners constitutionalized their claims, grounding them both in structural arguments and equality based arguments.<sup>56</sup> Those were more successful, and in several cases the Supreme Court struck down the arrangements obtaining to exemption of ultraorthodox Jews. Since then, the issue has become one of the most important and discussed issues in Israeli politics, with the government currently trying to enact a new plan for recruitment. It is unclear whether such a plan will

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55. For a discussion of Israel's constitutional revolution, see Gidon Sapir, *The Israeli Constitutional Revolution—How did it Happen?*, (Bar-Ilan University Public Law and Legal Theory Working Paper No. 08-02, 2008), available at <http://ssrn.com/abstract=1082230>.

56. HCJ 910/86 Resler v. Minister of Defence, 42(2) PD 441 [1988] (Isr.); HCJ 3267/97 Rubinstein v. Minister of Defence, 52(5) PD 481 [1998] (Isr.); HCJ 6298/07 Resler v. Minister of Defence [2012] (Isr.) (unpublished).

emerge and whether it would be struck down as well. Should that happen, Seidman will be right to argue that a constitution can become a roadblock to further deliberation, but the point is that without constitutional review the issue would have likely remained blocked by the regular political channels because of Israel's parliamentary structure. Going to the Supreme Court, raising the stakes, and constitutionalizing the claims, forced the political branches to debate the issue and make decisions that otherwise would likely not have been made. Though it is too early to tell, this may be a case of constitutionalism improving, not degrading, political decisionmaking.

The second example is the political status of Palestinian citizens of Israel. Palestinian citizens can vote and be elected to Israel's parliament, and most of them run in what are called "Arab parties." Those parties do gain seats, but no Arab party has ever been a member of any Israeli governmental coalition. Thus the problem is that for the most part, Palestinian citizens have very little say in the laws governing them.

A partial remedy to the lack of representation and discrimination has been constitutional judicial review of laws and policies that discriminate against Palestinian citizens.<sup>57</sup> Recall that Seidman argues that constitutionalism unnecessarily raises the stakes of the debate and leads to absolutist language that excludes viewpoints and prevents merit-based policy judgments. But what if the political system is designed in such a way, or the political culture operates in such a way, that particular viewpoints and persons never get to enter the debate in the first place? If one thinks that ordinary political channels are captured by lobbies, or if particular groups do not have a say in the democratic process, then non-constitutionalist parliamentary regimes might exacerbate such tendencies. Of course, Seidman may reply that in such cases not having a constitution makes things easier because we can more easily change a non-functioning system. But what would be the majority's incentive to change a system that essentially works in its favor? Constitutionalism, then, has the potential to open up multiple avenues of discourse (legal and political), which in turn can expand the parameters of politics, broadly understood.

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57. The issue of Palestinians under occupation is more complicated, and the Supreme Court's record is much more controversial in that arena. For a critical overview, see DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* (2002).

My point is that the division of political power, a central feature of most constitutionalist regimes, can work as a bulwark against the political corruption generated by the concentration of power in parliamentary systems. Perhaps Seidman would respond that such problems do not arise in the United States, but then the question would be, is he right? And if so, did constitutionalism play an historical role in his being right?

I do not want to press this point too much. Seidman is not exactly suggesting that we transition to a Westminster style system.<sup>58</sup> What he really means to say is that we should operate without formally written constitutional constraints, *similar* to the workings of Westminster type systems. But there are two problems with such a claim. First, Westminster systems do operate with a set of constraints, written laws and unwritten constitutional conventions that effectively operate like a constitution in that changing these deeply embedded norms is extremely difficult.<sup>59</sup> Second, non-constitutionalist systems have their own problems that affect how political debate is conducted, with the result that some decisions will not be made after an all things considered process. Idealizing such systems is therefore a mistake.

#### C. DO CONSTITUTIONS ALWAYS NEGATIVELY IMPACT POLITICAL DISCOURSE AND DECISIONMAKING?

Understandably, Seidman does not spend too much time on comparative institutional analysis. His claim is philosophical, but mostly it is grounded in American constitutional experience, albeit only the *federal* constitutional experience. It would therefore be valuable to examine policy debates in areas in which the federal Constitution is silent or not litigated. If constitutionalism has a pervasively corrosive effect on political decisionmaking, we might expect that in non-constitutional domains political discourse will be of higher quality and not be infected by constitutional pathologies.

To evaluate the corrosiveness of constitutional discourse, we must first consider the scope of Seidman's claim. Suppose, for

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58. For an evaluation of such a suggestion, see Richard L. Hasen, *Political Dysfunction and Constitutional Change*, 86 *DRAKE L. REV.* 989 (2013) (arguing that tinkering with the constitutional design is risky and suggesting that the current crisis might self-correct as voters reject party positions that stray too far from the median voter).

59. See generally ALBERT VENN DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (10th ed. 1959).

example, that the Constitution affects only a small percentage of political activity and public policy. In that case, although Seidman's concerns would be valid, they would not trouble us all that much. Seidman's argument becomes more important as the scope of political activity that arises under the Constitution grows. To be sure, all political activity arises under the Constitution, because it takes place under institutional structures the Constitution sets up.<sup>60</sup> Seidman, however, focuses on constitutional language rather than institutional structures.<sup>61</sup> It is thus important to distinguish his argument from the arguments that abound about how the constitutional *design* contributes to the dysfunctional political system.<sup>62</sup> Although it is true that institutional design affects the way politicians make claims,<sup>63</sup> that linkage is not made explicit in the book.

How much political activity is actually affected by Seidman's argument? Here too the answer is elusive, but my sense is that constitutional scholars, unsurprisingly, exaggerate the importance of the Constitution and constitutional law. Let us assume that Supreme Court decisions on constitutional matters dovetail with the types of concerns made by Seidman. But as Frederick Schauer, drawing on extensive polling data, showed in 2006, many issues that engage the public and government never make it to courts, and when they are publicly discussed the Constitution is usually not invoked.<sup>64</sup> Standard debates about the economy, social security, pensions, foreign affairs, the federal budget, education, poverty, taxes, the environment, healthcare, welfare, fuel prices, wars, employment, energy, and defense spending, just to name a few, are rarely phrased and argued in constitutional terms.<sup>65</sup> True, the Constitution does play a role in some of these debates, but usually an indirect one, and it is not clear whether that role leads to the results Seidman warns

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60. MARK TUSHNET, *WHY THE CONSTITUTION MATTERS* (2010).

61. Though of course his claim about constitutional obedience applies to institutional structures as well.

62. LEVINSON, *supra* note 9; THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012); Symposium, *The U.S. Constitution and Political Dysfunction: Is There a Connection?*, 86 *DRAKE L. REV.* 937 (2013).

63. See generally GARY MUCCIARONI & PAUL J. QUIRK, *DELIBERATIVE CHOICES: DEBATING PUBLIC POLICY IN CONGRESS* (2006).

64. Frederick Schauer, *Forward: The Court's Agenda—and the Nation's*, 120 *HARV. L. REV.* 4 (2006).

65. Healthcare is a very recent exception, and even then the discussion was about two (central) provisions of an entire bill. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).



against.<sup>66</sup> Of course, even if the Court does decide to take up a hotly contested issue, that in itself does not necessarily lead to the denigration of political discourse. Courts often decide constitutional cases only to conclude that the political branches are owed broad deference and remand the matter to be argued elsewhere, often in non-constitutional language.

Seidman, I anticipate, would probably say this is beside the point. The Court does decide some issues, some of them are extremely important, and there is no reason for these issues to be beyond the reach of ordinary politics. We are thus left, again, with a question of comparative analysis: Is the political decisionmaking process in areas that are not dominated by constitutional considerations better than in the areas where constitutional discourse is regularly invoked by all sides?

Much like the claim about parliamentary regimes that do not have a written constitution that constrains ordinary lawmaking, I believe that any answer is contingent and context dependent. I leave it to the reader to decide the quality of American political decisionmaking in areas not dominated by constitutional considerations. Several points, however, are worth mentioning. For starters, there is relatively little research about actual political deliberation. Most theorists have ideas about what deliberation should look like, whereas empirically oriented research tends to focus on deliberation's effects.<sup>67</sup> Secondly, those who have studied deliberation in political settings are not as sanguine as Seidman about the possibility of merit-based all things considered decisions, with or without the Constitution. Obstacles to optimal deliberation include, among others, unequal deliberative capacities, varying motivations among participants, and information asymmetries. Even if these problems are overcome, the deliberative process takes place in institutional structures that are populated by elected officials, bureaucrats, and interest groups, all of whom have personal, ideological, economic, and institutional preferences that are not necessarily aligned with the substantive merits of the issue in question.<sup>68</sup>

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66. Schauer, *supra* note 64, at 49 (arguing that the Court is only indirectly involved in the nation's policy decisions).

67. See David M. Ryfe, *Does Deliberative Democracy Work?*, 8 ANN. REV. POL. SCI. 49, 54 (2005). The literature on public choice makes a similar point.

68. For a detailed discussion of congressional deliberation and its pitfalls, see MUCCIARONI & QUIRK, *supra* note 63.

Consider the political activity that takes place in Congress. Seidman argues that constitutional language is a conversation stopper because constitutional claims stem from first principles that are usually not open to reasoned debate. Yet the use of non-falsifiable language is not confined to constitutional talk. For example, research that examined 72 congressional committee hearings on Medicare, an area when the Constitution is not usually invoked, concluded that participants offer falsifiable rationales when the issue is only moderately contentious. The more contentious the issue becomes, the more participants shift to non-falsifiable rationales. When the debate shifts to irreconcilable value conflicts, “participants may expect others to filter out information that is inconsistent with their priors. . . . With strong disagreement over values and ideological beliefs, debate participants often cannot hope to modify their opponents’ views of the policy choice.”<sup>69</sup> Similar results have been found elsewhere.<sup>70</sup>

This suggests that the problem is disagreement, not constitutional language. The use of non-falsifiable language is but a symptom of a larger problem. Eliminating the Constitution does not get rid of disagreement. Speakers will simply revert to other non-falsifiable or contentious rationales (morals, religion, ideology) that are just as likely to be exclusivist or absolutist as constitutional discourse. When it comes to the most contentious issues, what gets in the way of resolution is not simply the language that we use, but the fact that these issues are really divisive and subject to reasonable disagreements. Of course we can eliminate constitutional language, but these disagreements will then be mediated by different terms which are likely to be just as unbridgeable.

In addition to the use of absolutist language, there is the phenomenon of “one party lawmaking.” For example, legislators have ways to avoid debating issues altogether by bypassing committee deliberations so as to limit the influence of their partisan rivals. Committee chairs have occasionally shut down hearings to stop minority-invited witnesses from testifying and prevented minority party members from reading

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69. Kevin M. Esterling, “*Deliberative Disagreement*” in *U.S. Health Policy Committee Hearings*, 36 LEGIS. STUD. Q. 169, 171 (2011) (citations omitted).

70. MUCCIARONI & QUIRK, *supra* note 63, at 14 (finding that welfare reform debates in Congress became less informative as “election time drew near” and “as the level of partisanship rose”).

legislation.<sup>71</sup> Majority leaders have at times excluded committees from the legislative process, giving the job to ad hoc task forces instead.<sup>72</sup> Both parties, when in the majority, have placed restrictive rules on many bills to prevent floor amendments from being made and debated.<sup>73</sup> As William Bendix concludes, one party lawmaking is attributable to increasing partisan polarization and electoral competition. One party control of legislation is more pronounced when the majority feels threatened or when the majority's policy goals face significant opposition. Unsurprisingly, restriction of debate occurs more in bills that reflect the majority party's "brand," for example in taxation and morals legislation. In these areas the majority party has fixed preferences, and therefore has "little incentive to collect new policy information and to explore counter proposals. If the majority deviates from its long-held policy positions, it risks harming its brand and alienating its core supporters."<sup>74</sup>

The takeaway is simple. Seidman claims that constitutionalism is harmful for democratic discourse. But although this observation may be correct, it may also be of relatively little import. Politicians have discursive and institutional tools at their disposal to limit democratic debate. They make non-falsifiable claims in matters of high saliency and they can rely on internal legislative rules to bypass all things considered judgments. Indeed, the filibuster, one of the more maligned devices claimed to be responsible for the current political gridlock, is a consequence of Senate rules that can be changed with an ordinary majority. These and other debate limiting strategies are not grounded in the Constitution. They would be available even if the Constitution was ignored, and they can be changed independently of the Constitution. On this view, constitutionalism is a rhetorical strategy, among many others. Does it add to the politician's toolkit? No doubt. Does it add to it in a way that is quantitatively and qualitatively significant? Of that I am less sure.

Up until now, I have argued that the host of factors affecting political debate makes it difficult to assess the relative

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71. William Claus Bendix, *One Party Deliberations in the U.S. House of Representatives 1* (Aug. 2012) (unpublished Ph.D. dissertation, University of British Columbia) (citing SUNIL AHUJA, *CONGRESS BEHAVING BADLY: THE RISE OF PARTISANSHIP AND INCIVILITY AND THE DEATH OF PUBLIC TRUST* 33 (2008)).

72. *Id.* at 2

73. *Id.*

74. *Id.* at 4.

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contribution of the Constitution to the denigration of that discourse. To be clear, I do not think Seidman is wrong to believe that constitutional talk has harmful consequences, only that the empirical case for proving this assertion is complicated and has not been made out as fully as it could have been. Before concluding, however, we should consider whether the Constitution also has the capacity to create better discourse and generate better democratic decisions. If it does, then we must weigh those benefits against the purported costs.

Much like Seidman's claim about the harm of constitutional language, it is difficult to gauge the discursive benefits of having a constitution.<sup>75</sup> Still, it is worth considering what the Constitution does. A constitution can serve as a "focal point for an ongoing debate and dialogue, in which all members of society participate."<sup>76</sup> The emphasis here is on the words "ongoing" and "all members." Just as constitutional talk can be exclusive and absolutist, so too can it be inclusive and relative, and mediate all things considered decisions. As Joseph Raz argued in the context of individual rights:

Assertions of rights are typically intermediate conclusions in arguments from ultimate values to duties . . . . The fact that practical arguments proceed through the mediation of intermediate stages so that not every time a practical question arises does one refer to ultimate values for an answer is . . . of crucial importance in making social life possible, not only because it saves time and tediousness, but primarily because it enables a common culture to be formed round shared intermediate conclusions, in spite of a great degree of haziness and disagreement concerning ultimate values.<sup>77</sup>

Indeed, in an earlier book Seidman himself made a similar claim when he defended judicial review on the grounds that it has the

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75. Seidman essentially admits this. Recall that he argues that the Constitution does not necessarily protect freedom. Yet the use of the word "necessarily" implies that the case for a definitive determination is complicated. Seidman references many cases where the Court protected freedom only when the public supported it, but the counterargument to that is that such cases can later serve the Court in instances where the public is more ambivalent.

76. Barak Medina, "Foundational" Originalism? On Jack Balkin's *Living Originalism*, 7 JERUSALEM REV. LEGAL STUD. 1, 16 (2013) (internal quotation marks omitted).

77. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 181 (1986), cited in Medina, *supra* note 76, at 13 n.64. For a similar point, see Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

capacity to unsettle outcomes produced by the political process.<sup>78</sup> In that book, he argued that constitutional law can help build a community not by settling political disputes, but by creating them. Losers have no reason to abide by political settlements they deeply oppose, he wrote, “[b]ut a constitution that unsettles creates no permanent losers.”<sup>79</sup> On that view, constitutional language is the opposite of exclusivity and absolutism. It provides a semantic framework that, precisely because of its haziness, destabilizes political conflict and keeps everyone engaged in the same enterprise.

Of course, according to Seidman we can (and should) use constitutional language without giving it constitutional force. The Constitution will be available, but its power will be limited to that of a poem, as a symbolic expression of our commitments, much in the same way we use the Declaration of Independence as a rhetorical device. The problem is that if the Constitution were a poem it would not be as powerful a focal point. It would not be able to perform the unsettlement function and it would lose much of its symbolic capital.<sup>80</sup> To be sure, this is exactly what Seidman is driving at, yet alongside the discursive benefits of such a move, there may also be discursive costs—costs that even Seidman used to believe existed—that should be taken into account.

A constitution can be viewed pessimistically, as introducing brakes on popular self-government, or optimistically, as introducing devices that may activate and energize better democratic government by making officials and society more focused about everyone’s rights and interests.<sup>81</sup> A constitution can mobilize social movements, both symbolically and substantively, but it may also limit social change, because of the narrow, and often conservative, legal frame it necessarily adopts

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78. LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF JUDICIAL REVIEW* (2001).

79. *Id.* at 8.

80. Ackerman, *supra* note 38, at 779 (discussing the symbolic capital of constitutions). Historically, the legal status of the Constitution was essential for signaling to the rest of the world that the United States should be admitted to the community of civilized states, and constitution making was key to realizing that goal. See David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010).

81. Works in game theory and economics, for example, seek to show how institutional constraints can increase the capacity of government by making it more credible to others, both domestically and internationally. See Ferejohn, *supra* note 35, at 22–24, 25 n.19 (citing studies).

in order to succeed in the courts.<sup>82</sup> Constitutional law is thus both transformational and limiting. Both of these strands exist in American constitutional history. Both have proved correct in different times, and it is not clear which has the better argument.<sup>83</sup> In the end, Seidman is right to argue that even under the optimistic view of constitutionalism there is no political obligation to obey. But there may be good reasons why we would want a constitution. Those reasons will likely be instrumentalist and depend on the particular constitutional design and its likely effects in a particular society. Although explicating all the reasons goes beyond the scope of this review, they should nevertheless inform our decision whether to discard the Constitution.

#### IV. CONCLUSION

Louis Michael Seidman has written a deep, probing, and fascinating book on the nature of constitutional obligation. His diagnosis that American constitutionalism is gravely ill is highly persuasive. His argument that there is no moral obligation to obey the Constitution is, to my mind, convincing. It does not follow, however, that constitutionalism as an idea must be discarded. To borrow a line from his former book, the fact that there are problems with constitutional theories does not mean we should get rid of constitutional theory.<sup>84</sup> There may be good reasons to obey a constitution even if there is no political obligation to do so. One may wish to emulate, as Seidman does, countries that do not impose higher law constraints on ordinary politics, but then one should also keep in mind that such systems have costs of their own. No political system is perfect, nor can it be. The questions are what are the costs and benefits and the tradeoffs that are involved. Those are questions Seidman does not answer, though he nevertheless opens the conversation for such an inquiry.

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82. Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 894 (2013).

83. For an optimistic account about the interaction of judicial review and civil society, see CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998).

84. SEIDMAN, *supra* note 78, at 7.