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Book Review: Nothing To Lose But Our Chains: On Constitutional Disobedience, by Louis Michael Seidman

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Book Review



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Book Review: Nothing To Lose But Our Chains: On Constitutional Disobedience, by Louis Michael Seidman

Abstract

Book review of Nothing To Lose But Our Chains: On Constitutional Disobedience, by Louis Michael Seidman.

Keywords

Constitution

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**NOTHING TO LOSE BUT OUR CHAINS:
ON CONSTITUTIONAL DISOBEDIENCE,
by Louis Michael Seidman¹**CARISSIMA MATHEN²

LOUIS MICHAEL SEIDMAN'S *On Constitutional Disobedience* is a small book that packs a punch. In it, the Georgetown law professor offers a novel take on the endless debates over constitutional text, meaning, and interpretation in US legal and academic circles (and, for that matter, Canadian ones). Seidman argues that the entire exercise is a shell game. Why, he asks, should a mature democracy care about principles and rules laid down generations ago by a different polity? Why, in other words, should anyone care about the Constitution?

Seidman's answer, laid out in a terse 150 pages, is that "we"³ should not care very much at all. Caring too much leads to disingenuous arguments and dishonest politics that inhibit constructive resolution of social issues. Disingenuous arguments arise from a position of bad faith: Though everyone loves to talk about constitutional compliance, what they mean is compliance with the Constitution as *they* think it ought to read and be read. In reality, "almost no one changes her opinion on anything important just because of the Constitution."⁴ Dishonest politics arise because, according to Seidman, people regularly violate the US Constitution when it compels actions or results that they reject. Thus, American constitutional traditions reveal an uneasy mix of performed reverence for what the

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1. (Oxford: Oxford University Press, 2012) 143 pages.
 2. Faculty of Law, University of Ottawa.
 3. The term "we" refers to the American polity.
 4. Seidman, *supra* note 1 at 7.

document says and deep cynicism about its (mis)use by one's political adversaries. As for resolving social issues, Seidman argues that relying on constitutional norms designed by a long vanished society is nonsensical.

In reviewing this provocative and engaging work, I largely adopt Seidman's terms of reference, which are almost entirely American. Because, however, the core of Seidman's argument draws on premises that should be applicable beyond his domestic framework, I also consider it in a broader context.

Describing Seidman's argument as an uphill battle is an exquisite understatement. Geoffrey Stone, editor of the *Inalienable Rights* series in which this book was published, admits as much.⁵ The series includes Laurence Tribe's *The Invisible Constitution*,⁶ J. Harvie Wilkinson III's *Cosmic Constitutional Theory*,⁷ and Martha Nussbaum's *From Disgust to Humanity*.⁸ As Stone points out, while these works are tremendously varied, they all engage, to some degree, in "giving concrete meaning to the often vague and open-ended provisions of the American Constitution."⁹ *On Constitutional Disobedience*, in contrast, argues that any search for constitutional meaning misses the point, spectacularly, because of the accompanying presumption that the document matters. That presumption is rooted in aspects of the American national psyche developed over some two and a half centuries. Seidman acknowledges its power and influence but insists that it rests on a profound, and ultimately insurmountable, mistake.

The thesis is presented in five chapters. After a section entitled "The Argument in Brief," Seidman canvasses some ideas in favour of constitutional obedience. He views all of them as irredeemably flawed and asserts that alternative arguments do not exist. He seeks to demonstrate that constitutional disobedience is not only inevitable but superior to constitutional obedience. Disobedience, he says, is actually widespread and there would be no net negative impact if the entire notion of obedience were to vanish. And he addresses the implications of the notion of obedience to law writ large.

In all, Seidman considers ten arguments for constitutional obedience, though he does not accord them equivalent treatment. The arguments run the gamut from formalism to political ethics to consequentialism. The first two are the most clearly formalist, for they rely on the US Constitution itself (specifically, the supremacy clause in Article VI), and premises about the inherent nature of

5. *Ibid* at xi-xii.

6. (New York: Oxford University Press, 2008).

7. (New York: Oxford University Press, 2012).

8. (New York: Oxford University Press, 2010).

9. Seidman, *supra* note 1 at xi.

written constitutions in general. There are two “process” arguments: that “we the people” consented to the Constitution and that the Constitution contains within it the possibility of change by formal amendment. Next, Seidman presents four broadly consequentialist arguments: that the Constitution leads to good results because of the wisdom of its framers (Madison, Jefferson, et cetera); that this wisdom is reflected in the Constitution’s broadly prescriptive values, which even today enjoy a high degree of social consensus; that constitutional disobedience promotes social chaos; and that constitutional disobedience threatens civil liberties. The ninth argument is more theoretical: that, by enabling and requiring a more reasoned and sober approach to public debate, constitutions seek to avoid spur-of-the-moment political decisions. The tenth is that Americans appear to want to obey the Constitution.

Interestingly, none of the arguments considers the role played by a written constitution in a federal state. To the extent that he focuses on the exercise of power, Seidman is concerned with state-citizen relationships, that is to say, the general arena of civil liberties and other individual rights. He argues that the presence of a written constitution is not necessary to prevent “tyranny,”¹⁰ pointing to countries (the United Kingdom, New Zealand) that have avoided dictatorship despite the absence of enacted constitutional law.¹¹ He argues, too, that there is inadequate evidence that the US Constitution has actually enabled liberty protection. But the book contains very little discussion of intergovernmental relations and the degree to which a written constitution might promote stability in such matters. It is almost trite to say that federal states must divide legislative authority, and it is unclear how they might do so without crafting some form of obligation that is out of the reach of ordinary politics. The division of legislative authority was a primary preoccupation of Canada’s first constitutional document; the enactment of individual rights and liberties required another century to manifest.¹² Perhaps many of Seidman’s arguments—democratic (il)legitimacy, the political benefits of disobedience—would apply *mutatis mutandis* to federalism. But the “chaos” argument that Seidman tries to dispatch in the area of civil liberties has even greater purchase in a nation state with fifty-one governments unconnected by

10. *Ibid* at 19.

11. In his review, Jeremy Waldron quibbles with this part of Seidman’s argument, noting several quasi-constitutional statutes in both the United Kingdom and New Zealand that regulate the practice of politics and reflect quite old and settled assumptions. See Jeremy Waldron, “Never Mind the Constitution” (2014) 127:4 Harv L Rev 1147 at 1163.

12. See *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Constitution Act, 1982*]; *Constitution Act, 1867*, (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

any common parameters for collective action or negotiation. It is curious, then, that an argument about the relationship between constitutions and federalism scarcely makes an appearance.

Note, too, that while Seidman considers the desire to avoid chaos and tyranny as possible arguments in favour of constitutional obligation, he does not consider whether a written constitution might exert a far more prosaic pull: towards the status quo, the known, and the predictable. Under this alternative analysis, the issue is not whether abandoning the notion of constitutional obligation is likely to lead to better public decisions and political agreements. The issue is whether a constitution provides such a familiar benchmark for political negotiation that most citizens might view the costs of overturning it as too onerous *even if* they believed that the result of such an overturning might be a net gain.

On Constitutional Disobedience focuses explicitly on US politics, history, and consequences. Seidman is perfectly entitled to argue that, in the American context, constitutional disobedience is justified neither normatively (because of its costs) nor ethically (because of the fatal flaws¹³ in the early democracy that produced the governing constitutional document). But he frequently elides the distinction between the US-focused arguments in his book—what one might call his empirical or social fact evidence—and the more theoretical ones.

In order to see how this elision occurs, it helps to look at the argument in its entirety.¹⁴ Seidman first attacks what is often considered a strength of the US Constitution: Its longevity. His argument is simple. Because the Constitution has persisted for centuries, there is no meaningful connection between its framers and the citizens who now abide by it. The framers lived in a “small, preindustrial society”¹⁵ dependent in large part upon slave labour. They could not have anticipated the kinds of problems that now confront Americans. It is “impossible to imagine what they would have thought of women’s liberation, evolution, gay marriage, psychoanalysis, reality television, globalization or the war on terror.”¹⁶

Proponents of the so-called living constitution point to a constitution’s ability to act as a broad repository of social values that transcends generations. In this way, the argument goes, the US Constitution is a continually evolving testament to a society’s core political commitments, even if those commitments shift over

13. Seidman, *supra* note 1 at 17. Seidman observes that, “Nothing like all the people participated in the Constitution’s ratification. Large segments of the population, including women, slaves, American Indians, and people not owning property, were mostly excluded from the ratification process.”

14. *Ibid* at 11-28.

15. *Ibid* at 11.

16. *Ibid*.

time. Seidman is not convinced. First, some of the Constitution's provisions, such as the "grotesquely malapportioned Senate"¹⁷ and the fact that the role of President is not limited to the person who actually wins the popular vote, are worded in such precise terms that they are beyond such transformative power.¹⁸ While all provisions are open to formal amendment, the process is exceptionally difficult (indeed, Seidman describes the US Constitution as "more difficult to amend than any other national constitution in the world").¹⁹

In any event, and this is the second prong of the argument, those provisions that *are* more malleable—like equal protection—present a fundamental challenge to the idea of constitutional obedience. This is because, for Seidman, authentic obedience requires submitting to a result with which one does not agree. The idea behind the living constitution, he says, is that certain provisions can change over time to support a result with which the proponent *does* agree. Seidman sees this not as obedience but manipulation. In that respect, he says, originalists—who seek to confine constitutional meaning to a fixed point in time—are more consistent with authentic obedience. But originalists, too, fail to articulate persuasive reasons in favour of obedience *per se*.

Even if the US Constitution prescribes more definitive results, Seidman continues, those results cannot and do not establish its authority. If the results square with an individual's values, then it is those values, not the Constitution, that prescribe how that individual will behave. If the results do not square with one's values, the basic question remains: Why rely on "a past generation's discredited moral intuitions?"²⁰

Seidman recognizes that, in any society, people who espouse a variety of values will look for mechanisms capable of reaching a working consensus on important questions. Such mechanisms might include "systematically promot[ing] compromise," "allow[ing] local communities to decide for themselves," and "ced[ing] control to national majorities."²¹ But, no "sensible person would cede the value choice to a relatively small group of people who knew nothing about modern society, who are long dead, and who held values that virtually

17. *Ibid* at 12.

18. *Ibid*.

19. *Ibid* at 17. While it is true that amending the US Constitution is not easy, Seidman likely overstates. One need only point to the unanimity provisions in the Canadian Constitution. See *Constitution Act, 1982*, *supra* note 12, s 41.

20. Seidman, *supra* note 1 at 13.

21. *Ibid* at 14.

no American would accept today.”²² And yet, he claims, that is precisely what constitutional obedience requires.

As can be seen from the above encapsulation, much of Seidman’s argument rests on factual premises about US constitutional history and politics. One example is his reliance on the centuries-old gap between the Constitution’s framers and current citizens. But most constitutions do not last nearly so long: Median longevity has been pinpointed at about two decades.²³ Canada’s *Constitution Act, 1982*, for example, is within living memory of a large segment of the adult population, and a number of its framers continue to be active in public discourse.

Seidman argues that the US Constitution is rooted in a profound act of disobedience—the usurpation of the earlier Articles of Confederation. Enacted in the wake of the American Revolution to ensure a stable, continuing federal state, the Articles proved inadequate to the task. Nonetheless, they were a constitutional framework and, thus, commanded obedience. Yet the Articles were ignored at the 1787 Constitutional Conventions. Instead of amending the Articles, delegates opted to displace them entirely. Given that the framers exceeded the limits of their given constitutional authority, Seidman asks, why should anyone feel “obligated to obey their handiwork?”²⁴

One response is that by its very nature, constitutional transformation tends to be disorderly. Large-scale transformations require enormous expenditures of political capital. It makes sense that such moments would tend to be preceded by situations of some exigency or, more rarely, the exertion of focused individual will buttressed by exceedingly favourable circumstances. Seidman turns this argument on its head, claiming that “every new constitution begins with an act that is illegal under the previous regime.”²⁵ The argument is clearly overstated as applied to *every* constitution, and it fails in another sense as well. Throughout his book, Seidman’s focus is intensely pragmatic—he is concerned with the constraining effect of constitutional obedience on practical politics. Yet his historical argument has little to do with practical politics in the here and now; at most, the argument demonstrates that the US Constitution has an uncertain provenance. Indeed, it is hard to believe that Seidman would accept the bona fides of the US Constitution simply because its ratification followed the process set out in the Articles of

22. *Ibid.*

23. See Zachary Elkins, Tom Ginsburg & James Melton, *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009).

24. *Supra* note 1 at 6.

25. *Ibid* at 27.

Confederation. More is needed to support the argument that fidelity to the Constitution is politically misguided.

Here, the slipperiness between Seidman's historical and theoretical arguments is revealed. Consider what Seidman offers as the first possible argument "for" obedience: Article VI of the US Constitution, which states that the Constitution is the supreme law of the land. The argument is clearly meant to invoke legal formalism. Indeed, Seidman presents it as too silly to bear serious discussion. But it surely matters whether the argument responds to a query about whether the US Constitution should have any bearing *for Americans* or a query about whether *any* constitution could have a similar bearing *for anyone*. It is, of course, absurd to answer a challenge about the authority of constitutions per se with the fact that a particular constitution asserts supremacy. It is not at all absurd, though, to suggest that the supremacy clause in Article VI is relevant proof of its supremacy within the US legal system. Now, Seidman has other arguments why the clause is not *sufficient* proof. Still, taken on its own terms, and assuming that a system could meet Seidman's other demands for democratic legitimacy and even generational currency, that particular formalistic argument works just fine.

Seidman does, of course, offer plenty of other arguments. One, again articulated specifically with respect to the United States, is that federal and state actors have frequently avoided or minimized their constitutional obligations. As examples, Seidman cites Thomas Jefferson's execution of the Louisiana Purchase, Abraham Lincoln's suspension of *habeas corpus* during the height of Civil War hostilities in 1861, and Supreme Court Justice Robert Jackson's opinion that the wartime internment of Japanese-Americans was not amenable to judicial review.²⁶

Even on their own terms, the above examples are not coequal. Executive actions based on the belief that prudential concerns matter more than precise constitutional dictates are different in kind from a judge's decision not to intervene in a constitutional dispute because of separation of powers concerns. The point, for Seidman, is that such moments are not unusual. According to him, the system is rife with "unremedied constitutional violations by lower level officials."²⁷ A diversity of rules—including "the political questions doctrine, the mootness, ripeness, and standing requirements, the state secrets privilege, and various forms of sovereign and official immunity"²⁸—means that many violations

26. *Ibid* at 70-71, 73.

27. *Ibid* at 73.

28. *Ibid*.

are never recognized. As a consequence, political actors enjoy the “authority to obey or disobey the Constitution as they choose.”²⁹

The assertion that political actors regularly violate a constitution requires some clarification of the constitutional norms at issue because such norms manifest in very different ways. They can, for example, take the form of rules: bright-line boundaries that require very little else to determine their contours. The provision in Article II stipulating that the President must be thirty-five years of age is one such rule. So is Article I’s guarantee of two federal Senators to every state. Another kind of norm is captured by standards: baselines that determine the acceptable limits of state power but are inherently contextual, values-based, and judgment-driven. Many individual rights, including freedom of speech, the right against unreasonable search and seizure, and the right against cruel and unusual punishment, are standards. So are many of the constitutional rules governing the division of authority, such as the federal Commerce Clause. And finally, constitutional norms may take the form of principles that are not intended to be binding in a legal sense. Given its origins as a constitution of enumerated federal powers, relatively few such principles have been applied to the US Constitution,³⁰ but they can be found in other systems, including Canada’s.³¹

Seidman does not appear to mean that actors regularly violate bright-line constitutional rules. Many such rules govern the political process, making their routine violation both difficult to conceal and highly risky. More plausibly, Seidman appears to be talking about the violation of standards. That is to say, he has in mind actors who make decisions knowing that there may be legal precedents throwing their preferred action into some doubt. It is not clear whether Seidman has a similar view regarding the prevalence of disobedience with respect to constitutional principles.

The claim that actors regularly violate constitutional standards implies that those standards have fixed definition points. But the very nature of constitutional standards makes that unlikely. In part, this is because few constitutional disputes arise in exactly the same form. In part, it is also because in systems such as the United States and Canada, the arrangement of institutional authority grants to courts a special role in constitutional interpretation and adjudication. That role has specific consequences in terms of when a particular law or state action is appropriately labelled “unconstitutional.”

29. *Ibid.*

30. But see *Alden v Maine*, 527 US 706 (1999).

31. See *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385.

To be more precise, Seidman never explicitly considers the presumption that legislation and executive action is constitutional until a court rules otherwise. That presumption makes possible a balance between constitutionalism and the rule of law on one hand and reasonably efficient state action on the other. But, as well, the presumption of constitutionality avoids having to apply an *ex ante* analysis to every legislative or executive decision. Seidman would probably object to this presumption, or, perhaps more likely, find that such a presumption pulls against the very essence of constitutional obedience. For if a constitution is really to exert the pull on state officials' decisions that constitutionalists seem to prize, would it not be most useful to have that pull manifest *before* such decisions occur?³² Indeed, there is some recognition of this idea in the Canadian context, where all federal government legislation proposed in the House of Commons is to be accompanied by an attestation that federal Department of Justice lawyers have vetted it for constitutionality.³³ Indeed, the recently defeated federal Conservative government came under criticism for changing the standards to be applied to such vetting, allegedly to reduce the need for amendment at the pre-debate stage. The change was consistent with a perception that that government was both hostile to the *Charter* and indifferent to the fact that some of its legislative initiatives were “manifestly unconstitutional.”³⁴

Even in the Canadian landscape, though, it would put the case too high to say that the Conservative government regularly displayed constitutional disobedience. Given its numerous dramatic losses in the Supreme Court of Canada,³⁵ the government had ample opportunity to express defiance, yet it did not. Regardless of the desirability of pre-vetting proposed legislation, its

32. In the strictest sense, this would encompass an advisory function, which Article III of the US Constitution denies to federal courts but which is common in Canada. See *Supreme Court Act*, RSC 1985, c S-26, s 53.

33. See Jennifer Bond, “Failure to Report: The Manifestly Unconstitutional Nature of the *Human Smugglers Act*” (2014) 51:2 Osgoode Hall LJ 377. See also Roderick MacDonell, “The Whistleblower,” *National Magazine* (19 November 2013) <www.nationalmagazine.ca/Articles/November/The-whistleblower.aspx> (discussing the lawsuit filed by now retired Department of Justice lawyer Edgar Schmidt).

34. Bond, *supra* note 33.

35. See *e.g.* *Canada (AG) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 (holding that a Crown Minister’s refusal to continue an exemption for a supervised injection program was unconstitutional and issuing an order of *mandamus*); *Canada (AG) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 (holding that three prostitution-related laws were unconstitutional); *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21, [2014] 1 SCR 433 (holding that the Prime Minister’s appointment of Federal Court of Appeal judge Marc Nadon to the Supreme Court of Canada was void *ab initio*).

absence does not make out a situation of constitutional disobedience in the way that Seidman seems to view the term. A demonstrated readiness to test the constitution's limits is insufficient.

Seidman's suspicion of constitutionalism is explained, in part, by his origin story of how enacted constitutions first emerged in Western political thought. He describes constitutions as a technique for constraining executive authority following the dissolution of the divine right of kings. Constitutions were a method by which people who disagreed about political outcomes could agree on how to resolve such disagreement.

Seidman challenges the need for such a "meta-agreement,"³⁶ arguing that it often amounts to nothing more than coercion, especially if a constitution is crafted in the aftermath of political conflict. "Advocates for constitutional government," he writes, "argue that once the agreement is signed, both parties are obligated to obey its terms."³⁷ Putting aside the tricky comparison between the terms of a ceasefire and constitutional design, while each party in Seidman's hypothetical certainly would argue that the other is "obligated" to abide by what they have agreed to, that cannot be all that Seidman means. Most plausibly, he is talking about whether the parties can draw on the term "obligation" in a deeper sense. He claims they cannot. Any basis for obligation that rests on the document itself is prudential, not principled.³⁸ Moreover, if the obligation does depend, in part, on the agreement itself being viewed as substantively just (*i.e.*, separate from its status as the basis of agreement), then it is that quality of fairness that provides the real reason for obedience. The fact that the agreement takes the form of a *constitution* is wholly irrelevant.

A major plank in Seidman's argument, then, is that the common understanding of legal authority, namely, as content-independent reasons for acting or refraining to act in a certain way, is unsuited to the kinds of issues that inspire constitutional debate. By setting out a framework for governance that usurps at least some independent reasons, a constitution represents the ultimate assertion of authority. One need not debate when to call an election, for example, if the constitution already provides the answer. Nor need one justify a societal commitment to something like "freedom of speech" if the constitution already entrenches it as a fundamental right. One gets the sense that Seidman views that sort of attitude not only as disingenuous but politically lazy. Throughout the book, he prioritizes on-the-ground, grassroots political deliberation. Instead of

36. Seidman, *supra* note 1 at 23.

37. *Ibid* at 23-24.

38. *Ibid* at 122.

acquiescing in the “intergenerational power grab”³⁹ of a long dead people, he argues that people would do better to embrace “the duty we should all have—to explain and justify our positions to our fellow citizens.”⁴⁰ One of the more provocative points made along these lines is his enthusiastic embrace of the *terra nullius* involved in emerging democracies in the Arab world:

In countries with no condition of constitutional protection for civil liberties, constitutional obligation obviously plays no role. Yet, precisely because of this absence of prior obligation, there is vibrant debate and mass mobilization about the nature of and protection for rights. The very contingency of the rights—the very fact that they are not established and are up for grabs—leads ordinary people to value and fight for them.⁴¹

One is tempted to ask *which* Arab countries Seidman has in mind and, more pointedly, whether he means to suggest that the people living there are content to establish their rights absent constitutional protection. No evidence is offered for the latter proposition.

One of the arguments that Seidman considers in favour of constitutionalism is that it guards against “predictable pathologies”⁴² by providing safeguards against too-easy resort to majority decision making that could imperil freedom or harm minorities. Seidman disputes the idea that, unconnected from the broader political culture, constitutions themselves do anything to buttress civil liberties. In this, he is probably correct. A constitution *is* only as strong a protection for a set of values as those values are alive in the citizenry. He fails, though, to adequately consider the extent to which constitutions can shape the public debate that contributes to and sustains those values. While not determinative, the expression of values in constitutional form can present a powerful counterweight to untrammelled majority rule. A constitution may provide a constraining influence against coercive state action. Indeed, it may spur additional steps to protect constitutional rights.

Ultimately, one is left with the sense that Seidman’s quibble is not with the grand design represented by what most Americans would consider the very best parts of the Constitution. Though Seidman thinks that liberals advocate obedience to the Constitution only to the extent that obedience promotes liberal values, it is clear that he is sympathetic to many liberal aims, such as equal protection of the law and due process rights. What concerns him is a sense

39. *Ibid* at 41.

40. *Ibid* at 28.

41. *Ibid* at 115-16.

42. *Ibid* at 41.

that constitutional obedience has descended into slavish devotion to a game of trumps that seeps the lifeblood out of public discourse. In this, he may well have a point. But the argument is pitched a little too high, and a little too abstractly, to offer a genuine counterpoint to the entirely ordinary expectation that practical politics is aided, not impaired, by governing one's actions in accordance with principles that transcend the expression of popular will on any given day.