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BOSTON UNIVERSITY

CRITICAL REFLECTIONS ON SEIDMAN'S *ON CONSTITUTIONAL DISOBEDIENCE*

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At first glance, Louis Michael Seidman's term "constitutional disobedience" is strange. When the U.S. Constitution directs or forbids action, usually it is understood to be action on the part of government officials rather than ordinary citizens. And those officials take an oath to support the Constitution – an oath required by the text of the Constitution itself.[1] Seidman's book, however, is not best understood as a manifesto urging government officials to violate their oaths and abandon support for the Constitution.

Is it a call to action on the part of ordinary citizens? Some passages support this reading. For example, Seidman suggests in passing that perhaps "all of us have a natural duty to share fairly in the arduous but important work of undermining constitutional obligation."[2] Here, however, he seems more to be tweaking "natural duty" theories of political obligation than speaking seriously about our actual duties as citizens. More serious is his suggestion that individual citizens participate in a movement of cultural change by responding to each "claim that something is unconstitutional . . . with a perfectly straightforward, but deeply subversive two-word question: 'So what?'"[3] Significant cultural change, such as shifts in views about same-sex marriage, has happened, Seidman says, in significant part "by ordinary individuals who challenge conventional wisdom supporting the status quo."[4]

But here Seidman seeks not so much "constitutional disobedience" from ordinary citizens as "constitutional irreverence." In other passages, Seidman seems to seek something much deeper – something like an abandonment of constitutional discourse altogether.

With respect to both citizens and legislators, Seidman calls for a shift away from claims that the Constitution requires or forbids certain governmental choices and toward more straightforward, "all-things-considered"[5] political

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[1] *See* U.S. CONST. art. VI, § 3, cl. 3 ("The Senators and Representatives [of the United States], and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .").

[2] LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 122 (2012).

[3] *Id.* at 140.

[4] *Id.*

[5] *Id.* at 91.

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debate about "how to solve real, modern problems"[6] and "about what will produce the best country."[7] By focusing our attention instead on what the Constitution requires, permits, and forbids, Seidman contends, constitutional discourse has had a "destructive impact."[8] It has, he says, distracted us from "the merits" of "the real issues."[9] "[C]onstitutional argument," Seidman claims, "has become a partisan political weapon" that has contributed to our "broken" political dialogue.[10]

Seidman sometimes presents this development as the working out of an inbuilt tendency of constitutional discourse. The idea of self-governance, he says, is inconsistent with the idea that constitutional norms can trump the people's present-day "unfettered decisions about the questions that matter most to them."[11] Further, Seidman contends, "[w]hen arguments are put in constitutional terms, they become absolutist and exclusionary."[12] Constitutional arguments operate by locating one's opponents "outside the bounds of our community" and in this way they "have poisoned our political discourse."[13] The solution: "[O]ur disagreements ought not to be expressed in terms of constitutional obligation."[14]

In his preference for open, unfettered political debate over tendencies toward judicial supremacy in constitutional interpretation, Seidman is not unusual in contemporary progressive legal circles. Many have touted the Constitution outside the courts, often looking to social movements as interpreters and transformers of constitutional ideals, and in the case of Seidman's friend Mark Tushnet in particular, looking to legislatures as constitutional interpreters.[15] With Seidman, however, we get the progressive

[6] *Id.* at 59.

[7] *Id.* at 91.

[8] *Id.* at 120.

[9] *Id.*

[10] *Id.* at 141.

[11] *Id.* at 10.

[12] *Id.* at 141.

[13] *Id.* at 141-42.

[14] *Id.* at 142.

[15] MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); *see also, e.g.*, JACK M. BALKIN, CONSTITUTIONAL REDEMPTION 10 (2011) ("People must be able to disagree with, denounce, and protest the Constitution-in-practice, including especially the decisions of the courts, and claim the Constitution as their Constitution, so that they can help move the Constitution-in-practice toward arrangements that are closer to their ideals."); JACK M. BALKIN, LIVING ORIGINALISM 321 (2011) [hereinafter BALKIN, LIVING ORIGINALISM] ("The locus of constitutional change occurs simultaneously in the courts, in the political branches, and in the public sphere."); LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 8 (2004) ("Both in its origins and for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution. Final interpretive authority rested with 'the people themselves,' and courts no less than elected representatives were

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distrust of constitutional courts but not the faith in either social movements or legislatures as constitutional interpreters or transformers. In that sense, Seidman's attack on former orthodoxies in constitutional theory is much more radical.

What place does the Constitution have, then, in the wide-open political debate that Seidman prefers? Here Seidman seems ambivalent. Sometimes he suggests, in common with other progressive constitutional thinkers, that the Constitution can provide an organizing frame for political discussion. He invokes Tushnet's idea of the "thin Constitution," which he understands to mean "the ideals articulated in the Constitution's preamble, in its twin promises of liberty and equality, and in the Declaration of Independence."[16] While these ideals cannot prescribe unique results, Seidman writes, "there is nonetheless much to be said for organizing political discourse around these ideals."[17] In this mood, Seidman sees the basic values of the thin Constitution as providing a "common vocabulary,"[18] uniting us as a political community while at the same time showing us our differences and that these differences are reasonable.[19] Seidman aligns this with what he calls "contestation theory,"[20] under which "resort to foundational principles should be permitted only when they preserve the possibility of legitimate contestation."[21]

subordinate to their judgments."); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 171 (2006) ("What the Constitution constitutes *is* what we regard as ordinary politics . . . ."); MARK TUSHNET, WHY THE CONSTITUTION MATTERS 17 (2010) ("The constitutional provisions that help define our politics, the provisions that matter, can be changed only under quite special circumstances – never in litigation, and only once every generation or two through politics itself."); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1029 (2004) ("[B]oth judicial supremacy and popular constitutionalism each contribute indispensable benefits to the American constitutional polity. They are in fact dialectically interconnected and have long coexisted." (footnote omitted)). From across the Atlantic, consider the work of Jürgen Habermas. *See* HUGH BAXTER, HABERMAS: THE DISCOURSE THEORY OF LAW AND DEMOCRACY 142-45 (2011) (suggesting connections between Habermas's work and that of recent progressive American constitutional theory).

[16] SEIDMAN, *supra* note 2, at 135.

[17] *Id.*

[18] *Id.* at 8.

[19] *Accord* BALKIN, LIVING ORIGINALISM, *supra* note 15, at 31 (2011) ("In drafting constitutional rights provisions, constitution makers may not do much more than provide a constitutional grammar and vocabulary, a set of basic principles and textual commitments, and a practice of constitutional argument in which people reason about their rights. That is more or less what the American constitutional tradition has produced.").

[20] *See* SEIDMAN, *supra* note 2, at 131.

[21] *Id.* at 136; *see also id.* at 142 (suggesting that the Constitution should be seen "as a site for contestation, not a source for answers"); *id.* at 60 ("[C]onstitutionalism is a site for struggle and contestation rather than for settlement."); *cf. id.* at 8 ("We could all embrace the Constitution if we read it as a work of art, designed to evoke a mood or emotion, rather than

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Yet in other moods, Seidman seems skeptical about even this role for constitutional ideals. And even when he is not overtly skeptical, his premises suggest that perhaps he should be. In discussing judicial opinions, Seidman identifies the open-endedness and hence manipulability of basic values such as liberty and equality. He treats judicial talk of basic constitutional values as usually just obfuscation, cover for the Justices' "all-things-considered" preferences. But the open-endedness and manipulability of basic values is a general problem and not one limited to judicial discourse. Seidman's observation about judicial "values" talk seems no less applicable to ordinary political discussion: "It does not require much work to construct an argument for or against almost any outcome based on 'equality' or 'liberty.'"[22]

Seidman might reply that the problem he identifies arises only if we believe in constitutional obligation or obedience. Only then, the argument would go, do we believe that these basic values must decide disputes for us by leading us to single right answers that bind us, notwithstanding our preferences. But why doesn't all fundamental-values talk polarize and "poison" our political discourse, from Seidman's point of view?[23] If I invoke liberty and equality in my political argument with you, am I not at least suggesting that you misunderstand or don't care about a value basic to our political community? While not accusing you of "treason," as Seidman suggests that my invocation of constitutional obedience "effectively" would amount to, at least my fundamental-values argument would seem to locate you "outside the bounds of our community."[24] Seidman needs to explain why fundamental-values talk poisons and polarizes discourse only when constitutionalized, or at least why it is especially dangerous in that form.

The reply to this objection cannot be that ordinary citizens, or all persons not wearing a robe, are better at arguing about fundamental values than judges are. Seidman invokes the vexed arguments over abortion's constitutional status,[25] but anyone who has tried to have this discussion in fundamental-values terms, in pretty much any context, has discovered that it more often leads either to a shouting match or angry silence than to illumination and

as a legal document commanding specific outcomes."). Seidman also uses the term "contestability theory," but that term is more commonly associated with economic theory than the kind of political theory Seidman seems to have in mind. *See id.* at 136.

The idea of the Constitution as site of contestation rather than settlement is a staple of recent progressive constitutional theory. *See* BAXTER, *supra* note 15, at 222-27 (discussing the emergence of constitutional patriotism and its emphasis on constitutions as loci for political and moral contestation).

[22] SEIDMAN, *supra* note 2, at 13.

[23] *Id.* at 141-42.

[24] *Id.* at 141.

[25] *Id.* at 13 ("For example, abortion rights protect the equality and liberty of pregnant women, but abortion prohibitions protect the equality and liberty of unborn children. To the degree that the results commanded by constitutional values are indeterminate, the obligation of constitutional obedience fails to take hold.").

mutual understanding. Seidman is right to note that settlement and consensus are not the only goals of political discourse, but he should acknowledge also that invocation of basic constitutional values in non-judicial discourse, not just in court opinions, seems likely to lead quickly to the polarization and demonization he decries. On the penultimate page of the book, Seidman seems perhaps to come to this recognition. "More generally," he writes, "we need to stop posturing about fundamental values and begin an open and good faith discussion about what will work."[26]

The problem, of course, is that because we do not agree about goals, we cannot agree "about what will work." Seidman would reply that he seeks not settlement but contestation. Still, however, that contestation does not seem usefully pursued in terms of disagreement over fundamental values. And so, even Seidman's argument for a radically trimmed down constitutionalism – that it might provide a "common vocabulary" for productive political discussion – does not seem very promising. His position seems to target constitutionalism as such, not just the idea of constitutional obedience.

Seidman might well be happy with this conclusion. In one of the more interesting sections of the book, he tries to assess the extent to which, over the course of American history, constitutional obedience – judicial enforcement of constitutional guarantees against present governmental resistance – has in fact protected minority rights and civil liberties. He invokes a whole series of historical experiences: the Alien and Sedition Act's enforcement in lower courts; the World War I-era Supreme Court's approval of the Espionage Act and its accommodation of the Palmer raids; the Court's blessing of World War II German saboteurs' execution "after hasty findings by a military commission"; the Court's refusal to limit McCarthyism "until passions had cooled"; the Court's upholding of Japanese-Americans' exclusion; and the Court's refusal to invalidate racial segregation until the mid-1950s, "after approximately half the country had come to oppose it, and, then, only with a symbolic decision that remained almost entirely unenforced" until "southern segregationists suffered major defeats at the polls."[27] On the rights-protective side of the ledger, Seidman identifies a number of decisions he finds unpalatable: constitutional protection for (1) treating slaves as property before the Civil War, (2) "commercial and sexually explicit speech," (3) "the rights of white people threatened by affirmative action," (4) corporate political spending, and (5) picketing by "fringe groups" at soldiers' funerals.[28] From Seidman's point of view, the suggestion that these decisions are rights-protective is ironic. Even if they can be so described, they are not decisions Seidman celebrates. True, Seidman also mentions, perhaps with more sympathy, the Warren Court's criminal procedure and school prayer decisions, as well as the Court's recent decisions that have begun to offer support for gay

[26] *Id.* at 142.

[27] *Id.* at 111-13.

[28] *Id.* at 113-14.

and lesbian rights.[29] But he notes retrenchment on the criminal procedure decisions,[30] and as with the Court's move against racial segregation, he argues that the beginnings of constitutional protection for gays and lesbians have come "only after a seismic change in public opinion made the cause respectable."[31]

And thus, in sum, constitutionalism – at least the American version, with a written constitution that is judicially enforced – does not seem on balance to have produced much that Seidman finds worth celebrating. Even the decisions whose consequences Seidman approves, such as protection of gay and lesbian rights and abortion rights, seem not to go beyond what the median voter would approve[32] and to be reasoned in language that differs hardly at all from the language of ordinary politics.[33]

Of course, Seidman's quick survey of American constitutional history cannot settle definitively whether equality rights and civil liberties would have been protected at least as well, and with fewer other disadvantages, without a written constitution and the practice of judicial supremacy in constitutional review.[34] His catalog is instructive, but his analysis would have been stronger had he considered two points.

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[29] *Id.* at 112-13.

[30] *Id.* at 34.

[31] *Id.* at 112.

[32] *Id.*

[33] See *id.* at 12-13, where Seidman acknowledges that equal protection and due process decisions that favor liberal and progressive causes "come[] at the expense of authentic obligation" and "are no longer bound by constitutional language in a meaningful sense." Seidman writes specifically of the Supreme Court's gay-rights opinions, as well as those disapproving affirmative-action plans, that they "are at best tenuously tied to the constitutional text. Rather than textual exegesis, they reflect some mix of policy judgments, interpretations of our traditions, moral determinations, and prudential conclusions. Without constitutional obligation, one could easily imagine a court deciding issues like these on similar grounds." *Id.* at 129. Elsewhere, Seidman writes of the anti-affirmative action opinions that they "hardly differ from the kind of policy paper one might expect from a think tank or a presidential commission." *Id.* at 113-14. This description seems to me even more descriptive of the Court's opinion upholding the University of Michigan Law School's affirmative action admissions plan. *See* Grutter v. Bollinger, 539 U.S. 306 (2003) (sanctioning the law school's use of racial minority status as a "plus" factor in admissions decisions, in part because diversity promotes "cross-racial understanding," enhances leadership opportunities, and better prepares the workforce).

[34] Mark Tushnet has called this practice "strong-form" judicial review. By that term he means courts' insistence on having the final and supremely authoritative word on constitutionality, notwithstanding legislatures' reasonable constitutional judgment to the contrary. *See, e.g.*, MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 33-34 (2008) ("Strong-form review is a system in which judicial interpretations of the Constitution are final and unreviewable by ordinary legislative majorities.").

The first concerns Seidman's insistence that *real* constitutional obedience – the kind that matters to him – can be found only when one would have decided otherwise but for the Constitution's pull.[35] Constitutional obedience thus is significant and real for Seidman only when it overcomes contrary inclination in our ordinary "all things considered" judgments. But what of the possibility that those very inclinations are themselves partly shaped by, and to some extent reflect, constitutional commitments? Can we separate our political inclinations cleanly and entirely from our constitutional tradition? This point seems particularly evident in the area of free speech, where ordinary persons likely favor protection of some speech whose content they detest, simply because protection of a wide range of speech against government suppression is a generally accepted norm in American political thinking. In other words, it seems likely that some of the inclinations Seidman locates in ordinary all-things-considered thinking are shaped by our constitutional tradition and its norms. And so constitutionalism may have real effects – even effects Seidman might approve – outside of "constitutional obedience" as Seidman defines it.

Second, even if the Court's protection of rights notably follows majority preferences, it might still be significant in imposing more-or-less progressive national solutions on "outlier" or "retrograde" states. This pattern is evident in, for example, the Court's recent death penalty decisions that have read the Eighth Amendment in light of what it has seen as "evolving standards of decency."[36] One sees the same pattern just as clearly in *Lawrence v. Texas*, which looked to an emerging consensus among states, and also among other nations, to rule that Texas and a few other states no longer could criminalize private, consensual, non-commercial sex between adults.[37] This point has been made amply in the literature of recent progressive constitutional theory,[38] and Seidman could have taken it into account.

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[35] *See* SEIDMAN, *supra* note 2, at 13-14 ("[P]eople exercising the power of constitutionalism are usually excused from the obligation to provide reasons for why we should be bound by constitutional commitments. They need not respond to even the most powerful arguments premised on policy and principle for a course of action. Instead, they are empowered to say 'no' just because of words written on very old parchment."); *id.* at 104 ("[I]t is precisely in those cases where obedience does not advance a particular side's interests that true obedience is tested.").

[36] *See* Roper v. Simmons, 543 U.S. 551, 574-75 (2005) (rejecting Missouri's attempt to execute a juvenile offender and deeming prior supportive Supreme Court cases no longer controlling); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (relying in part on evolving standards in rejecting Virginia's attempt to execute a defendant with mental disabilities, holding that "death is not a suitable punishment for a mentally retarded criminal").

[37] Lawrence v. Texas, 539 U.S. 558 (2003).

[38] *See, e.g.*, Jack Balkin, *Roots of the Living Constitution*, 92 B.U. L. REV. 1129, 1137 (2012) (remarking, for example, that "the Warren Court repeatedly exercised judicial review to promote liberal political ideas shared by the dominant forces in national political life, overturning a series of older doctrines and enforcing liberal interpretations of the Constitution against outliers in state and local governments, particularly in the South");

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Seidman's *Constitutional Disobedience* is a well-written and thought-provoking book about whether American constitutionalism really has the positive values commonly attributed to it. I find myself engaged by the lively argument but ultimately wondering whether Seidman might romanticize ordinary political discussion in somewhat the same way that orthodox constitutional theory romanticized the opinions of constitutional courts.

David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 875-87 (2009) (identifying numerous major decisions wherein the Supreme Court invalidated state or local statutes as outliers).