

# But the Constitution is not the Problem on Constitutional Disobedience

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## Abstract

Professor Seidman really doesn't like the United States Constitution, a "deeply flawed eighteenth century document" (4) laden with "silly or pernicious" provisions (135) reflecting some "quite unlovely" motivations. (21) Observance of the Constitution, based on "the pernicious myth that we are bound in conscience to obey the commands of people who died several hundred years ago" (9), is inconsistent, he argues, not only with our "pretending that we have a polity based on popular sovereignty," but also with "the kind of open-ended and unfettered dialogue that is the hallmark of a free society."

**Keywords:** United States; Popular; Society; Supreme Court's

## Introduction

Professor Seidman has cause to complain of our loss as a practical matter of a large degree of popular sovereignty in the name of constitutionalism. He is mistaken, however, in attributing the loss exclusively to the Constitution and, therefore, recommending as a solution that the Constitution simply be "systematically ignore[d]." The restrictions on popular choice of which the complains are less the result of the commands of the Constitution than of the Supreme Court's supposed enforcement of these commands through the power of judicial review. It is true that, as Seidman argues, without the Constitution, there would be no constitutionalism and therefore no judicial review, but that does not make the Constitution the sole or even the main source of the problem. Constitutional theorists, "all of them," Professor Seidman argues, "are obsessed with the false problems of judicial power and techniques of constitutional interpretation" which are simply ways "to avoid the deeper issue: Why should the members of any branch of government obey the Constitution in the first place?" (32). The source of this alleged obsession, surprisingly enough, according to Professor Seidman, is the work of a mid-twentieth century Yale law professor, Alexander Bickel and, specifically, his 1962 book ("written in the ponderous, portentous style favored ... by legal academics"), *The Least Dangerous Branch* [1]. Bickel famously criticized judicial review as a "deviant institution" which raises "the countermajoritarian difficulty" of unelected judges "making public policy that binds the rest of us." "[A]lmost a half century after the book was published, Bickel's thesis," Seidman argues, "continues to haunt constitutional debate.... Although Bickel himself is rarely cited in public debate, his claim has been repeated countless times in newspaper editorials, talk show rants, pompous confirmation hearing speeches, and boring law school lectures."

Unfortunately, Professor Seidman believes, "Bickel made a crucial mistake – a mistake that we need to correct if we are ever to engage seriously with the real problems of constitutionalism" (32). Bickel's crucial mistake was his alleged failure to see that "judicial review is merely a technique for enforcing the commands of the Constitution. The *Constitution* is countermajoritarian, at least in a certain sense." "The real countermajoritarian difficulty, then," Professor Seidman concludes, "is not with judicial power, but with the power we have ceded to the Constitution itself....Bickel, and his many followers, thought that judicial review was problematic because it was in tension with democracy," but once one sees that judicial review "is only a technique for ensuring constitutional obedience, then Bickel's worry

should extend to constitutional obligation" (36, Seidman's emphasis) [2].

It is not credible, of course, that Professor Bickel did not realize that the Constitution itself is undemocratic. The point of his book was to show that judicial review is nonetheless inconsistent with democracy to the extent that the Court's rulings of unconstitutionality are *not* based on the Constitution. He rejected as unrealistic Alexander Hamilton's famous defense of judicial review—adopted by Professor Seidman—as merely judicial enforcement of "the will ... of the people, declared in the Constitution." In fact, Bickel argued, the Court's rulings of unconstitutionality are "not in behalf of the prevailing majority, but against it.... An altogether different kettle of fish, and...the reason that judicial review is undemocratic [3]." The difference between Bickel and Seidman is not that Bickel did not realize that the Constitution is undemocratic, but that he realized, as Seidman does not, that many of the Court's most important rulings of unconstitutionality are not necessarily mandates of the Constitution [4]. In attributing our loss of popular sovereignty solely to the undemocratic Constitution, it is Professor Seidman who makes a crucial mistake, his failure to distinguish between constitutionalism, as such—judicial invalidation of policy choices clearly prohibited by the Constitution—and "living constitutionalism"—judicial invalidation as unconstitutional of policy choices not clearly prohibited by the Constitution [5]. Seidman correctly criticizes constitutionalism as amounting to rule of the living by the dead, which is true, but limited to explicit constitutional restrictions; living constitutionalism, however justified, amounts as a practical matter to rule by judges limited only by their willingness to abstain from removing an issue from the ordinary political process [6]. The Constitution does impose some dubious

limitations on democratic government (only a "natural born Citizen" can be president [7]. California with 35 million people and

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**Received** March 30th, 2015; **Accepted** April 29th, 2015; **Published** May 15th, 2015

**Citation:** Graglia LA, Seidman LM (2015) But the Constitution is not the Problem on Constitutional Disobedience. J Civil Legal Sci 4: 145. doi:[10.4172/2169-0170.1000145](https://doi.org/10.4172/2169-0170.1000145)

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Wyoming with 500,000 each gets two senators, but it is the Court's rulings of unconstitutionality *not* clearly required by the Constitution that present the primary challenge to our "pretending that we have a polity based on popular sovereignty" [8].

Prof Seidman attempts to lessen in two ways the apparent radicalism of his recommendation that the Constitution be ignored. First, he points out, in a chapter headed "The Banality of Constitutional Violation," (63) that we have had examples of constitutional disobedience from the beginning [9]. President Jefferson made the Louisiana Purchase, President Lincoln issued the Emancipation Proclamation, and Justice Jackson voted for the *Brown v. Board of Education* decision although they each doubted their action's constitutionality. These and the many more examples Seidman gives show, he concludes, that there is no reason to fear "the polity will not survive widespread constitutional violation" (90).

Second, Professor Seidman argues, "we might have a very different attitude about the obligation to obey" the Constitution if we "would only acknowledge what should be obvious to everyone—that constitutional language is broad enough to encompass an almost infinitely wide range of positions" (142). Of course, if the Constitution's language can mean anything, it is essentially meaningless, as Seidman himself recognized earlier in the book [10]. The constitutional provisions then become not meaningful restrictions or guidelines as to policy choices, but simply transferences of lawmaking power to the Court. The Court's decisions, however, cannot then be described as merely enforcing the Constitution's commands, and those decisions, not the Constitution, must be, as Bickel said, the source of the countermajoritarian difficulty.

It is not true, however, that the Constitution's language must or should be read as so broad as to be meaningless, which could hardly have been the intent of its authors or the understanding of its ratifiers. To the extent that it now seems so, it is mostly the result of the Court's decisions, particularly under the Fourteenth Amendment. The purpose and provenance of the Fourteenth Amendment are not mysterious or obscure. It was adopted to constitutionalize the 1866 Civil Rights Act which guaranteed basic civil rights to the newly emancipated slaves [11]. The Court converted the amendment's Due Process Clause—a guarantee of procedural regularity—and Equal Protection Clause—a guarantee of equal enforcement of legal protection—from meaningful provisions of law into virtually unlimited grants of policymaking power [12,13]. If the Fourteenth Amendment could be returned to its intended meaning and purpose—or, given any definite meaning—the need to disobey the Constitution that Seidman sees would be less much urgent, if not largely eliminated. Professor Seidman is also mistaken that if we confine "general guarantees like equal protection and due process of law ... to their 'original public meaning' or the framers' specific intent, we are stuck with eighteenth-century judgments about twenty-first-century problems" (13). All we would be "stuck with" is the quite limited and uncontroversial meanings those clauses were intended to have. They would be quite properly understood as very rarely, if ever, either providing the answer or precluding any answer to contemporary problems. The result would be to preclude their use as alleged obstacles to policy changes, precisely what Seidman is arguing for. They would no longer effectively serve as blank checks for judicial policymaking, permitting decision of issues of domestic policy to return to the ordinary political process—which may be the real objection to originalism by many academic defenders of judicial review, not known for their commitment to democracy. Bickel's concern about judicial review being countermajoritarian was not only based on his failure to recognize that the Constitution is the source of the problem, but, in any

event, exaggerated, Professor Seidman argues, for several reasons. One is that "[i]n recent years, a growing body of scholarship has questioned just how countermajoritarian Supreme Court decisions really are." "[I]t turns out" that the justices' decisions have "only rarely...frustrated popular majorities for very long. For the most part, the justices have been quite cautious" (33).

This ameliorative but implausible assertion has long been a standard response to critics of the constitutional revolution that began with the Warren Court. As Professor Justin Driver concluded in a very recent and thorough discussion of the claim, however, "it reflects an anemic notion of the Court's countermajoritarian capabilities" and "makes for bad history [and] worse law" [14]. If the Court's recent decisions on corporate campaign contributions, gun control, term limits, and homosexuality, for example, to say nothing of school busing and abortion are "quite cautious," one wonders what a daring Court might do [15-20]. The reality—the countermajoritarian difficulty—is that the Court has given itself the final word on important issues of domestic social policy regardless of popular opposition. In further rejection of the countermajoritarian objection to judicial review, Professor Seidman runs down the hoary list of supposed political controls on the Court. Adopting Hamilton's argument that there is no need to fear misuse of power by the Court because it "has no influence over either the sword or the purse," Seidman points out that the justices "must depend on the political branches for enforcement of their decisions [21]." "Moreover, Congress and the president have a number of means at their disposal to discipline a Court that is too far out of step with prevailing political values." "Congress can limit the Court's jurisdiction to hear cases," "it can and has overruled unpopular decisions by constitutional amendment," and finally, "it can impeach a justice" (34-35).

It is true, Professor Seidman concedes, that the political branches have not refused to enforce a Court decision or exercised their power to discipline the Court, but that, he says, is because the Court has not "decide[d] cases in a way that would trigger" discipline (35). The reality, unfortunately, is that the supposed political constraints on the Court are more theoretical than real [22]. The Constitution is extremely difficult to amend, apparently the most difficult in the world, and very few decisions have been overturned by amendment [23]. Congress can attempt to limit the Court's jurisdiction, but Congress has rarely made the attempt and the Court gets to pass on the validity of any attempt and has not always agreed with Congress [24,25]. Hamilton put great faith in impeachment, but it failed the one time it was tried, and will not and should not be tried again absent a serious criminal offense [26,27].

Finally, Professor Seidman rejects the "originalist" view prominently urged by Robert Bork that judges would be more restrained and therefore the countermajoritarian difficulty would be less if they confined themselves to interpreting the Constitution to mean what it was understood to mean when it was adopted. A Constitution divorced from its original meaning, Bork argued, becomes meaningless. The argument, Seidman responds, that rejection of originalism "leaves judges with the power to decide cases based on their uncontrolled discretion" is "patently false".

Judges who adopt nontextual theories of judicial review are not unconstrained. They are simply constrained" by something other than the Constitution, for example, "by moral philosophy, by American traditions, by prior precedent, or by a commitment to democratic politics....Perhaps more fancifully, judges who did not obey the Constitution might be constrained by the teachings of the Bible, John Stuart Mill, John Rawls, or the United Nations Declaration of Human Rights" (39). "To be convincing," Professor Seidman concludes, "an

originalist must explain to us why the views of James Madison are more worthy of respect than the views of a host of other great thinkers” (39). The explanation, one is initially tempted to respond, is that James Madison was the principal author of the Constitution, the supposed basis of constitutional law. But that explanation obviously will not do for someone who, like Seidman, denies that the Constitution is the necessary basis of constitutional law and would permit judges to invalidate laws as “unconstitutional” on the basis of whatever else they find appealing. Consistency would seem to require, however, that a law invalidated on the basis of the Bible, say, should be declared “unbiblical,” not “unconstitutional.” Further, if a law may be invalidated on a basis other than the Constitution, it would seem impossible to argue that it is the Constitution, not judicial review, that is countermajoritarian. Finally, Professor Seidman notes at the conclusion of his book “the obviously partisan nature of constitutional argument.” It is not “mere coincidence that, say, Justice Ginsburg and Justice Alito regularly read the same document in ways that correspond to the political orientation of liberals and conservatives.” (140) But that, of course, is to recognize that judicial review involves something more than the Court merely enforcing the commands of the Constitution [28]. The simple and easily observable fact is that the Constitution rarely settles or even addresses the policy issues involved in actual constitutional cases. If the question were in practice what it is in theory—Does the Constitution clearly preclude the challenged legislative policy choice?—the answer in nearly all cases would be that it does not. That the Constitution does not settle the issue involved in controversial cases should also be clear enough from the remarkable consistency with which the votes of eight of the Justices on most issues are evenly split apparently along “conservative liberal” ideological lines, leaving the decision to the vote of the ninth Justice, Justice Kennedy. Congress cannot restrict corporate campaign contributions, for example, because Justice Kennedy resolved a four-four conservative-liberal split on the issue by voting with the conservatives; the states may not impose term limits on their federal representatives because faced with a similar four-four split, the voted with the liberals. The Constitution would rest equally unconcerned if in each case he had voted the other way. It would seem difficult, therefore, not to avoid Judge Posner’s conclusion that the Justices are “politician[s] in robes” and that “ideology plays a significant role” in the Court’s decisions.

Professor Seidman’s book importantly challenges the near-scriptural reverence shown the Constitution and the wisdom of deciding current issues of public policy by studying an ancient text. It is difficult to see, however, how this situation can be improved by following his recommendation to disobey or ignore the Constitution. The correct response to an argument that a desired policy choice cannot be adopted because it is prohibited by the Constitution is usually not “So what?”, as he recommends. It is, rather, to point out that the argument is almost

surely mistaken because the Constitution does not clearly prohibit the choice. The wise framers left us, happily, with little need to disobey the Constitution.

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