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# PANELIST PAPERS

## WHAT IS CONSTITUTIONAL OBLIGATION?

ABNER S. GREENE\*

In my book *Against Obligation*, I argue against political obligation, for permeable sovereignty and accommodation, and against interpretive obligation.<sup>1</sup> In the first half of the book, I contend that even citizens in a liberal democracy do not have a general moral duty to obey the law.<sup>2</sup> In other words, there is no good reason or set of reasons to obey all laws all of the time, even presumptively. Thus, I reject political obligation. At the same time, I argue for something I call permeable sovereignty, a type of pluralism.<sup>3</sup> All of our sources of norms should be considered, at least at first blush, on par with each other and on par with the state's laws. I construct this argument from both my case against political obligation and a case for pluralism, although the latter is less well developed in the book. Since I also believe legitimacy and obligation are correlative, I argue that the state can seek to overcome its legitimacy problem by accommodating, whenever possible, our religious and other norms that conflict with the laws of the state.<sup>4</sup>

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\* Leonard F. Manning Professor, Fordham Law School. I am grateful to Ben Zipursky for comments on a draft of this piece. Many thanks to Jim Fleming for inviting Mike Seidman and me to Boston University School of Law for a day of discussion about our books and for the opportunity to contribute to this volume of the *Boston University Law Review*. Finally, thanks to all of those at Boston University who participated in the exchanges that day and in this issue of the *Boston University Law Review*.

<sup>1</sup> ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* 13-14 (2012) ("There is no moral duty to obey the law, and accordingly only through viewing sovereignty as permeable, as partial rather than full, can we provide even a semblance of a remedy for the obligation/legitimation problem that otherwise exists. Only, that is, by disclaiming plenary sovereignty can government remain in position as an authority worth obeying. Interpretive obligation in constitutional law raises a related set of concerns, and insisting on interpretive pluralism (regarding both prior and higher authority) yields benefits similar to insisting on permeable sovereignty.").

<sup>2</sup> *Id.* at 35-113.

<sup>3</sup> *Id.* at 20-24.

<sup>4</sup> *Id.* at 114-60. Even if one rejected correlativity, one could still accept the rest of my argument for accommodation, to relieve some citizens of the dilemma they face when confronted with conflicting obligations.

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In the second half of the book, I reject what I call interpretive obligation in constitutional law. Constitutional interpreters, I contend, need not follow either prior or higher sources of purported interpretive authority, even presumptively.<sup>5</sup> Thus, they need not follow original meaning, intent, precedent, or what the Supreme Court thinks the Constitution means now (with an exception for a duty to follow court orders, which is over-determined by arguments for both political and interpretive obligation).

Louis Michael Seidman has written a powerful new book, *On Constitutional Disobedience*.<sup>6</sup> Seidman and I agree that present-day constitutional interpreters are not bound, even in a prima facie sense, to prior sources of constitutional meaning. We also agree that at any point in time, the Supreme Court is just one among many constitutional interpreters. Seidman briefly addresses, without resolving, the political obligation question.<sup>7</sup> So where do we, or might we, differ?<sup>8</sup> Perhaps it is on the question whether the Constitution itself obligates.

In *Against Obligation* I argue against the bindingness of ordinary law and of supposedly authoritative sources of constitutional meaning. I say briefly that those alive at the time of the framing were not bound by the new constitutional order, and thus we today cannot be bound by tethering back to them,<sup>9</sup> and I ask the question, “[W]hy this particular constitutional text . . . should be thought to

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<sup>5</sup> *Id.* at 161-251.

<sup>6</sup> LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* (2012).

<sup>7</sup> *See id.* at 3-10.

<sup>8</sup> In his essay for this Symposium, Seidman sets forth some critiques of my argument for accommodation. Louis Michael Seidman, *On Political and Constitutional Obligation*, 93 B.U. L. REV. 1257, 1257-62 (2013). I respond in more detail below. *See infra* text accompanying notes 56-78. For now, I offer one small point of clarification: In my book, I do not argue that if the state accommodates a citizen’s religious or other practice, the citizen thereby has a moral duty to obey the law, that is, political obligation. Accommodation is at best a partial remedy for the problem posed by the state’s claiming a general authority over all of us through all of its laws. GREENE, *supra* note 1, at 114-15 (“Representations of exit remedy the harm caused by the state’s unjustifiable general demand for compliance with law and the correlated failure of a satisfactory theory of political obligation. . . . We might call this a ‘partial remedy,’ for even exemptions won’t fully ameliorate the dilemma in which some citizens find themselves when confronted with law that conflicts with other normative commitments. . . . [E]ven a robust system of exit options [that is, accommodations or exemptions] doesn’t fix the problems discussed [earlier] with theories of political obligation; rather, it acknowledges the difficulties and responds by letting people free from the clutches of the state.”).

<sup>9</sup> GREENE, *supra* note 1, at 172 (arguing that it would be appropriate for original meaning to bind current interpreters “only if the sovereign people from the time of the Constitution’s framing (or the framing of the various amendments) ceded self-government to the new constitutional order or were otherwise properly bound by such an order. But just as there are no satisfactory arguments for the political obligation of any individual citizen, even in a liberal democracy, so are there no satisfactory arguments for the political obligation of the people extant at the time of the Constitution’s framing.”).

obligate?”<sup>10</sup> The book does not seek to answer that question, however, and does not otherwise address whether and how the Constitution as a document, as a text, might be binding.<sup>11</sup>

Much of Seidman’s argument against constitutional obedience is an argument against obedience to original meaning or intent. At times he discusses in the same breath obedience to the Constitution as a text and obedience to certain understandings of the Constitution.<sup>12</sup> He also argues, apart from any critique of original understanding, against the bindingness of the Constitution as a document, as a text: “Should we . . . feel obligated to obey this deeply flawed, eighteenth-century document?” asks Seidman.<sup>13</sup> For example, he discusses Article II, Section 1, Clause 5, which provides, “No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . .”<sup>14</sup> Suppose (falsely) that President Obama “really were born outside the United States,” posits Seidman.<sup>15</sup> “Why should this matter to us?”<sup>16</sup> Later, he claims that “[i]t is ultimately deeply authoritarian to try to end an argument by insisting on the sanctity of a particular text.”<sup>17</sup>

We might, though, profitably distinguish obligation to the Constitution as a text, as a governing and structuring document, from obligation to any particular interpretation or purportedly authoritative meaning of that text. Our Constitution purports to place obligations, both positive and negative, on public officials. Apart from the Thirteenth Amendment, which places a duty on all of us,<sup>18</sup> our Constitution empowers and limits government. Pursuant to Article VI, Clause 3, all government officials – federal and state; legislative, executive, and judicial – “shall be bound by Oath or Affirmation to support

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<sup>10</sup> *Id.* at 208.

<sup>11</sup> I also mention that aspects of our Constitution may be defensible from arguments for coordination or political justice. *See id.* at 208 (“Some aspects of our Constitution . . . may be defensible as a retail matter; some, for example, will be backed by coordination arguments (e.g., election rules; how a bill becomes a law); others may fit well with straight-on conceptions of political justice (e.g., equal protection of the laws).”). I take it Seidman would not disagree with that. This still leaves us short of deeming our Constitution morally binding as a wholesale matter, even if only presumptively so, subject to override.

<sup>12</sup> *See, e.g.,* SEIDMAN, *supra* note 6, at 5 (“Suppose . . . that the Tea Partiers are right and the Constitution means what they say it means. Why, then, should the rest of us obey its commands? . . . If forced to choose between obedience to such a document and fundamental principles of justice, shouldn’t we choose justice?”).

<sup>13</sup> *Id.* at 4.

<sup>14</sup> U.S. CONST. art. II, § 1, cl. 5.

<sup>15</sup> SEIDMAN, *supra* note 6, at 4.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 28.

<sup>18</sup> *See* U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

this Constitution.”<sup>19</sup> Arguably these oaths bind officials to the duties and limits placed on them in the Constitution. If not, officials arguably have positional duties with stated limits by virtue of taking and performing their jobs.

One has to be careful here, because although some of the Constitution’s language places duties on officials, most of the language is better deemed power-conferring or power-limiting. I think it safe to say, though, that, for example, Congress’s power to make laws includes a conditional duty – that is, if Congress decides to make laws (a power choice), it must make them in certain ways (a conditional duty). And so on for other powers the Constitution grants to Congress, the President, and the federal courts. Here one could talk about H.L.A. Hart’s elegant reminder that law is not just about conduct rules, but about governance rules as well.<sup>20</sup>

In other words, via the oath or taking and performing their jobs or some combination, officials accept – in a Hartian sense – the Constitution’s rules, which include duties and powers with limits on both. This gives us a legal system, in Hart’s terms,<sup>21</sup> and, arguably, constitutional obligation for officials. This does not say anything about interpretive obligation. Despite some attempts by originalists at combining arguments for fealty to text and fealty to original meaning of text,<sup>22</sup> these are different things. One may endorse my and Seidman’s arguments against originalism – and even my argument against the bindingness of precedent – and still argue for the bindingness on officials of the Constitution as a text.

I do not mean to say that official acceptance in a Hartian sense necessarily involves incurring an obligation. As several scholars have noted, Hart’s

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<sup>19</sup> *Id.* art. VI, cl. 3; *see also id.* art. II, § 1, cl. 8 (establishing the presidential oath or affirmation: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States”).

<sup>20</sup> *See* H.L.A. HART, *THE CONCEPT OF LAW* 27, 81 (2d ed. 1994).

<sup>21</sup> *See id.* at 61, 115-16. More specifically, Hart argued that the minimum conditions for a legal system to exist are that citizens generally obey primary conduct rules and that the “rules of recognition specifying the criteria of legal validity and . . . rules of change and adjudication must be effectively accepted as common public standards of official behavior by . . . officials.” *Id.* at 116.

<sup>22</sup> *See* Larry Alexander, *Telepathic Law*, 27 *CONST. COMMENT.* 139, 141 (2010); Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 *NW. U. L. REV.* 615, 618 (2009) (stating that constitutions are “put in writing to ‘lock in’ or fix a meaning”); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 *NW. U. L. REV.* 751, 781, 794 (2009) (arguing the Constitution’s “[original] meaning [was] passed through the supermajoritarian process”); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 *NW. U. L. REV.* 803, 805 (2009); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 *NW. U. L. REV.* 857, 861 (2009); Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CIN. L. REV.* 849, 854 (1989).

conception of official acceptance of a society's secondary rules for making, changing, and interpreting its primary rules needs further analysis.<sup>23</sup> If such acceptance exists only out of fear – say, of the ruler's force – then it is too weak to establish a legal system, let alone to predicate obligation. Somewhat more strongly, and probably sufficiently for undergirding a legal system, we could see official acceptance as a type of faith in the system, not blind, but founded on good reasons. Jules Coleman refers to this as “a critical reflective attitude toward [convergent] behavior . . . . In other words, officials behave in a manner that is consistent with their following the same rule for validating laws.”<sup>24</sup> This notion of official acceptance does not necessarily involve incurring an obligation. But if officials take an oath of fealty to the Constitution, or if it is otherwise understood when taking their jobs that their positions involve such fealty, then we have a strong enough type of acceptance to yield obligation.

One might argue, though, that an oath, or some other grounding for positional duty, is insufficient to ground official constitutional obligation. This is similar to the argument that consent is insufficient to ground political obligation. There are various versions of that case. All turn on reasons for consent binding that must exist outside consent itself. As Leslie Green puts it, our obligation to keep agreements “must be a non-voluntary obligation.”<sup>25</sup> Joseph Raz explains that “[c]onsent to political authority . . . is binding only if there are good reasons to enable people to subject themselves to political authorities by their consent.”<sup>26</sup> David Hume classically argued:

We are bound to obey our sovereign, it is said; because we have given a tacit promise to that purpose. But why are we bound to observe our promise? It must here be asserted, that the commerce and intercourse of mankind, which are of such mighty advantage, can have no security where men pay no regard to their engagements.<sup>27</sup>

Heidi Hurd contends that if we

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<sup>23</sup> See RONALD DWORKIN, *LAW'S EMPIRE* 34-35 (1986); PHILIP SOPER, *A THEORY OF LAW* 24, 31, 33, 172 n.22 (1984); Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW* 99, 119 (Jules Coleman ed., 2001); Stephen R. Perry, *Hart's Methodological Positivism*, in HART'S POSTSCRIPT, *supra*, at 311, 332-41, 345.

<sup>24</sup> JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 75-76 (2001).

<sup>25</sup> Leslie Green, *Associative Obligations and the State*, in DWORKIN AND HIS CRITICS 267, 268 (Justine Burley ed., 2004).

<sup>26</sup> JOSEPH RAZ, *THE MORALITY OF FREEDOM* 89 (1986). For a good discussion of this point, see SOPER, *supra* note 23, at 75-77, 179 n.28 (“That one must ultimately appeal to reason or value in some sense in explaining why promises create obligations is a point often made . . . . And it is a point just as often forgotten.” (citations omitted)).

<sup>27</sup> DAVID HUME, *OF THE ORIGINAL CONTRACT* (1748), *reprinted in HUME'S ETHICAL WRITINGS* 255, 268 (Alasdair MacIntyre ed., 1965).

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consent to the exercise of influential authority[,] . . . [o]thers may well rely on our consent . . . . And their reliance on our consent may indeed give us a new reason to abide by the laws enacted by the majority. But such a reason is not a content-independent one. The reliance of others is not a reason that is independent of the content of the reasons that we already have to comply with democratically enacted laws; rather, it becomes part of those reasons.<sup>28</sup>

Finally, consider Michael Sandel's discussion of this question: Even if the people of Israel freely gave consent to God's law at Sinai, "did the act of consent *create* the obligation to obey, or did it recognize and affirm a preexisting obligation? . . . The more compelling the grounds for consenting to a law or political arrangement, the less true it is that the act of consent creates the obligation to obey."<sup>29</sup>

Consistent with these arguments, one might contend that taking the constitutional oath of office binds an official to the Constitution only if there are independent reasons for such consent to bind. For consent of any form needs to be backed by a case for the good that the thing we are consenting to is doing. Thus, the oath or positional duty argument must be backed by an argument that our Constitution is net substantively good, or at least not net substantively bad. Additionally, one might invoke arguments of the systemic, consequentialist sort for why an official oath of office properly binds an official to the Constitution.

Although I am not entirely sure, I believe Seidman's view would be that our Constitution is not, as a wholesale matter, sufficiently good or just to ground obligation for officials. I do not have a developed view on whether our Constitution is net positive or negative in terms of its goodness or justness. I do, however, have a view about higher versus lower law generally, that is, about constitutionalism conceived synchronically rather than diachronically. It makes sense for a nation to impose both structural and rights rules and limitations on itself and to try to live up to them. We can do this at any and every slice of time, by reasoning about the purposes of our constitutional order, taking into account history and precedent but ultimately relying on justificatory argument. In other words, constitutionalism need not be seen as a people binding itself over time, but rather as binding itself to principles of political justice, worked out and applied within a particular polis, and constraining everyday politics, as shaped by the specific constitutional text, binding on the officials who legislate, execute, and adjudicate pursuant to that text.

Throughout his book Seidman is concerned that attention to the Constitution distracts us from serious argument about what we ought to do and from proper national discussion of principles of political justice (among other things). He does, however, believe the Constitution can play a framing role in these

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<sup>28</sup> HEIDI M. HURD, *MORAL COMBAT* 118-19 (1999).

<sup>29</sup> Michael J. Sandel, *Commentary: Covenant and Consent*, in 1 *THE JEWISH POLITICAL TRADITION* 30, 31 (Michael Walzer et al. eds., 2000).

national discussions: “The Constitution could be a symbol of national unity,” writes Seidman, “if we focused on its commands at the most abstract level. . . . The Constitution might provide us with a common vocabulary we could use to discuss our disagreements.”<sup>30</sup> This does not yield constitutional obligation, says Seidman, because that kicks in only if we believe the Constitution demands *X* but our all-things-considered judgment would demand not-*X* (or *Y*).<sup>31</sup> “[E]veryone can support their political agenda by referring to constitutional ideals at the most abstract level,” Seidman continues.<sup>32</sup> “If the Constitution allows all of us to do whatever we want to do, then the problem of obedience never arises.”<sup>33</sup> On my argument above, though, officials would be obligated to follow the constitutional text, if a separate case could be made that there are good reasons to bind officials to their oaths. That obligation would be present at a wholesale level, before we get to the retail questions of which provisions are independently defensible as a matter of political justice. For many of the most contested, abstract provisions – equal protection, due process, freedom of speech, and so forth – Seidman’s view and my view would not be that different, because both of us reject binding current interpreters to past sources of meaning. Moreover, both of us believe that the abstract provisions properly shape present-day discussions. Officials would be obligated, I am arguing, to constrain their decisionmaking by these abstract provisions (and by other provisions), but not by any particular interpretation of those provisions.

What about citizens? We do not have a general moral duty to obey the law, I have argued.<sup>34</sup> Here I am talking about ordinary laws that create primary conduct duties. Do we have a moral duty, an obligation, to obey the Constitution? Other than the Thirteenth Amendment, what would that even mean?

Some of us accept the Constitution as authoritative, as ours, as governing. In other words, some of us take the “internal point of view” regarding the Constitution.<sup>35</sup> Or as Hart put it: “[Acceptance] consists in the standing disposition of individuals to take [patterns of conduct regularly followed by most members of the group] both as guides to their own future conduct and as standards of criticism which may legitimate demands and various forms of pressure for conformity.”<sup>36</sup> As Hart argued, this kind of citizen acceptance is not necessary for a legal order to exist.<sup>37</sup> What is the connection between

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<sup>30</sup> SEIDMAN, *supra* note 6, at 8.

<sup>31</sup> *See id.* at 7.

<sup>32</sup> *Id.* at 8.

<sup>33</sup> *Id.*

<sup>34</sup> *See* GREENE, *supra* note 1, at 35-113.

<sup>35</sup> For a discussion of Hart on the internal point of view, see *id.* at 90-91.

<sup>36</sup> HART, *supra* note 20, at 255. For a helpful discussion, see COLEMAN, *supra* note 24, at 74-83.

<sup>37</sup> *See* HART, *supra* note 20, at 60-61, 116. This has led some to the concern that under

citizen acceptance and political obligation? Nothing, I would say, following Hart.<sup>38</sup> He wrote that those who “accept the authority of a legal system” and who thereby “look upon it from the internal point of view . . . are not thereby committed to a moral judgment that it is morally right to do what the law requires.”<sup>39</sup> Moreover, some rules “establishing duties or providing reasons for action,” wrote Hart, “may be accepted simply out of deference to tradition or the wish to identify with others or in the belief that society knows best what is to the advantage of individuals. These attitudes may coexist with a more or less vivid realization that the rules are morally objectionable.”<sup>40</sup> Thus, citizen acceptance may simply involve a sociological fact of treating the Constitution as the relevant, salient document constructing the basic legal order. That is, citizens may adopt an internal point of view about the Constitution as their own. In other words, following the definition set forth above, citizens may see the Constitution’s norms as guides to their own conduct (to the extent we can construe the Constitution as guiding private conduct) and as providing standards to critique others (certainly officials and perhaps even other citizens). Some citizens may further believe that obligation – to the Constitution? to the laws made thereunder? – follows, and perhaps such a feeling of loyalty can predicate a kind of political or constitutional obligation. But we should be careful about extending psychological notions such as acceptance or loyalty to

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Hartian logic, versions of popular constitutionalism that include citizen interpretation would be excluded. *See, e.g.*, Stephen Perry, *Where Have All the Powers Gone? Hartian Rules of Recognition, Noncognitivism, and the Constitutional and Jurisprudential Foundations of Law*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 295, 300 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (discussing Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 *Nw. U. L. REV.* 719, 720-29 (2006)). I do not think this is right. First of all, Hart was focused on how we identify valid law, not on how we interpret it. Second, even if official, and not citizen, acceptance of rules of validation (and we could add *arguendo* these include methods of interpretation) is required for something to be a legal system, that does not preclude societies from having a practice in which citizens participate in making and/or interpreting law. Hart says only official acceptance is necessary, but he does not say rules of recognition may not include citizen participation; nor does he say that citizens may not accept and be guided by such rules. Adler rejects this reading of Hart, *see* Adler, *supra*, at 733, but nowhere does Adler say Hart explicitly rejects the view I have advanced here. Hart was focused on the minimal conditions for a legal system to exist, not on the more robust possibility of a complex relationship between officials and citizens in determining legal validity and meaning. Adler and Perry also point to passages in which Hart focused on rule of recognition acceptance by courts, *see id.* at 723 & n.10; Perry, *supra*, at 302-05, while acknowledging that elsewhere Hart included all officials, *see* Adler, *supra*, at 723 & n.11. But Hart does not say that for a legal system to exist only courts need accept rules of recognition; he is focused on this, but does not exclude other officials. *See* HART, *supra* note 20, at 116.

<sup>38</sup> For a discussion of this point, see GREENE, *supra* note 1, at 91-93.

<sup>39</sup> HART, *supra* note 20, at 203 (emphasis omitted).

<sup>40</sup> *Id.* at 257.



a conclusion about obligation in the normative sense. Even if we may, in some instances, move from acceptance or loyalty to obligation, this will hold for only some and not all citizens. As Raz puts it, respect for law, which “arises out of a sense of identifying with or belonging to the community,” grounds only a “quasi-voluntary obligation.”<sup>41</sup> It does not “establish the existence of a general obligation to obey the law. For good or ill there are many who do not feel this way about their country, and many more who do not feel like this about its formal legal organization.”<sup>42</sup>

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In chapter three of his book – “The Banality of Constitutional Violation” – Seidman sets forth several arguments for the proposition that we already live in a nation with widespread constitutional violation and that we are doing okay nonetheless. Thus, he writes, we need not fear adopting a Seidmanesque position on constitutional disobedience. One of his arguments is that Supreme Court Justices disagree about what the Constitution means – either in a given case or over time when the Court overrules precedent – and thus, “even if we cannot know *which* cases involve violations, we can be certain that *some* of them do.”<sup>43</sup> Seidman acknowledges that these are not deliberate departures from the Constitution; rather, “someone, some of the time, is violating the Constitution in the sense that he or she is taking actions inconsistent with its requirements as properly understood.”<sup>44</sup> But all Justices are trying to apply the Constitution as they best understand it, and the Court as an institution sets forth in its rulings what it believes the Constitution means. Constitutional disobedience is occurring only from someone’s point of view (the dissenters, or the current Court’s view of precedent now considered erroneous). If a Justice or Justices or even the Court misinterprets the Constitution, this is not the same thing as deeming the Constitution nonbinding or irrelevant, which would be the result of a categorical constitutional disobedience.

Seidman makes the same point about departmentalism,<sup>45</sup> that is, the idea that all members of the federal government should interpret the Constitution in carrying out their designated tasks. Sometimes this means that political actors will fail to follow what the Court says the Constitution means. But this is not constitutional disobedience. It is not even disobedience of the Court if the actors respect judgments in individual cases but deem Court precedent nonbinding (as I have argued should be the case).<sup>46</sup> Again, what we have here

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<sup>41</sup> Joseph Raz, *The Obligation to Obey: Revision and Tradition*, in *THE DUTY TO OBEY THE LAW: SELECTED PHILOSOPHICAL READINGS* 159, 173-74 (William A. Edmundson ed., 1999).

<sup>42</sup> *Id.* at 174.

<sup>43</sup> SEIDMAN, *supra* note 6, at 67.

<sup>44</sup> *Id.*

<sup>45</sup> *See id.* at 74-82.

<sup>46</sup> *See* GREENE, *supra* note 1, at 52-56, 215 (“[A]lthough the Court’s holding in a specific

are different points of view on what the Constitution means. That some may be right and others wrong does not amount to deeming the Constitution nonbinding or irrelevant or otherwise not worthy of obeying, even in the form I endorse above – official obligation to follow the Constitution as a document or text, not any particular interpretation of it.

Perhaps Seidman is on to something, however, when he says that when we follow precedent we sometimes do so instead of following our best understanding of the Constitution, for anti-chaos purposes.<sup>47</sup> Similarly, a government official may decide, for stability reasons, not to follow his or her best understanding of the Constitution, but rather to defer to the Court or other purportedly authoritative interpreters. That is, an official may choose to depart from departmentalism rather than practice it.<sup>48</sup> In these two settings it seems more plausible to argue that an official is engaging in constitutional disobedience, allowing (purported) settlement virtues to override what (he or she believes) the Constitution means.

A few points on this: First, does it help Seidman's larger argument, that constitutional disobedience is a good thing? His general point is anti-settlement, and precedent-over-best-reading is a pro-settlement position, as is anti-departmentalism. In other words, Seidman's proof of the banality of constitutional violation – and thus a ground for an argument that we should not be so concerned about the unsettling nature of constitutional disobedience – turns centrally on some supposedly well-engrained tendencies toward settlement. Is there an internal contradiction in the argument here?

Second, perhaps the systemic/consequentialist argument is intra-constitutional, that is, part of what we think about when we think about interpreting/applying the Constitution. Thus, for example, when an official considers following her best interpretation of the Constitution versus Court precedent that goes the other way, and considers a reason for doing the latter to be the virtue of the stability of the constitutional order, we might properly think of that as one constitutional value trumping another, not as constitutional disobedience.<sup>49</sup>

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In her essay for this symposium,<sup>50</sup> Khiara Bridges expresses concern with the interpretive challenges to *Roe*<sup>51</sup> and *Casey*<sup>52</sup> that might ensue in a world in

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case must be final and binding in the case at bar for it to constitute a check on the political branches, this checking function need not extend to a broader conception of precedential bindingness.”).

<sup>47</sup> See SEIDMAN, *supra* note 6, at 85-89.

<sup>48</sup> See *id.* at 82.

<sup>49</sup> For more on this, see GREENE, *supra* note 1, at 199.

<sup>50</sup> Khiara Bridges, *Abortion Access in an Era of Constitutional Infidelity*, 93 B.U. L. REV. 1297, 1297-98 (2013).

<sup>51</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

which constitutional precedent were considered nonbinding, as I argue it should be. In his essay for this symposium,<sup>53</sup> Jay Wexler wonders whether my argument for accommodating all comprehensive sources of normative authority that compete with the state, non-religious as well as religious – at least as a prima facie matter, subject to a balancing test – might lead to a world in which even someone who centers his life around the New York Giants football team might be due some accommodation for his practices. In different ways, Bridges and Wexler make a similar move – rule-ness is a comfort; the refusal to abide by rules leads to anxiety, the anxiety of (supposed) disorder. On Bridges’ view, without stable, or at least presumptively binding, constitutional precedent, rights (such as abortion rights) are in jeopardy. Following Wexler’s argument, without some cabining of accommodations (to religious ones, which at least have a textual and historical basis),<sup>54</sup> everyone will become a law entire unto himself or herself, or at least everyone with a commitment of the sort the football fan has in the film Wexler discusses.

I reject the lure of rule-ness and believe the anxiety of disorder is mostly artificial. Wanting more stable and settled rules is both dangerous and a pipe dream – both in the interpretive setting, for example, precedent, and in the setting of primary conduct rules, for example, either that everyone should have to follow the laws of the state (perhaps subject to override in exigent circumstances), and thus even a system of religious accommodations is too unruly, or that if we are to have a system of accommodation, it should be limited to religious individuals. Furthermore, a focus on the supposedly stabilizing virtues of precedent and on asking us all to follow the law despite our conflicting norms improperly centralizes authority. I will briefly discuss each of these points – the dangerousness of rules, that their stability is ephemeral, and an endorsement of a more pluralistic approach to both interpretive and primary conduct norms.

Settlement is alluring, but deceptive and obscuring. One way of understanding the multiple repositories of power structure of the U.S. constitutional order is to see it as the instantiation of an anti-settlement position. That we usually do not trust any branch of government, level of government, or official, to have unchecked power properly reflects the core notion of citizen sovereignty. We delegate our sovereignty but it must be retained; seeing power as located outside ourselves is a danger; keeping such

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<sup>52</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845-46 (1992).

<sup>53</sup> Jay Wexler, *Some Thoughts on the First Amendment’s Religion Clauses and Abner Greene’s Against Obligation, with Reference to Patton Oswalt’s Character “Paul from Staten Island” in the Film Big Fan*, 93 B.U. L. REV. 1363, 1367-68 (2013).

<sup>54</sup> Wexler correctly notes that in prior work I limited the argument for mandatory constitutional exemptions to religious ones, and that in my current book I reiterate a version of that claim, but as a “stand-alone argument: one could reject it and accept the foregoing case for state recognition of permeable sovereignty; conversely, one could accept it while rejecting all or pieces of the foregoing.” GREENE, *supra* note 1, at 149.

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repositories of power fractured, unsettled in this way, helps advance citizen sovereignty. Saying we must defer to precedent, or must accept law as binding in plenary fashion and not subject to a plethora of accommodations, risks an inversion of authority, from us to our delegates.<sup>55</sup>

Moreover, neither precedent, as interpretation of the Constitution, nor a less forgiving set of primary conduct rules, can achieve real stability. The former is notoriously true: Think of all the constitutional overruling the Court does, paying mere lip service to precedent; think of all the Supreme Court nominees who say all the right things about the (defeasible) bindingness of precedent, only to treat it less than seriously when in office. Even on its own terms, a theory of constitutional precedent must account for many things – changed circumstances, distinctions, and new understandings of other aspects of the Constitution or our legal culture more generally. As for primary conduct rules, the stability of a less yielding set of exceptions is won at great social cost, often authoritarian rather than authoritative, with a great risk of real social disorder, offsetting supposed legal order.

These are all arguments against the supposed virtues of rule-ness. But the most important argument against deeming precedent even presumptively binding, and against a view of accommodations that quakes in the face of hypotheticals such as persons who live for their favorite football team, is that a more plural understanding of sources of interpretive authority and of sources of normative authority by which we live our lives is the correct understanding. Especially when we are interpreting the most difficult to interpret parts of the Constitution – such as the Due Process Clause, at stake in the abortion debate – we do better to appreciate all data as evidence of the correct answer, data including history and precedent, to be sure, but including on equal footing as-applied understandings of core concepts of political justice. And if we start with an understanding that all our sources of normative authority are presumptively of equal worth, we will need to engage in the hard, fact-intensive task of weighing the need for any particular exceptionless general rule against the importance, centrality, categorical nature, and so on, of religious and secular positions that compete with those of the state. We will then see hypotheticals such as sports fanaticism not as proof of the virtues of law without exceptions (or with limited, familiar ones), but as points on a spectrum of hard to easy cases, as part of what we must do to recognize the richness of the normative universe in which each of us lives.

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In his essay for this symposium, Professor Seidman offers critiques of arguments in my book about political obligation, political legitimacy, and exemptions.<sup>56</sup> Many of his claims suggest that my arguments display internal

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<sup>55</sup> For a more complete discussion of the dangerous lure of settlement, see *id.* at 101-07.

<sup>56</sup> See Seidman, *supra* note 8. Seidman's analysis does not extend to the second half of my book, on interpretive obligation, and accordingly my comments here are about the first

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tension or inconsistency. In response to these critiques, I first summarize some key aspects of the argument in my book, and then, based on that summary, hope to show that my positions fit together without contradiction.

In *Against Obligation* I argue that we do not have a moral duty to obey the law, even presumptively, as a general matter. Correlatively, the state does not, as a general matter, have a legitimate claim on our obedience to law.<sup>57</sup> Many of the arguments for political obligation turn, at least in part, on a centralizing move – the virtues of the state as a place for common ground support a moral duty to obey the law. That predicate for political obligation is undercut, I maintain, by a separate argument for what I called “permeable sovereignty,” the idea that for many persons, values, norms, and duties derive from sources other than the state, such as religion or cultural group. In my book this (not unfamiliar) argument for values pluralism does not entail an argument against political obligation, and the argument against political obligation does not entail an argument for permeable sovereignty. But the two still work together – the state does not have a morally justified claim that we all obey all laws all of the time (even presumptively), in part because of the weakness of common ground arguments for political obligation, and once we realize that all values, norms, and duties should be considered on par (at least at first blush), we can see that letting people out from under the grips of the state’s law (whenever possible) can properly respect their separate sources of value, norms, and duties. I do not, however, argue for a more thoroughgoing anarchism, which would either deem the state illegitimate through and through or suggest that the state could never justify its coercive authority. Instead, I am careful to argue that my goals are less ambitious – to shift the default position from a presumptive moral duty to obey the law (thus requiring those seeking

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half of my book only.

<sup>57</sup> My book sets forth increasingly thick conceptions of political legitimacy, and argues for the correlativity of political obligation and political legitimacy on the thickest conception. On a thinner conception, I suggest that “a constitution may be legitimate as a framework for governance, but not yield correlative political obligation.” GREENE, *supra* note 1, at 26. This thinner conception might include “conditions of [a constitution’s] acceptance,” “its justness,” or “participatory rights or some combination” – and yet fall short of yielding a moral duty to obey the law and thus fall short of properly backing the state’s demand that we obey the law. *Id.* On this thinner view of political legitimacy, we might have a duty to “support” the constitutional order (in some fashion, which I do not specify) and to “not actively undermine” it. *Id.* But we would not have a duty to obey the law. I fear that Seidman’s critique of this portion of my book, *see* Seidman, *supra* note 8, at 1277, assumes I was discussing the thickest conception; on that reading, much of his critique makes sense. In turn, I perhaps set up this problem by stating in the book that I disagree with Seidman’s (earlier-published) view that political obligation follows from a “satisfactory theory of constitutional legitimacy.” GREENE, *supra* note 1, at 26. I thought he was referring to a thinner conception of political legitimacy (from which I maintained and continue to maintain that political obligation does not follow), whereas he might have been referring to a thicker conception (in which case it seems he and I agree that obligation and legitimacy are correlative).

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accommodation to shoulder a burden of proof in each case) and toward a presumption that the state must justify its claims of legitimate coercive authority law by law or case by case. When the state is able to do so, I argue, political obligation and legitimacy are reinscribed, but at a retail rather than wholesale level.

In his essay, Seidman wonders whether my book argues that a regime of exemptions is sufficient to ground political obligation.<sup>58</sup> He (properly) then rejects that reading, in favor of an alternative (and correct) reading of my book: exemptions “soften the problem but do not eliminate it.”<sup>59</sup> On this reading, Seidman suggests that my argument does not go far enough, and that it goes too far. Regarding my argument not going far enough: Seidman puts this several different ways, all coalescing around the same theme. Seidman says that on the correct “soften but not solve” reading of how my book treats the relationship between exemptions and political obligation (and its correlate, political legitimacy), “objectors who do not satisfy Greene’s criteria for an exemption will have no obligation to obey the law,”<sup>60</sup> “individuals have no obligation to obey commands permeable sovereignty does not cover when those commands conflict with their moral commitments,”<sup>61</sup> and “[t]he result is the creation of a right to exemption in cases where Greene claims that there is no such right.”<sup>62</sup> Using the specific example of a pharmacist whose religious views militate against prescribing abortifacient medication, but who loses a balancing test to a compelling state interest to provide such medication, Seidman suggests that on my logic the pharmacist still has “no obligation to obey the law,”<sup>63</sup> and thus that the “state is acting illegitimately when it insists that the pharmacist obey, and under Greene’s logic is entitled to an exemption after all.”<sup>64</sup> Perhaps the simplest statement of this theme comes earlier in Seidman’s piece, when he writes, again addressing the “soften but not solve” reading of my book, that “individuals outside the realm of permeable sovereignty have no obligation to obey the law,” correlatively “the state acts illegitimately when it punishes these individuals,” and thus “permeable sovereignty indeed covers cases that he claims it does not cover.”<sup>65</sup>

This set of critiques could be about exemption claimants from religious and other comprehensive value systems, and/or it could be about exemption claimants who lack such a comprehensive value grounding for their claims, but who base the request for exemption on (say) a more amorphous claim of liberty from the state. Regarding the former group, this is where the

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<sup>58</sup> Seidman, *supra* note 8, at 1263.

<sup>59</sup> *Id.* at 1263; see also *supra* note 8.

<sup>60</sup> *Id.* at 1263.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1264.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1258.

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retail/wholesale distinction in my argument regarding obligation and legitimacy is most important. The first half of my book argues against a presumptive general moral duty to obey the law and for a presumptive system of exemptions, creating a partial though incomplete remedy for the state's unwarrantedly demanding our lock-step obedience. The system of exemptions is presumptive only, however, subject to case-by-case balancing to account for the needs of both the claimants and others the state may be seeking to protect. The state may prevail under a careful balancing test; a judge may conclude that obedience to a specific law is generally justified or that obedience in a specific instance is. At that point, the claimant has a moral duty to obey that law (at least in that instance) and the state has a legitimate claim that she do so. Nothing in my book – and, specifically, nothing about my setting up political obligation and political legitimacy as correlative – suggests otherwise, that is, suggests that the absence of obligation and legitimacy persists.

Regarding the latter group, the amorphous liberty claimants, this may not have been the thrust of Seidman's concerns, but it is a related point, and worth covering here. How does my argument against political obligation and legitimacy and for permeable sovereignty/exemptions deal with those who object to obeying a (or the) law from some general libertarian position, not otherwise grounded in a competing set of values, norms, and duties? My book offers one sort of response to this: The "argument against political obligation is made in the context of norms competition,"<sup>66</sup> and forcing someone to obey a law that conflicts with her (say) religious duty is "more severe"<sup>67</sup> than forcing one to obey a law that conflicts with her conception of liberty. I could also have said – and it is not inconsistent to say – that my argument is just about the conflict of duties, and is not about a liberty-based claim for exemptions (and thus, although I have not addressed the matter, one could conceivably develop an argument for exemptions more broadly).<sup>68</sup> Another (not inconsistent) response is that even for the liberty claimants, there is no presumptive political obligation or legitimacy. But the balancing test of state interest against individual interest may well be easier for the state to meet (depending in part on how we answer the question whether liberty claims may stand on similar ground to competing duties claims). On this response, obligation and legitimacy will be reinscribed for liberty claimants as well as for competing duties claimants at the retail, not wholesale level.

Seidman may also be concerned about why we even need an argument for exemptions if the state may not legitimately ask us to obey the law. One response to this is practical: The state asserts its authority, whether or not legitimately so, and we have to deal with that; exemptions help to soften the blow. Another response is that on my argument as laid out above and in the book, the state makes retail as well as wholesale assertions of authority, and

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<sup>66</sup> GREENE, *supra* note 1, at 21.

<sup>67</sup> *Id.*

<sup>68</sup> I gestured at this sort of response. *See id.* at 4-5.

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the retail assertions may possibly be properly grounded, even as the wholesale ones are not. Thus, an exemptions regime that includes a balancing test – of harm to the individual claimant from having to obey a particular law versus harm to others the state claims to be protecting – puts us all back at the proper starting point of whether the state will be able to justify its authority (law by law or case by case), not at the starting point of unjustified general claims of authority.

I turn now to Seidman's arguments about my "soften but not solve" claims going too far. First, he correctly points out that I resist rule utilitarian claims for political obligation in part because of epistemic modesty; the state should be cautious about certainty that it has found right answers. He says that epistemic modesty should similarly make exemptions claimants doubt the certainty of their sources of values, norms, and duties, that is, their defiance of the law.<sup>69</sup> But there is no inconsistency here. My argument is not for an absolute right to exemption, but for a presumptive one, subject to balancing against state interests. This rights the ship from tilting toward the presumption that law is correct; epistemic uncertainty all around will yield a properly balanced vessel of state. Seidman is correct that I have replaced one presumption with another; but since it is the state that claims a monopoly on justified coercion, a premise of my book is that it should bear the burden of persuasion, and not operate from a presumption of correctness.

Second, Seidman maintains that one person's right is sometimes another person's harm.<sup>70</sup> One cannot disentangle obligation claims from merits claims, he says; a system of exemptions "cannot be trans-substantive because it forces us to choose between conflicting moral claims"; "[a] thoroughgoing opponent of legal obligation would embrace this point," but I cannot because I want us to "obey the system of exemptions" that I favor.<sup>71</sup> My response is that we do not properly balance exemptions versus states' interests by assessing the morality at stake in the conflicting moral claims; we do not award an exemption, say, to a minority religious group because we determine that the religious group's claim of truth is correct. Rather, we assess matters such as the centrality and obligatory nature of the religious duty at stake and determine the importance to the state in uniform enforcement of the law in question. Of course we must have a theory of what counts as a cognizable harm or cost; that is one of the great difficulties of liberal democratic political theory. In the book, I do not delve into how to do this. (That would take another book, or two!) But at least we can acknowledge that it should involve hearing from all sides and adjusting, not simply relying on a centripetal/majoritarian notion of harm/cost.

This connects to Seidman's next argument, from economics: exemptions will incentivize people to have religious (and other) commitments.<sup>72</sup> We

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<sup>69</sup> Seidman, *supra* note 8, at TAN 29-31.

<sup>70</sup> *Id.* at 1265-66.

<sup>71</sup> *Id.* at 1266.

<sup>72</sup> *Id.*



should insist people give up something in return.<sup>73</sup> He does not want permeable sovereignty claimants to get a free ride with their exemptions.<sup>74</sup> He rejects the argument from my book that religious (and other) minorities are already giving up lots in return.<sup>75</sup> Perhaps we just disagree about this; my contention is that minority groups with normative systems of value and duty (religious, cultural, ethnic, family, tribal, and so on) are living constantly with having to accommodate society's norms (often instantiated in law) as to which the minority groups will not get a break (even in my system of exemptions), for various reasons, including second-order ones such as coordination and solving collective action problems, that are weighty enough to provide a compelling state interest but still impose significant costs on the minority groups.

Finally, Seidman argues that to best respect those who adhere to sources of normative authority other than the state, we should punish them.<sup>76</sup> Using the state's tools to balance and resolve exemptions claims "corrupt[s]" religion, "normalize[s]" it, "defang[s]" it.<sup>77</sup> To which I say: That the arbiter must account for various rights-holders and other state interests and balance is hardly a corruption of religion (or other comprehensive belief system). It is a nod to Seidman's earlier point regarding rights conflicts and is an attempt to see, via the terms of the various rights-holders, what is at stake and to achieve some harmony, which the state in theory is trying to do anyway. I have just recalibrated the default starting points. The religious (or similarly situated secular) believer can refuse legislative accommodations and judicial exemptions and succumb to law. Or she can seek partial exit, which will entangle the state to some extent in understanding the religious claim, but at the believer's behest. This is a kind of waiver argument. We need not defang an odd (to many of us) minority belief to give it breathing room.

Much of Seidman's concern is that I seem to want it both ways – to argue against political obligation and legitimacy, but suggest conditions for its (partial) success; to argue for exemptions, but suggest why they must be limited. Indeed: Both ways is the only way I want it.<sup>78</sup>

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1667-68.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 1269.

<sup>77</sup> *Id.* at 1270.

<sup>78</sup> See MAILE MELOY, BOTH WAYS IS THE ONLY WAY I WANT IT (2009).