
WHY NOT JUST SAY NO? AN ESSAY ON THE OBDURACY OF CONSTITUTION FIXATION

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INTRODUCTION

A. *A Dog That Does Not Bark*

Speaking of constitutional connections to America’s political dysfunction, what about this? Our troubles might stem – not entirely, of course, but significantly and crucially – from the very striving of our politics to hold public policy hostage to a higher legal code of prefixed limits and demands, the one we call the Constitution. The first and foremost constitutional connection of America’s political dysfunction might be constitution fixation itself. If so, then the path to a cure must lie through kicking the constitution habit, or at any rate drastically toning it down.

Within our current conversations, that should register as no wild or unheralded suggestion. Recent scholarship from leading authors, including contributors to this Symposium, is thick with suggestions for the relief of American politics from harms and burdens of constitutional subjection just as such. Proposed remedies range from a turn towards broadly idealized or instrumentalized modes of constitutional interpretation,¹ to institutional

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¹ See David Lyons, *Professed Values, Constructive Interpretation, and Political History*:

reconstruction (affecting, say, the role and conduct of the Supreme Court),² to a stepped-up reliance on ground-level social mobilizations to preempt the constitutional-interpretive choices of courts and other official bodies,³ to a more-or-less complete takeover of constitutional-constructive work by legislatures and voters,⁴ to – at the outer edge – expressions of doubt about the value of the constitutional project *tout court*⁵ and proposals to Americans that they should simply and systematically “ignore the Constitution.”⁶ Despite their saliency and vigor in the scholarship surrounding us, these counterconstitutional thematics (as I name them) are mainly absent from our Symposium. Contention over interpretive methods makes its appearance here⁷ and so does the social-movement “talking cure.”⁸ The rest – and most glaringly

Comments on Sotirios Barber, The Fallacies of States’ Rights, 94 B.U. L. REV. (forthcoming July 2014) (manuscript at 2) (commenting on constitutional-interpretive approaches designed to idealize our constitutional commitments); Robin West, *Constitutional Culture or Ordinary Politics: A Reply to Reva Siegel*, 94 CALIF. L. REV. 1465, 1483 (2006) (questioning constitutional-legal discourse for its inattention to social consequences); *infra* notes 41-48 and accompanying text.

² See *infra* notes 33, 50-51 and accompanying text.

³ See *infra* notes 35, 51 and accompanying text.

⁴ See *infra* notes 25, 51 and accompanying text.

⁵ See Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241, 244-46 (1993) (reporting suggestions that “the Constitution itself is a part of the problem, that constitutional constraints are themselves in some way incompatible with the pursuit of right and justice,” and that “the value of constitutionalism itself” is accordingly up for serious reconsideration); West, *supra* note 1, at 1466, 1476 (advising American political progressives to “curb [their] inclination[s] to cast political views and values in the framework of constitutional argument” and indeed to question “the entire enterprise of seeking constitutional meaning”).

⁶ LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 5 (2012) (asking Americans to consider why they should not “systematically ignore the Constitution”). Some may doubt how literally we are meant to take this advice. See Jeremy Waldron, Book Review, *Never Mind the Constitution*, 127 HARV. L. REV. 1147, 1159-61, 1168-69 (2014) (reflecting on whether Seidman “can . . . possibly” mean that a practice of submission to constitutional law “in itself is systematically a bad thing,” *id.* at 1168-69); see also Louis Michael Seidman, *Why Jeremy Waldron Really Agrees with Me*, 127 HARV. L. REV. F. 159, 160 (2014), <http://harvardlawreview.org/2014/02/why-jeremy-waldron-really-agrees-with-me>, archived at <http://perma.cc/5TF3-EWDP> (responding that the focus of his book is on constitutionalism in the United States and that “the worth of constitutions and of constitutional law must be judged contextually”).

⁷ See Michel Greve, *Fallacies of Fallacies*, 94 B.U. L. REV. (forthcoming July 2014) (manuscript at 1) (reviewing SOTIRIOS A. BARBER, *THE FALLACIES OF STATES’ RIGHTS*) (“Professor Barber thinks in terms of constitutional aspirations, derived from the Constitution’s capacious Preamble. I am more concerned with who can do what to whom under the Constitution’s operative provisions, and skeptical of Marxist-Brennanist theorizing that mows down the legal text and structure.”).

⁸ See Ken I. Kersch, *The Talking Cure: How Constitutional Argument Drives*

the cold-turkey prescription to simply kick the habit, to just say no to the Constitution – are mute.

The articles here address topics of diagnosis and cure. Which effects count as systemic breakdowns? How should we measure their gravity? Which specific features in the Constitution – affecting rights, political structures, or other aspects of constitutional design – call most urgently for reconsideration? What are the available tactics and strategies of repair and how do we rate them for utility? These topics, which occupy our pages, can all assume without question the continuation of the reign of the Constitution – the Constitution as is or as revised, but still the Constitution and still fully in charge. What seems lacking is pitched debate about whether the country has got right its ideas about the proper place and role of the constitutional instrument – or any realistically conceivable modification of it – in the conduct of its politics. The counterconstitutional voice has gone missing. That observation prompts my reflection here.

Explanation might seem easy, had our Symposium been exclusively focused on the Constitution’s “thick” or “hard-wired” provisions for political structures and procedures – as distinguished, that is, from its rights-based and other limitations on the permissible substance of legislation.⁹ While some of us might look with trepidation on the prospect of life without these substantive limitations, we can all easily imagine such a possibility. It is much harder to explain how we could get along without *something* in the place of the hard-wired parts of our fundamental law. If we reject the original equipment then replacements must be found, and we can hardly escape questions about what those ought to be. Our Symposium, though, has not been confined to the hard-wired constitutional parts. It includes numerous contributions laying blame for dysfunction at the door of one or another substantive limitation or current judicial constructions of it.¹⁰ Some of those contributions propose improvements in the way we handle the problematic clauses. None that I can see responds with suggestions of refusal to pay those clauses heed, or to take them seriously as laws meant to govern according to their terms, or to accept dictation of the meaning of those terms from any source save certifiably democratic political action deciding on the spot.

The reticence I point to might be just a matter of following suit or staying on message. Diagnoses of excessive constitution fixation operate on a different,

Constitutional Development, 94 B.U. L. REV. 1083, 1088-92 (2014) (making the case that constitutional development responds to changes in regnant discursive regimes).

⁹ See SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 29 (2006) (drawing the distinction); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 9-10 (1999) (making a similar distinction).

¹⁰ See, e.g., Robin West, *A Tale of Two Rights*, 94 B.U. L. REV. 893 (2014) (contending that the problem with American constitutional rights talk lies not with the very idea of rights, but rather with the emergence of “exit” rights as the dominant form of constitutional rights, and the correlative suppression from that category of “civil” rights).

more radical plane – they differ in tone and spirit – from those that trace American political dysfunction to specific, presumably corrigible defects in the Constitution as currently written and read. For the sake of thematic unity, then, a joint effort like this Symposium might tend to draw its participants all onto one critical track or the other, meliorist or rejectionist, whichever gets early established. The dominant discourse occupies the field. The retail crowds out the wholesale. Reform cuts off resistance.

It may be hard to refrain from putting in your reformist two cents while reformist debate is surging all around you, the order of the day. But resistance-minded critics could find perfectly good and logical reasons for proceeding on both tracks at once, retail and wholesale. Perhaps if the country tried (they might say), it could succeed in loosening or lightening the constitution habit, but probably not in kicking it entirely. Given that obviously nontrivial likelihood, it behooves us also to keep working toward relief from constitutional malignancies and stupidities.¹¹ So it is far from logically precluded, and it might well be rhetorically advisable, to proceed along both tracks at once: protesting against the advent of constitutional “exit” rights¹² even as one also mounts a critique of the constitution habit *tout court*.

B. *Legitimation Crisis?*

Thus I push on with this rumination about the relative silence in these pages of the counterconstitutional voice. Might there be something more to it, I wonder, than mere accident? In particular I want to see what might be learned by focusing the inquiry on a deeply persistent American thoughtway to which I give the name of legitimation by constitution.¹³

By the term “legitimation,” I mean the social, communicative processes by which a country’s people sustain among themselves a sense of assurance of the overall deservingness of its political regime of general and regular support – even as they may also be confronting facts of widespread doubt or disagreement, some of it profound, about the justice or wisdom of this or that law or combination of laws. For a political company claiming to prize each member’s full and equal claim to freedom and responsibility, legitimation represents a moral-cultural as well as a practical need. It is a matter not simply of securing a regularity in fact of people’s acceptance of the state’s authority, but of sustaining across the society a mutual assurance of merit in the state’s claim to an authority that is acceptable on terms, and for reasons that “all citizens as free and equal may reasonably be expected to endorse.”¹⁴ Failure of

¹¹ See generally CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (William E. Eskridge, Jr. & Sanford Levinson eds., 1998).

¹² See West, *supra* note 10, at 897-905.

¹³ See *infra* Part II. I develop this notion more thoroughly in other work, although not under the same name. See Frank I. Michelman, *Ida’s Way: Constructing the Respect-Worthy Governmental System*, 72 FORDHAM L. REV. 345, 346-47, 351-58 (2003).

¹⁴ JOHN RAWLS, POLITICAL LIBERALISM 137, 217 (1993) (proposing a “liberal principle of

legitimation here would void our moral license to carry on, each one, with our little, daily, unremembered acts of express and implicit support for the American state's claim upon its citizens for a general disposition to comply with its laws.

As I will suggest, Americans rely on the Constitution, and the supposition of fidelity to it, for legitimation of the American state. While we need not necessarily, at the beginning, have placed our legitimation eggs in the constitution basket, that is in fact what we have done, for reasons not in themselves discreditable. Such, at any rate, is the thesis on which I proceed.¹⁵ Acceptance of it would apparently rule out kick-the-habit as a plausible, practical proposition for the cure of current acute American political-systemic distress, and thus might help explain the silence of the counterconstitutional voice in these pages. I hope not, though, because, as I suggest toward the end of this Essay, there are reasons to think that a persistent cultivation of the counterconstitutional impulse not only fits logically with the pursuit of legitimation by constitution, but also might contribute positively toward success in that pursuit.¹⁶

I. LEGITIMATION BY CONSTITUTION: THE GENERAL IDEA (FIRST PROCEDURALIZATION)

Americans take for granted both the moral and practical necessity of an effective legal system. We think that stable, effective, social ordering by law is an indispensable requirement for any decent form of human social coexistence. Americans are, furthermore, minded to think that the stability of our legal order depends on a general expectation of regular (not perfect) compliance with the order's duly issued laws by approximately everyone, regardless of immediate personal cost or opinion. We might be sometimes prone to take the

legitimacy"); see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005) ("In the Weberian sense, legitimacy signifies [a belief by citizens] that [the state's] claims to authority deserve respect . . . for reasons not restricted to self-interest.").

¹⁵ *But cf.* Louis Michael Seidman, *Constitutional Skepticism: A Recovery and Preliminary Evaluation* 4-5, 7 (Jan. 28, 2014) (unpublished manuscript, *archived at* <http://perma.cc/W8RT-GXP3>) (describing, documenting, and analyzing a rich history of challenges by American constitutional skeptics to "the goodness, enforceability, legitimacy, and workability of the Constitution" – amounting, in sum, to "doubts about whether moral and political disagreement can be bridged by a legal text" – while also concluding that the skeptical stance today stands "far outside the mainstream" of American attitudes toward the Constitution).

¹⁶ See *infra* Part V. That view puts me, I believe, on the same page (writ large enough) with Mark Tushnet. Mark Tushnet, *The Relation Between Political Constitutionalism and Weak-Form Judicial Review*, 14 GERMAN L.J. 2249, 2263 (2013) ("I have suggested that weak-form review is compatible with – and may even be functionally desirable for – a system of political constitutionalism.").

point to extremes,¹⁷ but few would deny the reality and gravity of society's interest in sustaining across the population a prevailing inclination toward law-abidingness.¹⁸

Democracies decide on potentially coercive laws and policies by majorities in divided votes. In conditions where citizens disagree about whether this or that law, or combination of laws, really does measure up to demands of justice and prudence, but none of the contenders can honestly and cogently deny the reason or sincerity of all the opposing views, that looks like an imposition on the free moral agency and responsibility of dissenters. How can citizens hope to justify to one another these impositions? The constitutionalist answer is: By a proceduralization of the question – a diversion of it from one frame of inquiry (is this law good and right?) to another (is this law constitutional?) where we expect the answers to be more readily at hand.¹⁹ You or I may love or hate this law or that one, but we can still propose to ourselves and each other that, as long as our country's constitution sets up institutions of political democracy, and as long as it furthermore guarantees respect for certain basic rights and interests of persons, then this kind of rightness in the constitutional laws allows each of us reasonably to expect from each other a general disposition to comply with all the further laws that issue in accordance with that constitution.²⁰

It is this proceduralizing idea to which I give the name of “legitimation by constitution.” If the Constitution contains the requisite “essentials” (to use an expression of John Rawls²¹) – if it is, as we might say, a “legitimation-worthy” constitution – then the fact (assuming it is one) that the country's practice of

¹⁷ See ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* 96-99 (2012) (calling for clearer recognition of the system's resiliency to occasional acts of conscience-driven defiance of the laws).

¹⁸ Certainly Professor Greene does not deny it. He calls that interest “strong.” *See id.* at 96. He says it merits substantial weight in every citizen's “calculus of right action.” *Id.* at 99. What he denies is the sufficiency of that interest to ground a strict, exceptionless, personal moral obligation to comply with each and every law just because it is the law and no further questions asked. *See id.* at 96.

¹⁹ See Frank I. Michelman, *Dilemmas of Belonging: Moral Truth, Human Rights, and Why We Might Not Want a Representative Judiciary*, 47 *UCLA L. REV.* 1221, 1234-36 (2000) (explaining this sense of proceduralization and its application to problems of legal controversy).

²⁰ I have been crudely tracking here an account that John Rawls presents as “the liberal principle of legitimacy.” RAWLS, *supra* note 14, at 137, 217 (proposing that majoritarian exercises of coercive political power are justifiable to dissenters, as long as those exercises conform to “a constitution the essentials of which all citizens may reasonably be expected to endorse”). Rawls presents the principle as a normative proposition of political philosophy, but I believe few readers will question its descriptive applicability to prevailing American belief.

²¹ *See id.* at 137, 217, 227-29 (explaining the concept of constitutional essentials).

lawmaking conforms to that constitution provides a sufficient reason to expect and support a general cultural climate of law-abidingness.

Legitimation by constitution may not supply the only possible or the theoretically best answer to the highly urgent question of the ways and means of political legitimation in a (broadly speaking) liberal modern state. It is obviously not a trouble-free solution. (Critics might ask, for example, what licenses the supposition of a societal consensus even at the abstract, constitutional level.²²) Legitimation by constitution might nevertheless figure as a fact of American political culture for which any practical prescription for current political dysfunction here would have to make due allowance. My next point will be that a great deal of prominent, recent, counterconstitutionalist advocacy quite clearly does make such allowance, and so a pressure to do so would not explain its relative silence in this Symposium.

II. COUNTERCONSTITUTIONAL CURRENTS, MAINSTREAM AND EDGE

A. *Evading Scylla (Anti-Constitutionalism)*

Very little recent American legal academic writing²³ suggests a wish to dislodge completely from American political culture its insistence that even our top-ranking officials and lawmakers stand under obligation of fidelity to a set of publicly codified, intelligibly debatable and interpretable norms for the conduct of government business, whose applied meanings may be open to debate but which no official body may simply cast aside on the spot because it seems all-things-considered better right now to do so.²⁴ A rejection of strongly judicialized constitutional control in favor of “political” or “popular” constitutionalism does not nearly amount to a disparagement of constitutionalism per se.²⁵ Neither, quite – although it comes closer – does a

²² See *infra* Part V. I have myself been a critic. See Frank I. Michelman, *Reply to Ming-Sung Kuo*, 7 INT’L J. CONST. L. 715, 724-26 (2009) (proposing a “governmental totality” conception – as opposed to a “constitution-as-contract” conception – of the putatively legitimation-worthy political system); see also Michelman, *supra* note 13, at 347-49, 360-65.

²³ Professor Seidman’s may be the salient exception. See *supra* notes 6, 15, and accompanying text.

²⁴ See Waldron, *supra* note 6, at 1168 (“Everywhere political systems are framed and defined by . . . constitutional law. And we consider it an important part of the rule of law . . . that, until [these provisions] are repealed or amended, [politicians] have an obligation to modify their behavior accordingly.”).

²⁵ See, e.g., LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 227 (2004) (posing, as the crucial question, whether Americans today will reclaim “their right, and their responsibility, as republican citizens to say finally what the Constitution means”); Laurence H. Tribe, Jeremy Waldron & Mark Tushnet, Debate, *On Judicial Review*, DISSENT, Summer 2005, at 81, 81-85 (“[I]f ever we are to be serious about taking back the Constitution from the courts, would not [a] form of weak [judicial] review offer a constitutional democracy perhaps the best of both worlds?” (statement of Jeremy

preference for a “thin” construction and conception of our constitutional law.²⁶ That still retains some work for a publicly legible and binding Constitution – its commands now construed in a spirit of relative abstraction, on the level of aspirations that “everyone” can embrace²⁷ (“liberty,” “equality,” “the common defense,” “a more perfect union”) as “a common vocabulary we could use to discuss our disagreements.”²⁸

There thus remains in play, in what I call the counterconstitutional mainstream, more than a trace of an American penchant for legitimation by constitution. To the instances so far mentioned, we may add the counterconstitutional advocacy of Robin West. Professor West’s critique of American political discourse for its overcommitment to constitutional-legal forms and formats²⁹ comes coupled with her condemnation of a spreading retreat of that discourse from a “constitutional” understanding of law, as “that which limits the power of the state through rules.”³⁰ Judicial allowance of law-free zones where violence goes unregulated (a “nonreciprocal” protection of law)³¹ is, in her words, a “political tragedy,” offensive to an ideal that lies “at the core of legal identity” – namely “civic peace achieved through law.”³²

B. *Evading Charybdis (Constitutional Law)*

What we predominantly find in the counterconstitutional mainstream is not constitutional rejectionism *tout court* but rather objection to excessive domination of our constitutional politics by the technical discourses of constitutional-legal insiders. Counterconstitutional corrective strategies are various. They range from the abolition of judicial constitutional review, to toleration of it when stripped of supremacist pretensions,³³ to a thinning down

Waldron)).

²⁶ See, e.g., SANFORD LEVINSON, CONSTITUTIONAL FAITH 191-94 (1988) (accepting the Constitution on the understanding that it all comes down to a commitment to “tak[e] political conversation seriously”); TUSHNET, *supra* note 9, at 11 (“We can think of the thin Constitution as its [bare] fundamental guarantees of equality, freedom of expression, and liberty,” stripped of encrustation by court-made doctrine); Frank I. Michelman, *Faith and Obligation, or What Makes Sandy Sweat?*, 38 TULSA L. REV. 651, 666-67 (2003) (reflecting on how razor-thin the “political conversation” understanding of the Constitution would be).

²⁷ SEIDMAN, *supra* note 6, at 142.

²⁸ *Id.* at 8.

²⁹ For numerous instances, see *supra* note 5; *infra* notes 36-37, 39-40.

³⁰ Robin West, Lecture, *Reconsidering Legalism*, 89 MINN. L. REV. 119, 145 (2003).

³¹ *Id.* at 140. A case in point for West is *DeShaney v. Winnebago County Social Services Department*, 489 U.S. 189, 195-96 (1989), which denied the existence of a constitutional right to protection against violence. See West, *supra* note 30, at 139 (comparing the facts and outcome in *DeShaney* to a quasi-Hobbesian state of nature).

³² West, *supra* note 30, at 141.

³³ See, e.g., KRAMER, *supra* note 25, at 249-53 (endorsing “judicial review without judicial supremacy”); Tushnet, *supra* note 16, at 2249-50 (favorably comparing nonsupremacist, “weak form” judicial review with abolition, as a preferred design feature

of constitutional-legal meaning to a point at which it imposes hardly any constraint on politics that its proposers (or, in their view, Americans at large) cannot happily and confidently endorse.³⁴ Importantly, and to a somewhat opposite effect, the mainstream strategies also include resort to sustained mobilizations of ground level politics, aimed at effective resolutions of contested constitutional meanings as societal *faits accomplis*, outside of and anterior to any submission of them to professionally specialized forums of constitutional inspection.³⁵

Putting the whole package together, it seems the devil lies not in constitution talk per se but in a prevailing reduction of it to technocratic searches in the Constitution for unrealistically detailed, prescribed answers to questions demanding more open-ended forms of consideration. Constitution talk *in that form* can divert attention and wisdom from the real issues at hand, opening the way to arbitrary choice under cover of legalist technique and sleight of hand.³⁶ It can truncate political vision and limit reformist possibility.³⁷ It can induce

for systems aiming to combine limited government with popular-political control of constitutional interpretation); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1354 (2006) (stating that the target of his objection is strong-form, not weak-form, judicial review).

³⁴ See LEVINSON, *supra* note 26, at 193 (focusing on the “fluidity” of the Constitution and arguing that it commits Americans “not to closure but only to a process of becoming and taking responsibility for constructing the political vision toward which [they] strive” together); TUSHNET, *supra* note 9, at 30-31 (explaining how under a thin Constitution, disagreement on policy does not lead to disagreement on democracy and the processes embodied in the Constitution).

³⁵ See, e.g., Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323 (2006) (presenting a classic study of the power of social movement activity to produce and to alter regnant constitutional interpretations).

³⁶ See Waldron, *supra* note 33, at 1353, 1381 (objecting that “the words of each provision tend to take on a life of their own, becoming the obsessive catchphrase for expressing everything one might want to say about the right in question,” and so a focus on “precedent, texts, and interpretation” distracts from “the real issues at stake when citizens disagree about rights”); West, *supra* note 1, at 1485 (remarking on constriction of social vision and consequentialist sensibility by submission to the authority of court-made doctrine and precedent); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1414, 1428 (2009) (remarking that results possibly obtainable from “adjudication” as opposed to “politics” are limited to those that can be “shoehorned” into existing legal precedent, doctrine, and form).

³⁷ See West, *supra* note 1, at 1471, 1480 (showing how the price of correcting a specific injustice through constitutional litigation might be legitimation of remaining injustice); West, *supra* note 36, at 1406 (expressing concern that reliance on constitutional law to correct a perceived injustice “may come at the cost of legitimating deeper . . . injustices” that constitutional law is not poised to correct); *id.* at 1420 (remarking on the contrast in styles, and the difference in potential for a transformative effect on prevailing political-moral sensibility and vision, between arguments “on the street” and arguments in court); *id.*

submission to professional insiders as ultimate governors over matters of the deepest importance to a supposedly self-governing populace.³⁸ It can destructively brand the losers in good-faith political arguments as would-be deserters from the social contract.³⁹ To those global objections to technicized constitution talk, some would add a local American objection, to the effect that *our* constitutional-legal doctrine has historically become so freighted with substantively objectionable ideological biases that a right-minded politics must try as much as possible to steer clear of the whole shebang.⁴⁰

In sum, granting that more sweeping forms of constitutional rejectionism are also visible in recent academic debates, it seems that what our current company of counterconstitutional advocates have foremost in their sights is not constitution regard at large. Rather it is constitutional-legal technocracy, submission of the country's governance to constitution talk of the kind conducted by lawyers in specialized, expert tribunals, whose evident command of the field naturally brings others – such as legislative committees, journalists and bloggers, college classes on constitutional law – to ape their style. My next step will be to see whether I can restate and generalize a prescriptive program for a political practice that avoids collision with legitimation by constitution, while remaining harmonious with the main line of recent counterconstitutional advocacy.

at 1422 (“Aspirational visions of what justice requires get truncated as they get litigated . . .”).

³⁸ See SEIDMAN, *supra* note 6, at 10 (“When a political actor tells someone ‘you must do this because the Constitution requires it,’ the actor demands that people forsake their own deeply held moral and prudential judgments . . .”).

³⁹ See, e.g., *id.* at 141-42 (“When arguments are put in constitutional terms, they become absolutist and exclusionary. . . . [They] effectively [accuse] . . . opponents of treason. . . . [W]hen we disagree about fundamental values, we must learn to express our disagreements in terms that do not invoke our nation’s supposedly defining commitments.”); West, *supra* note 1, at 1476 (deploring divisive and oppressive results of oppositionists claiming to be in the right – and so the other side is in the wrong – in the sight of the Constitution viewed as an expression of the social-ethical posture of the country as a whole); West, *supra* note 36, at 1427 (suggesting that the one-right-answer setup of constitutional-legal contestation veils possibilities of coalition and reduces the chances of “ordinary politics . . . to achieve common goals”).

⁴⁰ See West, *supra* note 5, at 245 (distinguishing, while also linking, the questions of “the value of the United States Constitution” and “the value of constitutionalism itself”); West, *supra* note 1, at 1466 (proposing as an apt response to the Supreme Court’s “outsized role” in deciding constitutional meanings that we should “curb our inclination to cast political views and values in the framework of constitutional argument”); West, *supra* note 10, at 912 (“Rights themselves are not the problem. Rights that target civil society and the social compact – and do so in the name of the Constitution – are.”).

C. *Contra Stipulative Constitutionalism*

A constitution (in the sense that concerns us here) is a collation of canonically worded, prescriptive sentences. These sentences set mandatory terms of validation for any further purported acts of lawmaking or legal administration by, or by the authority of, the state whose constitution it is. The words and phrases composing these canonical verbal terms may appear more or less open ended, abstract, ambiguous, vague, or otherwise contestable in concrete application. Within some very spacious outer limit, though, it seems we can still always do our best to give them their due *as terms*.

We can strive to follow a two-step procedure when deciding questions of constitutionality. At the first step in this “stipulative” approach (as I name it) to constitutional interpretation, we take up the constitution’s putatively applicable verbal terms and resolve definitional options to a point (or as close to such a point as the language will allow) where the terms as defined will direct a decision of the case at hand. Then, at the second step, we subsume the case under the terms as defined to see whether it fits or not. The first, definitional step will have to be more or less locked into a formalistic usage of materials and tools like dictionaries, historical research (into, say, original public meanings), tests for relevant similarity or analogy between pending cases and past decisions, accumulations of doctrine built up out of the results of such testing over time, and default rules such as the presumed lawfulness of conduct unless and until prohibited by some rule or enactment of law. The formalistic lock-in does not have to be extreme. It must, however, prevail at least to a point where we can honestly say we feel its effects in the resulting run of constitutional applications; for only then can we claim to be relying on *terms* – on the semantic properties of words in sentences – to curb effectively whatever wish we might sometimes feel to have a law or its validity be decided solely by someone’s unbounded consideration of what would be the all-things-considered best or preferred way to proceed with the matter at hand.

Granting that the difference will always be a matter of degree, it seems there is a contrasting approach we can take to making prescriptive sense of the textual constitutional object. We can do so without, as Seidman says, reading it “as a legal document commanding specific outcomes.”⁴¹ We can treat its sentences quite differently, as pointers toward “general aims,”⁴² the more concrete plans and rules for the pursuit of which (or even the exact conception of which) the Constitution has left it to us to specify and respecify, in the

⁴¹ SEIDMAN, *supra* note 6, at 8. Seidman also speaks, apparently equivalently, of “poring over the Constitution as if it were a holy scripture.” *Id.* at 95-96. I take him to have in mind a “protestant” as opposed to a “catholic” attitude toward biblical interpretation, in the distinction employed by Sanford Levinson – “*sola scriptura*” as opposed to reading figuratively through the scrim of an interpretive tradition. LEVINSON, *supra* note 26, at 18-19, 47.

⁴² SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 189 (2007).

conditions and with the experience and wisdom then at hand. These would be aims on the level of “justice, the general welfare, and other goods listed in the Preamble”;⁴³ or perhaps, even more abstractly, “government by reflection and choice,”⁴⁴ or “taking political conversation seriously.”⁴⁵ I will name as “broad-gauged constitutional constructivism” this counterstipulative approach to constitutional interpretation.⁴⁶ Though this approach has a foothold in our constitutional practice,⁴⁷ it remains on the defensive. A more thickly stipulative approach retains its dominance in American constitutional culture; or so, at any rate, critical observers might readily conclude. So perhaps it is a stance of opposition to this prevailingly *stipulative* character of American constitutional practice that might define a counterconstitutional contingent that still decidedly (if not always by miles) steers clear of a contradiction or rejection of legitimation by constitution.⁴⁸

⁴³ *Id.* at 156; *cf. supra* notes 27-28 and accompanying text (detailing Seidman’s account of a “common vocabulary” of “aspirations everyone can embrace”).

⁴⁴ SOTIRIOS A. BARBER, *WELFARE AND THE CONSTITUTION* 113-14 (2003) (tracing a certain proposed construction of constitutional obligation to considerations “rooted either in human nature or conventions deep enough to be normative for the Constitution itself – like self-directed conduct generally and ‘government by reflection and choice’”); *see* THE FEDERALIST NO. 1, at 27 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (speaking of “government from reflection and choice”).

⁴⁵ LEVINSON, *supra* note 26, at 193.

⁴⁶ I do not mean to take sides in a debate between a “constructivist” and a “moral realist” approach to the ascertainment of constitutional meaning. *See* BARBER & FLEMING, *supra* note 42, at 11-12. “Constructivism,” as I use the term here, comes from John Rawls through James Fleming. *See* JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* 62-63, 70-71 (2006) (describing constructivist interpretation as “the exercise of reasoned judgment in quest of the interpretation that best fits and justifies the constitutional document and underlying constitutional order” (internal quotation marks omitted)). I add “broad-gauged” so as to avoid any suggestion of a strict identification of the counterstipulative stance with the distinctively liberal theorization of the American Constitution prominently advanced by Professor Fleming, generically called by him a constitutional constructivism. *See id.* at 62-69 (providing an outline of constitutional constructivism, in parallel with Rawls’ political liberalism).

⁴⁷ *See* James E. Fleming, *Lawrence’s Republic*, 39 *TULSA L. REV.* 563, 567, 570-71 (2004) (describing the Supreme Court’s constructivist rendition of “liberty” in *Lawrence v. Texas*, 539 U.S. 558 (2003), as an elaboration of abstract aspirational principles grounded in the moral progress of “a wider, western civilization,” and contrasting that with the stipulative definition of the same term in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which *Lawrence* overruled, in terms of historically verifiable concrete practices).

⁴⁸ Arguments may now start to fly about whether a “stipulative” constitutional practice can possibly be conducted without overt or covert, witting or unwitting lapse into constructivist supplementation. *See, e.g.,* Stanley Fish, *Fish v. Fiss*, 36 *STAN. L. REV.* 1325, 1328-29 (1984) (“[A]bility to read the rules . . . presupposes an understanding of . . . the ‘deep’ issues that underlie the issue of record [We are able] to read the rule because [we see it] as already embedded in the context of assumptions and practices that make it

I will next run a rough audit on the plausibility of that suggestion. The audit will proceed in three steps. First comes a rough check on whether a prevailing discursive practice of broad-gauged constitutional constructivism can sufficiently avoid the debilitating, corrosive effects on politics that have been a main concern of counterconstitutional advocacy. My answer will be yes. Next, I consider whether a practice that is thin enough (so to speak) to satisfy the first test can still be thick enough to meet the need of legitimation by constitution for an objectively cognizable body of fixed constitutional norms. Again, I answer yes. Finally, I ask whether the resulting position – avoidance of corrosive political effects by interpretive methods that still meet the needs of legitimation by constitution – can satisfy even the most ardent counterconstitutional advocates in our midst. My answer is probably not.

III. COUNTERCONSTITUTIONALISM AND LEGITIMATION BY CONSTITUTION: ENEMIES OR FRIENDS?

A. *Not Too Thick?*

At this step of the audit, my focus is on counterconstitutionalist concerns related to the ways in which acceptance of the rule of the Constitution might harm political debate.⁴⁹ Does legitimation by constitution in itself bring on these evils? One might think it does, because legitimation by constitution fails in the absence of a visible submission to constitutional rule. But let us now review the strategies proposed to avoid or defeat such concerns, in mainstream counterconstitutional advocacy,⁵⁰ and ask which ones repel or take issue with constitutional fidelity.

Certainly rejection of strong-form judicial constitutional review in favor of weak form does not. If not for the sake of its service as an institutional support to the rule of Constitution, to what end is weak-form review retained at all? Not even all-out advocacy of sweeping retirement of courts from the field, in favor of a purely and flatly “political” or “popular” constitutional practice, can avoid that sting. The program still includes the ascertainment of constitutional meaning, apparently in the pursuit of constitutional fidelity (why else?), although by parliamentary or popular-political means that avoid the overhang of law courts.⁵¹ And of course the same applies to counterconstitutional prescriptions for ground-level social movement activity, in preference to an

intelligible . . .”). For my purposes here, it does not matter. If the answer is that Fish is right, that would be all the more (not less) reason to target for critique an American *penchant for* – or call it our pretension to – a stipulative constitutional practice. The evils attached to that practice will follow from the pretension to it, however hollow the pretension might be.

⁴⁹ See *supra* notes 36-40 and accompanying text.

⁵⁰ See *supra* notes 33-35 and accompanying text.

⁵¹ See KRAMER, *supra* note 25, at 237-39 (asserting that Congress may be at least as capable as the Supreme Court of interpreting the Constitution, and in many ways more so).

institutionally specialized interpretive authority, as a preferred means to the saturation of situationally applicable meanings into relatively abstract constitutional verbiage. (Except as an enactment of constitutional fidelity, why should it be a conscription to its aims of *that verbiage* to which social-movement activity directs itself – instead of purely, simply, and directly the cry for justice above all?)

Thus, in sum, both political constitutionalism and the “talking cure” are easily seen as confirmations, not contradictions, of the instinct for legitimation by constitution. Turning the point around: Moves to political constitutionalism amount to rejection, not acceptance, of demands for the total release of democratic political energy from constitutional tutelage. But suppose these moves come along with a thinning down of the constitutional text to the point where it constrains us only by its establishment of a vocabulary for political debate.⁵² After that step is taken, after we have so far swept away the remains of a stipulative style of constitutional interpretation in favor of the broad-gauged constructivist style, will legitimation by constitution *then* still be in play?

B. *Not Too Thin?*

You might answer no because you think legitimation by constitution is inescapably a stipulative constitutional practice. The point, after all, of the proceduralizing move⁵³ is to enable us to say to one another that the regime’s observable conformity in practice with that – pointing at something “out there” that we can all suppose each other to see just as we see it – suffices to justify our daily connivance in the social production of dispositions in citizens to be law-abiding. Pointing at what, then? The answer has to be, for better or for worse: a textual object, composed of prescriptive sentences, whose terms *as terms* must count for something beyond mere pointers toward something else that it never, in the first place, took any particular words to point to.⁵⁴ Slice it as thin as you like, there is a difference between pointing at *something* and pointing at thin air. That would go far toward explaining why, for better or for worse, the history of the succession of American constitutional orders is presentable also as a history of successful engagements in stipulative constitutional struggle.⁵⁵ So might you say.

⁵² See SEIDMAN, *supra* note 6, at 8 (approving acceptance of the Constitution as the source of “a common vocabulary we could use to discuss our disagreements”).

⁵³ See *supra* Part II (setting forth the “first proceduralization” of legitimation by constitution).

⁵⁴ See Waldron, *supra* note 6, at 1164, 1169 (suggesting that “a country has a constitution only if the basis of its system of government can be identified and reflected on as such,” because a constitution’s purpose, after all, is to “make politics possible among a people who disagree, often quite radically, about values, principles, rights, justice, and the common good”).

⁵⁵ See Kersch, *supra* note 8, at 1084-88.

You would be right, up to a point. Legitimation by constitution surely does require the Constitution's appearance to us as an object "out there" where we can show it to each other. But a broad-gauged constructive approach to the Constitution, in honest pursuit of general aims at which, holistically construed, the Constitution points, can meet that need. A constitution read constructively is still there before us as an object, still an interpretable textual container of the terms of validation for any further, purported acts of lawmaking or legal administration.

Okay, you ought to say in return, but the discussion cannot end there. In order for legitimation by constitution to be in play, abstraction of constitutional prescriptive content away from society's concrete political disagreements must at some point hit a limit. Legitimation by constitution does, after all, presuppose a society-wide convergence on a horizon of legitimation-worthiness for a country's constitution.⁵⁶ The common ground we share – the common *substantive-visionary* ground – may shrink, but it cannot shrink away to nothing.⁵⁷ Not where legitimation by constitution holds sway.

C. *Unreconciled Reminders*

That claim is surely correct, and from it follows a conclusion that legitimation by constitution disallows democratic politics a totally unfettered access to on-the-spot, here-and-now determination of state policy. Insofar as it is this hindrance to unfettered popular rule in the here and now that begets counterconstitutional objection – and I mean *just* this hindrance, severed from concerns about possible debilitating impacts on the energy, focus, amity, and quality of political debate⁵⁸ – my suggestion of an easy consistency between the counterconstitutional stance and legitimation by constitution must fail. Abstention of counterconstitutional views from a forum devoted to constitutional malfunction and repair would thus, to that extent, stand explained.

IV. A FURTHER COMPLICATION (THE SECOND PROCEDURALIZATION)

That explanation, however, covers only the outer edge of current counter-constitutional advocacy. It leaves the "mainstream" still with a stake in the

⁵⁶ See *supra* Part II (showing how legitimation by constitution depends on a shared social confidence in the conformity of the state's operations to a commonly identified set of express constitutional assurances).

⁵⁷ Cf. Andrew Koppelman, *Darwall, Habermas, and Fluidity of Respect*, 26 *RATIO JURIS* 523, 534 (2013) ("The common ground shrinks in conditions of pluralism, but it does not shrink to nothing."). Koppelman argues that, in conditions of normative disagreement, the possibility of a politics of mutual respect must still depend on the possibility of a "consensus about goods as well as rights." *Id.* at 535.

⁵⁸ See SEIDMAN, *supra* note 6, at 10, 59, 91 (objecting to the very idea that "the people should not be allowed to make unfettered decisions about the questions that matter most to them," *id.* at 10).

American practice of legitimation by constitution, and still, therefore, with a motive to contribute to a forum on correction and repair of breakdowns observed in the practice. One further possible worry still threatens the safety of that conclusion, to which we must now attend. I call it the second proceduralization of legitimation by constitution.

The first proceduralization, as discussed above, is displacement of “is this law good and right?” by “is this law constitutional?” as a test of our moral entitlement to a strong presumptive expectation of a regularity of compliance with the law in question.⁵⁹ Allowance of that substitution, we say, can still – given the right sort of constitution – leave everyone with reasons good enough to support the country’s politics. But let us now notice how our saying so depends on an expectation of belief across the country in the possibility of real rightness for the job of a set of constitutional essentials, even in expected conditions of intractable, reasonable disagreement about the virtues and vices of many of the laws, policies, and demands that will issue from democratic politics conducted in pursuit of that constitution. The belief appears to be that we, fated to disagree about the justice and fitness of laws that *will* be made, can nevertheless all judge to be right a regnant body of standards regarding the laws that permissibly may (or positively must) be made.

But how, after all, is that supposed to work? Legitimation by constitution depends on an anticipation of public verification, *as right*, of a conception of the minimum political-structural conditions for morally justified collaboration in the country’s practices of coercion by law. As any American who follows these matters will immediately see, that idea of verification-as-right cannot be fully represented in a set of abstract statements, the rightness of which is apparent to all but only because the abstractions paper over the persisting disagreements that inevitably will surface at the point of application of them to live political issues. Legitimation by constitution requires, after all, that state operations *observably, in practice*, really do comply with the constitutional essentials (for example, “the freedom of speech” or “the equal protection of the laws”). When that applied-in-practice demand inevitably discloses persisting, deeply felt moral and practical disagreements among the citizens,⁶⁰ then those will be nothing less than comings apart over the legitimacy of the regime. Completion of the idea of legitimation by constitution thus requires some way of closing or filling that inevitable gap of disagreement.⁶¹

It seems that we look to a second proceduralization for a solution to this problem. We call into operation a special institutional service. We commission that service to decide questions of constitutionality at the point of application.

⁵⁹ See *supra* Part II (outlining the first proceduralization).

⁶⁰ For example: Does race-based affirmative action conform to equal protection? Do campaign finance laws conform to free speech?

⁶¹ See, e.g., Frank I. Michelman, *The Problem of Constitutional Interpretive Disagreement*, in HABERMAS AND PRAGMATISM 113, 115-20 (Mitchell Aboulaflia et al. eds., 2002).

We hope that people can find they have good enough reason to trust that service to get its answers close enough to right, enough of the time, to let those answers count as publicly authoritative for legitimation purposes. We call that service, as it now exists, the Supreme Court.⁶²

But the requisite institutional service would not necessarily have to look or act much like the Supreme Court as we know it. It could be a joint committee of the Congress, detailed to pass on the constitutional compliance of bills that make it through to an advanced stage of consideration, and also – to cover any positive legislative obligations we might find in our constitutional law – to review recent past and pending future legislative agendas for constitutional compliance. Or the service could be each House of Congress sitting in Committee of the Whole. It could be a citizens’ annually elected body of hundreds. Its speech could be more common than technical. Its constitutional-interpretive methods could be, within wide limits, as broad-gauged constructivist as you like.⁶³ It could be, in a word, political constitutionalism on the march.⁶⁴ But still there is a requirement at which the counterconstitutional mainstream might balk. The requirement is one for *authoritative resolutions*, from time to time, of questions of constitutional meaning. However the institutional service may be organized, its job is to help guide us past the endlessly recurring gaps of societal disagreement over constitutional meanings, so that life and government can go on while the debates continue. Its job, in a word, is one of institutional settlement.⁶⁵ Its pronouncements are *official*. They are to be accepted as legally controlling unless and until officially supplanted. The operations of the service thus run headlong into objections against people forsaking their own honest judgments of the right answers to disputed constitutional meanings by submission to

⁶² See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992) (plurality opinion) (speaking of the dimension of the Court’s responsibility that comes into play “whenever the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution”).

⁶³ See *supra* notes 56-57 and accompanying text (setting the limits of such methods).

⁶⁴ See TUSHNET, *supra* note 9, at 27-30 (elaborating on the difference between “the need for an institution of authoritative decision-making” and having that institution be the Supreme Court instead of, say, “a majority of the House of Representatives and the Senate”).

⁶⁵ See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371, 1377 n.80 (1997) (explaining in like terms the “settlement function” of law and why that requires the presence on the scene of a “single authoritative interpreter to which others must defer”); Jeremy Waldron, *Kant’s Legal Positivism*, 109 HARV. L. REV. 1535, 1540 (1996) (explaining similarly the value to a society of a legal corpus, the validity of which is subject to determination “without reproducing the disagreements which it is [the law’s] moral function to supersede,” and, hence, by socially identified institutional authorities set up for that purpose).

judgments that emanate from others.⁶⁶ How should the counterconstitutional mainstream respond? I think with guarded acceptance.

Suppose that the institutional service of the second proceduralization would indeed be the Supreme Court. The Court's role, then, as a legitimacy-sustaining tribunal, would be to help shepherd public opinion – which would mean leading as well as listening – if toward nothing more, then at least toward a reasoned concurrence on the outer boundaries of the space of credible conscientiousness in the pursuit of the constitutional essentials. That means in the pursuit of the essentials both as abstractly written and as situationally construed with a view toward the real legitimation worthiness of the resulting Constitution.

These implications of legitimation by constitution seem to chime nicely with counterconstitutional aversions to judicial supremacy and constitutional-legal technocracy – and also with the prescriptions for weak-form institutionalized constitutionalism that increasingly seem to attract the counterconstitutional voice.⁶⁷ That voice, I conclude, owns a full ticket of admission to the conversations of the American constitutionally faithful under stress.

⁶⁶ Cf. SEIDMAN, *supra* note 6, at 14 (“This fundamental problem with constitutional obligation is not just theoretical. Insistence on constitutional obligation is a way that some people exercise power over other people.”).

⁶⁷ In a separate paper planned for publication in *Critical Law Quarterly* (a journal of the Faculty of Law, Economics and Finance of the University of Luxembourg), I take up questions regarding tensions and interactions between the legitimating and other functions of constitutions, and their implications for forms and styles of judicial review. See Frank I. Michelman, *Social-Liberal Constitutionalism: Political-Liberal Thought and the Aims of Judicial Constitutional Review* (Sept. 30, 2013) (unpublished manuscript) (on file with author).