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## REASON, MORALITY, AND CONSTITUTIONAL COMPLIANCE

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### INTRODUCTION

The central claim of Abner Greene’s *Against Obligation* appears to be that the federal government should allow exemptions from some restrictive laws in order to accommodate religious and other such commitments of its subjects.<sup>1</sup> Professor Greene says that the law should be seen as a source of normative authority on a par with independent sources of authority (such as ordinary subjects’ religious convictions), and the government should loosen its own commitment to the Constitution accordingly.<sup>2</sup>

Michael Seidman’s *On Constitutional Disobedience* appears to claim that our preoccupation with whether or not laws accord with the U.S. Constitution prevents us from considering the merits of public policies.<sup>3</sup> Professor Seidman suggests that ridding ourselves of the written Constitution – or, perhaps, ridding ourselves of a commitment to respect it – would secure reform of our political discourse and proper evaluation of governmental policies.<sup>4</sup>

I offer these brief characterizations of the two books tentatively because I have doubts about the soundness of their respective arguments, so understood. I shall now try to explain.

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<sup>1</sup> I say “subjects” instead of “citizens” because many of those whose conduct is regulated by law are not citizens.

<sup>2</sup> ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* 253 (2012).

<sup>3</sup> See MICHAEL LOUIS SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* 67-69 (2012).

<sup>4</sup> See *id.* at 142.

## I. MORALITY AND THE DUTY TO OBEY THE LAW

These books challenge the idea that officials have an absolute or overriding obligation to respect the U.S. Constitution. As they do so in different ways and with different aims, they require somewhat separate discussion. But as each addresses the idea of a duty or obligation to respect the law, and specifically the U.S. Constitution, I begin with some general observations on that topic.<sup>5</sup>

It seems clear that the obligation in question is not a legal requirement. The question is not whether the law may be seen as demanding compliance but whether compliance is called for by good and sufficient considerations that are independent of the law – *moral* considerations. Consider the following. Professor Greene begins with a lengthy discussion of “political obligation” – the idea that all of those to whom the law of a given system applies are *morally* required to comply with all of the system’s applicable laws on all occasions.<sup>6</sup> I say “morally required” because Professor Greene draws upon literature that explicitly concerns a moral requirement.<sup>7</sup>

When Professor Seidman addresses the issues of compliance and non-compliance with the U.S. Constitution, it seems clear that his argument must likewise be understood in moral terms. His call for “disobedience” of the Constitution cannot plausibly be understood as a claim that disobedience is required by law. On the contrary, he is reasoning from an independent, extra-legal perspective.<sup>8</sup> The obligation that he wants us to renounce in order to reform our political discourse may accordingly be characterized as moral.

Morality calls on us to treat others with at least a minimum of respect and care, to honor commitments we have made, and to give special consideration to those with whom we have morally significant relationships. Experience shows that our moral responsibilities can and sometimes do come into conflict. Suppose that, if I attend to the urgent needs of my child, who has suddenly fallen ill, I will not be able to meet with my class today. Circumstances like these create conflicts between our diverse obligations, even when we have taken responsible steps to avoid such contingencies.

Several points about such predicaments will be relevant to this discussion. First, when moral responsibilities clash, they function like moral presumptions. A moral presumption represents a good moral reason to behave in a certain way – a reason that provides sufficient moral guidance when there are no overriding considerations. Moral obligations are thus *limited in strength*.

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<sup>5</sup> Because the distinction between duty and obligation does not seem relevant here, I will use the terms interchangeably and will sometimes speak of responsibilities or requirements instead.

<sup>6</sup> See GREENE, *supra* note 2, at 14-34.

<sup>7</sup> See *id.* (discussing the works of John Rawls, Frederick Schauer, Heidi Hurd, and A. John Simmons).

<sup>8</sup> See, e.g., SEIDMAN, *supra* note 3, at 99-100 (arguing that constitutional obedience impedes “freedom,” a value that transcends law).

Second, very few, if any, of our moral obligations are “absolute” in the sense that they are capable of overriding all other moral considerations. It is possible that no moral consideration is absolute in that sense – that when obligations clash, the right thing to do always depends on the specific circumstances. In any case, it is unlikely that more than one obligation could be absolute and, if any are absolute, they are unlikely to include a moral obligation to obey the law. That is because laws may be morally indefensible, which generates a moral objection to compliance with the law and a possible occasion for overriding any obligation to comply.<sup>9</sup>

Third, political theorists who endorse political obligation as well as theorists who reject it *agree* that a duty to comply with the law is *not* absolute.<sup>10</sup> Critics take this position because they do not wish to attack a straw man, while supporters agree because they recognize that it would otherwise be very difficult, if not impossible, to defend an absolute moral obligation to comply with the law. Fourth, when someone understands that one of her obligations is overridden and acts accordingly, she cannot reasonably be seen as simply violating or failing to respect that obligation. A morally responsible person is sensitive to the “secondary” obligations that follow from an obligation’s being overridden. If caring for my ill child when no other caregiver is available requires me to miss a class, then I am expected to take actions such as arranging for someone else to teach the class and notifying the students of my impending absence. Those efforts represent my acknowledgment that the moral obligation to teach my class did not simply disappear, but rather was overridden by a competing moral obligation to care for my child.

Fifth, it seems reasonable to suppose that moral obligations are also *limited in scope*. I assume that an agreement to participate in a gang rape or a massacre, for example, would not be morally binding; it would be morally void *ab initio*. I think it follows that open-ended moral obligations, such as an obligation to comply with the law, are likewise limited in scope. If one could not acquire a moral obligation to participate in a gang rape or massacre, then a moral obligation to obey the law would not encompass an order to participate in a massacre or a gang rape, even if the order were legally valid. So, if there were a moral obligation to comply with the law, it would be limited in scope as well as in strength.

Finally, we ought to consider the fact that both authors are primarily concerned with *governmental* action, not the actions of ordinary citizens or other subjects. If we try to translate that concern so that it applies to the conduct of real human beings, then they are concerned with the obligations of

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<sup>9</sup> See David Lyons, *Moral Judgment, Historical Reality, and Civil Disobedience*, 27 PHIL. & PUB. AFF. 36-39 (1998) (using the examples of chattel slavery, colonial rule, and Jim Crow laws to illustrate when indefensible laws may create a moral objection to compliance).

<sup>10</sup> See *id.*

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*public officials*, such as judges.<sup>11</sup> Let us suppose that it is possible, under favorable circumstances, for a morally responsible person to function as an official in a political system that is inevitably imperfect, perhaps very much so. Because one who accepts such a position can be understood to accept a public trust of fidelity to law, such an official's moral obligation to comply with the law is, arguably, more stringent than any ordinary subject's moral obligation to comply. For reasons already noted, however, an official's moral obligation of fidelity to law would also be limited in scope as well as in strength.

## II. *AGAINST OBLIGATION*: POLITICAL OBLIGATION AND POLITICAL LEGITIMACY

*Against Obligation* challenges the government's "political legitimacy," which Professor Greene understands as the government's right to demand compliance with its laws.<sup>12</sup> Professor Greene develops this challenge indirectly by assuming that the government's right to demand compliance stands or falls with its subjects' duty to comply.<sup>13</sup> In other words, he assumes that political obligation and political legitimacy are correlatives.<sup>14</sup> Professor Greene then reviews, expands upon, and accepts recent critiques of political obligation.<sup>15</sup> From that intermediate conclusion, he infers that a moral obligation to comply with the law must be defended on a law-by-law basis.<sup>16</sup>

It is unclear, however, how Professor Greene gets from that intermediate result to his conclusions about ways in which the government should address religious and other such convictions that are offended by legal restrictions. Let me explain.

In assuming that political obligation correlates with political legitimacy, Professor Greene appears committed to the view that the government's moral right to demand compliance, like a subject's moral obligation to comply,

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<sup>11</sup> See GREENE, *supra* note 2, at 247-51; SEIDMAN, *supra* note 3, at 69-74.

<sup>12</sup> GREENE, *supra* note 2, at 24.

<sup>13</sup> See *id.*

<sup>14</sup> As Professor Greene acknowledges, some theorists deny that the alleged moral obligation to obey the law correlates with the government's right to demand compliance. *Id.* One reason is that, in the more plausible theories of political obligation, such as fair play, the obligation is owed to other subjects who hold the correlative right, not to the government. *Id.* at 6. Given his negative purposes, however, Professor Greene might argue that, if there is *no* duty to comply, a government is not likely to have a right to demand compliance.

<sup>15</sup> *Id.* at 35-113.

<sup>16</sup> It should be emphasized that the absence of a moral obligation to comply with the law does not imply that subjects are free to ignore legal restrictions. In fact, it is likely that there are good and sufficient reasons – including moral reasons – to comply with many laws, for many laws regulate conduct in morally justifiable ways. *Id.* at 91-94. In the absence of a moral obligation to comply, however, we cannot assume that compliance is required for all laws, especially those that are morally indefensible. See Lyons, *supra* note 10, at 31.

cannot be assumed but must be defended law by law.<sup>17</sup> Then, Professor Greene argues that the government should grant exemptions to some of its restrictive laws.<sup>18</sup> That is a moral, not a legal, argument, which presupposes that the government *has* a moral right to demand compliance with the laws in question. But Professor Greene seems to give us *no* reason to suppose that the government *has* a moral right to demand compliance with *any* of the laws to which he believes exceptions should be made. And, until the case for a moral right to demand compliance with those laws is made, there is no need to justify exemptions. Let me suggest an alternative approach. Like moral obligations, most, if not all, moral rights are best understood as presumptions that might be overridden. This presumably applies to a government's moral right to demand compliance with all of its laws. Professor Greene evidently wishes to *assume* that the government has a presumptive right to demand compliance with the relevant laws. If he were to assume this, his argument could be simplified (and shortened) considerably.

First, his claim that the government should grant exemptions could then be understood as a belief that the government's right to demand compliance is *overridden* in those cases. Second, he would not need to address the contested issue of political obligation and its relation to political legitimacy. And that would be a good thing. As I have explained, because Professor Greene's primary concern is governmental action, the people whose conduct is most directly relevant are not ordinary subjects but public officials. Professor Greene is primarily concerned with what *they* should do. We have no reason to believe, however, that an *official's* obligation of fidelity to law correlates with his or her government's right to demand that its ordinary *subjects* comply with its laws. Political obligation and its correlativity can thus be seen as an issue that need not be, or need not have been, pursued.<sup>19</sup>

### III. ON CONSTITUTIONAL DISOBEDIENCE: MORAL OBLIGATION AND CONSTITUTIONAL FIDELITY

I turn now to the argument of *On Constitutional Disobedience*, which I reconstruct as follows:

1. In the United States, public discussion of public policies is woefully inadequate;<sup>20</sup>
2. We are diverted from considering the merits of laws and public policies by instead considering their constitutionality;<sup>21</sup>

<sup>17</sup> *Id.* at 42.

<sup>18</sup> *See id.* at 50.

<sup>19</sup> The space and effort saved by dropping the peripheral discussion of political obligation could then have been devoted to explaining why we should assume that the government has a right to demand compliance with all of the relevant laws.

<sup>20</sup> *See* SEIDMAN, *supra* note 3, at 116.

<sup>21</sup> *Id.*

3. This is because we have a written constitution;<sup>22</sup>
4. Other nations without written constitutions fare well without them;<sup>23</sup>
5. This shows that we do not need a written constitution;<sup>24</sup>
6. Deviation from our written Constitution – for example, by respecting precedents that interpret the Constitution – has not created chaos;<sup>25</sup>
7. This shows that getting rid of our written Constitution would not cause chaos;<sup>26</sup>
8. If we got rid of our written Constitution, public discourse would not be diverted from considering the merits of laws and public policies by considering instead their constitutionality;<sup>27</sup>
9. Therefore, we ought to get rid of our written Constitution.<sup>28</sup>

The foregoing reconstruction may be more categorical than Professor Seidman intended and may deviate in other ways from what he had in mind. What I have tried to do is fill in gaps between the claims he seems to make and the conclusions he seems to draw. I have done so in the simplest way, without qualifications, because the results seem to fit the text. I now offer several comments.

First, Professor Seidman's remarks about the development of constitutional caselaw suggest the assumption that officials have an overriding moral obligation not to deviate from the written Constitution. I question that assumption for two reasons.

On the one hand, a moral obligation to respect the Constitution cannot arguably encompass acts that support morally impermissible practices, such as race-based chattel slavery. If so, and if it was possible for officials to have a moral obligation of fidelity to the Constitution before slavery was abolished, then I would suppose that the obligation *did not encompass* the enforcement of laws that supported slavery, such as the Fugitive Slave Acts. As the moral obligation of fidelity to the Constitution would then be limited in scope and might not cover some important cases, it would be misleading, at best, to hold that the obligation to adhere strictly to the Constitution's text was overriding.<sup>29</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 18.

<sup>24</sup> *See id.* at 25 (suggesting that civic unity might be better achieved by a "constitution that provides a vocabulary and an abstract set of ideals that everyone can agree to").

<sup>25</sup> *Id.* at 18.

<sup>26</sup> *See id.* at 65.

<sup>27</sup> *See id.* at 142 (arguing that constitutionalism should be seen "as a site for contestation, not a source for answers").

<sup>28</sup> *See id.* at 22-26.

<sup>29</sup> It would not follow that an official's enforcement of such laws would be morally impermissible. There can be many good reasons to comply with laws in the absence of a duty to comply.

On the other hand, because laws enacted pursuant to the Constitution might be morally indefensible, as some enactments arguably have been, it would seem reasonable to suppose that any moral obligation of fidelity to the Constitution is only a moral presumption. Therefore, even if we imagine that an official's obligation encompassed enforcement of the Fugitive Slave Acts, it is quite possible that the obligation *was overridden* by considerations of justice and humanity.<sup>30</sup>

In sum, it is implausible to hold, as Professor Seidman seems to do, that an official's moral obligation of fidelity to the Constitution would prohibit deviation from the written Constitution.

All of this would hold true even if an official's moral obligation of fidelity to the Constitution is more stringent than an ordinary subject's moral obligation to comply with the law. This greater stringency would make it a bit more difficult to override, but I do not think that would make a difference in the present context. Specifically, greater stringency would not show that an official's obligation of fidelity to law could encompass morally impermissible actions, and, if the relevant official acts were morally impermissible, then it would not affect the possibility of overriding either.

Second, Professor Seidman appears to suppose that the development of constitutional caselaw based on judicial respect for interpretive precedent is incompatible with an obligation to respect the Constitution.<sup>31</sup> This assumes that ratification of the Constitution initiated an entirely new political system, lacking the doctrine of *stare decisis*. That seems to me mistaken. The Constitution was incorporated into an existing common law system that included the judicial practice of respecting judicial precedents.<sup>32</sup>

Third, Professor Seidman suggests that, because other nations get along without a written constitution, the United States can do so as well.<sup>33</sup> That inference is questionable because those other nations have never lived under a written constitution, whereas the United States has done so for two centuries. Professor Seidman assumes, in effect, that such differences between American legal history and the legal history of other nations are irrelevant. That needs to be shown; it cannot be assumed.

Fourth, Professor Seidman does not tell us what we could expect if we got rid of our written Constitution (save for his suggestion that it would improve our political discourse, which I will touch more on later).<sup>34</sup> Does he imagine, for example, that after scrapping the Constitution our political system would

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<sup>30</sup> Again, it would not follow that official enforcement of such laws is morally impermissible. There can be many reasons to comply with an obligation that is overridden.

<sup>31</sup> See SEIDMAN, *supra* note 3, at 76.

<sup>32</sup> See W. Lawrence Church, *History and the Constitutional Role of Courts*, 1990 WIS. L. REV. 1071, 1103 n.108.

<sup>33</sup> SEIDMAN, *supra* note 3, at 18.

<sup>34</sup> See *id.* at 15-21.

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maintain the same constitutional framework? If so, what would be the point of scrapping it? If not, what institutions would survive the change?

Fifth, it is unclear why Professor Seidman focuses on the fact that the U.S. Constitution has a *written* text.<sup>35</sup> He is concerned with the public's preoccupation with the constitutionality of laws and public policies at the expense of a consideration of their merits. But a preoccupation with constitutionality does not result from the Constitution's being written; rather, it is occasioned by the practice of judicial review. Why not simply end judicial review?

Finally, while I agree that our public political discourse is woefully inadequate, I am puzzled by Professor Seidman's diagnosis of the problem. His theory should lead one to expect that public discussion of laws and public policies is healthy and robust when constitutional issues do *not* arise. Unfortunately, experience proves the contrary. In the United States, few, if any, public policy issues are subjects of healthy and robust public discussion.

Consider, for example, the following short list of issues that are in desperate need of robust public discussion and governmental action<sup>36</sup>: joblessness; homelessness; housing foreclosures; banking regulation; the war in Iraq; the war in Afghanistan; immigration reform; residential segregation; educational segregation; student indebtedness; a single-payer healthcare system; equal opportunity for all of our children; increasing economic inequality; increasing concentrations of political power; decreasing social mobility; and global warming and climate change.

The failure of our political discourse and of our political system to address issues like these effectively would seem to have little, if anything, to do with the existence of a written constitution (or the practice of judicial review). If that is so, why should we suppose that ridding ourselves of a written constitution, or ridding ourselves of judicial review, would help significantly to reform our political discourse?

#### CONCLUSION

The two books under consideration in this Symposium assume that public officials have a moral obligation of fidelity to the U.S. Constitution. But a moral obligation may be overridden by conflicting moral considerations and may be morally limited in scope. Thus, it is arguable that officials should not have enforced the Fugitive Slave Act because doing so supported race-based chattel slavery and after it was amended in 1850 did so in a manner that was egregiously unfair.

It would have been useful for Professors Greene and Seidman to have suggested how the Constitution's persisting moral deficiencies affect the scope and strength of officials' moral obligations. It would also have been useful for them to have explained clearly the effects of implementing their proposals.

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<sup>35</sup> See *id.* at 142-43.

<sup>36</sup> A different list could be assembled for a different time.