Compromise, Contestation, and the U.S. Constitution



Sanford Levinson

The Original Compromise: What the Constitution's Framers Were Really Thinking. By David Brian Robertson. New York, NY: Oxford University Press, 2013. 153p. $29.95.

On Constitutional Disobedience. By Louis Michael Seidman. New York, NY: Oxford University Press, 2013. 153p. $21.95.

Why do we continue to take the United States Constitution so seriously, as measured not only by what may well be an "exceptional" veneration by Americans of their Constitution,[1] but also by the annual spate of books written by both prominent scholars and more popularly-directed authors about the Constitution? This is not a rhetorical question. Almost all political scientists are well aware of the fundamental tension between what might be termed "hard-core institutionalists," on the one hand, and those of our colleagues who are more prone to emphasize the importance of political culture, economic conditions, the actual distribution and intensity of political preferences in the polity, or some other exogenous variables that render particular institutions of only marginal importance, on the other. There is a reason that two distinguished political scientists published a book titled *Do Institutions Matter?*[2], that focused particularly on the ostensible consequences attached to adopting separation-of-powers as against parliamentary systems. Not surprisingly, it was written during the great flowering of constitution formation generated by the collapse of the Soviet Union and the winds of change that blew through South Africa and South America. One *must* believe that constitutions do matter in order to justify the time and energy (and, sometimes, violence) that go into drafting and ratifying them. But the overall question must haunt anyone, whether a political scientist, a legal academic, or simply a concerned citizen. These two books, one by a distinguished political scientist, the other by an equally distinguished law professor, present quite different approaches to answering the question.

Although David Robertson's *The Original Compromise* is descriptive in its principal thrust, it makes both implicit and explicit claims about the importance of its conclusions. Robertson *does* believe that the Constitution "matters," so that, even in 2013, it is worth studying its process of formation for the lessons it might teach us about contemporary politics. Louis Michael Seidman, on the other hand, argues that it matters far less than conventional wisdom teaches because what he calls "constitutional disobedience" is so pervasive as a necessary condition of actual governance. He is not subtle on this point: The cover of Seidman's book is the text of the Constitution "cancelled out" by a giant red "X."

One might believe that Robertson's assurance that he will tell us "what the Constitution's framers were really thinking" is linked to the contemporary infatuation with "originalism," the view that we have a duty to maintain the Constitution created in 1787 and ratified in 1787-88 (as amended, to be sure, but not otherwise to be treated as a "living" document) and that the "framers" offer privileged insights into how best to interpret the Constitution. Blessedly, though, there is no reason to believe that he subscribes to "originalism." Indeed, for Robertson the real point of immersion in the events of the Philadelphia Convention is to learn about the importance of compromise, not necessarily any kind of reverence for the specific compromises that were reached (such as those reinforcing the power of slave owners). Robertson announces his basic theme at the very outset: "The framers built their Constitution with the bricks and mortar of political compromise" (p. 4). They were faced with a "nearly impossible task" with regard to constructing a new political system that would prove adequate to facing the various challenges facing the new country (the success of whose revolution had

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been accepted by the British only four years before, in 1783). "Only their formidable talents for political compromise made it possible for them to write a Constitution that narrowly won national approval after a bitter, closely contested fight for ratification in the states" (id.) No one should regard the United States Constitution as "the product of a careful plan, but rather the cumulative by-product of a sequence of political negotiations and compromises. The result was not foreordained. No delegate viewed the result as a perfect answer to their original aspirations" (p. 232).

One still needs to know, of course, what motivated the belief that it was necessary to replace the existing Articles of Confederation with a brand new Constitution. The replacement, of course, required going well beyond the limited mandate of Congress—to "revise" rather than systematically replace the Articles of Confederation—and then even more ruthlessly ignoring Article XIII, which required the unanimous consent of the thirteen state legislatures (all of which, save for Pennsylvania's were bicameral). This explains, for example, why Rhode Island made the (retrospectively) disastrous choice not to send any delegates at all to Philadelphia, since they falsely believed that it could rely on the solemn promises set out in Article XIII that it would in effect possess a hard-and-fast veto power over any changes deemed unacceptable. One could, of course, view the Convention as a truly world-historical example of "constitutional disobedience," at least if one accords the status of "constitution" to the Articles.

Why did this disobedience occur? The answer is deceptively simple: There was wide, even if not unanimous agreement, with Virginia Governor Edmund Randolph's exhortation on June 16, 1787 to his fellow delegates that they do whatever was necessary to overcome "the imbecility of the existing Confederacy." "There are great seasons," Randolph asserted, "when persons with limited powers are justified in exceeding them, and a person would be contemptible not to risk it."[3] Strong words indeed, but not unique. His fellow Virginian, George Mason, agreed, "In certain seasons of public danger it is commendable to exceed power."[4] None dared quote Machiavelli, but one might suggest that this might count as one aspect of what J. G. A. Pocock so memorably labeled "the Machiavellian moment" in American political thought. The Framers had no regard for the system established by America's first (and oft-forgotten) Constitution and believed that national survival required its unsentimental replacement. Indeed, Hamilton would later begin *The Federalist* by appealing to "an unequivocal experience of the inefficacy of the subsisting federal government."

If this perception of what they were prone to call "exigency" pervaded the Convention, it is not surprising that there were deep and heartfelt arguments about the specific ways of responding to it, and those arguments—and compromises necessary to achieve resolution—constitute the bulk of Robertson's book. He makes a genuine contribution inasmuch as he carefully looks at a variety of important issues and demonstrates the specific debates and crucial compromises that were made. Unlike many other books on the Convention, it is not written chronologically. He aptly describes his project as "disentangl[ing] debates on separate substantive issues and reorganize[ing] all the records into eleven separate conceptual categories." They are "the delegates; the problems; the necessary remedies; representation in Congress; the House and Senate; the presidency; the courts; national security and federalism; slavery; national defense; and amendment and ratification" (p. 18).

Central to Robertson's analysis of the terms of compromise is his division of most of the delegates into two broad groups, one committed to "broad nationalism," the other equally committed to "narrow nationalism" (p. 15). The first group included such luminaries as Madison, Hamilton, James Wilson, and Gouveneur Morris. For them "the national government required strong and very extensive policy authority. The national government should exercise all the important powers of government, and the state governments' role should be reduced to a minimum" (id.). Their opponents are less well known to non-historians. Delegates like Roger Sherman and Oliver Ellsworth "sought to expand national authority in a narrow, limited way, and to protect as much of the existing policy authority of the state governments as possible" (id). Madison and Hamilton can fairly be described as despising state governments and the officials purporting to lead them. For their opponents, "the states were functioning polities that already enjoyed the loyalty of their citizens" (id.), presumably for good reason. These opposing sides generally tracked the size of the states from which they came.

In any event, there was hard bargaining to be done, and Robertson sets this out in an admirably readable and comprehensive manner. He sets out the competing positions, always noting the political interests that were often behind them. But, obviously, the very insistence on "compromise" as the chief motif of the Convention suggests that it should not be viewed as the triumph of a process of "deliberation" where people changed their positions in light of "better arguments" offered by their adversaries. Instead, debates were brought to an end by the ability of the winners to put together effective coalitions that could outvote their opponents. Political, as well as intellectual, skills were essential, though it also obviously helped that an early, and basically undiscussed, decision was to accept the principle of equal state votes.

There are nits to be picked regarding some of Robertson's specific analyses of the compromises. It is not, as a technical point, true that the Framers "added a provision [to Article V] that the equal apportionment of Senate seats could not be amended in the future" (p. 223). That may be true, at least until 1808, of the limit on

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Congress's power to ban the international slave trade until 1808. But all that Article V does is to set up a de facto unanimity requirement for amending the allocation of votes in the Senate. It is not an "eternity" clause similar, say, to the provision of the German Constitution that prohibits amendments that would threaten the overarching value of "human dignity" or fundamentally affect the powers of the German lander.[5] What makes this a nit, as every political scientist would recognize, is that no state is remotely likely, save at the point of a gun, to consent to a reduction of its voting power in the Senate. But such nitpicking is almost beside the point, for the question is whether Robertson casts sufficient light on the compromises that took place to warrant reading (and assigning) his book. And the answer is yes.

Robertson reveals his distance from most contemporary "originalists" inasmuch as he emphasizes that "[t]he framers, like many politicians before and since, left [many] ambiguities to be worked out in the future, through" similar processes of "negotiation and compromise within the political rules they drafted." They knew well that "enormous changes" would take place in the future. "The Constitution was designed to structure vigorous, evolving politics—not to fix all specific boundaries for all times" (p. 236). Robertson's Constitution is very much a "living one." For Robertson, the politics of compromise "*is* the original meaning of the Constitution: the framers left it to us to determine what is necessary and proper for the general welfare and to determine and answer politically, within the general rules laid out in the document" (p. 236). Robertson is surely correct. This may help to explain why Yale law professor Jack M. Balkin's 2012 book – the most important work on constitutional interpretation in many years – bears the title, *Living Originalism*. Balkin emphasizes the extent to which the Framers established important foundations within which the political enterprise takes place but, easily as important, did *not* set out the specifications for the ensuing skyscraper that we were tasked with building. Whether or not Robertson venerates the Constitution, he clearly seems to admire the "the framers' pragmatic political idealism" (p. 236).

But if the lesson taught by the Constitution is the importance of "pragmatic political idealism," why would there be an inevitable *frisson* attached to Seidman's surely deliberatively provocative title, *On Constitutional Disobedience*. He seems to be suggesting, contrary to some perhaps extreme versions of pragmatism, that there really is a determinate "there there" when we read and analyze the Constitution and that it often commends our rejection—our "disobedience"—rather than fidelity. Thus he anticipates his critics by admitting that the "proposal that we systematically ignore the Constitution will strike many as stupid, evil, dangerous, or all three" (p. 5). What he wants to do, however, is persuade us that "the arguments for constitutional obedience are far more fragile than commonly acknowledged" (id.). He suggests that our concern with constitutional fidelity turns out, practically speaking, to operate as a way of seriously constraining the "kind of open-ended and unfettered dialogue that is the hallmark of a free society" (p. 10). He asks, rhetorically, if it is really the case that "people [are] incapable of coordinating their activities and avoiding chaos without a constitution" (id.). That is, of course, an immensely fascinating question, especially if, as I will suggest, we change it slightly. What if, instead of asking if we need *any* constitutional limits at all—with its overtones of anarchy—we ask if we are well served by *this* particular constitution and, if the answer is no, whether we should feel free to ignore it. In any event, Seidman's may be an extreme version of the question whether institutions really matter, especially if "mattering" is defined as providing genuine constraints on allowing us to get where we might think it of vital importance to go.

Christian Fritz notes that American political thinkers and activists at the end of the 18th century were divided quite sharply with regard to their conceptions of what popular sovereignty might mean.[6] Although the United States Constitution spoke in the name of "We the People," those who drafted and supported it could scarcely be described as friends of vibrant popular rule. They might have agreed with Lincoln's emphasis on government *of* and *for* the people, but government *by* the people was decidedly something else, not to be embraced. As James Madison wrote in *Federalist 63,* the essence of the new American governmental system "lies *in the total exclusion of the people, in their collective capacity*, from any share" in the actual process of making decisions, save, of course, for elections of the all-powerful (even if checked-and-balanced) representatives. Fritz, however, emphasizes the importance of a quite different tradition within America, far more sympathetic to direct democracy. Many early state constitutions emulated the Declaration of Independence itself by emphasizing the ever-present right of the people to "alter or abolish" their existing systems of government whenever "the public happiness" might require it. And Madison also had written, in *Federalist 40,* that "a rigid adherence" to the established forms of government "would render nominal and nugatory the transcendent and precious right of the people to "abolish or alter their governments as to them shall seem most likely to effect their safety and happiness." One may, of course, easily find other, more conservative, quotations from Madison, especially those set out in *Federalist 49* concerning the desirability of "venerating" the new Constitution and resisting any Jeffersonian call for frequent (or perhaps any) conventions assessing its value for ever-new generations. That is irrelevant, for the real point that Fritz makes—an important point with regard to understanding Seidman's place on the spectrum of American constitutional thinkers—is that there continued to be a rich and vibrant tradition of popular constitutionalism that countered the more institutionalist and

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reverential forms that we are far more likely to take for granted today.

Seidman's argument is one version of the "dead hand of the past" critique of any old constitutions. There is a reason, after all, that a recent study of the "endurance of constitutions" discovered that the mean lifespan is approximately 19 years, uncannily close to the Jeffersonian "generation" after which he commended "revolution."[7] Constitutions inevitably are responses to time-bound realities. Yet, says Seidman, "the framers knew nothing of nuclear weapons, mass production, multiculturalism, cell phones, professional sports, modern birth control, or global warming" (p. 11). We would not take seriously their advice on how to respond to medical problems. How many of us keep leeches on hand to draw our blood? Why, then, do we take any more seriously the nostrums of the Framers? So the real point of this quite short essay is "to convince readers that there is a problem with constitutional obedience and that the simple responses to this problem do not resolve it" (p.15). Many analysts might quickly point out that the Constitution hardly speaks with sufficient clarity to allow us to confidently say that we can really figure out when one is being obedient or disobedient. Who knows what "equal protection of the laws" or "due process of law" really means? Indeed, I have argued in my own recent book that such clauses—and there are many other examples that could be offered—work as nothing more than invitations to an endless conversation with no genuine closure other than exhaustion or the implicit coercion captured in Ring Lardner's immortal line "'Shut up,' he explained." One might place self-serving assertions by the United States Supreme Court of its interpretive supremacy in the latter category. From one perspective, Robertson and Seidman are comrades, albeit adopting very different professional methods and terminologies. But the bottom line for both is that the actual skills of citizenship and governance require an ever-present willingness—perhaps denominated by "pragmatism"—to ignore existing forms and do whatever is necessary to achieve workable solutions. Would Robertson really feel uncomfortable with Seidman's comment that "constitutionalism is a site for struggle and contestation rather than for settlement"(p. 60). Rules are made to be broken whenever they appear to be sufficient impediments to human betterment. *That* is the lesson taught by Robertson's Framers, along with the practical need for compromising with one's adversaries. It is probably relevant to mention another recent book authored by a distinguished law professor, Fordham Professor Abner S. Greene's *Against Obligation: The Multiple Sources of Authority in a Liberal Democracy,* a far more systematically argued, but ultimately equally antinomian rejection of legal obligations (i.e., the duty to obey the law, including the Constitution, just because it is "the law" or "what the Constitution requires" than because it is, on independent grounds, the right thing to do).

Seidman presents his argument via a very clever ju-jitsu move: "If every actor were obliged or permitted to obey his best understanding of the Constitution, there would be no hierarchical, orderly system for resolving our disputes. *Constitutional* obedience would produce widespread *civil* disobedience" (p. 75). Stability itself requires "constitutional disobedience." Seidman's most interesting chapter is titled "The Banality of Constitutional Violation," which elaborates his argument that "constitutional disobedience" is pervasive. Consider first the dilemma of anyone who disagrees with a judicial decision, including one by the Supreme Court, and believes that it is profoundly mistaken with regard to the discerning what the Constitution "really means." One must therefore decide between remaining faithful to "what the Constitution really means" or, on the contrary, bowing to the decision of the Court. It really will not do to say that "the Constitution just *is* whatever the Supreme Court says it is," at least as a serious jurisprudential proposition; this makes hash of the notion that the Court could ever make a mistake, a notion that almost all serious persons, including dissenting judges, accept. Perhaps the argument is that we're all better off if we acquiesce to judicial (or presidential, or congressional. . ..) mistakes and the concomitant "constitutional disobedience" that is entailed; but this is just to concede Seidman's central point that the notion of constitutional fidelity or disobedience is far more complicated than one might first think.

"[J]udicial supremacy has come to be seen as the same thing as 'the rule of law.' It is therefore important to point out that it is not the same thing at all. Instead, judicial supremacy embodies the rule of order" (p.79). Most Americans give "legal stability" priority over "respecting our constitutional commitments" (p. 89). Seidman offers a host of examples of the fact that we cannot make sense of our actual political practices if we actually expect to find constitutional fastidiousness. Thus he concludes that chapter by stating that "[i]t simply will not do . . . to insist that the polity will not survive widespread constitutional violation. At best, what we are left with is . . . a very different assertion—that our society is held together by the *myth* of constitutional compliance" (p. 90). He cites Leo Strauss for the proposition that "what we need to prevent disaster is not constitutional governance itself, but a 'noble lie' persuasive enough to convince naïve Americans that there is constitutional governance" (Id.). As one might imagine, he admires the United Kingdom, New Zealand, and Israel for foregoing written constitutions (p. 126), though one might suggest that the United Kingdom is now sufficiently integrated into the European legal order, based on various treaties and the European Convention on Human Rights, to be described as in fact possessing a de facto written

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constitution even if it is not one that is necessarily the product of "We the British People." One might also suggest that Israeli constitutionalism is also quite complex, especially since former President of the Supreme Court Aharon Barak suggested almost two decades ago that the passage by the Knesset of certain foundational statutes had affected a "constitutional revolution" enforceable by the Court.[8] New Zealand, on the other hand, may well be the purest form of classic "Westminster parliamentary sovereignty" in the world today as even its foundational Bill of Rights Act explicitly rejects any possibility of judicial review.

There is much to be said for this emphasis on a pragmatic, near antinomian reading of our actual, rather than our imagined, polity. Do institutions matter? Perhaps not much at all, at least if we stop right here. Not surprisingly, though, things may be more complicated. Consider in this context Robertson's comment, in his introductory chapter, that "[t]he resulting Constitution—this original compromise—has proved remarkably durable and authoritative. It has anchored the national government through spectacular economic growth, social changes, and expansions of democracy and rights that were inconceivable in 1787. It is easy to forget that politicians produced this remarkable document. . ." (p.8). The theme is repeated on the next to the last page, where we are told that "[t]he enduring achievements of the Convention's Constitution are remarkable. . .." (p. 235). The overall tone of the *The Original Compromise,* therefore, is primarily comic. Not entirely so, since no book that includes a full chapter on slavery could maintain an unalloyed spirit of good cheer. Robertson readily concedes that the "Constitutional Convention's compromises ensured that conflict over race would be an 'American dilemma' for generations" (p. 190). This is surely true, but what's crucially missing is more specification of the particular ways that the Constitution itself contributed, and quite likely directly "caused," the conflagration of war in 1861. As Mark Graber has argued, the fact that every single member of the legislature is elected locally, even if senators usually represent a larger patch of land than do individual representatives, means that political issues that generate an electorate divided primarily by geography will almost certainly create a highly polarized Congress that will be unable to engage in compromise with one another.[9] The "American dilemma" was not only racism and chattel slavery, but also the specific set of political institutions that we were saddled with in 1787.

It is misleading to note only that the "Constitution protected slavery, and it guaranteed that the South's slave-owning whites would have a disproportionate influence in national policy-making" (p. 190), even if that is true. After all, the Constitution protected slavery from Day 1, and white slave-owning Southerners always enjoyed a "disproportionate influence in national policy-making," as illustrated by the fact that most ante-bellum presidents either owned slaves directly or were, like James Buchanan, strong political allies of slave-owners. Those facts alone do not explain why the system was unable to maintain itself. Graber notes that the Electoral College guaranteed the election of Abraham Lincoln, who received only 39.8% of the vote; his resolute opposition to any compromise with the South over expansion of slavery into the American territories triggered secession and war. Graber ends his book by touting the claims of John Bell, whose election, he suggests, might have led to yet one more compromise that, as in 1787, 1820, and 1850, preserved the Union and avoided conflagration. One may, of course, disagree with Graber's valorization of Bell and criticism of Lincoln. But this requires one to accept the proposition, as articulated in Lincoln's Second Inaugural, that the loss of 750,000 lives (for starters) was the reasonable price paid by the United States for the sin and scourge of slavery. If that is the case, then one might question exactly why the Constitution was worth accepting in 1787. Why shouldn't it have been rejected as what William Lloyd Garrison would memorably call "a Covenant with Death and an Agreement with Hell"?

Perhaps it is unfair to Robertson to tax him for not writing a book that would have necessarily been far longer and, almost certainly, more ambiguous and uncertain in its conclusion. After all, how do we really know the degree to which the "spectacular economic growth, social changes, and expansions of democracy and rights that were inconceivable in 1787" is attributable to the Constitution, as against other aspects of American culture, the fortuitous location of natural resources, like river systems and, later, oil, or the happy circumstances that a gigantic "pond" separated the new nation from the warring parties (and navies) of Europe? Moreover, it is extraordinarily unlikely that the Constitution has generated only benefits with regard to the three variables named by Robertson. Might we have had even more "spectacular economic growth" with a different constitution? How precisely *does* separation of powers or an immensely difficult-to-amend Constitution contribute to economic growth? And how much do these economic developments have to be understood within the context of the various *state* constitutions within which almost all activity takes place? How does one demonstrate the priority of the United States Constitution to, say, the New York Constitution, which in 1846 adopted what became the common practice within the states of electing their judges as a way of limiting the power of state governors.[10] One might even wonder how one could one prove the importance of *either* constitution to a skeptical political scientist inclined to denigrate the importance of formal institutional structures as against, say, political culture? Moreover, with regard to "social changes and expansions of democracy," it seems quite easy to demonstrate that the institutions established in 1787, with their multiple veto points making "progressive" legislation especially difficult, have, by and large, served as

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distinctly negative rather than positive aspects of American politics. To cite one example, woman's suffrage proceeded far more rapidly within the states—and their easily amendable constitutions—than at the national level, where almost a full half-century separated the 15th Amendment ineffectively barring African-American males from voting (itself basically the result of war) and the 19th Amendment's requirement that women be allowed to vote.

But Seidman, too, elides the all-important question of the degree to which the Constitution really *does* matter and whether it can so easily be ignored via exuberant "disobedience." For me the most important, and problematic, statement in the book is as follows:

> After over two centuries, most Americans have expectations about how government works. They know, for example, that presidents serve for four years and that the Congress consists of a House and Senate. Even without a constitution, someone who suggested that we ignore these long-standing practices would bear a very heavy burden of proof (pp. 125-126).

But what if someone thinks, as I do, that it is precisely these "expectations" that are increasingly dysfunctional for the American political system in the 21st century? It is disingenuous in the extreme to suggest that they are merely "long-standing practices"; rather, they are "hard-wired" into our polity because of the constitutional text that awards even incompetent (but non-criminal) chief executives a four-year term and grants to Wyoming equal voting power in the Senate with California. Indeed, I argue that it is truly stupid to wait until January 20 to inaugurate the winner of a presidential election who may have run on a platform of repudiating the policies of the incumbent. And bicameralism, which in the United States (though not necessarily in some bicameral systems abroad) grants each house the equivalent of a "death-ray veto" over any and all legislation passed by its purported partner in governance, today leads such sober political scientists as Thomas Mann and Norman Ornstein first to refer to Congress as "the broken branch" and, more recently, to say of the American system of non-government that "it's even worse than it looks." These are among the reasons that I strongly advocate a new constitutional convention that could explore contemporary "imbecilities" with the same spirit as that displayed by the Framers whose actions Robertson so well sets out.

For me the principal function of constitutions is to specify the answers to basic institutional questions: Who holds power, how are they to be selected, and how long do they serve? Note the absence of the specification of constitutional rights, which I agree are, in large measure, what Madison dismissed as "parchment barriers" that explain relatively little about the actual protection offered by a given political system, including our own, to vulnerable groups without significant political power. I am inclined to believe that the Inauguration Day clause matters more, in some profound ways, than does the far more malleable First Amendment. Perhaps there are a very few countries that can leave such institutional questions up to tacit "conventions," such as trusting the currently empowered government in Great Britain not simply to repeal the current Act limiting its term to five years. Most, for good reason, do not.

Perhaps more to the point is that it is difficult to envision what constitutes the practice of constitutional disobedience in the context of the "hard-wired" institutions established in 1787 and left remarkably unchanged since then. Assume that a President of the United States agrees with me that the United States Senate is simply illegitimate as it violates any acceptable 21st century notion of "one-person/one-vote." Can/should we imagine the possibility that the President will simply announce that she will no longer require passage of legislation deemed "necessary" by both houses (one of whom is illegitimate), but will instead sign, and expect compliance with, legislation passed by the uniquely legitimate House of Representatives? Or should Congress be able to proclaim, altogether reasonably, that the presidential veto, especially when based only on policy disagreements instead of constitutional complaints, has turned us into a de facto tricameral system that violates any acceptable notion of 21st century democracy inasmuch as it gives a single individual the power to negate legislation agreed to by both of the very different legislative bodies? As a result, Congress will regard re-passage following a veto by a majority of each House as sufficient to override the President, and it will expect courts and, as much to the point, administrative agencies to obey the new law. Or imagine that President Barack H. Obama announced that the 22nd Amendment is truly stupid and that the "public happiness" requires emulation of Franklin Roosevelt, who flagrantly rejected what many people might have described as the American constitutional "convention," traceable to George Washington that presidents are in fact limited to two terms. Does it make a difference that Roosevelt did not face a Constitution that included the text of the 22nd Amendment? And does it make a difference that Obama does?

Seidman is so unsympathetic to any robust notion of "constitutionalism" at all, at least if that is defined as putting in writing some of the essential features of a political system and then expecting compliance with what is written down, that he in effect discourages the kind of conversation about constitutional amendment that I personally think is essential at present. It is not that he is "wrong" in his basic argument. Indeed, there is much to be learned from reading and discussing it. But it turns out to be an unfortunately limited argument precisely because he refuses to take seriously the reality of written constitutions and the very real limits they may place on the possibilities of achieving what many of us regard as the "public happiness."

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In sum, the value of David Robertson's book is its reminder that the particular text of the United States Constitution was the result of hard-fought political battles and concomitant compromise, some of it unattractive and even "rotten," and that at least some of these texts genuinely matter. Its deficiency is a certain complacency about what was achieved in Philadelphia. The value of Louis Michael Seidman's book is its reminder that one cannot possibly make sense of American political practices by reference to an inevitably jejune notion of constitutional fidelity; "constitutional disobedience" is pervasive and necessary to a functioning and stable political system. Its weakness is an almost cavalier disregard to the institutional—and textually mandated—structures of the American polity and the near-irrelevance of a model of "constitutional disobedience" as the cure for what truly ails us.

As I write this review, Congress, at the behest of President Obama, is engaged in a genuine debate over American intervention in Syria. Some of the President's supporters suggest that Congress's decision will not in fact be dispositive. Not only, of course, will he not be bound to attack Syria even if Congress "authorizes" him to do so. Far more important is the claim that the President will, as Commander-in-Chief, retain the power to attack Syria even if Congress says "No." Should this happen, what will it tell us about the significance of our institutional structure, the importance of constitutional text (including the impeachment clause), or the phenomenon of "constitutional disobedience"? Both books raise, in their own way, issues of the highest importance in a way that should be easily accessible both to general readers and to students who might well be assigned the books in courses or seminars.

Notes

1 Levinson 2011.
2 Weaver and Rockman 1993.
3 Speech June 16, 1787. Farrand ed. 1937, 362
4 Rosenfeld, ed. 1994.
5 See Kommers and Miller 2012.
6 See Fritz 2007.
7 Elkins, Ginsburg, and Melton. 2009, 2.
8 See Barak 1993.
9 See Graber 2006.
10 Shugerman, 2012.

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