

SHOULD WE HAVE A LIBERAL CONSTITUTION?

*Louis Michael Seidman**

Here is a modest proposal: If I had the power to rewrite the United States Constitution, I would first take some time to think hard about the sort of country I wanted to live in. Having done my homework, I would then draft language that, to the best of my ability, insured that we had such a country. Some of the language would be substantive—for example, guaranteeing the rights that I think people ought to have and directly commanding outcomes that I think we ought to reach. Of course, there would also be procedural provisions. Various powers would be allocated and divided, various offices created and the duties of their occupants specified, and various practical details sorted out. But all of these procedural provisions would have but a single purpose—to produce the substantive outcomes that I preferred.

On one level, this approach seems both obvious and question-begging. It is obvious because, after all, what else would one possibly expect? *Of course* my choice of a constitution will be dictated by my hopes for the country to be governed by the constitution. It is question-begging because it leaves unresolved the really hard issues about what sort of country I *should* want to live in and about what sort of constitutional design would create such a country.

On another level, though, my proposal is deeply controversial. The constitution I drafted would not provide a level playing field on which people with different conceptions of justice could do battle. It would not be neutral as between competing conceptions of the good. It would not provide terms of fair cooperation for people with different such conceptions. It would not leave to individuals operating within a private sphere

* Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center. Thanks to Jill Hasday, Michael Klarman, Gregory Klass, Girardeau Spann, Mark Tushnet, and Robin West for commenting on an earlier draft.

the workings out of the distribution of resources or the pursuit of their own conception of happiness. Because my constitution would resolve, or attempt to resolve, all these matters in a particular and controversial way, it would not be democratic. In short, my constitution would lack all the hallmarks of constitutional liberalism.

In this brief essay, I attempt to accomplish two things. In Part I, I defend my proposed constitution against its putative liberal critics. In Part II, I argue that given contingent but highly plausible empirical assumptions, the differences between my constitution and a liberal constitution are less dramatic than one might suppose. There are often sound, nonliberal grounds for supporting institutional arrangements that appear liberal. It turns out, then, that liberalism is both less attractive (Part I) and less necessary (Part II) than its defenders suppose.

I. IN DEFENSE OF MY CONSTITUTION
(OR HOW FANTASIZING ABOUT ABSOLUTE POWER
CAN BE REALLY FUN, BUT ALSO QUITE DISTURBING)

Before mounting a defense of my nonliberal constitution, we need to dispose of a move that would short-circuit the argument. Perhaps the kind of country I want (or should want) should be organized around liberal virtues. Perhaps, in other words, I should value for its own sake a system marked by what I take to be the main features of constitutional liberalism: a commitment to procedural fairness, a large private sphere, expansive negative rights, and neutrality with regard to matters of religion and other conceptions of the good.¹ If these are my substantive preferences, then, obviously, I will end up supporting a liberal constitution that encourages these outcomes. To make the argument interesting, then, we need to assume that, as a substantive matter, I prefer something else. For example, I might think that a fair distribution of resources is central to justice and that a liberal society will not produce this distribution. Or I might worry that we face an environmental catastrophe and that liberal politics cannot be counted on to fend off disaster. Or I might believe that a particular set of religious beliefs is simply true and that a just society must be organized around those

1. There is, of course, a problem as to how one defines liberalism. The label is deeply ambiguous. For purposes of this essay, I am defining it as a theory that privileges the virtues I have mentioned in text. One might claim with some plausibility that these virtues are so vague and open-ended that they have no actual bite.

beliefs. Perhaps these positions are misguided—perhaps I ought to be a liberal. The question I want to address, though, is whether someone like me who is not persuaded by liberalism as a substantive matter should nonetheless favor a liberal constitution.

At first, it may seem that setting up the argument in this way makes things way too easy. If we start by stipulating the truth of nonliberalism as a substantive matter, then it would seem to follow apodictically that our constitution should be nonliberal. In fact, though, the stipulation clarifies an important point that, in turn, helps support a position the truth of which is not merely built into a controversial premise.

The point is that substantive liberalism, itself, entails a contestable substantive program that requires a substantive defense. For this reason, liberal constitutionalism is bedeviled by a well-known contradiction. Its chief attraction is its claim to neutrality as between various reasonable political and moral positions. Liberals seize on this neutrality to insist that their doctrine can be embraced by adherents to all these positions. But liberalism cannot be neutral about itself. By definition, a liberal constitution biases outcomes toward liberalism and is, therefore, not “fair” to nonliberalism.

The controversial position that follows from this point is that people who favor nonliberal constitutions should not be subject to special criticism on the ground that they are rejecting “fairness” in the sense of an *ex ante* right of all persons to equal treatment and regard. *All* constitutions—including supposedly liberal ones—take contestable positions on points of disagreement. They are all “unfair” to people who have different positions and all of them treat these people unequally. There is therefore no ground for privileging liberal constitutions before the argument about substantive liberalism even begins.

I have made this point abstractly, but it may help to make it concretely with regard to our own Constitution. Defenders of the U.S. Constitution often argue that it is liberal in the sense that its binding force derives from the fact that it is an agreement that people with a wide variety of substantive conceptions of justice can accept. As Justice Holmes famously said, it is “made for people of fundamentally differing views.”² Several generations after Holmes wrote, John Hart Ely argued that our

2. *Lochner v. N.Y.*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

Constitution was liberal in the sense that it was overwhelmingly about fair procedures. He claimed that for the most part the Constitution did not resolve controversial questions of substantive value but, instead, left them for a democratic process that was fair to all participants in the polity.³ In our own time, libertarians like Randy Barnett, while less enthusiastic about democracy than Holmes and Ely, nonetheless argue that we have a liberal constitution in the sense that it protects a large sphere for individual liberty. For this reason, they claim, our Constitution should be attractive to people with different substantive conceptions of the good.⁴ All of these thinkers, writing within different versions of the liberal constitutional tradition, claim that the U.S. Constitution is worthy of respect because it is transsubstantive.

These claims are demonstrably false. They are also deeply ironic given our Constitution's origins. The United States Constitution was not written so as to provide common ground for people who disagreed about issues that mattered. Although its apologists persist in ignoring or denying the fact, it is simply the case that an important driving force behind the new constitution came from speculators in Revolutionary War debt who had bought up the debt at pennies on the dollar and then wanted the government to impose taxes high enough to insure that the debt was redeemed at face value.⁵ The Constitution was meant to reduce the power of the state governments that threatened these interests and, more broadly, to protect the emerging commercial class at the expense of farmers and debtors.⁶ Southern delegates were happy to go along with this agenda, but they also demanded an additional price: numerous provisions that protected and entrenched slavery.⁷

All this is ancient history, but even as amended and interpreted, our modern Constitution is hardly a blank substantive slate. We can begin with the substantive conceptions of justice that it pretty clearly rules out. Pace Pat Robertson, it

3. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

4. See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

5. CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 34–35 (1913). For the best recent account with elaborate documentation, see WOODY HOLTON, *UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION* (2007).

6. BEARD, *supra* note 5, at 52–63.

7. *Id.* at 29–30, 169–70, 176–77, 192.

does not permit a Christian theocracy. Pace Mark Tushnet, its protections for private property strongly discourage socialism. Pace Holmes and Ely, institutions like the Senate, the Electoral College and the Supreme Court mean that it does not even permit anything like serious democracy.

Then there are the things that our Constitution requires or strongly encourages. It mandates active government intervention to protect existing distributions of property and private market ordering. For the most part, it obliges the victims of injury imposed by speech to bear their own losses. It encourages political gridlock. It puts all of us at the mercy of a single person who is vested with the capacity to blow up the world.

To be clear, I am not suggesting that these supposed defects in our Constitution mean that it should be condemned. It is non-neutral with regard to the matters described above, but it is not as if some other constitution could be neutral. My point is only that all constitutions, including our own, promote some political outcomes and obstruct others. These outcomes require a defense on the merits, and the defense cannot simply be that this is what liberalism requires.

There is, to be sure, a response to these complaints. Perhaps the Constitution is sufficiently open-textured that it does not really command any of these results. True, some readings of the text seem more plausible than others, and some readings seem completely implausible. But the substantive yoke the Constitution apparently imposes on us is actually an artifact of existing power distributions, or at least so the argument goes. Change the distributions and other interpretations of the document will suddenly become plausible.

For example, our system of separated and divided powers strongly encourages gridlock, but presidents like Franklin Roosevelt and Lyndon Johnson managed to overcome these hurdles. The free speech clause is open to readings, and occasionally has been read, to force speakers to pay for some of the injuries their speech causes.⁸ The claim that the Obama administration has produced socialism is nonsense, but it is true that the recent economic crisis has produced a greater degree of public ownership and control over some segments of the economy. Constitutional structure encourages presidential power,

8. *E.g.*, *Ozer v. Borquez*, 940 P.2d 371 (Col. 1997) (recognizing a tort claim for the public disclosure of private facts and affirming an award of compensatory damages).

but it took the intersection of that structure with twentieth-century developments to produce it.

Given our existing Constitution, and given my own substantive commitments, I think that it is important for people to understand how open-textured the Constitution is. The best hope for our existing Constitution is that people will come to see its invocation of grand ideas like liberty, equality, and a “more perfect union” as open for exploitation by any side of any dispute. One might advance this understanding on liberal grounds: Only a constitution that is completely unsettled provides grounds for fair cooperation among people with different views. But, as I will argue in the next Part, the understanding can also serve nonliberal ends. Anyone opposed to the outcomes that our current Constitution produces will have an incentive to persuade people that the Constitution, properly understood, need not dictate these outcomes.

The question before us, though, is not what understanding we should have of our existing Constitution, but how to draft a new one. If we really believed that constitutional language was wholly irrelevant—that its meaning was wholly dictated by power relationships—then there would be no point to the exercise. The project makes sense only if, as I believe to be true, there is a dialectical relationship between text and power. Interpretation of text is often or always an artifact of power distributions, but the text also helps constitute those distributions in the first place. Any new text that we draft will be vulnerable to new interpretations as social and material facts change. Still, that text will have some role in establishing and preserving those social and material facts.

If all this is right, then it follows that a drafter needs to think first and foremost about how he wants that power distributed. Neutrality is not an option. All political arrangements, including those entrenched by our present Constitution, privilege some at the expense of others. Choices about who benefits and who is hurt are both inevitable and inevitably controversial.

One would suppose that all of this was obvious were it not for the frequency with which it is denied. Why are so many so resistant to these conclusions? Some of the problem is caused by misunderstanding. At first, it might seem that the position I advance here is selfish and arrogant. Why privilege my whims and preferences over everyone else’s? How can I be so certain that I am right?

There is something to this complaint if one means by it that a constitution drafter should worry deeply about her responsibility. After all, she has the fate of an entire society in her hands. But this worry and responsibility is built into the hypothetical situation we are asked to address. If I alone were given the power to rewrite the Constitution, then, of course, I would ultimately have to resolve contested issues in the way that I think best. It would be very odd—maybe even conceptually impossible—for me to resolve these questions any other way.

It does not follow that I would resolve them selfishly or without consulting others. To be sure, one substantive theory of constitutional governance is that our polity should maximize my personal happiness and preference satisfaction. If this were my theory, then I would draft a constitution that attempted to implement it. But then I would be subject to legitimate criticism for advancing a very poor constitutional theory. In fact, as it happens, this is not a theory that I hold, and I doubt that many others do either. There is simply no logical connection between the premise that my constitution must inevitably advance my own theory and the conclusion that it would advance a selfish theory.

Nor does it follow that I would insist on my own omniscience and infallibility. In fact, I am well aware of my own limitations (or at least, perhaps arrogantly, I think that I am), and I would do my best to take account of these limitations as I went about my task. I would listen to what others have to say, and I would surely recognize that changing material and cultural conditions might make rigid constitutional language counter-productive in the future. I would need to think hard about the merits of the advice I received, about how specific my constitutional language should be, and about what institutions should be assigned the tasks of interpretation and application going forward.

The fact remains that after I had done all this, it is, once again, simply built into the hypothetical situation that I would be responsible for the draft constitution that I produced. Ultimately, I am the one who must decide whose advice to accept, what language to include, what to specify now and what to leave to future generations. Humility should not be confused with cowardice, and doubt and modesty are no excuse for leaving the task unfinished. After all, if I did not draft the document, someone else would, and then the document would

incorporate her ideas rather than mine. And if I thought that her ideas were better than mine, then her ideas would *be* mine.

There is another set of objections the answers to which may not be directly built into the hypothetical problem. If my constitution reflects no more than my own conception of the kind of country I want to live in, then what makes it legitimate? Why should someone with a different conception feel any obligation to obey it? The problem of constitutional obligation is vexing and complex, and I will not set out a full theory here. Instead, what follows is a sketch addressed to the particular question before us—whether we should have a liberal constitution.

One solution to the legitimacy problem might once again be built into the hypothetical situation. Perhaps we are to imagine that I have somehow been given not only the task of drafting a new constitution, but also the authority to promulgate it. If I have been authorized to promulgate the constitution, then this authority, whatever its source, also makes my constitution legitimate and obligates others to obey it.

Even if I have not been endowed with authority in this sense, perhaps we are to imagine that I have been granted sufficient power to coerce compliance. Why worry about legitimacy if one has power? Indeed, if we build omnipotence into the hypothetical, why worry about a constitution at all? With sufficient power, I could simply command the outcomes I desired without bothering to justify them by reference to a document written out beforehand.

But this solution is too simple. Apart from whatever moral qualms one has about naked coercion, there are conceptual difficulties with the assumption that effective coercive power can ever exist absent some sort of persuasion. No one person has the physical power to compel an entire society. Even in a brutal, totalitarian country, the regime's enforcers, thugs though they be, must be persuaded to obey the dictator. To be sure, they might be persuaded by bribes, but then the dictator must persuade the person who collects and stores the money to dispense it as the dictator directs. Ultimately, it turns out, there must be some kind of politics in every society, however authoritarian.

The question, then, is what will drive this politics? There are three possibilities. First, there is the politics of self-interest. People might be motivated to obey by, say, fear of death or

imprisonment, monetary or other material rewards and deprivations, and the like. In other words, the regime might use negative and positive incentives to buy off or scare off its opponents.

There is no reason to disparage this politics. As argued above, no political system can rest solely on coercion, but no political system—even a democratic one—can survive without it either. With the largest per capita prison population in the world, it hardly befits the United States to complain about state coercion in the service of regime maintenance.⁹ Moreover, the belief that people respond to economic pressures premised on self-interest is central to the market economies that liberals favor. Still, the politics of self-interest, standing alone, is not only unlovely, but also quite inefficient. A regime dependent on this politics must bear the cost of continually providing the carrots and sticks necessary for its own preservation.

A more hopeful and efficient possibility is the politics of moral responsibility. When this sort of politics works, people feel a justified obligation to follow the dictates of a constitution and of subrules authorized by that constitution, even if it is not in their immediate self interest to do so. What might give rise to such an obligation? Liberals claim that the obligation derives from the transsubstantive character of their constitutions. People feel, and should feel, an obligation to obey such a constitution because it is “made for people of fundamentally differing views.” But we have already seen that this claim is false. If constitutions are not and cannot be transsubstantive, then what is left is an obligation grounded in belief in the contestable substantive ends that a particular constitution seeks to advance. On this view, then, liberals will feel a justified obligation to obey only liberal constitutions, theocrats only theocratic constitutions, and so forth.

To be sure, no constitution is ideal. Liberals, theocrats, and everyone else will have to make a judgment about whether a given nonideal constitution is nonetheless worthy of respect on the ground that its unraveling would produce worse results than its preservation. Perhaps the current constitution is the best deal on offer, and the benefits derived from it entail a reciprocal obligation to put up with its burdens. But, of course, it might also

9. PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN 2008, at 5 (2008), available at http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf [hereinafter CENTER ON THE STATES].

be possible that the constitution can be disaggregated with the good parts preserved and the bad parts jettisoned or undermined. Or perhaps imperfections can be corrected at no appreciable cost if we started over. No doubt, citizens will be forced to make difficult contextual political calculations. The important point, though, is that these calculations will be grounded in controversial substantive theories of justice, and people with different theories will come to different conclusions.

In a diverse society like our own, this possibility of splintering and disunion is troubling. The great goal of constitutional governance is to provide unity among people who disagree about fundamentals. How is this goal to be achieved if constitutional obedience turns upon belief in the very doctrines that divide us? This problem leads to the third sort of politics that might produce obedience and, so, civic peace, in a society that disagreed about fundamentals. This is the politics of obfuscation. Perhaps people who, in justice, have no obligation to obey a particular constitution might nonetheless be tricked into believing that they have such an obligation. This sort of politics avoids the necessity of coercion by inducing voluntary compliance, while also avoiding the problem of fundamental disagreement by persuading people (falsely) that a biased constitution is really neutral. The next section is devoted to this possibility.

II. CONSTITUTION-MAKING IN A NONIDEAL SETTING (OR HOW TO STOP FANTASIZING AND MANAGE A SOFT LANDING INTO THE REAL WORLD)

So far, I have patiently indulged this Symposium's organizers by taking their hypothetical situation at more or less face value. At this point, though, it is useful to ask some subversive questions about the world that they ask us to imagine. In particular, just how did it come about that I—a lone law professor, and a politically and culturally marginal one at that—was empowered to draft a new constitution for the United States of America? I must confess that, try as I might, I cannot get my mind around the circumstances that would produce this result.

There are really only two possibilities: Either the counterfactual politics of this alternative universe is radically, unrecognizably different from our own, or the counterfactual me who lives in this universe is radically, unrecognizably different from the real me. So we are asking, in effect, how a Mike

Seidman, who is not Mike Seidman, would draft a constitution for a United States that is not the United States. With no actual experience living in a different skin in this different world, I cannot begin to imagine the contours of the constitution that would result.

In order to make the thought experiment more coherent and interesting, we must imagine a situation closer to the world we actually live in. Three facts stand out about this world. First, in the real world, someone like me would have a marginal impact at best on the shape of a new constitution. I and my allies (such as they are) can expect to be consistently outvoted, overpowered, or, most likely, simply ignored. We would be fighting a desperate, rear-guard action, trying to stave off truly terrible outcomes and making only very occasional and very marginal advances. The relevant question, then, is not what sort of constitution to draft with all the power, but how to avoid disaster with virtually no power.

This is emphatically not a world where one has the luxury to work out ideal political theory or to take principled and uncompromising stands on issues of institutional design. It is an environment that privileges finely honed political instincts and craftiness rather than deep thought and theoretical insight. Better a Lee Atwater or Rahm Emanuel than a Roberto Unger or John Rawls.

Second, like it or not, in our actual world, constitutional liberalism is the reigning ideology. No brilliant law review article or inspired work of political theory is about to change that. It will not do, then, to insist that liberalism is incoherent, contradictory, vapid, or evil. It is a fact on the ground that we must deal with rather than simply assume away.

Third, in our current world, people who share my views are quite vulnerable and are likely to remain so for the foreseeable future. This is a world, therefore, that puts a premium on the acceptance of Nietzsche's slave morality. No doubt, at first, this claim seems quite implausible—perhaps, even paranoid. After all, I occupy a privileged status in our society. I am economically more than comfortable with a not-very-demanding tenured position (and, as if this were not enough, protection into my dotage by the Age Discrimination Act!) that, for reasons that escape me, commands high social prestige. My own extraordinary good fortune, however, should not distract us from the fact that many others with outsider mentalities are in much

more danger of serious retaliation. We live in a society with a vast government security apparatus and a private, disciplinary culture that constantly brandishes, and occasionally uses, the power to crush its enemies. Moreover, we need to entertain the possibility that even the privileged, leftist elite may owe its relative security to the very liberal culture it deplures.

This last point suggests a strategy for dealing with our imagined constitutional moment in something like our real world. From the defensive crouch that we necessarily occupy, people like me need to focus on the clear and present danger of catastrophic loss rather than the remote possibility of dramatic gain. It turns out that constitutional liberalism, already regnant, can be exploited to serve this purpose. Features of liberalism like civil liberties, procedural regularity, frequent elections, and pretensions to neutrality can provide at least some cover for unpopular outsiders.

I do not mean to exaggerate the extent of this protection. We have learned from sad experience that, all too often, liberalism's velvet glove hides an iron fist. It is asking a bit much of the radicals rounded up during and immediately after World War I, of McCarthy's victims in the 1950's, or of today's supporters of a free Palestine to expect them to sit through a lecture about liberalism's virtues. Still, constitutional liberalism offers *some* protection. It has the capacity to convince some people, some of the time, that they have an obligation to tolerate views that they hate. It provides some space for political organization and pressure that would not otherwise be available.

Moreover, even if we abandon our defensive crouch and proceed with more self-confidence, constitutional liberalism may still have an important role to play. Perhaps the right strategy for outsiders is to choose a few relatively unimportant provisions and devote all of their limited political power to including them. Even if they succeeded at the drafting stage, however, they still face the problem of insuring that people take these new provisions seriously. We have already seen that the politics of self-interest has its limits and that the politics of moral responsibility is not transsubstantive. How, then, can we assure obedience among people who disagree with substantive ends that we favor and that have, somehow been at least partially embedded in the constitution?

Including within the Constitution some of the trappings of liberalism may provide a solution to this problem. The feature of

liberalism most useful in this regard is its uncanny ability (at least in our political culture) to persuade people of their duty to obey even when the politics of self interest and of moral responsibility fail. Viewed in one way, liberalism's obfuscatory potential is precisely its problem. Supposedly expansive individual rights, supposedly free elections, a supposedly neutral playing field—all of these institutions serve to justify outcomes that should outrage us. On one view, then, outsiders should devote their energy to breaking down this ideology of legitimation.

The other view, though, is that this approach is either hopeless or foolish. It is hopeless because constitutional liberalism is too deeply engrained in our political culture to be displaced. It is foolish because any constitution, even my nonliberal one, will require a mechanism that convinces the populace to obey, and, given our present political culture, liberalism's pretensions to being transubstantive provide such a mechanism.

It is important to understand just how limited and qualified this endorsement of constitutional liberalism is. First, I emphatically do not mean to endorse liberalism as a principled matter. My view is far removed from John Rawls' position that liberalism is necessary for political justice in a diverse society.¹⁰ I do not even endorse the view that he rejects—that liberalism might provide a mere *modus vivendi* for divergent groups.¹¹ Rather, my view is analogous to that entertained by some Catholics before Vatican II and before John Courtney Murray's influential reinterpretation of Catholic doctrine for an American audience. Some pre-Vatican II Catholics treated religious toleration as a contingent good to be supported only when and to the extent that it advanced the interests of Catholics.¹² So, too, we might treat constitutional liberals as "useful idiots" who, at this particular moment in history, deserve our support because, but only to the extent that, they offer some protection to political outsiders and legitimation for good, nonliberal constitutional provisions.

Second, my commitment to a seemingly liberal constitution is necessarily temporary, partial, and pragmatic. Because the

10. See generally JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

11. *Id.* at 148.

12. For an excellent account of the older Catholic view and of Murray's role in producing change, see generally Leslie Griffin, *Good Catholics Should Be Rawlsian Liberals*, 5 S. CAL. INTERDISC. L.J. 297 (1997).

commitment is not to liberalism itself, but to the nonliberal causes that liberalism aids at this historical moment, it is subject to termination as soon as liberalism no longer aids those causes. Moreover, a constitution that was thoroughly liberal would, by definition, not advance nonliberal causes. What is required, then, is an outer liberal façade just thick enough to legitimate and protect the substantive, nonliberal provisions that lie within.

No doubt, these views will strike many as unprincipled and perhaps even as deeply immoral. Unsurprisingly, I think these charges miss the mark. The partial and pragmatic embrace of liberalism that I advocate is motivated by deep commitment to principle, albeit not to liberal principle. It is precisely the desire to further and protect these principles that motivates the search for a strategy that shields them from attack. To be sure, the strategy does not prioritize *procedural* principles. It does not treat “fair” and “neutral” processes as ends in themselves. Instead, institutions instantiating these processes are goods only so long as they advance the right *substantive* principles. But this is only to say that the strategy is not liberal (no surprise there), and it is surely unfair and non-neutral to claim that only liberals act out of principle.

Another charge is more troubling. As I have already conceded, my embrace of liberalism is premised on liberalism’s obfuscatory and legitimating potential. As such, the strategy arguably fails to treat others as autonomous equals. It assumes that our fellow citizens are mere objects to be manipulated rather than human beings to be heard and respected. I am prepared to concede that nonliberal principles need not prioritize fair and neutral procedures. It is another thing altogether to cede to liberalism alone concern for individual autonomy and respect. On the contrary, my quarrel with constitutional liberalism is precisely that it accords too little attention to these concerns. So if my approach is indeed incompatible with autonomy and respect, then it is also incompatible with the constitutional ideals that I embrace.

I must confess that I am troubled by this charge. If it is right, then we need a constitution that comes as close as possible to being authentically transsubstantive. I have argued elsewhere that such a constitution would be deeply unsettled. It would be written in open-ended terms that could be used by people of all views to advance their causes.¹³ This is the best version of liberal

13. See LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW*

constitutionalism—the best version of our Constitution—and it surely has its attractions. If one privileges civic peace and unfettered discourse, then perhaps it is the best that we can do. And, as I have just argued, even if one does not privilege these goods and, indeed, is not a liberal, such a Constitution may provide the best cover for the pursuit of nonliberal causes under our present conditions.

Ultimately, though, for reasons discussed above, I do not think that even an unsettled constitution can be truly transsubstantive. Nor do I believe that a merely pragmatic embrace of liberalism is inconsistent with the respect that we owe to others. One must first note the deeply ironic nature of the latter charge. Recall that the complaint is about the inclusion of some liberal elements in our Constitution. How can liberals object to this? True, my motivation for this inclusion stems from a belief that liberalism merely obfuscates and legitimates. But if I am wrong about this—if a liberal Constitution really does respect dignity and autonomy as liberals insist—then there is surely no problem with the inclusion of these elements. If I am right, then my putative liberal critics need to reconsider their liberalism.

Perhaps more to the point, there is indeed good reason for liberals to reconsider their liberalism. The silent premise of their argument is that, but for the deeply cynical intervention of political radicals, Americans would regularly exercise meaningful political autonomy. If liberal constitutionalism were serving the goals that it sets for itself, this might be correct. In fact, though, anyone who pays any attention knows how false this claim is. Our society is marked by a huge and growing gap between rich and poor that has a deeply corrosive effect on our politics.¹⁴ We have an astonishing percentage of our population behind bars and an even larger percentage living in the shadows and excluded from political participation because they are not citizens.¹⁵ Our existing political culture is shot through with ignorance, lies, misinformation, manipulation, and subtle but nonetheless very effective forms of coercion. In a political

THEORY OF CONSTITUTIONALISM AND JUDICIAL REVIEW (2001).

14. See Larry M. Bartels, *Economic Inequality and Political Representation*, in *THE UNSUSTAINABLE AMERICAN STATE* 166, 167–68 (Lawrence R. Jacobs & Desmond S. King eds., 2009).

15. See CENTER ON THE STATES, *supra* note 9, at 5; PEW HISPANIC CENTER, *UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS*, 2010, at 1 (2011), available at <http://pewhispanic.org/files/reports/133.pdf> (finding that unauthorized immigrants constitute 3.7 percent of the U.S. population).

environment as degraded as this, the truly cynical move is to condemn people who recognize the truth of our situation and who try to use their knowledge of the truth to make things better.

In the end, I hardly expect that this defense will convince liberals. There is a sense, though, in which this disagreement itself punctures liberal pretensions. The dispute demonstrates, yet again, that constitutional liberalism cannot bridge disagreements between people of good will as to what is to be done. Of course, this problem can be avoided if one pretends that people like me simply do not exist or that, if we exist at all, we are not people of good will. In other words, the liberal myth of a transsubstantive constitutional order can survive, but only if liberals deny to my side the respect and autonomy that they claim for themselves. And that denial is hardly liberal, is it?