THE SUPREME COURT'S INDEPENDENCE: ACCOUNTABILITY, MAJORITARIANISM, AND JUSTIFICATION. COMMENTS ON SEIDMAN

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I find myself in substantial agreement with what I take to be most of Professor Seidman's general themes. I do have three criticisms of the paper. The first two are not disagreements with any particular statement; instead, these criticisms stem from my puzzlements about its enterprise. First, I find the enterprise a bit odd, given Seidman's definitions of objective justification and nonaccountability. Second, the paper by and large proceeds on the mistaken assumption that majoritarianism has a kind of presumptive virtue. In fact, I think that the proposition that the Supreme Court Justices should have to stand for election every four years would be at least as difficult to justify as the current arrangement. Finally, I have difficulty understanding Seidman's main conclusion concerning the relationship between national identity and justificatory practice, and to the extent I do understand it I am inclined to disagree.

I.

Here is why I find Professor Seidman's enterprise odd. As I understand the paper, it defines nonaccountable as "not subject to periodic elections" and it defines objective justification as a reason that would command unanimous agreement. The paper seeks to prove that there are no reasons to refrain from subjecting Supreme Court Justices to periodic

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elections that could command unanimous agreement. I think this argument is odd both because it seems obviously true and because it seems not to be the important question.

With regard to accountability, the Supreme Court certainly is not insulated from the pressures of public and political opinion. The "switch in time that saved nine"[1] is the most dramatic evidence of this, and we all know that in many ways public opinion can and does affect the Court's behavior.

With regard to justification, this word normally describes a reason that shows why an act or belief corresponds to some description of the good. The more persuasive the reason, the better the justification. In ethical and moral discourse, however, the demand for unanimous agreement will almost always be an impossible one to meet.

The important question, in my view, is not whether we can find reasons for having an unelected Court that commands unanimous agreement. Rather, the question is whether we can find more persuasive reasons to defend one or another institutional arrangement, including our own arrangement in which the Court is somewhat accountable, perhaps as accountable as a Congressman from a "safe district."

I really do not regard my criticisms thus far as terribly serious. Properly viewed, I think that Professor Seidman has bitten off a piece of the larger question and chewed it quite well. I do think, however, that the way he has defined his enterprise has skewed his analysis to some extent.

For example, Seidman says that a justification is objective if it could "convince the losers, whose decisions have been frustrated, that these losses are nonetheless ones that they should legitimately bear."[2] The paper, however, does not clearly identify the proposition or propositions of which the losers need be convinced. Sometimes it seems that the losers need to be convinced that a nonelected Supreme Court is a good idea. At other times it seems that they need to be convinced that the decisions they think bad are actually good. In this view, for example, the right-to-lifers would need to be persuaded that *Roe v. Wade*[3] is a good idea.

1. The phrase refers to Justice Roberts apparent switch in position on the virtually identical economic due process issues presented in Morehead v. New York, 298 U.S. 587 (1936), *overruled*, Olsen v. Nebraska, 313 U.S. 236 (1941) and in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). In the interim, President Roosevelt had announced his Court-packing plan.

2. Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1578 (1988).

3. 410 U.S. 113 (1973).

I think that distinctions can be drawn between these questions. I very much doubt that losers can ever be convinced of the goodness of particular decisions with which they strongly disagree. However, this has nothing to do with the fact that the Supreme Court is not electorally responsible. For example, the losers would be equally upset and unconvincible if a *Roe*-like decision issued from an elected state court, or for that matter, from a legislative body. Nor does episodic disagreement necessarily imply serious institutional disaffection, whether from the Supreme Court, Congress, or whomever the decisionmaker happens to be.

The institutional question strikes me as more complicated. I have no strong intuition about whether the groups that have been losers by reason of particular Court decisions would favor subjecting the Court to periodic elections. Many of these groups later have become at least partial winners, since, precisely because the Court is somewhat accountable to public opinion, it later has overruled or watered down the decisions with which they disagree.[4]

More generally, the fact that people may disagree with Court decisions does not prove that they could not agree (even unanimously) that the current partial independence of the Court is a good idea. Yet in order to show that proponents of the three dominant theories of constitutional interpretation would not agree to what he calls a nonaccountable judiciary, Professor Seidman posits that completely nonaccountable justices might systematically violate the proponent's interpretive rules or reach controversial decisions under interpretive theories that underdetermine particular cases. This is basically an abuse or "Court run amok" story, which gives no attention to the accountability features of the current arrangement. Under our current arrangement extreme versions of the abuse story are quite unlikely and accountability features might dispose proponents of all three theories to be quite satisfied with the current institutional arrangement (so long as their interpretive theories were generally accepted).

II.

Professor Seidman's paper is written more or less on the assumption that majoritariamism is so obviously virtuous that it supplies a secure

4. *Roe* itself was arguably watered down when, in the most important post-*Roe* abortion case, the Court refused to invalidate state and federal laws denying public medical aid for abortions. *See* Harris v. McRae, 448 U.S. 297 (1980); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977).

vantage point for criticizing the Court's nonaccountability. I think that, as a consequence of this assumption, Seidman at one point confuses majoritarianism with justification and thus seriously weakens his analysis. More basically, I think that this assumption is mistaken. Seeing this mistake helps illustrate the uselessness of a unanimous agreement standard for testing the adequacy of justifications.

Professor Seidman's confusion of majoritarianism and justification occurs when he asks whether, "an independent judiciary is justified if the majority itself prefers that contested questions of text or political theory be resolved by the judiciary."[5] Seidman rejects this possibility, believing that it confuses the case for nonaccountability with that for delegation: It is one thing to say that judicial review is consistent with democracy so long as the majority is willing to defer to the Court's decisions, but quite another to say so when the majority wants to reverse a court decision.

If majority preferences could supply a justification for nonaccountability, then it seems that judicial review would be justified so long as the Court decided cases consistently with the views of the majority. The case for nonaccountability would depend upon how the Court in fact behaved, which in turn depends to some extent upon what is usually called interpretive theory. Professor Seidman's analysis would thus be incomplete, because, while he is no doubt right that all three dominant interpretation theories could produce majority-disaffecting decisions, it does not follow that all interpretation theories will have this effect. Consider, for example, the following abbreviated theory: Whatever interpretation theory the Court follows, it should not interpret the Constitution in a way that is likely to produce significant disaffection in a majority of the population.

Putting aside the question of whether this interpretive theory could be justified, it is not improbable that it more or less accurately describes the Court's behavior over fairly long stretches of time. If majoritarian, as opposed to unanimous support, is the standard, and leaving out of the picture intensity of preference decisions, even some of the Court's more controversial decisions, like *Brown v. Board of Education*[6] and *Bowers v. Hardwick*[7] might pass the test. I remember Chief Justice Warren once commenting that he doubted whether the Court would have gotten involved with the school desegregation issue if it had realized the intense and broadly based opposition which its decision would generate.

5. Seidman, *supra* note 2, at 1586.
6. 347 U.S. 483 (1954).
7. 487 U.S. 186 (1986).

The more basic problem with this section of Professor Seidman's paper is that it confuses majoritarianism with justification. In order to show that a majority preference for judicial nonaccountability objectively justifies it, one must show that a majoritarian decision is itself justified, whether by Seidman's standard or some other. The argument that the justification for following majorities lies in the majorities' agreement with that position obviously begs the question.

This section is symptomatic of Professor Seidman's general assumption that majoritarianism provides a secure normative vantage point from which to criticize the Court. Seidman believes that the institution of judicial review and particularly the Court's nonaccountability need justification because they operate to frustrate majoritarianism. But why is this the right question? Why is it not equally important to ask whether majoritarianism is objectively justifiable because it interferes with people's autonomy and violates their rights?

Professor Seidman is cognizant of this problem. He mentions some of the many ways that—apart from judicial review—our system of democracy is nonresponsive to majority preferences. He concludes that a commitment to majoritarianism leaves the political system underdetermined, and that the proper role of majoritarianism in a democracy is far from clear. He argues that this controversy over what democracy entails shows that Ely-like theories of interpretation do not justify nonaccountability. He also acknowledges that this same phenomenon gives reason to question the resort to majoritarianism in the attack on judicial review. His answer invokes what I would call the "majoritarianism primitive": Whatever else one believes the concept of majoritarianism includes, there is surely general agreement that it does not normally include substantive decisionmaking by officials who are deliberately shielded from any form of popular control. This answer is unsatisfactory for two reasons.

First, assuming that general agreement justifies the majoritarian primitive, it is quite unclear whether the primitive covers the case of judicial review. The Supreme Court is certainly not an institution that is "shielded from any form of popular control." The Court is both de jure and de facto subject to political and popular opinion in many ways. The Court's immunity from periodic elections is not at all the same as being shielded from any form of popular control.

Second, in Professor Seidman's formulation, majoritarianism "normally" excludes shielded decisionmaking. It seems to me, however, that judicial review is abnormal, and hence it is exempted from the

majoritarian primitive. In other words, in talking about primitives, we ought to acknowledge what can be referred to as the "basic rights primitive" as well. To paraphrase Seidman: whatever else one believes the concept of basic human right includes, there is surely agreement that there are some rights so basic to humankind that they cannot be taken away just because a majority want to do so.[8]

It is no accident that Professor Seidman's formulation of the majoritarian primitive results in underdetermination of the respects in which our institutions, including but not limited to judicial review, should be fashioned to reflect majority preferences. Had he formulated this majoritarian primitive in a way that purported to cover concrete controversial questions, he would not plausibly have been able to assert that there existed general agreement about it. The same is true of my formulation of the basic rights primitive.

I think this offers insights into what happens when justifications are subjected to a unanimous agreement standard. Some normative propositions can pass this test. One might consider, in addition to the two previous examples, "people should be treated equally," or "individual liberty is a precious heritage."

Unfortunately, normative propositions like these are not going to justify much of that which is of consequence in our public life for two reasons. First, the propositions greatly underdetermine particular decisions. Second, they often potentially conflict with each other.

III.

My last point regards Professor Seidman's view of the relationship between justification and identity. He believes that the best possibility for justifying judicial independence rests upon majoritarianism, but that any such attempt faces the impossible task of justifying one temporal preference—that of the Framers—over another—that of a contemporary majority. He later suggest, however, that the problem of inconsistent preferences over time is really not that significant after all. He tells a story about our national "identity," which is rooted in an analogy to individual identity. Because individuals see themselves as the "same" person extending over time, they do not see their earlier "metapreferences" (by which he seems to mean their general goals or moral codes) as intruding into their autonomy. Later, these individuals develop preferences inconsistent with the earlier ones. Accordingly, such individuals

8. Seidman, *supra* note 2, at 1581.

do not need to have an objective justification for the way in which they resolve the conflict.

The nation, according to this story, has a corporate identity similar to an individual's, and the ambivalence that "we" feel about judicial nonaccountability exists because we simultaneously want two inconsistent things. But because it is we who experience the ambivalence, the debate is wholly internal—as in the case of an individual—and the search for normative justifications is fruitless. The bottom line is that this is the way we have chosen to mediate between these conflicting, context dependent preferences.

On first reading, I thought Professor Seidman was launching a broadside attack against all forms of justificatory discourse in constitutional law. However, on rereading the article, I think Seidman is making a narrower point. He seems to assert that when "we" as a society have preferences that differ from those in the Constitution, it is silly to ask whether following the Constitution can be objectively justified because the Constitution is as constitutive of who we are as our current preferences. All that we can sensibly say is that "we" are of two minds. I find the broad interpretation argument baffling, and the narrower one, problematic.

Professor Seidman acknowledges that the crucial point in his line of argument is that the debate over judicial role and accountability comes from a perspective that is internal to our political culture. However, I think Seidman is mistaken in suggesting that it is internal in the same way in which an individual's identity is internal. I think, in fact, that Seidman's account of individuals is open to serious question. For now, however, I want to accept it as an accurate conception of how well-functioning, mature adults grow and change over time.

To the extent that Seidman's view is accurate, he reasons that such persons internalize the various normative commitments they have made in such a fashion that makes it is not meaningful, and perhaps not possible, to separate "ought" and "want" propositions. Such a person experiences potential transgressions of his or her ethical commitments undifferentiatedly as acts that he or she neither ought nor wants to accomplish. Asking a question even implicitly at the moment of choice like "what do I want to do?" both subsumes and avoids any conscious or overt justificatory question. For such an individual the fact-value distinction collapses: The web of merged norms, preferences, and feelings that constitutes that individual's identity is simply an undifferentiated data bank that guides his or her choices.

With regard to the narrow interpretation of Professor Seidman's arguments, the relevant difference between such an individual and our society is this: How an individual gains knowledge of his or her own prior ethical commitments. This is relatively unproblematic. However, how "we" gain knowledge of the Constitution's commitments is very problematic. This is precisely, where the controversy concerning the question of constitutional interpretation arises.

Can Professor Seidman make out even his limited claim without telling us what the Constitution's commitments are, that is, how we should interpret it? If the Constitution's meaning, as some suggest[9] is to be found in the very concrete intentions or expectations of those who drafted or ratified it, it contains very different commitments from those, for example, that Professor Ely finds in it.[10] In turn, the meanings that Ely finds differ from those found by others, many of whom differ amongst themselves.[11] Is Seidman claiming that the Constitution is constitutive of our identity no matter what it means? If so, how?

On the broader interpretation, Professor Seidman argues that objective justification has no role in constitutional discourse. He is correct, but only because the word "objective" precedes "justification." I find it baffling why one would want to refute such an untenable claim with such little relevance to our actual constitutional system.

Value judgments could be "objective" only in a society in which there existed no fact-value distinction. Such a society likely would be extremely homogenous with internal noncontroversial and pretheoretical ethical commitments. Such a community might experience its "thick" ethical commitments, perhaps concepts like "courage," as constitutive of its identity, and as descriptive of social facts much like any other fact. Discreet questions of justification may never arise in such a community.[12]

A community in which people sharply disagree about what is good is quite different. The very fact of disagreement is what gives rise to the idea of justification. Justification functions partly to allow people to explain themselves to each other, and more importantly to allow them to try to persuade each other. A culture's evolutionary interpretation of the

9. *See, e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

10. J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

11. For a recent, intelligent review of some of these views, see D. RICHARDS, TOLERATION AND THE CONSTITUTION (1986).

12. B. WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 142-48 (1985).

good provides its members with both shared concrete stories about its ethical heroes and a shared system of rather abstract and competing values, both of which serve as a public source of persuasive rhetoric.[13] Because the value is shared only as stories open to competing interpretations and abstract values, and because the values also compete for allegiance, disagreement among community members about the meaning of the stories and values is common. Professor Seidman is no doubt right that a historical accumulation of a culture's public choices reveals much about the culture's identity, but it cannot dispense with justification, even if objective answers are generally not possible.

Our society's institutions for public choice face an unending stream of normative choices. Should we alter in some way the form of independence now enjoyed by the federal judiciary? Should people have voted to retain former California Chief Justice Rose Bird despite her apparent unwillingness to enforce the death penalty? Should the Supreme Court recognize a constitutional right to sexual liberty, or more strenuously protect property rights?

People faced with questions such as these will often disagree. Positions will be taken and arguments made about what is good for society. In order for our historical public choices to influence this process, they will require interpretation. This will typically involve the telling of competing stories about how our past choices interpreted our values or resolved conflicts among these values, and how this ought to affect the decision at hand. Moreover, our past choices will never completely divest direct appeals from the values themselves (chiefly democracy, liberty, equality, and justice). All of these are justificatory practices.

When questions relating to judicial role or accountability arise, it seems to me both inevitable and appropriate that we engage in arguments about how our values and prior commitments affect on these questions. Objective answers are not available. But I can not see how this can or should stop us from trying to give the best answers possible. When we do so we are giving justifications, although conventional not objective ones, because we are supplying reasons for why our position coincides with some description of the good.

13. Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 614-15 (1985).