# ARE PROFESSORS LAWSON AND SEIDMAN SERIOUS ABOUT A "FIDUCIARY CONSTITUTION"?

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In *By Any Other Name: Rational Basis Inquiry and the Federal Government's Fiduciary Duty of Care*,[1] Professors Gary Lawson and Guy I. Seidman elaborate part of their argument for a "fiduciary Constitution" that they put forward in their recent book for the University Press of Kansas.[2] In this book, Professors Lawson and Seidman argue that the U.S. Constitution is best seen as a delegation of governmental powers to agents of the American people (i.e., the national government) to serve the interests of the American people.[3] The book argues that power that is delegated by principals and accepted by agents imposes duties on the agents, duties that include loyalty to the principals and care for their well-being.[4] To support this general theory of the Constitution, Professors Lawson and Seidman need have looked no further than the Declaration of Independence (second paragraph), the Constitution's preamble, and *Federalist No. 1*.[5] Though they cite the Constitution's preamble and other agency tracts, like Locke's *Second Treatise*,[6] Professors Lawson and Seidman rely mostly on the 18th Century common law of agency. They cite numerous cases in this body of law and presume both its knowledge by, and its influence on, the general public of the founding era and the Committee of Detail of the Federal Convention of 1787.[7] All of this raises a question: why the arcana of 18th Century private law for a proposition easily affirmed by the foundational documents of the American system?

Before I hazard an answer to this question, let me note a difficulty with Professor Lawson and Professor Seidman's recent article: *By Any Other Name: Rational Basis Inquiry and the Federal Government's Fiduciary Duty of Care.* Professors Lawson and Seidman need no argument that fiduciaries owe duties of loyalty and care to their principals and that these duties entail instrumentally reasonable conduct on the part of fiduciaries. These propositions are all but analytic—integral to the very meaning of a fiduciary relationship. Thus, Professors Lawson and

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1. Gary Lawson & Guy I. Seidman, *By Any Other Name: Rational Basis Inquiry and the Federal Government's Fiduciary Duty of Care*, 69 FLA. L. REV. 1385, 1385 (2017).

2. *See* GARY LAWSON & GUY SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION ch. 7 (2017) (discussing the duties of care and loyalty) [hereinafter A GREAT POWER OF ATTORNEY].

3. *Id.* at 6–7.

4. *Id.* at 132–50.

5. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776); U.S. CONST. pmbl.; THE FEDERALIST NO. 1, at 3–4 (Alexander Hamilton) (J. Cooke ed., 1961).

6. A GREAT POWER OF ATTORNEY, *supra* note 2, at 41, 47, 49, 50, 88–89.

7. *Id.* at ch. 2, 85.

Seidman can safely say that "[t]he idea that federal governmental action should, as an ideal, be reasonable, is not especially controversial."[8] One can also agree with Professors Lawson and Seidman that because the Constitution's Due Process Clauses are phrased as procedural guarantees, requirements of substantive reasonableness flow more readily from background fiduciary norms than from the Constitution's Due Process Clauses.[9] Indeed, a fiduciary constitution would seem to compel substantive reasonableness for any governmental act. No mentally competent person would voluntarily delegate power to an agent to be exercised carelessly or pretextually or for anything less than an understanding and reasonably competent pursuit of the principal's interest. But instead of affirming a meaningful standard of reasonableness, our authors equivocate. They start out well. Citing *United States v. Windsor*, Professors Lawson and Seidman suggest serious judicial scrutiny of legislative acts to ensure constitutionally legitimate purposes and plausible causal efficacy, even in cases involving no fundamental rights.[10] Yet two paragraphs later they back off. Here Professors Lawson and Seidman say that "[t]he background duty of care imposed by fiduciary theory . . . may even be slightly more rigorous than modern 'rational basis review.'"[11] *Slightly* more rigorous? Nothing more?

By "modern rational basis review" our authors are not thinking of the *Windsor* standard; they are thinking of a standard that "excuses even gross negligence" and allows "laws to stand if one can imagine a rationale for them, even if the actors did not actually formulate or rely upon that rationale."[12] By this modern standard, our authors continue, governmental actions are "unconstrained by other than express [constitutional] prohibitions," a practice that "is quite absurd" where "government actors are seen as fiduciaries of any sort."[13] By article's end, our authors call for no more than "a modestly revamped 'rational basis' review"[14]—no more than modest improvement of a standard that is "quite absurd."[15] Topping things off, Professors Lawson and Seidman conclude that "[w]hether one calls this background norm 'substantive due process' or anything else is a matter of taste."[16] So the fiduciary duty of care seems to leave us pretty much where we started, and this minimalist advance on the status quo justifies the reader's doubt either that our authors take their fiduciary constitution seriously or that anyone else should take it

8. Lawson & Seidman, *supra* note 1, at 1406.
9. *Id.* 1405–06.
10. *Id.* at 1404–05 (citing United States v. Windsor, 133 S. Ct. 2675, 2696 (2013)).
11. *Id.* at 1405.
12. *Id.*
13. *Id.*
14. *Id.* at 1407.
15. *Id.* at 1405.
16. *Id.* at 1407.

seriously.

That our authors do not take their fiduciary constitution seriously is indicated further by their hesitation to apply a requirement of reasonableness (a duty of care) to the actions of state governments. Professors Lawson and Seidman pointedly leave the question open because "the Constitution does not generally empower state officials and state legislators . . . those actors are not subject to the background fiduciary standards that underlie the federal Constitution . . . ."[17] Yet, here Professors Lawson and Seidman forget their own analysis. A fiduciary duty of care arises not from the Constitution; it arises (they claim) from a part of the Constitution's historical background, namely, 18th Century private law.[18] Moreover, the *Constitution's* empowerment cannot be the reason for a fiduciary duty of care in the national government, for strictly speaking, the Constitution empowers no one. The *people* empower the national government: the people is the principal, the government is the agent, and the Constitution is the instrument (the "power of attorney") that attests the people's establishment of, and delegation of power to, the national government.[19] So say the fiduciary principles that predated 1787 and that informed the thinking of the founding generation, according to Professors Lawson and Seidman.

But not just according to Professors Lawson and Seidman, for the Declaration of Independence says virtually the same thing. To secure the natural rights to life, liberty, and the pursuit of happiness, says the Declaration, people institute government, which governments derive their just powers from the consent of the governed.[20] Moreover, says the Declaration, when government becomes destructive of these ends, the people have a right to abolish the old government and institute a new one.[21] Each of the thirteen states bought into this understanding of government when their delegates, 56 in all, signed the document as representatives of their several "Free and Independent States."[22] The political philosophy in the background of the U.S. Constitution is thus the same political philosophy in the background of the state constitutions. If this philosophy makes one constitution a fiduciary constitution, it makes all American constitutions fiduciary constitutions. One can only wonder why Professors Lawson and Seidman hesitate to say so. Can it be that they have something other than a fiduciary constitution in mind?

This question returns us to our first problem: Professors Lawson and Seidman's emphasis on the 18th Century private law of agency over

17. *Id.* at 1406–07.
18. *Id.* at 1386.
19. *Id.* at 1387–88.
20. THE DECLARATION OF INDEPENDENCE (U.S. 1776).
21. *Id.*
22. *Id.*

material more familiar to their readers and more immediately associated with the American founding. Though Professors Lawson and Seidman acknowledge that the choice between agency instruments like the corporate charter and the power of attorney can be inconsequential, they prefer the power of attorney.[23] The explicit reason for this preference turns out to be that the power of attorney serves as a greater restriction on the power of the national government than other agency instruments, especially the corporate charter. Apparently, observers who see the Constitution as a corporate charter are likely to be "liberal constructionists," and those who see the Constitution as a power of attorney are likely to be "strict constructionists."[24] By strict constructionism Professors Lawson and Seidman seem to mean an attitude toward national power that borders on a presumption of unconstitutionality.[25] Because defending strict constructionism requires a moral argument, and because Professors Lawson and Seidman repeatedly disclaim moral argumentation,[26] they leave strict constructionism undefended. Professors Lawson and Seidman want to be strict constructionists, but they do not say why anyone else should want to be a strict constructionist.[27] More to present concerns, they fail to show that a fiduciary constitution entails strict constructionism.

Maybe the 18th century private law of agency entails strict constructionism (I doubt it, but I concede the possibility *arguendo*), but common sense does not support strict constructionism. Nor does the thought of leading figures of the American founding. The power of attorney is what Professors Lawson and Seidman call an "agency instrument[]."[28] They say that by such an instrument "[p]owers of certain kinds—some defined more precisely than others—are vested by the principal in different actors whose attributes, duties, and limitations are laid out with obvious and considerable care in order to accomplish the principal's goals."[29] This statement implies two things that common sense affirms. First, that the governing concern of the power of attorney—its "final cause," if you will—is the realization of a goal, an end, a good thing, like the ends to which the second paragraph of the Declaration of Independence refers, or the good things to which the

23. *See* A GREAT POWER OF ATTORNEY, *supra* note 2, at 136–37; Lawson & Seidman, *supra* note 1, at 1389, 1397–98.

24. A GREAT POWER OF ATTORNEY, *supra* note 2, at 68, 105–07.

25. See Professors Lawson and Seidman's criticism of the individual mandate of the Patient Protection and Affordable Care Act of 2010. *Id.* at 91–96.

26. *Id.* at 2, 5; Lawson & Seidman, *supra* note 1, at 1387 n.4.

27. In both their article and their book, Professors Lawson and Seidman ignore Ronald Dworkin's famous argument that strict constructionists abandon fidelity to the Constitution as written. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 133–37 (1977).

28. Lawson & Seidman, *supra* note 1, at 1388.

29. A GREAT POWER OF ATTORNEY, *supra* note 2, at 3–4.

preamble of the U.S. Constitution refers. Secondly, the statement implies that the institutions, functionaries, and powers of an agent-government are essentially means to the ends of the agent-government. The Constitution's preamble reflects these propositions when it says that the people do ordain and establish this Constitution "in order to" form a more perfect union, establish justice, and realize other preambular ends. Now in common sense, if your chief concern were a set of goods, and if you had confidence in the way you structured a government to help you realize those goods—a confidence implicit in the preamble and explicit in *Federalist No. 1*[30]—would you construe the powers of that government in a manner that restrained the government's pursuit of those goods? John Marshall asked essentially the same question in a famous passage of *Gibbons v. Ogden*:[31] Why a "strict construction" of the commerce power asked Marshall; why "that narrow construction, which would cripple the government, and render it unequal to the object for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent"?[32] Professors Lawson and Seidman ignore this question.

A related dictate of common sense is the need for discretionary powers in confronting future uncertainties. Professors Lawson and Seidman appreciate this need. At one point in their book they acknowledge it. They say that when an agent represents multiple principals of varying interests in unpredictable or "myriad circumstances," "the wisest course of action is to leave agents with discretion to adjust to future developments."[33] What Professors Lawson and Seidman fail to acknowledge is what this need implies for constitutional interpretation. In a famous passage from *Federalist No. 23*, Alexander Hamilton affirms the need for discretionary power; here he counsels against constitutional restraints on powers "essential to the care of the common defence . . . ," "to commerce, and to every other matter to which its [the national government's] jurisdiction is permitted to extend."[34] Hamilton, like Marshall, but unlike Professors Lawson and Seidman, was a liberal constructionist. Hamilton's statement, like Marshall's position in *Gibbons*, shows that one cannot just assume that an agency theory of the Constitution entails strict constructionism. Strict constructionism may be a splendid idea; but it has to be argued for, not just attributed to the founding generation.

The relative importance of means to ends in any agency theory burdens any argument for a "strict construction" of delegated powers. Hear James Madison on this subject. The Continental Congress charged

30. *See* THE FEDERALIST NO. 1, at 6 (Alexander Hamilton) (J. Cooke ed., 1961).
31. 22 U.S. (9 Wheat) 1 (1874).
32. THE FEDERALIST NO. 1, at 187–88 (Alexander Hamilton) (J. Cooke ed., 1961).
33. A GREAT POWER OF ATTORNEY, *supra* note 2, at 157.
34. THE FEDERALIST NO. 23, at 147, 149 (Alexander Hamilton) (J. Cooke ed., 1961).

the Constitutional Convention with (1) "revising the articles of confederation" in a manner (2) "adequate to the exigencies of government and the preservation of the Union."[35] Instead of following those instructions, the Convention reported back a fundamentally new constitution to be ratified or rejected by a procedure other than that prescribed by the Articles of Confederation.[36] In *Federalist No. 40*, Madison claimed that the Convention had been faithful to its charge because no mere revision of the Articles could possibly be adequate to the exigencies of government and the Union's preservation.[37] By commonsense and legal "rules of construction," said Madison, where two parts of a charge could not "be made to conspire to some common end . . . the less important should give way to the more important part; the means should be sacrificed to the end, rather than the end to the means."[38] Madison then challenged the Convention's critics to "declare, whether it was of most importance to the happiness of the people of America, that the articles of confederation should be disregarded, and an adequate government be provided, and the Union preserved; or that an adequate government should be omitted, and the articles of confederation be preserved."[39] Such is one man's view of what kind of constructionist a fiduciary should be.

Maybe Professors Lawson and Seidman can square their agency theory of the Constitution with their strict constructionism, a vacuous standard of rationality, and their hesitation about fiduciary restraints on the states, but until they do, we can question either their understanding of the fiduciary constitution or their commitment to it. In the meantime, we might consider the principal task that a fiduciary constitution would impose on constitutional theory as an academic discipline.

Taking our bearings from the Declaration of Independence, the Constitution's preamble, and the relevant passages of *The Federalist*, we observe that a fiduciary constitution would be an ends-oriented document. It would exist chiefly to authorize the pursuit of a social state of affairs thought to be a good state affairs, like a general economic prosperity (where people enjoyed the "Blessings of Liberty") and security from foreign domination (where the government had achieved "the common Defence"). The principal thrust of this constitution would be the positive thrust of its principals. As Professors Lawson and Seidman conclude, this government would operate under delegations of power conceived as affirmative duties of loyalty, impartiality, and care whose

35. THE FEDERALIST NO. 40, at 259 (James Madison) (J. Cooke ed., 1961).

36. *Id.* at 258 (discussing whether the Convention had the authority to report back a fundamentally new constitution to be ratified).

37. *Id.* at 267.

38. *Id.* at 259–60.

39. *Id.* at 260.

essential functions it could not sub-delegate.[40] Whatever "negative liberties" this constitution might secure would be connected to what Lincoln referred to as "laudable pursuit[s]"[41]—liberty of the kind Chief Justice Charles Evans Hughes called "liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people."[42] Good citizens of this constitution would have to have the positive attitude toward government that Alexander Hamilton displayed when he said in *Federalist No. 1* that "the vigor of government is essential to the security of liberty; that, in the contemplation of a sound and well-informed judgment, their interest can never be separated; and that a dangerous ambition . . . often lurks . . ." in the breast of those who deny it.[43]

Because the ultimate test of any such constitution would be whether it could generate a politics that supported realistic hope for reasonable progress toward what Madison called, in *Federalist No. 45*, "the real welfare of the great body of the people . . . ,"[44] constitutional theorists would have to work out a substantive theory of constitutional commitments and corresponding human virtues. Such a theory would be essential to an agency theory of government because the chief "limits" of agents as agents are the ends that principals engage agents to pursue.[45] By this general theory of the ends of government observers would assess the conduct and decisions of governmental functionaries (legislative, executive, and judicial) and, indeed, the adequacy of the Constitution itself—just as the framers did when they abandoned the Articles of Confederation. This, of course, would be a moral-philosophic enterprise, and that might rule out participation by writers who eschew moral philosophy, as Professors Lawson and Seidman claim to do.

But this claim needs clarification. Professors Lawson and Seidman can and do avoid open moral argumentation; but they hardly avoid moral choices. The choice to be a "strict constructionist" is certainly a moral choice because neither the constitutional text, nor judicial precedent, nor the history of the American founding, nor the logic of agency mandate a view of national power that would cripple the national government's pursuit of preambular ends like national security and prosperity. Moral choices are inevitable in constitutional decision for reasons that include

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40. Lawson & Seidman, *supra* note 1, at 1389–90, 1394–95.

41. Abraham Lincoln, *Message to Congress in Special Session* (July 4, 1861), *in* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS, 607 (Roy P. Basler ed., 1946).

42. West Coast Hotel v. Parrish, 300 U.S. 379, 391 (1937).

43. THE FEDERALIST NO. 1, at 5–6 (Alexander Hamilton) (J. Cooke ed., 1961).

44. THE FEDERALIST NO. 45, at 309 (James Madison) (J. Cooke ed., 1961); SOTIRIOS BARBER, CONSTITUTIONAL FAILURE 51–52, 107 (2014); JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 2, 65–66, 71–72, 119–23 (2011).

45. This is the principal message of John Marshall's career. *See* SOTIRIOS BARBER, THE FALLACIES OF STATES' RIGHTS 43–44, 46–47, 55–56, 59–63 (2013).

the necessarily abstract nature of constitutional standards, the illogicality of normative conclusions drawn from non-moral facts, and the inability of history and legal precedents to speak unequivocally for themselves.[46] Writers who eschew the activity of moral philosophizing succeed only in escaping responsibility for the choices that they inevitably make. When Professors Lawson and Seidman come to appreciate this fact, they can responsibly pursue the truth about what a fiduciary constitution would be.

46. *See generally* SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 29–30, 155–60, 166–69 (2007) (discussing how a philosophical approach is essential to understanding and interpreting the Constitution).