Disobeying the Constitution: Interpretation and Modernization of New and Old Ideals Without Obligation and Obedience

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"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (U.S. Const. Amend. 1) Thus begins the Bill of Rights, the first ten amendments of the Constitution of the United States of America. The Constitution became officially approved by twelve state delegations and signed by thirty-nine of the forty-two delegates present on September 17th, 1787. Two hundred and twenty-six years later, the Constitution continues to be a strong presence in modern America, as we the people continue to revere and obey the document as legally binding in all situations. However, Louis Michael Seidman, author of *On Constitutional Disobedience,* is concerned that following an archaic doctrine created by men who had no knowledge of today's ideas and issues impedes the progress of the modernized United States of America. Yet as he publicly argues his point, Seidman continuously uses the first amendment, the freedom of speech and press, which allows him to state his well-researched opinion to the public. But are the freedom of speech and press, as well as all the rights, laws and amendments, followed in direct obedience, or simply because the greater public deems them reasonable and fair?

In the critically acclaimed book *On Constitutional Obedience*, Seidman analyzes the Constitution's language, wording, and overall message and decides that the Constitution should be read as "a work of art, designed to evoke a mood or emotion, rather than as a legal document commanding specific outcomes." (Seidman, 2012, p. 18) Seidman's book gives evidence and examples proving this point. Seidman describes the Constitution as a symbol of national unity to provoke feelings of patriotism. However, political figures use the Constitution as a tool to twist their opinions about today's issues and consistently interpret the text in order to support their

own views. Originalists, people who advocate a literal interpretation of the Constitution, disagree with the concept of a "living Constitution", where the archaic language in the Constitution can be modernized by "reading its vague commands in light of contemporary realities." (Seidman, 2012, p. 21) This concept cannot be applied to the very specific aspects of the Constitution. For example, the language that created the disproportionate Senate and the Presidential Election system that can allow the candidate who lost the popular vote to assume office are not in any way general enough for reinterpretation.

Constitutionalists and originalists are in firm agreement that if the Constitution were not upheld, the United States of America could descend into anarchy and tyranny. Seidman refutes this belief with examples of other strong nations that do not have a written constitution, including New Zealand and the United Kingdom. The belief that the Constitution is the only linchpin keeping the United States of America from complete anarchy and tyranny implies that the United States citizens are incapable of rational and reasonable thought and decision making. The citizens of the United States are completely capable of making rational decisions without the aid of the Constitution, even going against the document, in order to provide justice and order. In *On Constitutional Disobedience*, Seidman states that "Lincoln's refusal to obey constitutional text during the Civil War was arguably necessary to avoid tyranny and anarchy. So was Roosevelt's stretching of constitutional authority during the Great Depression. When the risks of unraveling are small, or (especially) when constitutional disobedience itself might produce unraveling, the anarchy and tyranny argument does nothing to support constitutionalism." (Seidman, 2012, p. 26) This is a clear statement about the ineffectiveness of the constitutionalists' argument that the United States would become anarchistic without absolute obedience of the Constitution. The

examples given show that the Constitution cannot be used as a key to make all important national decisions, and anarchy and tyranny can be avoided without strict adhesion to the document.

Throughout his book, Seidman continues to debunk the arguments in favor of complete obedience to the Constitution. A common complaint is that ignoring the Constitution would intrude on civil liberties. In fact, Seidman states that "the Supreme Court did nothing ... to protect the victims of McCarthyism when the anti-red scare was at its height." (Seidman, 2012, p. 27) The document, text written on parchment, has no effect on civil liberties or civil rights, and Seidman continues with the definite statement, "The only real protection for Civil Liberties is an engaged and tolerant public willing to respect and defend minority rights." (Seidman, 2012, p. 27) The premise that disobedience or ignorance of the Constitution would put civil liberties in danger has no platform on which to stand. The real focus should be on protecting civil liberties without having the shadow of the Constitution influence what should and should not be done in order to establish equality. I find Seidman's views on absolute obedience to the Constitution reasonable, yet I also agree that the Constitution should hold power as a guiding symbol. Originalists are people who regard the Constitution as absolute law, unlike Seidman, and although I do not agree with these views, I admire the commitment and historical research and accuracy that accompany them.

In *Judges on Judging: Views from the Bench*, Antonin Scalia, who is a Justice of Supreme Court since 1986, and an advocate of originalism conveys his unique and interesting opinions about both orginalism and nonoriginalism. Scalia's stance on past theories on nonoriginalism is made very clear in the beginning of the essay. He states that "Nonoriginalist opinions have almost always had the decency to lie" (Scalia, 2009) and that they would "either ignore strong evidence of original intent that contradicted the minimal recited evidence of an

original intent congenial to the court's desires, or else not discuss[ing] original intent at all, speaking in terms of broad constitutional generalities with no pretense of historical support." (Scalia, 2008) His words are harsh, as if he is describing uneducated children. Scalia accuses the past theorists of having no historical basis for their beliefs. Scalia then compares the originalist and nonoriginalist views in a more objective manner. Scalia concedes that "in its undiluted form, at least, [originalism] is medicine that is too strong to swallow." (Scalia, 2009) Scalia uses this metaphor to portray how drastic the concept of originalism is when taken in the literal form. Although he refers to originalism as the "lesser evil" Scalia himself subscribes to originalism. He is able to put the concept into perspective in modern judicial law.

The Constitution in relation to the United States court system often creates paradoxical situations. Stare decisis is the Judicial Court doctrine of precedence, that is, when judges are obligated to respect prior rulings when making the final decision on a court case, and Seidman has strong views on precedent and the Constitution. Stare decisis is a difficult concept to interpret, Seidman freely admits, yet the way he is interpreting it is explained that in order for stare decisis to take effect, "the doctrine requires [the judge] to disregard [the] judgment, not because she has been persuaded by other material, but despite the fact that she has not been persuaded." (Seidman, 2012, p. 76) Seidman is basically stating that the judge's own judgments are to be cast aside when following stare decisis, the doctrine of precedent, as it is completely dependent on the prior rulings of other judges, and not on the previous material that may have swayed the judge to rule the same way as in the past. Based on the material and the examples in Seidman's book, *On Constitutional Disobedience*, my interpretation of stare decisis is that it is the doctrine of ruling on a case based blindly on a previous case of the same content. I personally do not agree with this doctrine, even though there are specific stipulations set by the judicial

court in order to determine if stare decisis is appropriate. I labor under the personal belief that judges should look at all the facts and evidence of a case, prior and similar, and make, as Seidman refers to it several times in his book, an "all things considered" judgment. (Seidman, 2012, p. 76) I see stare decisis as a paradox because the Constitution decrees a fair trial, yet respecting precedent to the point of ignoring what might be important factors in a specific judicial court case is fundamentally unfair. Seidman's previous statement about the hypothetical judge being persuaded or not being persuaded in a stare decisis situation supports my concern about stare decisis as a concept. This concept is defended by originalists, however, as described by Seidman in *On Constitutional Disobedience.*

Seidman recognizes that arguments against the doctrine are defended by the insistence that stare decisis is a constitutional demand. "They point to the fact that at the time of the framing, judges regularly followed their own precedents and argue that stare decisis is built into what the framers meant by 'judicial power'." (Seidman, 2012, p. 76) The framers may have thought stare decisis was an integral part of judicial power, but when the Constitution was written the judicial system was relatively new and the only precedent available to refer to was English Common Law. However, Seidman also argues that applying stare decisis can be in violation of the Constitution's commands. He states that "as the doctrine of stare decisis illustrates, it is constitutional obedience, rather than disobedience, that threatens order." (Seidman, 2012, p. 78) I interpret this quote from Seidman's book to mean that adhering strictly to stare decisis as the Constitution commands in its judicial laws causes more chaos than order, because of the complicated stipulations that must be met before even applying stare decisis, and these complications could potentially hinder a court proceeding instead of assisting in the final rulings made by the judge. I am under the firm belief that stare decisis, as a doctrine, does more

harm than good and that while material from precedent could make a situation clearer, precedent alone should not be the sole reason for a specific ruling. I conclude that precedent should not be absolutely obeyed as the Constitution mandates, and should be more of a guideline as much as the rest of the document.

Constitutional obedience appears to be a country-wide rule, and a standard tool to be used in defense of any convention or party to defend their ideas of morality. However, it can be debated that fewer people actually follow the Constitution than commonly assumed by the citizens of the United States of America. Seidman addresses this phenomenon in his book by stating that the "very presence of constitutional disagreement itself mean[s] that the Constitution is regularly violated." (Seidman, 2012, p. 79) This makes a good deal of sense, as discussion of the necessity of following the Constitution would suggest that it is violated regularly by the widespread movement that wants to prove the Constitution is not a fundamental part of the way the United States of America is being operated. By this logic, the United States of America is held together by what Seidman refers to as a "myth of constitutional compliance". (Seidman, 2012, p. 79) Seidman states the opinion of political theorist Leo Strauss, who argues that the lie of constitutional governance is a stronger influence in the American government than the reality of constitutional governance. This idea is called the noble lie, which supports Seidman's overall argument, yet also shows the American people as naïve and easily lied to, by the politicians in the United States government. He maintains that this deliberate manipulation of the American people that was suggested needs to be debated. The right and left sides of politics also debate each other about the intricacies of the Constitution.

The general right wing argument is that our civil liberties are not secure, and that state's rights which protect the people from federal government interference and regulation are

dwindling. The left wing's concerns lean more toward the sheer amount of violence in the United States and the staggering number of incarcerated Americans. The left wing is also concerned about the lack of progress being made by the President of the United States, and the previous lack of progress that was made by the former President of the United States, on the war effort. However, they share some fundamental concerns as well. "Elements of both the Left and the Right share overlapping concerns about the emergence of a National Security State under which the executive involves us in foreign adventures without a vote by Congress." (Seidman, 2012, p. 80) Seidman is trying to convey the concern that the left and right have with what they think that involvement might lead to, such as the government's increased violation of the privacy of citizens, misuse of the executive power, and using its own authority to conceal the government's own wrongdoing. Seidman believes these concerns reflect the worry that civil liberties are weakening, which would bring about the question of whether or not the United States citizens can be trusted with their own freedoms and rights.

However, civil liberties also cannot be protected by the absolute obedience to the Constitution. I agree with Seidman's viewpoint that "we need to develop a culture of civil liberties - a culture that values argument and disagreement more than obedience." (Seidman, 2012, p. 81) He states that "the best way to create such a culture is to encourage independent thought, debate, and skeptical engagement with various versions of liberty." (Seidman, 2012, p. 81) What I interpret from Seidman's "various versions of liberty" is that Seidman wants the citizens of the United States of America to apply their own thoughts and opinions and work together to construct a world in which everyone would commit to a system of rights and liberties. Seidman has a two part argument for these propositions, theoretical and empirical. Theoretically, there is very little reason to believe that a document that is two hundred years old would protect

any freedom, and empirically, Seidman explains to the reader that “historically, constitutional enforcement has not meaningfully contributed to American freedom and has probably done a great deal to harm it.” (Seidman, 2012, p. 82)

The theoretical argument begins with the premise that a government is created for specific ends and should only function according to specific rules. Seidman explains the Constitution’s role in the government by stating that “Constitutions are documents that specify those ends and rules and establish that government actions not justified by the ends and authorized by the rules are illegitimate.” (Seidman, 2012, p. 82) The “ends” referred to in the quote are the “ends” in which the government exists to create. I see the Constitution, in accordance with Seidman’s argument as an instruction manual for the government. A constitution contains rules and regulations, as well as consequences for disobeying said rules and regulations. Whether or not there is a direct link between a constitution and civil liberties, and if they are protected, depends entirely on the content of the Constitution.

The United States Constitution has little to do with civil liberties as far as protection is concerned, as the Constitution protected the obscene act of slavery with several provisions. Obedience to this early Constitution did not support all civil liberties. Seidman argues that the Constitution does not benefit any spectrum of the political prism. He claims that liberal and conservative views cannot both be represented in the Constitution, and complete compliance with the document would have to involve deception by either party. Citizens of the United States, if left to their own devices without the influence of the Constitution, would develop a system that would serve every side’s interests. However, Seidman states that upsetting the equilibrium does not damage civil liberties, as evidenced by the freedom that was produced by the Civil War, which “upset a deeply entrenched, self-enforcing equilibrium.” (Seidman, 2012, p.

90) Seidman claims that “our historical experience with civil liberties strongly supports that constitutional obligation does little or nothing to protect freedom.” (Seidman, 2012, p. 90) Seidman supports his claims with his empirical argument.

Seidman claims “that judges are more likely than other political actors to protect civil liberties because of constitutional obligation. If this is true, but if it is also true that judges in fact almost never protect civil liberties because of constitutional obligation, then it follows that constitutional obligation is quite unimportant.” (Seidman, 2012, p. 91) Seidman uses parallel wording and repetition to make his point, which reads as confusing to the reader; however I interpret his point according to the context and confounding phrasing. Seidman is trying to convey the unimportance of the Constitution in relation to civil liberties in a judge’s ruling. Whether the judge would rule in a particular way, protecting or ignoring civil liberties based on constitutional obedience, proves that the Constitution is not necessary for protecting civil liberties. Seidman claims that “if judges are more likely to act out of a pure sense of constitutional obligation than political actors, then we can measure the extent to which constitutional obedience protects civil liberties by looking at the judiciary’s record in providing such protection against the opposition of political actors.” (Seidman, 2012, p. 93) Seidman believes that “since courts are systematically more likely to act because of obedience, the frequency of such cases provides an indication of how much effect obedience has on civil liberties.” (Seidman, 2012, p. 93) Seidman believes that this research would prove his points about the Constitution’s failure to do anything to protect civil liberties, or even has anything at all to do with civil liberties. Obedience to the Constitution, without debate and advancement, is no way to advance freedom.

It is impossible to turn back in time to recreate courts that talked through and debated rulings rather than ruling based on writings in the Constitution. However, it is possible to look at the United States today and "compare our own culture of civil liberties with that of countries where constitutional obligation plays a lesser role." (Seidman, 2012, p. 96) Seidman expresses concern over the results of this comparison. Countries such as Australia and Great Britain are basically equal to the United States in terms of the protection of civil rights. However, Seidman claims that the most revealing comparison would be to countries with young democracies, such as the Arab world. "In countries with no tradition of constitutional protection for civil liberties, constitutional obligation plays no role." (Seidman, 2012, p. 97) Seidman's statement makes sense, and he also claims that the absence of a document outlining and establishing rights could influence a population to value and fight for rights and liberties. Seidman believes that "our liberties will never be safe so long as they depend for their existence on the very mechanisms of repression that they are meant to combat." (Seidman, 2012, p. 97) The mechanisms Seidman refers to are obligation and obedience to the Constitution, and he feels that the "wide-open discussion that accompanied the Arab Spring or our own revolution" (Seidman, 2012, p. 97) would be ideal for the development of true liberties.

Seidman makes his central argument at the end of *On Constitutional Disobedience*. "The central argument of this book is that we do not benefit from constitutional obligation." (Seidman, 2012, p. 101) Seidman has repeated this sentiment from the very first page, in the form of vague examples, detailed hypothetical situations, and blunt statements. In the last section of the book, Seidman brings his overall point to a close with the opinion that the Constitution is not needed to make laws legitimate, and that systems would not fall apart simply because a law or system was not based on the Constitution. The Constitution even causes conflict with certain laws, or

statutes. “Because the Constitution is open-textured and subject to different interpretations, our rule of recognition is ambiguous, and this ambiguity erodes the moral obligation to obey ordinary statutes.” (Seidman, 2012, p. 106) Seidman is describing the problems that the Constitution causes when people try to use it to explain and validate statutes, because the Constitution is so vague in certain areas and exactingly specific in others, it does not always apply laws the same way to every person. In his book, Seidman proposes a world where Constitutionalism exists without the bonds of obligation and obedience. However, he admits that this view is unrealistic without a nationwide discussion that would contain new ideas and thoughts. Seidman states “even if we cannot completely and immediately kick our Constitutional law addiction, we can soften the force of constitutional obligation.” (Seidman, 2012, p. 116) I find this statement harsh, with negative connotations. Seidman compares the constitutional law to an illegal substance with the use of the word “addiction”, and makes constitutional obligation sound like it was forced upon the American people. I feel that Seidman, while making his overall point, is too harsh on constitutionalism as a whole. I do believe that we, as citizens of the United States of America should “give constitutional disobedience a try” (Seidman, 2012, p. 117), but at the same time, I do appreciate the foundation of the Constitution and what it symbolizes for this nation.

The Constitution, as the founding fathers wrote it, was based on the English “law of the land”, the Magna Carta. In June of the year 1215, the Magna Carta was written by angry barons who wanted equal and just rights. They wrote their requirements on one piece of parchment, using only 2,500 words, and the king placed his own seal on the document to avoid civil war. The document bound the king, his heirs, and his subjects to respect the nobility’s liberties it addressed. The Magna Carta is very relevant to the Constitution of the United States of America.

In the *American Heritage* magazine article, “Magna Carta Comes to America” by A.E. Dick Howard, the Constitution is shown to share common elements and structures. The Constitution was born from the Magna Carta, and one link between them was the Virginia charter from 1606, which directed the colonies being planted in North America. “One provision of the Virginia charter provides a direct link between Magna Carta and modern constitutionalism by guaranteeing colonists “all liberties, franchises, and immunities” to the same extent “as if they had been abiding and born” in England.” (Howard, 2008, p. 35) In this decree, colonists had the freedom to bring their rights and liberties that they had in England. The charters of early colonies, such as Maryland, contained similar wording. The ideals in the Constitution were based on the Magna Carta; however the Magna Carta was also the very inspiration for the writing of the Constitution in the very beginning. The concept of the supreme law of the land was born from the effect of the Magna Carta, and “Magna Carta stirred the notion of a constitution as superior even to legislative acts.” (Howard, 2008, p. 34) Howard states that America’s historic constitutional moments owe a debt to the Magna Carta, but the concepts that are shared with the Constitution are the ones that Seidman believes should not be obeyed absolutely by the American people. He disagrees with the Constitution’s superiority over laws and legislative acts, and I agree with the sentiment. If Seidman is right about the destructive future of complete Constitution obedience, do we owe the Magna Carta or blame it for our failures in politics today?

Seidman has great ideas for a nation not hindered by constitutional obedience, filled with open discussion about today’s issues without the shadow of the Constitution hanging over every decision. I agree with the overall idea system that he proposes. However I found his book over complicated for the message that it was trying to convey. The phrasing seemed to contradict the message in certain passages, such as the section in which the Constitution is used in judicial

situations. *On Constitutional Disobedience* was educational and it opened my eyes to the complications involved with complete constitutional obedience, yet I found that Seidman was almost scornful in his descriptions of how outdated the document was compared with the modern world. I do agree, and can even think of several examples of the conflict between the modern world and the dated Constitution, such as the second amendment in which we have the right to bear arms. When the document was written, the standard weapon was a musket, but today's modern weaponry makes the average citizen with the right to bear arms more dangerous than the average citizen was 200 years ago. However, I do not agree that the Constitution's importance has been reduced over the years. The words and systems are outdated and revised, but the national symbolism is as crucial now as it was then. The Constitution, as a symbol, stands for liberty and independence, and the document will forever show the citizens of the United States that they are capable of changing their world, and that they have the right to freedom from oppression. I agree with Seidman that the Constitution should not be obeyed by obligation, and that politics and the judicial system should have more open discussion and less constitutional precedent. However this lessening of obedience to the Constitution should not simultaneously lessen the meaning of the Constitution.

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U.S. Const. Amend. 1