Adam C. Shaver 2013 Judge Dan O'Hanlon Essay Contest

The Constitution's Necessity in American Government

Since its inception in 1787, the Constitution of the United States has been a hallmark of American government, outlining the core foundation upon which American government is built and controlling legal precedent for more than two centuries. Furthermore, the Constitution guarantees citizens protection from an overbearing and unrestricted national government and ensures the basic tenets of civil liberties. In his book, *On Constitutional Disobedience*, Georgetown University Law Center professor Louis Michael Seidman discusses the need for Constitutional compliance.

As Alexander Kafka paraphrases in his article, "The Constitution: Who Needs It?", Seidman's argument is that the "American people are not the people who agreed in the 18th century to be governed by the Constitution . . . More practically, politicians, judges, and advocacy groups contort the Constitution's often vaguely worded precepts to match whatever they're pushing for. That makes citizens cynical and distracts us from considering what policies would be best for the country in regard to health-care finance, gun control, antiterrorism, and countless other matters."[1] Seidman's argument focuses on the weakness and danger of a literal interpretation of the Constitution, and his book reveals his clear objection to the unwarranted reliance placed upon constitutional decrees. Through his book Seidman makes a few compelling arguments. Specifically, he identifies the tendency for constitutional debate to obfuscate the relevance of modern-day national issues. This paper will demonstrate how Seidman's argument fails to adequately acknowledge the necessity of the Constitution's provisions and the importance of the Supreme Court's interpretation which permits the Constitution to evolve with new

[1] Alexander Kafka, "The Constitution: Who Needs It?," *The Chronicle of Higher Education*, December 10, 2012.

generations of Americans; additionally, this paper will provide an overview of the consequences of fully accepting either constitutional compliance or disobedience.

Arguments for the Necessity and Relevance of the Constitution of the United States

Throughout *On Constitutional Disobedience*, Seidman cites several issues he has with the Constitution. These range from the ambiguous language itself, which he claims "is broad enough to encompass an almost infinitely wide range of positions,"[2] the insistence on obedience where, as he feels, none is warranted, and some provisions which he claims are innately flawed. Specific examples of these provisions include the unfairness of Senate representation and the presence of the Electoral College. This section of the paper will seek to address some of his concerns regarding the Constitution by examining which provisions really are necessary, which of Seidman's arguments are misguided, and why the Constitution cannot, as he claims, be reduced to merely "a symbol of national unity."[3]

A large portion of Seidman's argument rests on his assertion the Constitution is archaic and its language is not only irrelevant but forces the values of the founding fathers upon contemporary people of the United States. As stated in his book, "This gap between them and us provides a powerful argument for giving up on constitutional obedience. The sheer oddity of making modern decisions based upon an old and archaic text ought to give constitutionalists pause."[4] However, Seidman does not give enough credence to the importance of Constitutional interpretation. Allowing constitutional interpretation keeps the document relevant. There are modern issues faced by this nation which the founders could not have possibly considered, and the founders certainly were not infallible. Constitutional interpretation prevents the nation from

[2] Louis Michael Seidman, *On Constitutional Disobedience* (New York City, NY: Oxford University Press, 2012), pg. 142.

[3] Seidman, *On Constitutional Disobedience,* pg. 8.

[4] Seidman, *On Constitutional Disobedience,* pg. 11.

being stagnant and demonstrates the nation has the potential to grow and accommodate new technologies, ideas, and debates. Along with the nonspecific language which enables the Constitution to be adapted, the Constitution also provides a means for updating itself through amendments.

Seidman downplays the significance of Constitutional amendments throughout his book, arguing that "the amendment provisions of Article V are exceedingly cumbersome" and the process is "useless when powerful minorities benefit from the status quo."[5] However, as Jonathan Adler, professor of law at Case Western Reserve University School of Law, responds to one of Seidman's editorials, "the Constitution itself provides for its own revision to cure deficiencies: Article V. This amendment process has allowed for dramatic changes to the document, from the Bill of Rights and the Civil War Amendments to women's suffrage and changes to election procedures."[6] Furthermore, to tarnish the reputation of the original founders, Seidman often focuses on controversial issues like slavery and the Constitutional provisions, specifically Article IV, sec. 2 and Article I, sec. 2, cl. 3, which deprive slaves of rights and give protections to slaveholders.[7] While focusing on the provisions allowing slavery emphasizes the generational difference in values between the founders and contemporary Americans, Seidman is overlooking that the founders anticipated the need to change the Constitution through amendments. Yes, the amendment process is difficult, but it should be.

Consider, for example, the Federal Marriage Amendment (FMA) which would permit only marriages between one man and one woman in the United States. The FMA has failed to

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[5] Seidman, *On Constitutional Disobedience*, pg. 13.

[6] Jonathan Adler, "Let's Give Up on [Parts of] the Constitution," December 31, 2012 (9:29 a.m.), The Volokh Conspiracy, http://www.volokh.com/2012/12/31/ seidman-lets-give-up-on-parts-of-the-constitution/.

[7] Seidman, *On Constitutional Disobedience*, pgs. 11, 17, 55, 97, 113.

obtain the required votes to become an amendment five times (2002, 2003, 2004, 2005/2006, and 2008), and now, for a sixth time, the FMA has again been brought before the House, as Representative Tim Huelskamp reintroduced the amendment on Jun 28, 2013.[8] When the FMA was first suggested in 2001, the American public opposed marriage between homosexual couples 60 percent to 40 percent; today, however, Gallup polls show 53 percent of Americans support gay marriage.[9] Because Article V stipulates that two thirds of the both Houses and three fourths of the states must pass a potential amendment, the Constitution provides innate safeguards against passing rash and often discriminatory legislation based on popular opinion at the time.

Furthermore, Seidman argues the Constitution's provisions are ineffectual in causing change or enforcing law. Here he argues that, despite the Supreme Court ruling racial segregation as unconstitutional in 1954, "little real change was made until almost a decade later when violent events in Birmingham and other parts of the south convinced northern whites that southern Jim Crow regimes were intolerable."[10] It is true that the Supreme Court ruling in *Brown v. Board of Education* came several years prior to the actual Civil Rights Movement of the 1960s, but this fact does not inherently mean that the Court's ruling carried no weight. In fact, knowing the Supreme Court stood for civil rights should be encouraging, as it points to the Court's protection of minority rights despite the hostile sentiment of the popular majority. Seidman's argument that the Constitution is irrelevant does not consider the persistent encroachment on individual freedoms, encroachments which, though possibly supported by the majority, still threaten the foundation of democracy. Chief Justice Earl Warren believed "the

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[8] Jennifer Bendery, "Tim Huelskamp Introduces Constitutional Amendment Banning Gay Marriage," The Huffington Post, July 1, 2013.

[9] Gallup Politics. "Same-Sex Marriage Support Solidifies Above 50% in U.S." Accessed July 23, 2013. http://www.gallup.com/poll/162398/sex-marriage-support-solidifies-above.aspx.

[10] Seidman, *On Constitutional Disobedience,* pg. 20.

preservation of our civil liberties to be the most fundamental and important of all our governmental problems, because it always has been with us and always will be with us and if we ever permit those liberties to be destroyed, there will be nothing left in our system worthy of preservation."[11]

Beyond his apparent objection to the vagueness of the Constitution and the difficulty of the amendment process, Seidman also identifies issues he has with specific "silly or pernicious provisions" of the Constitution. Namely, Seidman expresses disapproval of Senate representation and the Electoral College. Through the remaining portion of this section, the importance of both the Senate and Electoral College will be demonstrated to emphasize the necessity of the Constitution in providing a framework for government. In pointing out the flaw in Seidman's disdain for these Constitutional provisions, it becomes obvious that his desire to make the Constitution obsolete is unfounded and misguided.

Perhaps the provision of the Constitution Seidman finds most appalling is the "grotesquely malapportioned" Senate.[12] Seidman is critical of the arrangement of Congressional representation dictated by the Constitution and claims there is an egregious "overrepresentation of the small states in the Senate."[13] However, to appreciate why the Constitutional founders included such a seemingly unfair provision, it is imperative to remember the foundation of their decision. In 1787 the small states worried that a population based congress would eliminate any influential role they may have in government, while large states were reluctant to forfeit their advantage in claiming population-based representation. Roger Sherman's Great Compromise of 1787 assuaged the debate between small and large states with the establishment of a bicameral

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[11] National Lawyers Guild Review, Vol 13-14, (1953). pg. 47.

[12] Seidman, *On Constitutional Disobedience,* pg. 18.

[13] Seidman, *On Constitutional Disobedience,* pg. 18.

Congress with equal representation in the Senate and population-based representation in the House. Had this compromise not been the case and without the presence of a Senate, power in Congress could be dominated by only a fraction of the fifty states. Hypothetically, if California, Texas, New York, Florida, Pennsylvania, Michigan, Ohio, Georgia, and North Carolina were to band together today they would hold 218 of the 435[14] votes in the House of Representatives and thus be able to influence legislation in a way feared by the 1787 proponents of a bicameral legislature.

Continuing with the above situation, now assume, as Seidman would prefer, Congress did solely reflect a state's population and California, Texas, New York, Florida, Pennsylvania, Michigan, Ohio, Georgia, and North Carolina formed a coalition to vote together, thus ensuring a victory on all issues. Forty-one states would no longer have influence in Congress. Excluding the original colonies, all new states have been established through the procedure set forth in Article IV, Sec. 3 of the Constitution and, therefore, are arguably of equal legal status and deserve an equal stake in governing. To further argue the need for the Senate as an equalizing force in the Legislative Branch, consider a modern debate like funding for the agricultural sector. When the Constitution was written, agriculture made up 90 percent of the workforce; today agriculture accounts for only one percent of the workforce, yet still 85 percent of food consumed in the United States is grown domestically,[15] as is 32 percent of the world's corn and 50 percent of the world's soy bean crop.[16] Yet, as cited by the Department of Agriculture, the vast majority of

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[14] World Atlas. "U.S. Electoral Vote Map by State." Accessed July, 29, 2013. http://www.worldatlas.com /webimage/countrys/namerica/usstates/electorl.htm.

[15] Brady Dennis, " FDA unveils rules to make imported food meet U.S. standards," *The Washington Post,* July 26, 2013.

[16] United States Environmental Protection Agency. "Crop Production." Accessed July 28, 2013. http://www.epa.gov/agriculture/ag101/printcrop.html.

corn, barley, wheat, and soy beans consumed in the United States is produced in only a small section of the nation, specifically Illinois, Kansas, Indiana, Iowa, Minnesota, North Dakota, and South Dakota.[17] If the House were the only component of Congress, the 45 collective congressional votes from Illinois, Kansas, Indiana, Iowa, Minnesota, North Dakota, and South Dakota would be an insignificant force against the 218 votes from hypothetical coalition of nine states previously mentioned. The argument for equal representation in the Senate rests on the realization that not all important national interests are necessarily supported by the most populous states.

In a related argument, Seidman expresses his disdain for the Electoral College which he claims "allows the loser of the popular vote to assume office."[18] The process for electing the President, as outlined in Article 2 and revised through the 12th Amendment of the Constitution, does ascribe electors to represent the will of each state in choosing the winner of presidential elections. Yet this provision does not seek to undermine the majority opinion, although there are clearly situations where the popular vote has not matched the electoral outcome, most recently the election of President George W. Bush in 2000. In this case, Vice-President Al Gore, who won the popular vote 50,996,528 to President Bush's 50,456,062,[19] challenged the results of the presidential election in Florida where President Bush won the 25 electoral votes, clinching the election victory. After nearly a month, the Florida election results were confirmed by then Florida Secretary of State Katherine Harris, but facing increasing debate, the Florida Supreme Court voted to manually recount the votes. On December 9, 2000, the United States Supreme

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[17] United States Department of Agriculture. "Usual Planting and Harvesting Dates for U.S. Field Crops." Accessed July 24, 2013, http://www.nass.usda.gov/Publications/Usual_Planting _and_Harvesting_Dates/uph97.pdf.

[18] Seidman, *On Constitutional Disobedience*, pg. 12.

[19] U.S. Electoral College. "2000 Presidential Election Popular Vote Totals." Accessed July 28, 2013. http://www.archives.gov/federal-register/electoral-college/2000/popular_vote.html.

Court voted to stay the Florida recount, resulting in President Bush's victory. Supporting the Supreme Court ruling, Justice Antonin Scalia argued that the court could not uphold Florida's recount of votes because "the counting of votes that are of questionable legality does in my view threaten irreparable harm to petitioner Bush, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election."[20]

Additionally, Seidman's argument overlooks the practicality and benefits of the Electoral College. First, going back to the 2000 presidential election, if there had been no Electoral College, the entire election result would have been up for debate. The month it took Florida to rectify the voting confusion is not comparable to what could have ensued if all votes tallied were subject to recount, which would likely have happened in an election separated by only half a million votes. Also, as alluded to by Justice Scalia, a recount of election votes cast doubt on the legitimacy of a President, thus weakening him in the eyes of his constituents. The Electoral College can then be seen positively in that it helps prevent such close elections because most states award their electoral votes in a winner-takes-all method.[21] Furthermore, the Electoral College gives influence to battleground states which may otherwise be overlooked by presidential candidates during the campaign. While some opponents of the Electoral College may argue such a system only favors states with a large number of electoral votes, it must be realized that a popular election would have the same, if not a more profound, effect. For example, during the 2012 election, President Obama won with approximately 64 million votes and 303 of the required 270 electoral votes.[22] If a President were to win only the states with the largest number of electoral votes, it would still require at least 11 state victories to reach 270.

[20] George W. Bush v. Albert Gore, Jr., 531 U.S. 98 (2000).

[21] Bush v. Gore.

[22] Craig Kanalley, "Who Won the Popular Vote in 2012?," The Huffington Post, November 9, 2012.

However, in a popular election, and using President Obama's 64 million votes as a threshold for winning, a presidential candidate could theoretically win with only California, New York, and Texas. The populations of these states combined is 84,000,000 and accounting for the 23 percent of the population under 18, as cited by the US Census Bureau, there would still be 64,680,000 eligible voters, enough to win every presidential election thus far.[23]

The Risks of Fully Rejecting or Accepting Seidman's Argument for Constitutional Disobedience

Of his many points, Seidman's most convincing argument supporting constitutional disobedience is achieved through revealing how and when the Constitution is used to distract from the merits of actual legislation. In chapter five, Seidman emphasizes the destructive implications of invoking the Constitution in political debate using the example of healthcare reform. Once invoked, he argues, the argument "shifts from a discussion of the merits to a discussion of constitutional interpretation and doctrine - a discussion that at once raises the stakes and distracts our attention from the real issues."[24] However, Seidman's stance is weakened as he claims Americans should abandon constitutional obedience but adhere to legal obligation. Through this section of his book, he introduces three categorical arguments depending on associative theories, transactional theories, and natural duty theories which were described by political philosopher A. John Simmons. Collectively, these arguments emphasize the role of legal obligation as an expectation, as being in the overall best interest of the nation, and as being integral for upholding the states.[25]

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[23] United States Census Bureau. "State and Country Quick facts." Accessed July 28, 2013. http://quickfacts.census.gov/qfd/states/00000.html.

[24] Seidman, *On Constitutional Disobedience,* pg. 120.

[25] Seidman, *On Constitutional Disobedience,* pgs. 120-123.

The issues of these claims, then, is in considering how legal obligation would function in the absence of the Constitution. As Chief Justice John Marshall expressed in *Marbury v. Madison*, "It is emphatically the province and duty of the judicial department to say what the law is . . . If two laws conflict with each other, the courts must decide on the operation of each . . . This is of the very essence of judicial duty."[26] How are the courts to pass judgments on law without the framework of a Constitution to provide context and guidance? There is a difference between a law being unconstitutional and, say for instance, unbiblical. This point is briefly explored by Seidman as he attempts to rebuff the argument of Robert Bork, a legal scholar and Yale Law School professor who advocated original interpretation of the Constitution. Bork argues that without adherence to the Constitution, judges would be deciding court cases with uncontrolled discretion. Seidman responds, stating that "judges who adopt nontextual theories of judicial review are not unconstrained . . . for example, judges who are guided by moral philosophy, by American traditions, by prior precedent, or by a commitment to democratic politics are not deciding cases according to whim."[27] However, Seidman's argument introduces a significant problem, because there is no guarantee, without a Constitution, that conflicting ideological approaches to law would not lead to considerable tension and, in an extreme situation, anarchy.

Closing Argument

Seidman's argument is persuasive, clearly supported, and, at first glance, seems so profoundly correct that a counterargument is illogical. However, looking beyond the compelling allegories and eloquent language, Seidman's argument can be seen as narrowly focused and idealistic. Seidman comments on relatively few aspects of the Constitution which he recycles

[26] *Marbury v. Madison,* 5 U.S. 137 (1803).

[27] Seidman, *On Constitutional Disobedience,* pg. 39.

throughout his book, and, while he makes a few points which should be seriously considered, he rarely discusses important aspects of the Constitution. He often ignores the importance of the Constitution in regard to establishing the separation of powers, the Bill of Rights, and division between the state and federal governments. Seidman criticizes the ambiguity of Constitutional provisions and the Supreme Court's changing interpretation and the difficulty of adding amendments. He mocks the founding fathers' wisdom and the country's strict adherence to the views of a generation long dead. But Seidman fails to see that the Constitution is not the same as when it was first instituted in 1787.

Today, the Supreme Court's interpretation has enabled the Constitution to evolve with contemporary generations beyond what the founding fathers could have possibly envisioned. A complete abandonment of the Constitution would introduce issues not adequately explored by Seidman. The Constitution serves to unite Americans who would be unlikely to otherwise agree upon on many of the nuances of government proceedings. Without the Constitution to serve as the basis for legal interpretation, the nation would be left in a dangerous position and possibly subjected to ideology contrary to the freedoms upon which the nation was formed. The questions and challenges faced by new generations of Americans can be subject to application of the Constitution, allowing the document to continually evolve and grow with a changing nation. As Seidman mentions throughout *On Constitutional Disobedience*, it is imperative to remember, as Thomas Jefferson insisted, that "the earth belongs to the living."[28] But so too does the Constitution, and that in itself should be venerated.

[28] Seidman, *On Constitutional Disobedience,* pg. 61.

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